IN THE SUPREME COURT OF FLORIDA

ROGER LEE CHERRY,

Appellant,

V.

STATE OF FLORIDA,

Appellee.

CASE NO. 83,773

BRIEF OF APPELLANT

ON APPEAL FROM THE SUMMARY DENIAL
OF APPELLANT'S RULE 3.850 MOTION

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A. STATEMENT OF THE CASE

In September 1987, Roger Lee Cherry, a mentally retarded, brain-damaged, drug- and alcohol-dependent black man was tried and convicted by an all-white jury for the murders of Leonard and Esther Wayne, an elderly white couple. The evidence presented by the State is summarized in this Court's opinion in Cherry v. State, 544 So. 2d 184 (Fla. 1989). The jury recommended death by a 7 to 5 vote as to the murder of Leonard Wayne, and by a vote of 9 to 3 as to the murder of Esther Wayne. Judge Uriel Blount, Jr. sentenced Mr. Cherry to death on September 26, 1987.

On April 27, 1989, this Court affirmed the convictions and death sentence imposed for the murder of Esther Wayne. The Court vacated the death sentence as to Leonard Wayne and remanded for the imposition of life without parole for 25 years.'

On April 16, 1992, Mr. Cherry filed a motion to vacate pursuant to Fla. R. Crim. P. 3.850. Twenty claims were presented, and an evidentiary hearing was requested on many of those claims, including Mr. Cherry's substantial claims of ineffective assistance of counsel. Judge Richard Orfinger, who was assigned to the post-conviction proceedings, directed the State to respond to the Rule 3.850 motion. A response was filed on June 30, 1992. On October 16, 1992, Mr. Cherry filed a motion and memorandum requesting an evidentiary hearing. On December 14, 1992, this case was assigned to Retired Circuit Judge Blount due to Judge Orfinger's heavy caseload.

Mr. Cherry then moved for disqualification of Judge Blount on the grounds that he was a material witness as to one of the 3.850 claims and that he was biased against Mr. Cherry. On February 23, 1993, that motion was denied. Mr. Cherry's Motion for Rehearing was denied on March 10, 1993. Two days later, Judge Blount summarily denied Mr.

'The Court also vacated and remanded for resentencing under the guidelines as to the non-capital offenses of which Mr. Cherry was convicted.

Cherry's 3.850 motion without a hearing or even oral argument, both of which had been requested by Mr. Cherry. Rehearing of the 3.850 motion was denied on April 25, 1994.

B. **SUMMARY OF THE ARGUMENT**

The court below erred in denying the 3.850 motion summarily, without a hearing or oral argument and without attaching portions of the record. The motion contained numerous claims that could only be resolved after an evidentiary hearing. The court also erred in denying Mr. Cherry's motion for recusal, which alleged that the judge was a material witness on one of Mr. Cherry's claims and that Mr. Cherry had a reasonable fear of bias. Retired Judge Uriel Blount, Jr., also improperly considered the merits of the motion.

Mr. Cherry, who is mentally retarded, brain damaged, drug dependent, and was subjected to unspeakable abuse as a child, was deprived of effective assistance of counsel at all stages of his trial. Defense counsel ignored viable defenses at the guilt phase and presented no testimony or argument in mitigation of the offense. Trial counsel failed to provide any information to the mental health expert who examined Mr. Cherry. Counsel made no objection to improper comments by the prosecution and erroneous instructions by the court. Counsel was prejudicially ineffective.

The trial court denied counsel's request for a psychiatrist to assist at penalty phase and for forensic experts to help challenge the State's case at guilt phase. The court's rulings and the psychiatrist's failure to conduct a competent evaluation deprived Mr. Cherry of due process and the effective assistance of counsel. The trial court also improperly excluded a defense witness, explaining off the record that he had done *so* because the witness's testimony would have been offensive to the elderly in the community. Mr. Cherry was also denied a fair trial by juror misconduct and by the prejudicial trial atmosphere surrounding the proceedings.

The decision to seek death against Mr. Cherry was motivated by racial considerations, in violation of the Eighth Amendment and equal protection. His death sentence is also

unconstitutional because, at most, Mr Cherry's intent was to commit an unarmed burglary. That intent is insufficient to support a first degree murder conviction based on the felony murder doctrine, let alone a sentence of death.

Numerous other errors occurred at the penalty phase: the prosecutor made repeated improper arguments; the court instructed the jury to and itself weighed nonviolent prior offenses as an aggravating circumstance; the court misled the jury as to its role as a sentencer; invalid prior convictions were used as an aggravating circumstance; the court gave the jury a vague and unconstitutional jury instruction on the heinous, atrocious or cruel aggravator; and other unconstitutional instructions were provided to the jury. These were fundamental constitutional errors, and counsel's failure to object was ineffective.

Finally, the trial court refused to consider, find or weigh uncontroverted mitigating evidence. This error, combined with counsel's failure to ensure a complete record of the proceedings, deprived Roger Cherry of meaningful review of his convictions and death sentence.

C. THE CIRCUIT COURT ERRED BY FAILING TO HOLD AN EVIDENTIARY HEARING.

The Rule 3.850 motion alleged critical facts not presented at Mr. Cherry's trial and sentencing. Because the "files and records in [this] case" do not "conclusively show that [Mr. Cherry] is entitled to no relief," this Court should remand this matter for an evidentiary hearing on Claims I through IX, XI, XV and XVI for the reasons set forth in the portions of this brief addressing those claims. Lemon v. State, 498 *So.* 2d 923 (Fla. 1986) (citing, ~~inter alia~~, Rule 3.850); see also Mason v. State, 489 *So.* 2d 734 (Fla. 1986); Sauires v. State, 513 *So.* 2d 138 (Fla. 1987); O'Callaghan v. State, 461 *So.* 2d 1354 (Fla. 1984).[2]

[2]The court below also erred in denying Mr. Cherry's request for oral argument. Huff v. State, 622 So. 2d 982 (Fla. 1993).

In its order denying the 3.850 motion, the court ruled that "it is not necessary or proper that oral argument or an evidentiary hearing be held herein . . . ." P.R. 2212.[3] In clear contravention of Rule 3.850 and Hoffman v. State, 571 *So.* 2d 449, 450 (Fla. 1990); see also Gorham v. State, 521 *So.* 2d 1067, 1069 (Fla. 1988), the court failed to attach portions of the record justifying summary denial of relief. The only document attached to the court's order was a copy of this Court's direct appeal opinion in this case. As to the claims of ineffective assistance of counsel, the court merely concluded, without further analysis, that Mr. Cherry failed to satisfy the standard set forth in Strickland v. Washinnton, 466 U.S. 668 (1984). That ruling was erroneous. Hoffman, sutlra: Lemon, sutlra.

D. THE CIRCUIT COURT ERRED WITH RESPECT TO ITS DECISION REGARDING MR. CHERRY'S MOTION FOR RECUSAL

Mr. Cherry's Motion for Disqualification of Judge Blount, filed on January 22, 1993, was based on two grounds: (1) Judge Blount's prior statements make him a material witness in this case, and (2) Judge Blount is biased against Mr. Cherry. P.R. 2051-154. The motion argued that Judge Blount is a material witness as to Claim VIII of the 3.850 motion, in because that Judge Blount stated in chambers that he refused to allow a defense witness to testify because the proffered testimony would have offended the elderly of the community, as possession of a driver's license signifies their last hold on their youth.

On February 23, 1993, Judge Blount denied Mr. Cherry's motion, stating that it was not brought under Fla. R. Jud. Admin. 2.160, not joined by Mr. Cherry, not sworn to by Mr. Cherry, and not certified by Mr. Cherry's "putative attorney."[4] P.R. 2115-27.

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[3] In this brief, Mr. Cherry will refer to the record of his trial as "R. __" and to the post-conviction record as "P.R. __."

[4] It should be noted that although Mr. Cherry's lawyer had neglected through oversight to sign the certificate of good faith attached to the January 22, 1993 motion, he did sign an affidavit swearing that he had formed a belief that the "information upon which these factual allegations are based establishes that Judge Blount is biased against Mr. Cherry, is incapable of rendering a fair and impartial

Judge Blount further stated that counsel obviously had not read this Court's direct appeal opinion and specifically, this Court's ruling as it affects Claim VIII of the Rule 3.850 motion. He further stated: "Even accepting the motion as filed under Fla. R. Crim. P. 3.230, the Court finds that said motion is legally insufficient."

On March 5, 1993, Mr. Cherry filed a Motion for Rehearing of the Disqualification Motion. P.R. 2128-2202. The motion was filed pursuant to Fla. R. Jud. Admin 2.160, was joined by Mr. Cherry, was sworn to by Mr. Cherry, and was certified by Mr. Cherry's lawyer. The motion incorporated the legal grounds for recusal asserted in Mr. Cherry's earlier motion.

On March 10, 1993, Judge Blount denied the motion for rehearing, stating that "counsel rationalizes his incompetent errors as clerical oversight which defies reason," and that the new motion "contains nothing upon which relief can be granted and is legally insufficient." P.R. 2203-04. Two days later, Judge Blount denied Mr. Cherry's Rule 3.850 motion. P.R. 2205-24.

A judge who is presented with a motion for disqualification is permitted only to determine whether the motion is legally sufficient. Fla. R. Jud. Admin. 2.160(f). Judge Blount's rulings on Mr. Cherry's motions constitute reversible error because (1) the motions were legally sufficient, and (2) even if legally insufficient, Judge Blount improperly considered the merits of the motions and thereby established grounds for his disqualification.

1. The Motions Were Legally Sufficient.

Where a party has alleged in writing that a judge will be a material witness at a hearing, it is not for the judge to determine whether he is in fact a material witness. Instead, upon such allegation, the judge is legally disqualified pursuant to the terms of Rule 2.160(d)(2). See also Hooks v. State 207 *So.* 2d 459,462 (Fla. 2d DCA 1968), overruled

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decision in this case, and furthermore, that Judge Blount is a material witness in this case, and is therefore ineligible to decide this case." P.R. 2112.

on other arounds; Moraan v. State, 352 So. 2d 161, 162 (Fla. 2d DCA 1977). Here, the judge should have disqualified himself as he is a material witness as to Claim VIII infra.

To determine legal sufficiency as to allegations of bias, the trial court must determine if the facts, which must be assumed to be true, would cause a reasonable person to believe that he could not receive a fair and impartial trial or hearing before the judge. Roners v. State, 630 *So.* 2d 513, 515 (Fla. 1993) (quoting Livinaston v. State, 441 *So.* 2d 1083, 1086 (Fla. 1983)).

Here, Mr. Cherry alleged that Judge Blount was biased because he previously had warned Mr. Cherry that if Mr. Cherry ever appeared before him again, he would send him to prison for good. Mr. Cherry further alleged that Judge Blount was biased because he presided over the estate of the Waynes at the same time he presided over Mr. Cherry's trial for the murder of the Waynes. Judge Blount therefore had direct contact with the victims' family members, some of whom were witnesses at Mr. Cherry's trial. These facts are reasonably sufficient to create a well-grounded fear in Mr. Cherry that he could not receive a fair hearing and ruling on his Rule 3.850 motion from Judge Blount.

2. Judge Blount Improperly Considered The Merits Of The Motions.

Even if Mr. Cherry's motions were not legally sufficient, Judge Blount improperly considered the merits of the motions and thereby established the grounds for his disqualification. See Roaers, supra; Bundv v. Rudd, 366 *So.* 2d 440 (Fla. 1978). "Where a judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and attempted to refute the charges of partiality [or that the judge will be a material witness], he has then exceeded the proper scope of his inquiry and on that basis alone established grounds for his disqualification." Bundv, 366 *So.* 2d at 442.

Judge Blount's March 10, 1993 order states, "From a reading of the Motion, it is clear that the pleader has failed to read the opinion rendered by the Supreme Court of Florida in this matter a copy of which is attached as 'Exhibit B.'" P.R. 2119-2127. He specifically

referred undersigned counsel to the Richardson issue. In so stating, Judge Blount obviously felt that the Richardson claim had already been resolved and therefore that Mr. Cherry's allegations in Claim VIII of the Rule 3.850 were meritless. As such, Judge Blount clearly reached the merits of Claim VIII.[5] Judge Blount further found that Mr. Cherry's "motion contains nothing upon which relief can be granted." P.R. 2203. This further indicates that Judge Blount looked beyond the legal sufficiency of the motion and determined that the charges of partiality and materiality as a witness were unwarranted.

Moreover, the language which Judge Blount uses in his orders evinces "'an intolerable adversary atmosphere' between the trial judge and the litigant" in this proceeding. Bundy, 366 So. 2d at 442 (quoting Department of Revenue v. Golder, 322 So. 2d 1, 7 (Fla. 1975) (on reconsideration)). For instance, Judge Blount twice refers to Mr. Cherry's lawyer as a "putative attorney." See Order dated February 23, 1993. P.R. 2115, 2116. In the same order, Judge Blount refers "for the enlightenment of the movant" to this Court's ruling on Mr. Cherry's direct appeal, even though that ruling was cited in Mr. Cherry's Rule 3.850 motion. P.R. 2116. In his Order dated March 10, 1993, Judge Blount states that "counsel rationalizes his incompetent errors as clerical oversight which defies reason." P.R. 2203. In his Order dated March 12, 1993, Judge Blount refers to Mr. Cherry's 3.850 motion as an "eleventh hour" filing, P.R. 2205, with a "shotgun approach." P.R. 2211. Additionally, he states that "[t]he allegations in the [3.850] motion are unsubstantiated and contain the usual misrepresentation of fact and law and consist of academic propositions of legal theory, case citations and conclusionary statements." P.R. 2210. He further implies that Mr. Cherry's counsel had not even made a "cursory review" of the court files in this case, P.R. 2210, and had not reviewed the opinion of this Court on direct appeal. P.R. 2211.

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[5]The facts underlying Claim VIII were only discovered in the course of post-conviction investigation and demonstrate that Judge Blount is a material witness as to this claim.

In sum, even if Mr. Cherry's motions were not legally sufficient, Judge Blount's improper consideration of the merits of the motions and his hostile attitude toward Mr. Cherry, his attorneys, and post-conviction proceedings in general establishes grounds for recusal. The Court should remand these proceedings for reassignment to an impartial judge.

E. ARGUMENT ON THE MERITS

CLAIM I

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING, WITHOUT ARGUMENT OR EVIDENTIARY HEARING, MR. CHERRY'S CLAIM THAT THE RACE DISCRIMINATION THAT PERMEATES VOLUSIA COUNTY AND THE SEVENTH JUDICIAL CIRCUIT AND THAT INFECTED HIS OWN TRIAL DEPRIVED HIM OF HIS RIGHTS TO EQUAL PROTECTION AND FREEDOM FROM CRUEL OR UNUSUAL PUNISHMENT UNDER THE STATE AND FEDERAL CONSTITUTIONS.

In his **3.850** motion, Mr. Cherry alleged that race discrimination pervaded the criminal justice system in Volusia County and the Seventh Judicial Circuit during the time of his trial, that such discrimination infected his own case and played a prominent role in the trial, and that the fact that he is African-American and the victims were white was the pivotal fact that resulted in his death sentence. Mr. Cherry further alleged that at a hearing, he would present evidence that would satisfy the standard set forth in McCleskev v. Kemp, 481 U.S. **279** (1987), for establishing a constitutional violation.'

Judge Blount summarily denied the claim on the ground thar it could or should have been raised on direct appeal, was not cognizable in **3.850** proceedings, and was therefore procedurally barred. In his motion for rehearing of the Rule **3.850** denial, P.R. **2225-86,** Mr. Cherry argued that a recent study of racial patterns in the prosecution and punishment of homicides in the Seventh Judicial Circuit, conducted by Professor Michael Radelet,

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'Subsequent to the McCleskev decision and to Judge Blount's denial of Mr. Cherry's Rule 3.850 motion, this Court decided Foster v. State, 614 So. 2d 455 (Fla. 1992), in which the Court, relying on McCleskev, held by a vote of 4 to 3 that Foster had not shown through statistical evidence that the State acted with purposeful discrimination in seeking the death penalty in his case. Mr. Cherry submits that based on the evidence he would present at an evidentiary hearing, he can establish purposeful discrimination by the Seventh Judicial Circuit State Attorney in seeking the death penalty in this case.

constituted newly-discovered evidence not available at the time of trial and therefore, the claim was not procedurally barred. Additionally, Mr. Cherry argued in rehearing that even if procedurally barred, the claim should be considered because it constitutes fundamental constitutional error and because counsel was ineffective in not presenting this claim, which would excuse any procedural bar. Judge Blount denied the motion for rehearing.

Professor Radelet has concluded:

> [T]he odds of a death sentence are much higher in cases in which a black is accused of killing a white than in other homicide cases. Almost a quarter (24%) of the black-on-white cases resulted in a death sentence, compared to 6.9 percent of the white-on-white and .7 percent of the black-on-black cases. . . .
>
> Although 41 percent of the homicides in the Seventh Circuit (141/341) took the lives of black victims, . . . [o]nly one defendant was sentenced to death during the 12 year study period for taking the life of a black . . . . In short, those who kill whites are 12.9 times more likely (9.0/0.7) to be sentenced to death than those who kill blacks . . . .
>
> Table 1 [of this study] shows that a black killing a white is 35.7 times more likely to be sentenced to death than a black killing a black....

See Motion for Rehearing, Appendix A, pp. 2238-2241.[7]

Given the opportunity, Mr. Cherry would have presented, inter alia, evidence of the intolerable racial atmosphere in the Seventh Judicial Circuit's criminal justice system during the relevant time period; testimony from a former assistant state attorney that race discrimination, including the failure of the State Attorney's office to employ black prosecutors in the felony division, plays a direct role in the Seventh Circuit not only in the capital sentencing process but also in the determinations as to which cases to pursue as first-degree murder cases, which cases to plead, and in which cases should death be sought; testimony that a jury selection manual utilized by *the* State Attorney Office directed that all blacks

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[7]Extensive testimony regarding this study was presented in another Volusia County capital post-conviction case, State v. Haves, No. 89-6211, during January and March 1994.

should be excluded from jury service; testimony that the NAACP had placed the State Attorney's Office on a "watch" because of that office's failure to employ any African-Americans; and testimony regarding numerous black-victim homicide cases that were not pursued as first-degree murder cases or, even where pursued as such, the death penalty was not sought, despite the fact that sufficient aggravating circumstances were present in order for death to be sought.

Mr. Cherry would also present evidence specific to his case that would establish, under McCleskey and Foster, that he was sentenced to death in violation of his eighth and fourteenth amendment rights, including evidence that race infected his own trial, that his own prosecutor made racially-based decisions as to which casesshould be pursued as first-degree murder cases; that he was tried by an all-white jury after the prosecution peremptorily challenged the only blacks present in the venire; that the police improperly investigated only black suspects in this case; and that Mr. Cherry's race and the race of the victims played a prominent role in the case and were repeatedly emphasized by the prosecution. This Court should reverse the summary denial of this claim and remand for an evidentiary hearing.

CLAIM II

ROGER CHERRY WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Under Strickland v. Washinnton, 466 U.S. 668 (1984), a defendant must plead: (1) unreasonable attorney performance, and (2) prejudice. Mr. Cherry sufficiently presented facts on each prong below, and the court below erred in declining to conduct an evidentiary hearing.

As is well recognized, counsel must discharge very significant responsibilities in the penalty phase. First is the duty to investinate available mitigating evidence before deciding whether such evidence should be presented. See, e.g., Stevensv. State, 552 *So.* 2d 1082,

1087 (Fla. 1989); Harris v. Dugger, 874 F.2d 567 (11th Cir. 1989); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir.), cert. denied, 474 US. 998 (1985). Second, counsel must ensure that his client receives adequate mental health assistance, especially when, as in the penalty phase of this case, the client's mental state is (or should be) at issue. Blake; Mauldin v. Wainwriaht, 723 F.2d 799 (11th Cir. 1984). Third, counsel must investigate and if possible present evidence to refute or minimize any aggravating factors argued by the State.

Trial counsel here failed to conduct any mitigation investigation, and Mr. Cherry is entitled to an evidentiary hearing on this claim. See Heinev v. State, 558 *So.* 2d 398 (Fla. 1990); O'Callaghan v. State, 461 *So.* 2d 1354 (Fla. 1984).

A. COUNSEL'S PERFORMANCE AT PENALTY PHASE WAS INEFFECTIVE.

In certain cases, counsel's performance is *so* deficient that counsel's ineffectiveness "cries out from a reading of the transcript." Doualas v. Strickland, 714 F.2d 1532, 1557 (11th Cir. 1983), vacated, 468 **U.S.** 1206 (1984), adhered to on remand, 739 F.2d 531 (11th Cir. 1984), cert. denied, 469 U.S. 1208 (1985). This is such a case. Defense counsel presented no penalty phase testimony. He merely admitted into evidence a four-page report of Dr. George Barnard. R. 1037; R. 1166-69. Counsel made no reference to that report in his penalty phase argument and failed to argue any mitigation whatsoever. See R. 1050-55. Nor did counsel make any argument to rebut or weaken the aggravating factors relied on by the State, although such arguments were available.*

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[8]Counsel should have argued that the State failed to prove beyond a reasonable doubt that Mr. Cherry intended to torture the victims, as was required for a finding of the "especially heinous, atrocious or cruel" aggravator; that lack of intent to kill, based on Mr. Cherry's acquittsl of premeditated murder, was a mitigating circumstance which the jury should consider; and that the jury could and should consider evidence suggesting that one or more other persons were involved in this offense. This evidence included: a negroid hair that was not Mr. Cherry's that was found in the victims' bedroom, R. 803; none of Mr. Cherry's blood was found inside the house. **R.** 505. See Claim V. The jury was entitled to consider doubt as to the identity of the actual killer in making its sentencing vote. Hawkins v. State, 436 So. 2d 44 (Fla. 1983).

Prior to the penalty phase, counsel did not request any special jury instructions.[9] Counsel asked Mr. Cherry two questions in open court before the judge and prosecutor:

> Counsel: Mr. Cherry, let me ask you something. If I understand you correctly, you are opting not to testify in front of the jury, is that correct?
>
> Mr. Cherry: Yes, sir.
>
> Counsel: And do you know of anyone who would be able to come in and substantiate the mitigating grounds that the court has enumerated here? As we have previously discussed, do you know anyone that could come in here and do that?
>
> Mr. Cherry: No. Sir.
>
> Counsel: I don't have anything further, Judge.

R. 1035.[10] That was the sum total of counsel's penalty phase presentation.

The prosecutor's closing argument included numerous improper comments and arguments, see Claim XII, but defense counsel made no objection during the entire argument. He also failed to make any objection, motion for a mistrial, or motion for curative instruction at the close of the prosecution's argument.

The court then gave the jury the final pnalty phas instructions. Defense counsel did not object to any of the instructions, including instructions that allowed the jury to weigh the pecuniary gain and murder committed during a burglary aggravating factors separately; the unconstitutionally vague instruction on the heinous, atrocious or cruel aggravating circumstance, Claim XVIII; arguments and instructions that misinformed the jury concerning

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[9]He objected only to the proposed instruction on the aggravating factor of a prior conviction of a violent felony, apparently unaware that Mr. Cherry's robbery convictions automatically met the definition of a violent felony under Simons v. State, 419 So. 2d 316 (Fla. 1982).

[10]The purpose of these questions was transparently not to assist Mr. Cherry in his defense, but to assist trial counsel in subsequently defending his own conduct. It is deficient performance for counsel -- particularly in a capital sentencing proceeding -- to abandon his client in this fashion. Kina v. Strickland, 714 F.2d 1481, 1491 (11th Cir. 1983), vacated, 104 S.Ct. 2651, reinstated after remand, 748 F.2d 1462 (11th Cir. 1984).

its role in sentencing, Claim **XIV;** instructions that permitted the jury to consider Mr. Cherry's nonviolent prior crimes as an aggravating factor, Claim **XIII;** instructions that improperly and prejudicially placed the burden on Mr. Cherry to prove that mitigation outweighed aggravation, Claim **XVI;** and instructions that precluded the jury from considering sympathy or mercy for Mr. Cherry in determining his sentence, Claim **XVII.** Competent counsel would have raised all of these objections.

Individually and cumulatively, counsel's failure to make objections that a competent attorney would have made creates serious doubt regarding the reliability of the outcome. It is much more than reasonably likely that the court's erroneous instructions and the prosecution's improper arguments affected the jury's death vote. Mr. Cherry has shown both deficient performance and prejudice, and is entitled to relief.

Throughout the entire proceedings, with the limited exception of defense counsel's ineffective and affirmatively harmful closing argument, counsel was a passive participant and a mere spectator. In almost any capital case, such performance would be deemed deficient because the failure of the defense to do anything at the penalty phase virtually guarantees a sentence of death. See Stevens v. State, 552 So. 2d at 1087 ("When counsel fails to develop a case in mitigation, the weighing process is necessarily skewed in favor of the aggravating factors argued by the state."). In Mr. Cherry's case, counsel's performance was particularly deficient, for, as discussed below, there was *so* much for reasonably competent counsel to do. See Claim II. B, C, infra.

Counsel's conduct at sentencing was equivalent to allowing Mr. Cherry to proceed with "no counsel at all." See United States v. Cronic, 466 U.S. 648, 654 n.11 (1984) ("In some cases the performance of counsel may be *so* inadequate that, in effect, no assistance of counsel is provided"). In Stevens v. State, 552 *So.* 2d 1082, the court vacated a death sentence where "trial counsel elected to make no arguments to the judge on behalf

of" a capital defendant at sentencing. "Trial counsel essentially abandoned the representation of his client during sentencing." Id. at 1087.

B. FAILURE TO INVESTIGATE, DISCOVER AND PRESENT EVIDENCE CONCERNING MR. CHERRY'S HISTORY.

Counsel never talked to anybody in Waynesboro, Mississippi, where Roger spent his early childhood, and where there were many relatives and community members who clearly remembered Roger's traumatic and poverty-ridden childhood, in which he was savagely beaten and humiliated by his father and received no care from his alcoholic mother. Counsel never talked to any who lived in Deland, Florida, where Roger grew up and the trial took place, and who would have been willing to testify about how the torture, abuse and rejection of Roger intensified after the Cherry family moved there. Counsel never even made any effort to contact Roger's former wife. Nor did counsel talk to school officials who could have confirmed the horrendous conditions in which Roger grew up and his severe mental limitations. There was no tactical reason for counsel's failures, which constituted prejudicially deficient performance.

Had counsel performed adequately, he could have presented credible, thoroughly corroborated and uncontroverted evidence of at least the following mitigating circumstances:

1. Roger Cherry grew up in conditions of abject poverty.

Roger Cherry grew up in extreme poverty in Waynesboro, Mississippi, and Deland, Florida. His mother, Ceola Cherry, was alcoholic and suffered from other illnesses, including tuberculosis and a seizure disorder. She was rarely able to work. His father, Tommie Lee Cherry, was a brutal sadist who spent whatever money he was able to earn on alcohol and other women. The entire extended family lived in extreme poverty. Roger Cherry's aunt, Daisy Gandy, witnessed and was part of that life.

> It wasn't long before I learned that Ceola was really telling the truth when she said Tommie Lee was mean.... Besides that, Tommie Lee and Ceola drank a lot. We all used to make wine and homebrew beer, and Tommie and

> Ceola both drank a lot of it. Tommie Lee was much worse to Ceola when they were drunk. The way he beat my sister just made me cry. He just beat her, beat her, beat her. He beat her with his fist, with belts, with wood, with whatever was handy.. ..
>
> [Later on, my three children and I] moved in with Ceola and Tommie Lee. The place we lived was a long, one-story, rooming house. Three families lived in the house. The whole place was falling down; I still have a scar on my leg from where I fell through the boards of the porch one day. Our family lived in four rooms. Tommie Lee and Ceola had one bedroom, I had one bedroom, the five children shared one bedroom, and the other room was the kitchen. We had a wood stove in the kitchen that also gave us our heat. There was an outhouse that was shared by all three families who lived in the rooming house. We had no running water inside but filled buckets from a tap outside. We had a tin tub and heated water on the stove for baths.... The food we got never did last a whole month.... We got all our clothes from Goodwill but we didn't have many. The kids had maybe a couple of shirts and pants. The kids always went barefoot except if we went to church on Sundays.

Motion to Vacate, App. 14, Affidavit of Daisy Gandy. The Cherry family continued to live in extreme poverty after they moved to Deland, Florida. App. 27, Affidavit of Leo Cherry.

Other witnesses were available to confirm the deprivation, filth and hunger that Roger endured as a child. A classmate, Norris Price, who was never contacted by trial counsel, recalls that Roger and his brother, Leo, usually had no lunch at school, and therefore ate from the garbage cans whatever scraps they could get that the other students threw away. App. 45, Affidavit of Norris Price. A former special education counselor, who again was never contacted by trial counsel, would have testified that Roger often came to school "filthy and unkempt" and that when he investigated Roger's family situation, he discovered that Roger "came from a very poor family situation in which he received little or no adult supervision," that Mrs. Cherry suffered from some kind of mental problem that prevented her from communicating with others, and that Roger could be seen wandering the streets in a trance before 5:00 a.m. App. 50, Affidavit of George Williams.

2. Roger Cherry was severely physically and emotionally abused and neglected from the time that he was an infant.

Roger Cherry suffered an unending stream of physical and emotional abuse, neglect and rejection from the time that he was an infant until he left home. This abuse was *so* extreme and *so* humiliating -- for it was often carried out in public -- that it would be more accurate to call it torture rather than mere abuse. There were at least a dozen witnesses who could have testified concerning this incredible torrent of abuse, as well as others who could have corroborated that Roger told them, well before the instant offense, of the abuse he had suffered.

Clearly, trial counsel should have learned of these facts from Roger and his family. Even if he did not get the information from those sources, however, at least a part of the information was handed to him. Dr. George Barnard, the psychiatrist who was appointed to determine Roger's competence and sanity, recounted in his report that Roger had told him that Roger's father beat him severely and put a chain around his neck, paraded him around, and deprived him of food and water for three days. R. 1167. Other than introduce Dr. Barnard's report at penalty phase, counsel presented no penalty phase evidence, and did nothing whatsoever to bring Dr. Barnard's report to life, to make it credible, or even to argue it as mitigating before the jury or judge.

Minimally competent counsel would have presented at least some of this mitigation to the jury. For example:

> On many occasions, either Ceola or Tommie Lee put a chain around Roger's neck and chained him to a bed. He had room to reach a chamberpot to use the bathroom but otherwise was unable to move. He was kept chained for a week or two at a time. While he was chained, he was given little or no food and water and was often beaten while chained to the bed. Roger had *so* little food even when he wasn't chained and was *so* skinny that I don't know how he survived the starvation he was forced to endure.

App. 28, Declaration of Willie Land. Roger's brother Leo also witnessed the abuse inflicted on Roger by their father. Tommie Lee would put a dog collar around Roger's neck and

beat him, or chain him in the yard, or even hang him from the ceiling. App. 27, Affidavit of Leo Cherry.

Neighbors in DeLand, who were readily available to testify at the trial, saw Roger's father commit acts that were if anything even more cruel and demented. One neighbor, Bernice Shipman, saw Tommie lash Roger with a leather whip, punch him, kick him, or hit him with whatever was handy.

> The worst abuse and humiliation that Tommie ever unleashed on Roger was when Roger was just about eleven years old. Much to my disgust, Tommie was pulling Roger down the road by a thick chain which was around his neck. Roger looked ***so*** confused and ***so*** filled with pain and fear that I was afraid for him. How a parent could do that to a child is beyond me. No one in my family could believe what they saw. Even as an adult, I could never think of putting a chain around my child's neck and dragging them down the street like a dog.

App. 39, Affidavit of Bernice Hill Shipman. Ms. Shipman's mother, Rosetta Hill, also witnessed and would have testified concerning this incident. App. 33, Affidavit of Rosetta Hill.

Many other people witnessed Tommie Cherry's senseless violence towards Roger. Norris Price saw Tommie beat Roger with his fists after school. App. 45, Affidavit of Norris Price. Rod and Joseph Fludd saw Tommie lash Roger with a leather whip. Apps. 37 and 38, Affidavits of Rod and Joseph Fludd. Ernestine Land saw Tommie beat Roger, kick him, whip him with a cow whip, and tie him to the bed to make it easier to beat and kick him. App. 34, Affidavit of Ernestine Land. Luke Williams saw Tommie hang Roger upside down from a tree and beat him with a rubber hose until he could barely walk after he was untied. App. 42, Affidavit of Luke Williams.

No decent person could have been unmoved by such testimony. Trial counsel never made the slightest effort to locate any of these witnesses or to discover their heart-rending tales.'[1]

3. Roaer's mother was an alcoholic who drank durina her pregnancy and throuahout Roaer's life, and repeatedly nealected, rejected and abandoned him.

Roger's mother, Ceola Cherry, drank heavily throughout her adult life, including the time she was pregnant with Roger. App. **14,** Affidavit of Daisy Gandy. As a result, Roger has been diagnosed with fetal alcohol effects, which may be why he has mental retardation.

As the years went on, Ceola's drinking became even worse, until she was incapable of taking care of herself or her children, or indeed of doing anything other than drink. She became a laughing stock in the neighborhood, to Roger's great distress, App. **34,** Affidavit of Ernestine Land, and was regarded by those who knew her as mentally ill. App. **40,** Affidavit of Sandra Henry. In addition to her alcoholism, Ceola also suffered terrifying seizures, either as a result of her heavy consumption of moonshine or because of some illness. App. 28, Declaration of Willie Land. At times she became violent during these seizures, and even attacked Roger with a knife. App. **14,** Affidavit of Daisy Gandy.

Caught between an incredibly violent father and an alcoholic, sick, uncaring mother, Roger experienced both extreme abuse and neglect. The rejection reached its height when Ceola abandoned her children for over a year in an attempt to escape from her abusive husband. App. **14,** Affidavit of Daisy Gandy. The fact that Roger received no nurturance from his mother, but only neglect and abandonment, was profoundly mitigating. Trial counsel never discovered that fact -- although it was readily available --and never presented it at sentencing.

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[11] **Although counsel retained an investigator to assist him, that investigator will testify that he conducted no penalty investigation whatsoever.**

4. Roaer witnessed extreme violence as a child and was traumatized bv seeina two men, one of whom was a close friend, killed in front of his eves.

In addition to the violent abuse that he suffered, Roger was also traumatized as a child by witnessing two men killed in front of his eyes. One of these was a man named Shorty, who had befriended Roger and his brother Leo. Another man walked up to Shorty and slit his throat. Roger, who witnessed the brutal killing, was "just devastated." App. 14, Affidavit of Daisy Gandy. The other was when Roger's father got into a fight with another man over a card game and ended up blowing the man's head off with a shotgun in front of Roger and Leo. App. 27, Affidavit of Leo Cherry.

The effects on a young child of witnessing such violence and gruesome events were immeasurable and were no doubt very traumatic. Trial counsel should have discovered those facts and presented them to the jury, along with mental health expert testimony concerning the impact of such events on a person's functioning.

5. Despite the abuse, nealect and trauma that he suffered, Roaer was a sweet and aentle, but mentallv limited person

Family members, friends and school officials universally remember that Roger was a sweet and gentle-natured person, but that he was mentally slow and often seemed out of touch with reality. These characteristics were evident from an early age, as Roger's aunt, Annie Mayfield, would have testified. App. 18, Affidavit of Annie Mayfield.

Rosetta Hill, a family friend who had experience working with retarded children, believes that Roger was retarded also.

> I was employed full time at the Duvall Home for Retarded Children for over eighteen years. During my employment, I became aware of how children with mental problems, illnesses, and handicaps behave. In my opinion, Roger suffered from mental retardation. He was very slow and it took him longer than other children to understand things. For example, if I asked him a question, Roger took forever to respond. Sometimes he had to even sit down and think about what was asked before he answered. Roger didn't know how to play with other children either. This was not because his behavior

> was disruptive, but because it seemed awkward and strange for him. Roger was always a good child and listened to me while he was at my house, but he was mentally disabled . . . .

App. 33, Affidavit of Rosetta Hill.

Roger was eventually placed in special education classes, but was given little more to do than clean the erasers and blackboards. School officials would have testified that it was extremely difficult to communicate with Roger because it took him *so* long to formulate his thoughts into words, App. 50, Affidavit of George Williams, and that he was teased and abused at school because of his mental infirmities. App. 44, Affidavit of Dorothy Price.

Eventually, Roger married a woman named Hettie Mabry, with whom he shared the only brief happiness he ever had. But after she married Roger, Hettie became aware that he was mentally no different from a child.

> It wasn't long after we were married that I discovered just how mentally slow Roger was. My best guess was that Roger functioned around a fifth grade level of intelligence.... I could not even send him to the grocery store to get a few items. Although Roger made it to the store, he never returned with anything I had asked him to buy.
>
> Roger was always very eager to please and did whatever he was told to do.... If I told him to sit on the couch, he would sit there with a blank stare on his face until I told him to go do something else.... He just couldn't make decisions on his own -- even about everyday kinds of things.

App. 57, Affidavit of Hettie Mabry Cherry. Lorraine Neloms, the woman Roger was living with at the time of the offense and a witness for the State, was also aware of his mental limitations and would have testified about them at the penalty phase had she been asked. App. 62, Affidavit of Lorraine Neloms Dallas.

Despite all of the abuse that he had suffered, there was a very positive side to Roger Cherry. He was basically a sweet, good natured child in a man's body. Trial counsel had

a duty to discover these facts and present them to the jury, but he never made the slightest effort to do *so*.

6. Roaer Cherrv was institutionalized at a young aae in a brutal and segregated juvenile institution

At the tender age of 11, and then two years later at age 13, Roger was sent to the Florida School for Boys in Marianna, Florida. His offenses were truancy and, on the second occasion, running away from his abusive and neglectful parents. For these minor status offenses he was sent to an institution that was segregated, where the facilities for black inmates were far inferior to those for white inmates, and where inmates of both races were subjected to hogtying, beatings, sexual abuse, and other serious abuses. Documentation of the abuses and inadequate facilities as they existed at that time, and witnesses who could testify concerning those abuses and the effects on all children, and especially on mentally retarded children, were readily available at the time of trial. See App. 48, Documentation on the Arthur G. Dozier School for Boys; App. 77, Affidavit of Dozier Superintendent Roy McKay. Again, counsel made no effort to discover or present this crucial mitigating information.

From even before his actual birth, Roger Cherry's life was incredibly traumatic. He knew only vicious abuse from his father, and never received love or attention from his mother or from anyone else. Such information is powerfully mitigating in its own right. When assessed by a mental health professional, the mitigating aspects of Mr. Cherry's life take on even greater significance.

As a result of counsel's failure to investigate and present the foregoing evidence, neither the judge nor the jury had this critically necessary informatior! before them to consider in making their sentencing decision.

C. FAILURE TO INVESTIGATE, DISCOVER AND PRESENT MENTAL HEALTH MITIGATION

Defense counsel had many reasons to be aware of the need for investigation and presentation of mental health mitigation. Roger Cherry admitted, at least to Dr. Barnard, that he had been abused by his father, and it is well known that such abuse can have long term effects on the victim's functioning. Moreover, counsel was concerned that Mr. Cherry was displaying excessive emotion when talking to counsel. R. 1168. Most significant of all, if counsel had performed even a rudimentary investigation of Mr. Cherry's life history, he would have discovered many red flags of likely mental health problems: the fact that many people who knew Roger considered him retarded or mentally impaired; his parents' alcoholism and his own dependence on drugs and alcohol; the fact that he attempted suicide on more than one occasion; the extremely traumatic abuse and life experiences he suffered; and his intoxication at the time of the offense.[12] The mental health experts contacted by post-conviction counsel all agree that both statutory and non-statutory mental mitigating factors were present in this case. If counsel had conducted even a minimal investigation, he would have discovered highly significant facts with respect to Roger Cherry's mental condition in addition to those set forth above.

Roger Cherry was the child of alcoholic parents, and his mother drank while she was pregnant with him. App. 14, Affidavit of Daisy Gandy. Not surprisingly, Roger was introduced to alcohol at a very young age. In fact, Roger first found and became intoxicated on his parents' homebrew at the age of six or seven. App. 26, Affidavit of Inell Gandy. From that point on, Roger frequently got drunk on his parents' alcohol. App. 27, Affidavit of Leo Cherry. Later on, he also learned to Ruff gasoline. App. 35, Affidavit of Sylvester

[12] In fact, counsel knew that a mental health expert was necessary if he was to make an adequate penalty phase presentation, for he asked for one. R. 1080. However, after the Court limited the expert's evaluation to a determination of competence and sanity, R. 1092, counsel never pursued the issue and never provided any background information to the psychiatrist.

Hill. Shortly before the offense occurred, he was introduced to crack cocaine by a man named James Terry, and quickly became addicted to it. App. 34, Affidavit of Ernestine Land; App. 35, Affidavit of Sylvester Hill; App. 62, Affidavit of Lorraine Neloms Dallas.

In addition to Roger's mental retardation and drug addiction, he was also extremely dependent on others and subject to lapses into depression. After his wife Hettie left him, he attempted suicide by slitting his wrists. On earlier occasions when she had threatened to leave him, he jumped out of a second story window in a suicidal gesture and shot himself. App. 57, Affidavit of Hettie Mabry Cherry. After he was arrested, Roger's mental state deteriorated further. He was placed on suicide watch, App. 65, Volusia County Jail Records, and made frequent desperate telephone calls to a family friend, Legertha Henry. He was *so* mentally deficient and out of touch with reality that he believed he would be taken straight from his jail cell to the electric chair without a trial. App. 36, Affidavit of Legertha Henry. According to Ms. Henry, he sounded "despondent and bizarre."

Finally, an adequate investigation would have revealed that on the night of the offense, Roger smoked massive amounts of crack cocaine and consumed a great quantity of moonshine and beer as well. App. 62, Affidavit of Lorraine Neloms Dallas; App. 64, Affidavit of Roger Futch. See Claim V, infra.

If a reasonable investigation had been performed, and this information had been provided to a competent mental health expert, a powerful mitigation case would have been presented at sentencing. Post-conviction counsel has now provided this information to three mental health experts: Jan Vogelsang, a licensed social worker, neuropsychologist Glenn Caddy, Ph.D., and psychiatrist Robert Phillips, M.D. In the court below, Mr. Cherry alleged that those experts would testify at a hearing to a broad array of statutory and non-statutory mitigating factors, as well as his incompetence to stand trial, incompetence to testify, voluntary intoxication at the time of the offense, and the fact that his mental state

rebutted several of the aggravating factors. Motion to Vacate, pp. **137-41, 150-60;** Memorandum in Support of Request for Evidentiary Hearing, pp. **4-8.**

Had counsel performed adequately, he could have presented testimony from an expert social worker concerning the long-term effects of the child abuse, abandonment and institutionalization that Roger Cherry suffered, including predisposition to alcohol and drug abuse; personality dissociation; constant anxiety; flashbacks; and inability to function in the everyday world. A neuropsychologist could have confirmed that Roger Cherry is mentally retarded, brain impaired and suffering the lasting effects of child abuse and institutionalization, and that those facts would support the mitigating factors of extreme mental or emotional disturbance and extreme duress. Section **921.141** (b), **(e), Fla.** Stat. Dr. Caddy will *so* testify if Mr. Cherry is granted an evidentiary hearing. Dr. Phillips would also have testified that Mr. Cherry suffers from mental retardation, brain dysfunction and emotional disorders, and that he was intoxicated at the time of the offense. Dr. Phillips would testify that those facts support the mental mitigating factors, including the factor of substantially impaired capacity, section **921.141** (f), Florida Statutes, and that Mr. Cherry's mental condition would have prevented him from forming the intent to cause excessive pain that is required for a finding of the especially heinous, atrocious or cruel aggravating factor.

D. THE RULING OF THE COURT BELOW

The court below summarily denied this claim -- like all of Mr. Cherry's claims -- without an evidentiary hearing and without attaching any portions of the record to support the summary denial of relief. The court's sole explanation for its action was as follows:

> These allegations recite the philosophical beliefs of the pleader and attacks [sic] tactical choice and strategy and are not grounds for collateral attack . . . . As there is no showing but for counsel's unprofessional errors, the results of the proceeding would have been different, [sic] and the Court finds that trial counsel was within the standard of competency expected.

Order Denying Motion to Vacate, at 8.

There is no basis whatsoever in the record to find that any of counsel's failures to investigate, develop and present the evidence set forth above was the result of a tactical or strategic choice. Trial counsel has not testified, and there is nothing in the trial record to suggest that he made any tactical choices with respect to these matters, much less a tactical choice made after a reasonable investigation. See Middleton v. Dunner, 849 F.2d 491, 493 (11th Cir. 1988). It is simply impossible to reach any conclusion in the absence of an evidentiary hearing with respect to any possible strategy or tactic for failing even to conduct a mitigation investigation.

Likewise, it is not possible to reach any valid conclusion as to prejudice in the absence of an evidentiary hearing. As the trial prosecutor argued strenuously and effectively to the jury, no mitinatinn evidence was presented at trial. R. 1043-44. Mr. Cherry has proffered that if counsel had performed adequately, the jury would have heard powerful and moving mitigation, both statutory and non-statutory. In these circumstances, it is impossible to conclude that Mr. Cherry was not prejudiced by his counsel's deficient performance. Certainly, such a conclusion cannot be reached on the basis of the pleadings alone. See Heinev v. Dugger, 558 *So.* 2d 398 (Fla. 1990) (evidentiary hearing required on basis of similar allegations). This claim must be remanded for an evidentiary hearing before an unbiased judge.

CLAIM III

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. CHERRY'S CLAIM THAT HE WAS DENIED A COMPETENT MENTAL HEALTH EXAMINATION, AND COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND ARRANGE FOR SUCH AN EXAMINATION IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS

Whenever the State makes a defendant's mental condition relevant to guilt/innocence and/or punishment, Article I, § 9 of the Florida Constitution and the due process clause of the Fourteenth Amendment require that an indigent defendant have access to a competent

independent mental health expert who conducts a competent examination and assists in the defense of the case. Ake v. Oklahoma, 470 U.S. 68 (1985). Florida makes mental condition relevant to criminal responsibility and sentencing in many ways. From competency to stand trial through determination of statutory mitigation factors, a defendant's mental condition is highly relevant. Consequently, Mr. Cherry was entitled to competent mental health assistance with respect to the guilt/innocence, penalty and sentencing phases of the trial. State v. Sireci, 502 So.2d 1221 (Fla. 1987). Mr. Cherry was deprived of this right by the court's order limiting the scope of the mental examination to competence and sanity, and by defense counsel's failure to provide the mental health expert with crucial information concerning Mr. Cherry's background.

Trial counsel moved to retain a psychiatrist to evaluate Mr. Cherry's competency to stand trial and sanity at the time of the offense, and also to "determine his capability to . . . be held otherwise legally accountable for any acts he may have committed." R. 1080. The trial court appointed the psychiatrist, but limited the scope of the examination to a determination of competency and sanity. R. 1092.

Mr. Cherry was adjudged insolvent and was clearly unable to pay for expert mental health assistance for himself. Thus, the court's limitation effectively precluded Mr. Cherry from obtaining the expert mental health assistance necessary to support both the statutory mitigating factors pursuant to § 921.141(6), Florida Statutes, and the nonstatutory mitigating factors that he had a right to present under the Eighth Amendment. See Lockett v. Ohio, 438 U.S. 586 (1978). As discussed above, see Claim II, Mr. Cherry's terrifying life experiences provided overwhelming mitigation evidence which, if correctly presented with the assistance of a competent mental health professional, would have persuaded the jury to recommend a life sentence.

In addition to the limiting order, Mr. Cherry's due process rights were violated by trial counsel's utter failure to investigate and arrange for a competent mental health

examination. Counsel never pursued the issue of obtaining expert mental health assistance with respect to mitigation, an unconscionable omission in a capital case involving a mentally retarded and brain-damaged defendant.

Dr. George Barnard performed a competency/sanity evaluation; however, because counsel had not performed any investigation of Mr. Cherry's background or history, Dr. Barnard was not provided with any of the background information regarding Mr. Cherry's extremely difficult life. In fact, despite requests from Dr. Barnard for additional information, as well as direction from the court to provide Dr. Barnard with any materials "that would be of assistance to the expert," R. **1093,** counsel did not provide any information concerning Mr. Cherry, other than police reports.

Dr. Barnard's examination consisted of a cursory self-report interview and a pro forma discussion of opinions gleaned therefrom. Mr. Cherry's self-report raised, or should have raised, issues regarding his horrific family history, his subjection to severe physicial and emotional trauma and downright torture, his medical history, his strong emotional reactions indicative of possible depression, and a history of long-standing drug and alcohol dependence. R. **1167-1168.** Despite this information, no investigation was done into Mr. Cherry's background.

The only information concerning Mr. Cherry's history that Dr. Barnard had available to him was self-report. It is well established both in psychiatric literature and in the decisions of this Court that self-report is not an adequate basis for a diagnosis. Mason v. State, **489** *So.* 2d **734, 737** (Fla. **1986);** Bonnie and Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, **66** Va. L. Rev. **427 (1980).** Here, no independent history was obtained by the doctor and none was provided by counsel. Accordingly, Dr. Barnard's evaluations were fundamentally flawed and insufficient under

the standards recognized by the mental health profession and by the courts. State v. Sireci, 536 *So.* 2d 231 (Fla. 1988); Mason v. State, 489 *So.* 2d 734 (Fla. 1986).[13]

Post-conviction counsel has retained Dr. Robert Phillips, an expert with respect to, among other issues, the standard of care required in forensic psychiatric evaluations. Dr. Phillips, who has been provided abundant factual background material regarding Mr. Cherry, in addition to a battery of psychological tests performed by Dr. Glenn Caddy, would testify that Dr. Barnard's superficial report is inherently incomplete and unreliable. Drs. Phillips and Caddy were prepared to testify regarding Mr. Cherry's incompetency to stand trial, incompetency to testify, extreme intoxication at the time of the offense, statutory and nonstatutory mitigating circumstances, and the absence of certain aggravating circumstances relied upon by the State.

Drs. Phillips and Caddy concluded that there are serious questions concerning Mr. Cherry's competence to stand trial in 1987.[14] Dr. Caddy's tests indicate that Mr. Cherry is now, and was at the time of trial, mentally retarded. Neuropsychological testing confirms that Mr. Cherry suffers from organic brain damage. Further, Dr. Caddy believes that the chronic abuse suffered by Roger has caused a mood disorder that is best described as the chronic residual effects of post-traumatic stress disorder. Dr. Phillips also seriously questions Mr. Cherry's cognitive ability to make decisions in terms of the ability to exercise judgment and to recognize the interaction between facts and future outcomes. All these questions

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[13]Dr. Barnard's report failed to even address the issue of mitigating factors.

[14]It is well settled that it violates due process to try a defendant who is actually incompetent. Dusky v. United States, 362 U.S. 402 (1960). Further, if the trial court should have held a hearing to determine competency, but did not, the failure to hold a hearing also violates due process. Pate v. Robinson, 383 U.S. 375 (1966). The glaring failures of Mr. Cherry's trial team implicate both of these issues.

are directly relevant to the issue of competency to stand trial, under Fla. R. Crim. P. 3.211.[15]

Based on his inadequate and fundamentally flawed cursory investigation, Dr. Barnard concluded that Mr. Cherry was competent. Had a complete evaluation been conducted, a competency hearing would have been required. The available facts raise grave doubts as to Mr. Cherry's competency at the time of trial. Accordingly, a hearing is now required to determine whether he was competent. If such a determination is not feasible, Mr. Cherry is entitled to a new trial. Miller v. Duaaer, 838 F.2d 1530 (11th Cir. 1988).

In addition to having serious doubts as to Mr. Cherry's competency to stand trial, Dr. Phillips would testify that Mr. Cherry was not competent to testify.[16] Dr. Phillips would testify that Mr. Cherry is mentally retarded, thus bringing into question whether he had sufficient intelligence to testify. Moreover, the precise nature of Mr. Cherry's mental impairments casts serious doubt on his ability to perceive, remember and communicate facts.

Additionally, Drs. Phillips and Caddy would testify that Mr. Cherry's cognitive defects, combined with his long-term drug and alcohol abuse, and his excessive cocaine and alcohol ingestion on the night of the incident, severely limit Mr. Cherry's ability to remember the facts accurately. Therefore, it is likely that Mr. Cherry's testimony was the result of confabulation rather than fact. Accordingly, Mr. Cherry was not competent to testify.

Dr. Phillips would also testify that a competent mental health examination would have provided additional support for Mr. Cherry's defense in the areas of voluntary

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[15]Mr. Cherry's impaired mental functioning also rebuts the especially heinous, atrocious or cruel aggravating circumstance. See Spencer v. State, No. 80,987 (Fla. Sept. 22, 1994)(striking "cold, calculated and premeditated" aggravator based on defendant's mental state).

[16]The primary test of competency to testify is the witness's intelligence. McKinnies v. State, 315 So. 2d 211 (Fla. 1st DCA 1975); Bell v. State, 93 So. 2d 575 (Fla. 1957). In addition, the witness "must have the ability to perceive, remember and communicate facts." Ehrhardt, Florida Evidence § 603.1 at 273 (2d Ed. 1984).

intoxication, mitigating factors and aggravating factors. See Claims II and V. If Mr. Cherry had received a competent mental health examination prior to trial, it is highly likely the jury would have recommended life. Trial counsel's complete failure to provide any information regarding Mr. Cherry's background is unquestionably below the standards for effective representation. Further, Dr. Barnard's evaluation was fundamentally flawed. Therefore, Mr. Cherry was denied his due process right to a competent mental health evaluation and is entitled to a new trial. The Rule 3.850 motion presented critical facts which were not presented at trial, and this Court should remand this matter for an evidentiary hearing. Lemon v. State, 498 *So.* 2d 923 (Fla. 1986).

CLAIM IV

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING THE CLAIM THAT MR. CHERRY WAS DENIED DUE PROCESS WHEN THE TRIAL COURT DENIED HIS MOTION FOR THE APPOINTMENT OF A FORENSIC PATHOLOGIST, A SEROLOGIST, AND A MICROANALYST.

The United States Supreme Court has held that the due process clause of the Fourteenth Amendment requires a state, upon request, to provide indigent defendants with the "basic tools of an adequate defense . . . when those tools are available for a price to other prisoners." Britt v. North Carolina, 404 U.S. 226, 227 (1971); see also Ake v. Oklahoma, 470 U.S. 68, 77, 83 (1985). Although a state need not provide indigent defendants with all the assistance wealthier defendants can afford, fundamental fairness requires that the state not deny indigent defendants "an adequate opportunity to present their claims fairly within the adversarial system." Ross v. Moffit, 417 U.S. 600, 612 (1974).

Expert witnesses can assist in at least two critical areas. First, an expert can gather facts, inspect tangible evidence, and conduct tests that may assist defense counsel in rebutting the prosecution's case. Moore v. Kemp, 809 F.2d 702, 709 (11th Cir.), cert. denied, 481 U.S. 1054 (1987). Second, an expert can provide opinion testimony to rebut the prosecution's evidence. Id. at 709-10.

In Moore, the Eleventh Circuit stated that the due process clause may require a state to furnish an indigent defendant expert assistance if: (1) the defendant made a timely request to the trial court for expert assistance; (2) the court improperly denied the request; and (3) the trial court's denial rendered defendant's trial fundamentally unfair. Moore, 809 F.2d at 710. The petitioner's motion need only create a "reasonable probability" that expert assistance is necessary and that without such assistance, petitioner's trial would be unfair. Id. at 718.

Here, it is undisputed that Mr. Cherry's counsel made a timely request.[17] The motion advised the court that the State would be introducing blood, hair and fingerprint evidence against Mr. Cherry. According to the motion, the blood samples and the fingernail scrapings were incomplete. The serological, forensic and crime scene evidence was central to the State's case and the judge knew the State would use experts to present this evidence. Without this evidence, the jury could not have convicted Mr. Cherry.

The trial judge was aware that the evidence required expert analysis. Additionally, as discussed in Claim V, had Mr. Cherry been allowed to retain an expert, he would have raised substantial questions as to the authenticity, reliability and accuracy of the State's evidence against him. As such, the denial of Mr. Cherry's request for the appointment of experts rendered the trial fundamentally unfair and deprived Mr. Cherry of his due process rights. The Rule 3.850 motion presented critical facts which were not presented to the court and jury at the time of Mr. Cherry's trial, and this Court should remand this matter for an evidentiary hearing. Lemon v. State, 498 So. 2d 923 (Fla. 1986).

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[17]The record is silent as to whether the court granted or denied this motion; however, trial counsel would testify at an evidentiary hearing that the trial court denied the motion for appointment of experts.

CLAIM V

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. CHERRY'S CLAIM THAT HE WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 AND 16 OF THE FLORIDA CONSTITUTION

Judge Blount disposed of Mr. Cherry's substantial claims of ineffective assistance of counsel, both as to guilt and penalty phase, in a single, short paragraph:

> The allegations in Claims II and V allege that the Defendant was denied effective assistance of counsel. These allegations in light of the record in this cause fail to set forth the standards established by Strickland v. Washinnton, 104 S. Ct. 2052 (1984). These allegations recite the philosophical beliefs of the pleader and attacks [sic] tactical choice and strategy and are not grounds for collateral attack. (Kennedy vs. State, 547 So.2d 912 and Ferby v. State, 404 So.2d 407 (Fla.App.) As [sic] there is no showing but for counsel's unprofessional errors, the results of the proceeding would have been different, and the Court finds that trial counsel was within the standard of competency expected.

Order Denying Motion to Vacate, P.R. 2211-12. Obviously, the circuit court was not in a position to determine whether trial counsel's acts and/or omissions were the result of "tactical choice and strategy" in the absence of an evidentiary hearing and any testimony from trial counsel. Nor could Judge Blount make findings of fact in the absence of a hearing. The Order speaks for itself, but Mr. Cherry nevertheless sets forth below the substantial claims of ineffective assistance at the guilt-innocence phase which clearly merit an evidentiary hearing and, ultimately, Rule 3.850 relief.

Under Strickland v. Washinaton, 466 U.S. 668 (19841, a defendant must plead: (1) unreasonable attorney performance, and (2) prejudice. As established in the Rule 3.850 motion and appendices, trial counsel's representation of Mr. Cherry fell below acceptable professional standards, and but for counsel's failures, there is a reasonable probability that Mr. Cherry would not have been convicted of first-degree murder.

A. Trial counsel failed to investiaate issues relatina to Mr. Cherrv's mental state and to present readilv available evidence of Roger Cherrv's mental incompetencv and his extreme intoxication at the time of the offense.

This was trial counsel's first capital case, which he tried solo. His specialty at the time of trial was personal injury and wrongful death. Perhaps due to his inexperience, he failed to investigate his client's background and to provide any information to his court-appointed mental health expert except police reports. As discussed in Claims II and III, had he done *so,* he would have uncovered significant evidence that Mr. Cherry was both incompetent to assist in his own defense and to testify. Mr. Cherry is mentally retarded, brain damaged, and suffers from mental illness -- specifically, a depressive mood disorder caused by chronic post-traumatic stress disorder. See Claims II and III, supra.

As discussed in Claims II and 111, had counsel provided this information to a mental health expert, there is a reasonable probability that Roger would have been found incompetent to stand trial and to testify. Furthermore, had counsel investigated, he would have discovered ample evidence of Mr. Cherry's excessive drug and alcohol intoxication at the time of the offense, which would have supported a defense of voluntary intoxication.

Under Florida law, voluntary intoxication is a valid defense to specific intent crimes such as burglary. Gardner v. State, 480 So. 2d 91, 92-93 (Fla. 1985); Linehan v. State, 476 So. 2d 1262 (Fla. 1985); Preslev v. State, 388 So. 2d 1385, 1386 (Fla. 1980). Under Florida law, any evidence of voluntary intoxication at the time of the alleged offense is sufficient to support a defendant's request for an instruction on the issue.[18]

Although trial counsel elicited testimony from Roger's girlfriend, Lorraine Neloms, that Roger had had a few beers at a friend's house that night, counsel inquired no further.

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[18] **Gardner, supra (evidence that, on day of offense, defendant consumed three and one-half cans of beer and, with his companions, two or three more quarts of beer, and smoked high potency marijuana, was sufficient to create jury question on defense of voluntary intoxication); Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA 1981).**

Had he done *so,* he would have learned that Roger also smoked approximately $250 worth of crack cocaine that night and also drank a quart of moonshine, App. 62, Affidavit of Lorraine Neloms, in addition to the beer he drank that night. These facts would have been substantiated by witnesses Roger and Kelly Futch. App. 64. Trial counsel's own investigator's report indicated that Roger Cherry and James Terry had each purchased $100 worth of crack on the night of the offense. Rule 3.850 motion, at p. 177. Other witnesses, including Sandra Henry and Roderick Williams, would have testified to Mr. Cherry's severe crack habit and the fact that he was a "crack head" who would use crack wherever and whenever he could get his hands on it. Apps. 40 and 63.[19]

Had counsel presented the foregoing evidence to a mental health expert and to the jury, he would have established that Mr. Cherry was *so* intoxicated on the night of the offense that he could not have formed the specific intent to commit the burglary that formed the basis for his felony murder conviction.[20] A mental health expert could also have testified to the heightened effects of drugs and alcohol on a mentally retarded and organically-brain damaged person such as Roger Cherry. Had counsel presented this evidence, there is a reasonable probability that Mr. Cherry would not have been convicted of first-degree murder.

B. Counsel failed to Present a viable, credible defense and to investigate and present evidence that someone other than Roger Cherry entered the home and killed the Wavnes.

Counsel has a duty to offer his informed opinion as to the best course to be followed in protecting his client's interests. See Stano v. Dunner, 921 F.2d 1125, 1151 (11th Cir. 1991). This duty is heightened "where a possible mental impairment prevents the client

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[19]Not only did counsel fail to seek out this evidence; he even cut off a witness' deposition testimony substantiating Mr. Cherry's intoxication. App. 80, Deposition of James Terry.

[20]As noted elsewhere, Mr. Cherry was found guilty of felony murder ratherthan premeditated murder.

from exercising proper judgment." Foster v. Dunner, 823 F.2d 402, 407 n.16 (11th Cir. 1987). In the instant case, trial counsel relied upon Roger Cherry to save his own neck. Relying upon an alibi defense, trial counsel presented as his sole witness none other than Roger Cherry, his mentally infirm client with a lengthy criminal history, thus guaranteeing that the jury would know of his criminal past.

Counsel failed to call even a single witness to substantiate Mr. Cherry's rambling testimony about his whereabouts on the night of the offense. There were numerous pieces of testimony by Mr. Cherry as to which supporting witnesses would have been expected and necessary.[21] Counsel's defense theory was that Jack Baumgartner, the Waynes' former son-in-law, may have committed the murder, yet he presented almost no evidence to support that theory. The failure to do *so* made the defense look extremely foolish. For example, counsel argued that Baumgartner's van was seen in the neighborhood. R. 295. Yet he presented no evidence to show that that was Baumgartner's van.[22]

Trial counsel also failed to investigate and present evidence that James Terry -- a close associate of Roger Cherry's who lived next door, the uncle of Lorraine Neloms, and initially a suspect in the murders -- may well have been the one who actually killed the Waynes. The day that police discovered the Waynes' bodies, they learned that James Terry had been seen walking around the victims' abandoned car early on the morning after the Waynes were killed.

When questioned by the police, Mr. Terry claimed that he was looking for bottles and cans to collect and that he just happened upon the victims' car. (He used his own

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[21] See, e.g., R. 837 (Mr. Cherry was gambling with "Jimpo" and four other guys); R. 843 (Mr. Cherry was gambling with 12 other guys behind "Mars Bar"); R. 847 (Mr. Cherry cut his thumb with a knife that he borrowed from his friend Woody); R. 857 (Mr. Cherry borrowed a lawn mower from his friend to mow the Waynes' lawn about two or three weeks before they were killed).

[22] The most helpful evidence to support that theory, incidentally, was the police "lead sheet" wrongfully withheld by the State that strongly suggested the Waynes' son-in-law. He was eliminated as a suspect, however, because the police were only investigating black suspects. See Claim VI infra.

car to drive to the site where the car was abandoned.) The police also "luminaled" Mr. Terry's shoes in an effort to determine whether there was any blood on them. (None of Mr. Cherry's three pairs of shoes seized from his house had blood on them.) The results of the test were said to be negative, although no written report of the results was made. Mr. Terry then disposed of those shoes in a garbage dumpster. See 3.850 motion, Apps. 73 and 80.

Despite Mr. Terry's suspicious activities, the police went no further in investigating his involvement, although a negroid hair was found at the crime scene that did not match Mr. Cherry's hair. (James Terry is black.) Nor did the police attempttocompare Mr. Terry's fingerprints with those lifted from the crime scene, despite the fact that Mr. Terry's prints were readily available in light of his criminal record.

The only effort defense counsel made to pursue Mr. Terry's possible involvement was to take his deposition. At that deposition, Mr. Terry acted extremely defensive and, without any prompting, volunteered that he had an alibi for the night of the offense.[23] Had counsel investigated, he would have learned that Mr. Terry lied when he *so* testified.[24]

Most significantly, the footprints seen around the Waynes' car, which undeniably belonged to James Terry, bear a striking resemblance to the footprint tread on Esther Wayne's pajama bottoms and additional partial prints on a sheet just inside the window that was the point of entry into the Waynes' home. App. 71, Affidavit of Dale Nute (crime scene expert). Unfortunately, although trial counsel attempted to show that the tread on the pajamas was similar to Mr. Terry's footprint treads, counsel inexplicably failed to

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[23]He claimed to have caught a ride to Apopka, Florida with "Don", "Pat" and "Shorty." He also claimed that he had nothing further to do with Roger Cherry, a fact that was easily refutable.

[24]Patricia Grimes is the "Pat" about whom Mr. Terry spoke. She has signed a sworn affidavit stating, "I can absolutely say without any reservations that this never happened. I have never gone anywhere with these two men [James Terry and "Shorty"]. They worked for me picking grass, and that is my only contact with them. [Mr. Terry] is lying. I was never contacted by any police agency or anyone else to confirm this preposterous story . . . ." App. 78.

introduce as evidence a photograph of the footprints around the car.[25] Consequently, the jury never had an opportunity to compare the tread on the pajamas with the treads from Mr. Terry's shoes.

Had the jury been able to compare those treads and had they been given the additional information that, as alleged in the 3.850 motion, Mr. Terry lied to the police, lied to the defense, had intimate knowledge of the Wayne homicides, was a close associate of Roger Cherry's,[26] and had a long criminal record, they might well have had a reasonable doubt as to who actually committed the crime.[27]

C. Trial counsel failed to attack the State's evidence and to show that Mr. Cherry most likely was never in the Waynes' house.

The possibility that someone other than Roger Cherry killed the Waynes would have been substantially bolstered had counsel effectively attacked the State's forensic evidence.[28] Counsel could have mounted various challenges to the State's evidence even without forensic assistance. For instance, it was the state experts' testimony that, based on the amount of blood found around the outside of the house that was said to be consistent

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[25]He had the photograph marked for identification as Exhibit F, but never moved its admission into evidence.

[26]See App. 64, Affidavit of Roger Futch ("I would bet my life that James Terry was involved. [Roger and Terry] did everything together. Terry could talk Roger into doing anything. And Roger wasn't capable of planning this kind of a thing. . .")

[27]Terry's involvement in the crime would also have established a motive for Lorraine Neloms to have lied about Roger Cherry's involvement. Because James Terry is Lorraine's uncle, counsel could have argued that blood is thicker than water and that Lorraine put the crime off on Roger Cherry in order to protect her uncle. It also would explain how Lorraine was privy to certain information about the crime.

[28]Some of that evidence could only have been successfully challenged had the defense's motion for the appointment of forensic experts been granted. To that extent, the trial judge's failure to grant that motion violated Mr. Cherry's due process rights, as argued in Claim IV, and also served to deprive Mr. Cherry of the effective assistance of counsel.

with Mr. Cherry's blood, he would have been bleeding like a stuck pig.[29] Yet there was not a drop of Roger Cherry's blood (or blood consistent with his blood type) inside the house.

Dale Nute, an expert in crime scene investigation and a former supervisor and crime lab analyst at the Florida Department of Law Enforcement, has concluded, based on an extensive review of the evidence and the crime scene, that if the blood outside the house was Roger Cherry's, then Roger Cherry was never in the house. App. 71.[30] Mr. Nute has further concluded that it would have been extremely difficult for one person to have entered through the jalousie window (the point of entry) without assistance from another person or without leaving scuff marks on the outside wall. (No scuff marks were visible.) Mr. Nute also found significant problems with a partial palm print said to place Mr. Cherry inside the house. First, there was conflicting testimony about who lifted the print, with two crime scene investigators each saying that the other had lifted the print. Second, Mr. Nute's investigation of the crime scene reveals that the print could not possibly have come from the doorjamb of the Waynes' bedroom as the State contended.[31] Hence, the print should have been excluded from evidence; at the very least, its reliability and authenticity should have been challenged before the jury. The prejudice resulting from the admission of this evidence is patent; it was the only piece of evidence that placed Mr. Cherry inside the house.

There were also substantial flaws in the State's serological evidence that should have been brought out at trial. See 3.850 motion, App. 46 (Affidavit of serologist Diane

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[29]The State argued that Mr. Cherry bled profusely when he cut his thumb in the course of cutting the telephone line to the Waynes' home. Trial counsel did not request an explanation why, if Mr. Cherry was armed with a knife, Mrs. Wayne was not stabbed but rather, was hit with a blunt object.

[30]Whoever entered the house had rummaged through the Waynes' belongings, including a pair of Mr. Wayne's trousers, the pockets of which were turned inside out.

[31]At the very least, counsel should have brought out in cross-examination that the State's fingerprint expert had been reprimanded by his supervisors for failing to identify a fingerprint, a very serious error. See 3.850 motion at 232.

Lavett). Among these were the fact that the State's blood expert was not qualified to conduct and analyze electrophoresis tests, was sloppy and ineffective in reporting his findings, made "typographical" errors in reporting the results, and used outdated testing methods. Furthermore, even without a serological consultant, trial counsel could have and should have pointed out that the statistics recited by the State's expert were highly misleading and that the error rates reported for this testing ranged from 20.6% to as high as 34.5%. App. 46. Such testimony would have raised significant doubts as the accuracy of the State's serological evidence.

Finally, a forensic pathologist retained by undersigned counsel has concluded that there were substantial problems both with the autopsy performed by Dr. Botting, the medical examiner, and with his findings and testimony.[32]

All of the foregoing evidence strongly suggests either that Mr. Cherry did not burglarize the Waynes' home and kill them, or that he had an accomplice -- most likely Mr. Terry -- and although involved, never entered the victims' home that night.[33] Mr. Cherry had a right to present the foregoing evidence at an evidentiary hearing, and the circuit court erred in summarily denying him that opportunity.

D. Counsel failed to impeach the testimonv of the state's kev witness, Lorraine Neloms.

Counsel failed to bring out prior inconsistent statements made by Lorraine Neloms, the key witness who testified against Mr. Cherry. At trial Ms. Neloms testified that Roger Cherry came home the night of the crime with two or three rifles. R. 450. Yet in her written

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[32]Specifically, Esther Wayne's assailant would have had blood all over his clothes, hands, and shoes, whereas Roger Cherry had none; Mrs. Wayne would have lost consciousness almost immediately upon being struck; and it was sheer speculation that Mr. Wayne's heart attack was the result of a struggle with an assailant.

[33]Ms. Neloms has signed an affidavit indicating that she told the police she thought someone else was involved, that Roger told her that he did not kill the Waynes and that someone else was with him at the Waynes' house, that Roger never "got into trouble alone," that she did not believe he killed the Waynes and that he was shocked and surprised upon learning they were dead. App. 62.

statement to the police prior to trial, she said Mr. Cherry returned with one rifle. App. **79.** Ms. Neloms testified at trial that Mr. Cherry told her that he entered the house and that Mrs. Wayne tried to fight him. R. **437.** Yet in her prior written statement to the police, she said Mr. Cherry told her that "he went into house by window he said the people in house were out (knocked out) *so* he got rifle and wallet found car keys to get away...." App. **79** (emphasis added). Her written statement suggests that the Waynes were already "out" when he entered the house, a substantially different version than her trial testimony.

Trial counsel also failed to bring out the fact that Ms. Neloms was a heavy crack user, was high on the night of the offense, and was not a truthful person. See App. **64,** Affidavit of Roger Futch ("she's not what you'd call an honest person"); App. **63,** Affidavit of Roderick Williams ("She was addicted to and consuming as much crack as she could . . . during the time she was questioned about Roger's involvement in the . . . murder."). Finally, counsel failed to impeach Ms. Neloms' testimony by calling Sandra Henry, Roger Futch and Roderick Williams as witnesses. Ms. Neloms testified that on Friday night, Mr. Cherry admitted all the details of the crime to her. Yet Ms. Henry testified in her deposition that two or three days prior to Mr. Cherry's arrest, all Lorraine said was that Roger had stolen a car and that she suspected that Roger might have been involved in some wrongdoing. 3.850 motion at p. **235;** App. **40.**[34]

Counsel also failed to impeach the testimony of Richard Clodfelter that the Waynes never allowed black people to mow their lawn because Mr. Wayne hated blacks.[35] Had counsel investigated, he would have learned from neighbors that blacks indeed were seen

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[34] ~~See also~~ **App. 63, Affidavit of Roderick Williams ("Lorraine said Roger never told her that he burglarized the Waynes' home or that he killed them. He just didn't say, and Lorraine didn't really know . . . ."); App. 64, Affidavit of Roger Futch ("I saw Lorraine shortly after Roger was arrested. She never said that Roger admitted to doing the burglary or to killing the Waynes. She iust said he was acting really paranoid . . . that night and she got suspicious.")(emphasis added).**

[35] **This testimony was offered by the State to refute Mr. Cherry's claim that he had mowed the Waynes' lawn on a prior occasion. R. 897.**

mowing the Waynes' lawn. Apps. 11-13, Affidavits of Carol Collins, Claudia Selmon and Diane Salmon.

E. Counsel failed to challenae the racial and aae composition of the venire.

African-Americans made up 11.16% of the population in Volusia County, yet post-conviction investigation reveals that of the 36 jurors questioned during voir dire, only two of them were African-American: Geraldine Patterson and S.S. Brown. Both of them were stricken by the prosecutor, resulting in Mr. Cherry being tried by an all-white jury. In addition to being racially skewed, the jury was also over-represented in terms of the number of elderly jurors who decided his fate. One half of Mr. Cherry's jury was retired or elderly.[36] In a case in which the victims were white and elderly and the defendant is young and black, such a jury impermissibly skewed the entire proceedings against the defendant. Counsel's failure to challenge the venire was ineffective, and the systematic underrepresentation of African-Americans and overrepresentation of elderly jurors deprived him of his right to a fair trial. See People v. Harris, 679 P.2d 433 (Cal.), cert. denied, 469 U.S. 965 (1984), and Claim I, supra.

F. Counsel failed to familiarize himself with the Rules of Evidence, to Mr. Cherry's great prejudice.

It is clear from the trial record that defense counsel was unfamiliar with the evidentiary rule regarding impeachment of a witness' credibility based on prior convictions. See Fla. Stat. § 90.610. As the following colloquy reveals, both Mr. Cherry and his attorney were totally unprepared for that line of questioning when Mr. Cherry took the stand in his defense.

Q. Ever been convicted of a felony or crime of dishonesty or false statement?

A. No. What you mean by dishonesty or false statement?

Q. Where you commit perjury or commit a theft or anything of that nature?

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[36]Senior citizens comprise 35% of the registered voters in Volusia County.

MR. MILLER [Objecting]: . . . theft, burglary is not false statement under the rule. It's my understandina that the rule does not provide for the dishonestv.

COURT: Objection overrruled. Answer the question, if you can.

A. Repeat the question, please.

Q. Have you ever been convicted of a felony or a crime of dishonesty or false statement?

A. Yes, I have. Five times.

R. 878-79 (emphasis added). The State subsequently introduced judgments and sentences of eiaht convictions, thereby making Roger Cherry look like a liar and substantially prejudicing him in the eyes of the jury, as the jury was shown the content of the judgments and sentences. The prejudice was only heightened when the prosecutor later argued that even while in prison, Mr. Cherry committed crimes (possession of marijuana) and therefore society would not be safe unless he was executed, R. 1049, and the sentencing judge found that he was a menace to society, R. 1243. See also Claim XIII (judge's reliance on Mr. Cherry's prior criminal history as a nonstatutory aggravating factor).

Trial counsel's ignorance of the Rules of Evidence fell below accepted professional standards and substantially prejudiced Mr. Cherry.[37]

G. Counsel committed other sianificant errors.

Counsel committed other errors too numerous to discuss at length here. Among other things, counsel failed to preserve the record, see Claim X infra; to move for a change of venue, despite the fact that "everyone in the DeLand area heard about" the crime (R. 56); see 3.850 motion at 184-85;[38] failed to move for a mistrial or to inquire further about

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[37] Counsel also failed to request a limiting instruction advising the jury that they were only to consider the prior convictions as relevant to Mr. Cherry's credibility and not to whether it tends to show guilt of this crime or that he is a bad person.

[38] Mr. Cherry's own attorney remarked, "Folks, this case was plastered all over the newspapers and only by the grace of God did you folks not remember the details of it." R. 982. The record is contrary to counsel's belief that no one remembered the details, see R. 76.

jury misconduct, see Claim VII infra; failed to move for individual voir dire or to request additional peremptory challenges; failed to object to the prejudicial trial atmosphere, see Claim XI infra; failed to move for Judge Blount's recusal on the ground that he was biased against Mr. Cherry, see Section D, supra and Motion for Recusal, P.R. 2051-2114; failed to challenge biased jurors, see 3.850 motion at 187;[39] and failed to learn the facts of the case.[40]

Counsel acted more as an advocate for the State than for the defense in making statements like the following to the jury:

> . . . the elderly lady in this case, died and died in what appears to have been a horrible death.

R. 84.[41]

> Mrs. Nye here indicated that whenever she picks up a paper and sees that somebody has appealed and appealed, ... that it's frustrating. It makes one auestion sometimes the intellinence of the Presumption of innocence.

R. 204 (emphasis added). Mr. Cherry could not help but be prejudiced by these unnecessary statements that could only have inflamed the jury's passions more.

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[39] These include a juror who was himself the victim of a burglary, R. 140 (juror Green); a juror who served a substantial period of time on the 1986 Term grand jury, R. 194 (juror Dickson); a juror who had "a little bit" of a problem with the presumption of innocence, R. 251; and a juror who stated she would automatically vote for the death penalty if the person was found guilty, R. 220 (juror Wredt).

[40] Among other things, counsel mistakenly brought out in cross examination that Mr. Cherry was present at the site of the victims' abandoned car and looked through it, when in fact that was James Terry. R. 294. Counsel also argued, amazingly, that the keys to the car were found at the scene, having been dropped there by Mr. Cherry, when in fact officers testified that the keys were never recovered R. 335, 338.

[41] Counsel also told the jury: [A]s a result of that brain damage of the soft tissues of the brain and its consequent swelling, [Mrs. Wayne] died. . . . She ceased to breath . . . I realize this picture may distress some but I've got to show you . . . blood was smeared all over this lady . . . She was either stomped to death, kicked to death or beat to death . . . she was stomped or kicked, . . . rather than merely being stepped on . . . it indicates, perhaps, even the lady was stomped when she was down." See also R. 973-74.

In sum, Mr. Cherry was deprived of his right to effective assistance of counsel, and but for those errors, there is a reasonable likelihood that he would not have been convicted of first-degree murder. An evidentiary hearing is warranted, as is Rule 3.850 relief.

CLAIM VI

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. CHERRY'S CLAIM THAT THE STATE'S FAILURE TO TURN OVER EXCULPATORY INFORMATION IN ITS POSSESSION BEFORE TRIAL VIOLATED MR. CHERRY'S CONSTITUTIONAL RIGHTS.

In a criminal case, the prosecution's failure to disclose evidence favorable to the accused violates due process. Bradv v. Marvland, 373 U.S. 83 (1967); Aaurs v. United States, 427 U.S. 97 (1976); United States v. Baalev, 473 U.S. 667 (1985). The State must reveal to defense counsel any and all information that is helpfu! to the defense, whether the information relates to guilt, innocence or punishment, and regardless of whether the defense counsel requests the specific information. Baalev, supra. Further, if the evidence withheld goes to the credibility or impeachment of a State witness, the accused's Sixth Amendment right to confront and cross-examine the witnesses against him is violated. Chambers v. Mississippi, 410 U.S. 284, 295 (1973).[42]

Pursuant to § 119, Fla. Stat., post-conviction counsel obtained the DeLand Police Department files, which contain a "lead sheet" -- never provided to the defense -- in which a clerk at a convenience store reported that:

> . . . w/m [white male] was in store day before S/5 & complained about "in-laws wanting to 'evict' him." The day after the S/5 the same fellow was in the store &again spoke to clerk saying, "Did she hear of the two old people . . . That was (my) in laws." W/m drives a red chevette (hatchback). Info via #11. This subject eliminated on basis of race - nearoid hair found at scene.

App. 72 (emphasis added).

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[42]The fact that the exculpatory information is withheld by the police rather than the prosecution makes no difference, for the "state attorney is charged with constructive knowledge and possession of evidence withheld by other state agents such as law enforcement officers." Gorham v. State, 597 So. 2d 782 (Fla. 1992) (citing State v. Coney, 294 So. 2d 82 (Fla. 1973); State v. Del Gaudio, 445 So. 2d 605 (Fla. 3d DCA), review denied, 453 So. 2d 45 (Fla. 1984)).

This lead sheet directly supported trial counsel's theory of defense that the victims' former son-in-law may have been the perpetrator. The report also shows how the police failed to adequately investigate other possibilities merely because they had found a "negroid hair" at the crime scene. Later, when it was determined that the hair did not come from Mr. Cherry, the police attempted to explain the hair away on the theory of "secondary transfer." Thus, if the report had been provided, counsel could have used it to argue that the state's secondary transfer theory was only an after-the-fact attempt to tailor the evidence to fit its case.

The police also took photographs, which were never turned over to Mr. Cherry, of the soles of James Terry's shoes.[43] An expert for the defense would testify that the treads of Mr. Terry's shoes match the tread marks appearing on Mrs. Wayne's pajama bottoms. This evidence supports the theory that someone other than the defendant committed this crime.[44]

In her affidavit, see App. 62, Lorraine Neloms indicates that the State told her that her fingerprint was found on the victims' stolen bank card. The State failed to disclose that fact to the defense.[45] Even if the State did not actually find Ms. Neloms' fingerprint on the bank card but merely told her that they did, it is still evidence that could have been used to impeach her credibility and explain her reason for testifying against Mr. Cherry.

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[43]James Terry was the uncle of the State's key witness, Lorraine Neloms.

[44]There is also reason to believe that the State failed to vigorously pursue Mr. Terry's involvement in the Wayne homicides due to the need for Ms. Neloms' cooperation in testifying against Mr. Cherry. The State had ample evidence to believe that Mr. Terry was involved, see Claim V supra, but made no effort to investigate his involvement beyond "luminaling" his shoes. The fact that Mr. Terry was suddenly dropped as a suspect raises questions as to whether there was an undisclosed deal to which the defense was not privy. Promises to and "deals" with witnesses are classically exculpatory. Ginlio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959).

[45]Such disclosure would have raised the inference that Ms. Neloms was involved in the crime. Additionally, it would have suggested that she feared being charged as an accomplice.

The State also failed to disclose that Ms. Neloms had told the police that she believed someone else was with Mr. Cherry at the Waynes' house; that she did not believe that he himself killed the Waynes; and that Mr. Cherry had been smoking crack and drinking beer and moonshine that night. App. 62.[46] This is favorable material information which should have been disclosed to the defense.

Finally, the State failed to disclose that Ronnie Chamberlain, who provided information to the police about the case and who pressured Ms. Neloms to report Roger Cherry as the perpetrator, was a confidential informant for the police. See App. 40; App. 62 ("It was Ronnie Chamberlain who pushed me and talked me into going to the police with my suspicions about Roger . . . I didn't want to . . . I told Ronnie that I just had a feeling that Roner had done somethina. He kept pushing me and saying, 'I'll call J.D. [Brown, a deputy sheriff].'").[47]

The foregoing evidence is clearly material, and Mr. Cherry was substantially prejudiced by the State's withholding of that evidence. As such, the prosecution's failure to disclose this material violates Mr. Cherry's right to due process. An evidentiary hearing on this claim is required. Lemon, supra.

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[46] See also App. 62, ¶ 7 ("I remember that [the sheriff's investigator] kept asking me for details, but like I told him, I was half asleep when Roger came in, and I wasn't all together then. I might have thought I heard stuff I didn't. So many cops and state people have talked to me, it's hard to remember who told me what and what I knew when . . . .).

[47] There was also a reward out for nformation about the homicide. Id. To this day, the police continue to withhold evidence of Mr. Chamberlain's association with the department; however, he has a reputation in the community as being a "snitch." Id. It is quite suspicious that just prior to Mr. Cherry's trial, a battery charge against Mr. Chamberlain was nolle prossed. Similarly, Assistant State Attorney Peter Marshall, who prosecuted Mr. Cherry, nolle prossed an aggravated battery charge against Mr. Chamberlain on August 10, 1988. At the very least, an evidentiary hearing is required to determine the extent of Mr. Chamberlain's role as a confidential informant in this case.

CLAIM VII

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR CHERRY'S CLAIM THAT HE WAS DENIED HIS RIGHTS TO MEANINGFUL VOIR DIRE AND A TRIAL BEFORE AN IMPARTIAL JURY.

The right to a trial by an impartial jury is a constitutionally provided fundamental right. Article I, § 16, Fla. Const.; Fifth Amendment, U.S. Constitution. In Florida, the recognized purpose of voir dire is simply to secure an impartial jury. Davis v. State, 461 So.2d 67 (Fla. 1985). A juror must answer all questions asked, unless excused by the court. Story v. State, 53 So.2d 920 (Fla. 1951). Moreover, counsel is entitled to truthful responses. State v. McGough, 536 So.2d 1187 (Fla. 2d DCA 1989).

During voir dire, the prosecution asked all potential jurors whether they knew any of the State's witnesses, two of whom were the victims' son, Jack Wayne, Sr., and daughter-in-law, Barbara Wayne. All of the jurors denied knowing any of the witnesses. R. 52, 135-36, 165, 194, 219, 231, 242-43, 250. After the panel had been sworn and the trial started, the prosecutor advised defense counsel and the court that Ms. Wayne might know one of the jurors. R. 464-5. Defense counsel briefly questioned Ms. Wayne, who testified that one of the jurors had been a customer of hers at a bank where she haa been the branch manager, and that they recognized each other one day at lunch during the trial. R. 466-67. The court let counsel think about how to deal with the issue overnight, R. 468, but counsel did nothing further.

The record clearly reveals that the juror (who was never even identified, let alone questioned) failed to apprise counsel of his relationship with the witness during voir dire and that the juror never brought his relationship with Ms. Wayne to the attention of the court even after he became aware of it. The court and counsel did nothing to inquire of the juror concerning the extent of his contact with Ms. Wayne and whether his prior relationship with her would affect his deliberations.

The presence of a juror who fails to disclose his knowledge of a witness is fundamental, "structural" error, see Arizona v. Fulminante, 499 U.S. 279 (1991), that can never be harmless because it deprives the defendant of the opportunity to conduct a meaningful voir dire and exercise appropriate peremptory challenges. Lyons v. United States, 1994 D.C. App. Lexis 116 (D.C., July 28, 1994). Moreover, the juror's failure to report his knowledge of the witness once he became aware of it raises serious concern about potential juror misconduct, which is also grounds for a new trial. Rule 3.600(b)(4), Fla. R. Crim. P.

In addition, another juror, Ms. Dickson, disclosed that during Mr. Cherry's trial she was asked about the case by a newspaper employee. R. 352. The court briefly questioned her, R. 352-53, but the questioning by court and counsel was inadequate.[48] The court and counsel failed to ask her whom she had spoken to, what the individual said about Mr. Cherry and his case, and whether she had discussed the incident with other members of the jury. The trial court's failure to conduct an adequate inquiry went unchecked by trial counsel's failure to question Ms. Dickson further. As a result, Mr. Cherry's right to a fair trial by an impartial jury was denied.

The trial court held that this claim was barred. However, as set forth above, the presence of a juror who failed to disclose a relationship with a witness, and of another juror who had extrajudicial contact with a newspaper employee, is fundamental error that this Court should correct without regard to any procedural bar. Wille v. State, 600 So. 2d 479, 482 (Fla. 1st DCA 1992). Should this Court nevertheless find the claim barred, it must consider Mr. Cherry's claim that counsel was ineffective for failing to conduct an adequate inquiry and make an appropriate motion to exclude the juror(s) or for a mistrial.

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[48]The trial judge is responsible for questioning jurors to determine whether extra-judicial exposure is prejudicial. See Robinson v. State, 438 So. 2d 8 (Fla. 5th DCA 19831. Moreover, failure to conduct the inquiry is reversible error. Kruse v. State, 483 So. 2d 1383 (Fla. 4th DCA 1986).

There can be no question that these failures were prejudicial, since had counsel properly preserved the error, it was per se reversible. Lvons, supra. This Court should remand for an evidentiary hearing on this claim.

CLAIM VIII

THE CIRCUIT ERRED IN SUMMARILY DENYING MR. CHERRY'S CLAIM THAT THE TRIAL COURT EXCLUDED A DEFENSE WITNESS ON THE IMPROPER BASIS THAT THE WITNESS'S TESTIMONY WOULD BE OFFENSIVE TO ELDERLY CITIZENS.

At trial, Mr. Cherry proffered a witness, Mr. Laughter, who would have testified that Leonard Wayne did not possess a valid driver's license at the time of his death; in fact, he had not been issued a driver's license since 1970. R. 814-15. Mr. Laughter's testimony was offered for the purpose of impeaching Lorraine Neloms' testimony that she saw Leonard Wayne's driver's license in Mr. Cherry's possession.[49]

The prosecutor objected to the witness on the grounds that he had not been disclosed to the State prior to trial, in violation of Fla. R. Crim. P. 3.220. R. 813-14. The trial court excluded the proffered witness, without stating a specific justification for its ruling. R. 816. The court did not conduct a Richardson hearing. R. 816. See Richardson v. State, 246 So.2d 771 (Fla. 1971). On appeal, this Court interpreted the trial court's action as holding that the proffered testimony was immaterial since there had been no testimony that Mr. Wayne carried a current license, and therefore found that a Richardson hearing was unnecessary. Cherrv v. State, 544 *So.* 2d 184, 186 (Fla. 1989), cert. denied, 110 S.Ct. 1835 (1990).

In Mr. Cherry's Rule 3.850 motion, he proffered newly-discovered evidence that Judge Blount told the defense attorney and investigator in chambers that he did not allow the testimony because it would offend the elderly of the community, since possession of

[49] As Ms. Neloms was the prosecution's primary witness against Mr. Cherry, any evidence tending to impeach her credibility was critical to Mr. Cherry's defense.

a driver's license signifies their last hold on their youth. Rule 3.850 motion, at p. 260; Affidavit of Christopher Harrison, P.R. 2066-2067. Obviously, this was an improper basis for excluding evidence necessary to impeach a key State witness, and the trial court abused its discretion in disallowing that testimony.

Because this claim was based on newly discovered facts outside the record, it was appropriately brought in a 3.850 motion and could only be resolved after holding an evidentiary hearing. See, e.g., Linhtbourne v. State, 549 So. 2d 1364 (Fla. 1989); Harich v. State, 542 So. 2d 980 (Fla. 1989). Once the 3.850 proceedings were assigned to Judge Blount, it was clear that Judge Blount's recusal was required, since he was a material witness with respect to this claim. See Section D supra. Judge Blount nevertheless denied Mr. Cherry's motion to recuse him and denied this claim for relief.[50] This claim should be remanded for an evidentiary hearing before an unbiased judge.

CLAIM IX

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. CHERRY'S CLAIM THAT HIS FIRST-DEGREE MURDER CONVICTIONS AND DEATH SENTENCE VIOLATE THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

On direct appeal, this Court vacated Mr. Cherry's sentence of death for the murder of Leonard Wayne and remanded for a sentence of life without parole for 25 years. This Court did *so* on the ground that "[w]e cannot conclude that death is a proportionate punishment when the victim dies of a heart attack during a felony in the absence of any deliberate attempt to cause the heart attack." State v. Cherry, 544 *So.* 2d 184 (Fla. 1989) (emphasis added). Mr. Cherry submits that the Court's decision, while correct, did not

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[50] Judge Blount's suggestion to undersigned counsel that they read this Court's opinion on direct appeal was particularly inappropriate since Mr. Cherry made clear in the Rule 3.850 motion that he was aware of that ruling, but that facts not previously part of the record demonstrated that it was based on an erroneous understanding of the trial court's original ruling. See 3.850 motion, at p. 260. The likely explanation for Judge Blount's reaction to this claim shows why he was required to excuse himself -- he did not like the fact that his conduct was questioned based on statements he made off the record.

go far enough, and that this Court should hold that Mr. Cherry's first degree murder convictions violate his right to due process. Additionally, his death sentence for the murder of Mrs. Wayne violates the prohibition against cruel or unusual punishment.

The jury specifically found that Mr. Cherry was not guilty of the premeditated murder of either victim, but rather, of felony murder. Based on the felony murder doctrine, the jury need only have concluded that Mr. Cherry intended to commit a burglary and therefore was guilty of first degree murder based on the doctrine of transferred intent --that is, since he intended to commit a burglary, it can be presumed that he intended the consequences of that act, including the death of the Waynes.

If Mr. Cherry had entered the house with a weapon or with the intent to use a weapon or some other deadly force, then reliance on that presumption would be appropriate.[51] However, it is undisputed that he entered the house without any weapon whatsoever and that Mrs. Wayne died as a result of either "rough handling," R. 415, or by being hit with a fist or other blunt force. Mr. Wayne died as a result of a heart attack.

Under the due process clause, the requisite mens rea element of first-degree murder is satisfied in the context of felony-murder only where the mental state underlying the felony is the culpable equivalent of deliberate murder because the felony is "known to carry a grave risk of death." See Schad v. Arizona, 501 U.S. __, 115 L.Ed.2d 555, 572-73, 111 S.Ct. __ (1991)(necessary mental state present in armed robbery). Unlike the robbery at issue in Schad, an unarmed burglary is not an activity "known to carry a grave risk of death." Under the unique facts of Mr. Cherry's case, the reckless disregard for human life that is evident in the course of a robbery is absent here. To conclude that he is guilty of first-degree murder where there is not a scintilla of proof that he intended, foresaw or contemplated that death would occur would be to deprive him of due process because it fails to require

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[51]Mr. Cherry contends that he never actually entered the Waynes' home, see Claim V supra, but for the purposes of this argument, he accepts the State's theory that he did enter the house.

the State to prove the requisite element of mens rea. Even if it could be said that Mr. Cherry "caused or materially contributed to the death of Leonard Wayne,"[52] R. 1014, the State nevertheless failed to prove, as required by Sandstrom v. Montana, 442 U.S. 510 (1979), that Mr. Cherry had the requisite culpable mental state required for a first-degree murder conviction. The same is true for the death of Mrs. Wayne. Both deaths were unintentional and unpremeditated.

In State v. Ortena, 112 N.M. 554, 817 P.2d 1196 (N.M. 1991), the New Mexico Supreme Court held that in order for its felony-murder statute not to be rendered unconstitutional, the Court would construe that statute to require proof that the defendant possessed the necessary mens rea for a conviction of first degree murder. Id. at 1204.

> [P]roof that a killing occurred during the commission or attempted commission of a felony will no longer suffice to establish murder in the first degree. In addition to proof that the defendant caused (or aided and abetted) the killing, . . . there must be proof that the defendant intended to kill (or was knowingly heedless that death might result from his conduct). An unintentional or accidental killing will not suffice.

Id. at 1204-05 (citations omitted; emphasis added).[53]

For the reasons set forth in Ortega, Roger Cherry's convictions must be set aside. By its verdict, the jury found no intent to kill, and the evidence is insufficient to establish

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[52]Mr. Cherry submits that the evidence was insufficient to support a finding that he "caused or materially contributed to" Mr. Wayne's death. The State failed to meet its burden of proving the causal connection between Mr. Cherry's acts and Mr. Wayne's death. There is absolutely no evidence at all to indicate when or how Mr. Wayne died, and the Medical Examinder's speculation that it was a confrontation with Mr. Cherry that caused the death is unsupported. The State failed to prove beyond a reasonable doubt that Mr. Cherry's acts "killed" Mr. Wayne.

[53]In so holding, the court explicitly rejected the notion of transferred intent and noted that it was not alone in so construing its felony-murder statute. Id. at 1204 (citing Iowa, Michigan and New Hampshire case law).

that Mr. Cherry "was knowinalv heedless that death might result from his conduct[,]" see Orteaa, supra, at 1205 (emphasis added).[54]

For the same reasons, the death sentence as to Mrs. Wayne should be vacated. Based on the rationale of Enmund v. Florida, 458 U.S. 782 (1982), Tison v. Arizona, 481 U.S. 137 (1987), and Coker v. Georgia, 433 U.S. 584 (1977), it would constitute cruel and unusual punishment to execute Mr. Cherry when he did not intend to kill or contemplate that deadly force would be used.

The Circuit Court erred in summarily denying this claim. The error here is a fundamental violation of his constitutional rights, thereby excusing any procedural bar. Wille, supra. Furthermore, counsel was ineffective in failing to *so* argue and to uncover readily available evidence that substantiated the fact that Roger Cherry did not intend or contemplate the use of deadly force.[55] This evidence was found in the course of post-conviction investigation and was presented below. An evidentiary hearing is appropriate.

CLAIM X

THE CIRCUIT ERRED IN SUMMARILY DENYING THE CLAIM THAT A NEW TRIAL IS REQUIRED DUE TO A LACK OF A RECORD OF THE BENCH CONFERENCES AND RULINGS ON CERTAIN DEFENSE MOTIONS.

The record on appeal is required to include the transcript of the entire trial proceeding. Fla. Stat. §821.131(4) (1979). In this case, the record indicates that there were at least 30 bench conferences that went unrecorded and that the court's ruling on several defense motions was never recorded either by transcript or court order.[56] The lack of a complete

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[54]The post-conviction evidence proffered below includes the fact that Roger Cherry was unaware the Waynes were dead; he was extremely drug- and alcohol-intoxicated at the time of the offense; and he is mentally retarded, brain damaged, and mentally ill. See Claims II, III and V.

[55]See footnote 54, supra.

[56]Trial counsel filed and noticed the following motions, the resolutions of which are absent from the record: a motion for appointment of a serologist, microanalyst and forensic pathologist; a motion to allow inspection of crime scene; a motion for disclosure of grand jury proceeding; and a motion to retain a fingerprint expert and to require the state to disclose and permit inspection of fingerprint evidence.

record violated Mr. Cherry's rights to due process and meaningful appellate and post-conviction review, in contravention of the Fourteenth Amendment, the Florida Constitution, and state statute. Failure to transcribe the entire trial may result in reversal and remand for a new trial in first degree murder cases. See Delap v. State, 350 So. 2d 462 (Fla. 1977). In Delao, this Court held that "since the full transcript of the proceedings requested by the defendant [including the charge conference, voir dire, and closing argument] is unavailable for review . . . and . . . the omitted . . . portions . . . are necessary to do a complete review of this cause, this Court has no alternative but to remand for new trial[.]" Id. at 463 (footnote omitted).[57]

Motion hearings, the orders resolving such motions, and the bench conferences are all critical stages of the trial proceedings. An appellate record without such proceedings is fundamentally inadequate. The failure to make a record of these proceedings resulted in the denial of Mr. Cherry's right to meaningful appellate review.

Although Mr. Cherry need not establish any prejudice resulting from the failure to preserve the record, such prejudice is nevertheless patent. The lack of bench conference transcripts and court orders affects, inter alia, Mr. Cherry's ability to plead and prove his Batson/Neil/Slappy claims (see Claim I), his Ake claims (see Claims III and IV), and his ineffective assistance of counsel claim (see Claim V). Mr. Cherry's conviction must be reversed and his case remanded for a new trial.

[57]Citing Delap, in 1982 the Florida Supreme Court reaffirmed that "in all capital cases, the appellant has an absolute, fundamental right to have his entire record reviewed." Sonaer v. Wainwriaht, 423 So. 2d 355, 356 (Fla. 1982). The failure of the trial court to record the entire proceedings constitutes fundamental error in that it amounts to a denial of due process. Rav v. State, 403 So. 2d 956, 960 (Fla. 19811.

CLAIM XI

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. CHERRY'S CLAIM THAT THE PREJUDICIAL ATMOSPHERE SURROUNDING THE TRIAL PROCEEDINGS CREATED A RISK THAT THE DEATH PENALTY WAS IMPOSED IN AN ARBITRARY AND CAPRICIOUS MANNER.

Due to the prejudicial atmosphere that pervaded Mr. Cherry's trial, he was deprived of his right to a fair trial and an impartial sentencing, in violation of his rights under the United States and Florida Constitutions. The right to be tried by an impartial jury is violated where the atmosphere in and around the courtroom is *so* hostile as to interfere with the trial process. Woods v. Duaaer, 923 F.2d 1454, 1456-57 (11th Cir. 1991).[58] A defendant's right to a fair trial must take precedence over the courtroom spectators' first amendment rights. Norris v. Risley, 918 F.2d 828, 832 (9th Cir. 1990) (citing Richmond Newspapers, Inc. v. Virainia, 448 U.S. 555, 564 (1980); see also Godfrev v. Georaia, 446 U.S. 420 (1980).

Throughout the trial, the gallery was filled with members of the victims' family and law enforcement officers. See App. 67. Three different area newspapers commented on the family's emotional outbursts during the trial. The family's dominant presence was *so* great that defense counsel was prompted to comment on it during his closing. The prosecutor only exacerbated the prejudicial effect of this dominant presence by making explicit references to the victims' family, friends and neighbors. See R. 1046.

There is clearly a risk that the jury was affected by the prejudicial atmosphere. Just as the spectators "hoped to show solidarity with" the victim in Woods, the courtroom full of family members and police officers similarly hoped to show solidarity with the victims in Mr. Cherry's case. See Woods, 923 F.2d at 1459. "The jury could not help but receive the message." Id. at 1460. Under Woods, a reviewing court must determine whether

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[58] See also Cox v. Louisiana, 379 U.S. 559, 562 (1965) ("The Constitutional safeguards relating to the integrity of the criminal process . . . embrace the fundamental conception of a fair trial, and . . . exclude influence or domination by either a hostile or friendly mob.").

an "impermissible factor is involved, and whether it poses an "unacceptable risk." Id. at 1457.[59]

It is clear that the present case meets both prongs of this test. The family's highly visible presence simply posed too great a risk that Mr. Cherry's conviction and sentence were based on impermissible factors. Further, the right to a fair trial is *so* fundamental that its denial can never be held harmless. See Coleman v. Kemp, 778 F.2d 1487, 1541 (11th Cir. 1985). Trial counsel's failure to object to the unacceptable circumstances, as well as the wholly improper statements by the prosecutor, constitutes fundamental error. An evidentiary hearing is appropriate *so* that Mr. Cherry can present evidence of the circus atmosphere that pervaded Mr. Cherry's trial in violation of his constitutional rights.

CLAIM XII

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. CHERRY'S CLAIM THAT THE PROSECUTORS EGREGIOUSLY IMPROPER CLOSING ARGUMENT AT PENALTY PHASE VIOLATED MR. CHERRY'S CONSTITUTIONAL RIGHTS.

A prosecutor's concern in a criminal prosecution "is not that it shall win a case, but that justice shall be done." United States v. Modica, 663 F.2d 1173, 1181 (3rd Cir. 1981), cert. denied, 450 U.S. 989 (1982). While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." Id. In Bertolotti v. State, 476 So. 2d 130 (Fla. 1985), the Court reaffirmed the longstanding principle that closing argument:

> must not be used to inflame the passions and minds of the jurors *so* that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Id. at 134.[60] "[T]he only safe rule appears to be that unless [it] can be determine[d] from the record that the conduct or improper remarks of the prosecutor did not prejudice the

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[69] See Norris, supra (spectators at kidnapping/rape trial wearing buttons reading "women against rape" created an impermissible factor).

[60] These principles are fully applicable to the closing argument at penalty phase. See Teffeteller v. State, 439 So. 2d 840, 845 (Fla. 1983).

accused the . . , [sentence] must be reversed." Pait v. State, 112 So. 2d 380, 385-86 (Fla. 1959).

In this case, the prosecutor's closing at penalty phase was a litany of improper argument, from start to finish. This misconduct, combined with counsel's inexplicable failure to object, was *so* serious that it deprived Mr. Cherry of even a minimally fair and reliable sentencing proceeding.

First, the prosecutor wrongfully told the jury that they could not consider sympathy for the defendant. See Claim XVII. Next, with respect to the heinous, atrocious or cruel aggravating factor, he flatly misstated the evidence and indulged in inflammatory argument to induce an emotional response from the jury to recommend death."

The prosecutor then turned to another irrelevant and inflammatory argument concerning this aggravating factor:

> You can bet on one thing, that if any state in the United States of America attempted to put a murderer to death in the same fashion in which Esther Wayne died, there would be an outcry over the land as being cruel and unusual punishment because you certainly couldn't put a murderer to death in the same way Esther Wayne died by stomping their brains out.

R. 1043. The prejudicial effect of this argument was heightened by the court's failure to give a limiting instruction regarding this aggravating factor. See Claim XVIII.

Next, the prosecutor turned to improper victim impact argument. See R. 1045-46. Such argument clearly violated the principles of Booth v. Marvland, 482 U.S. 496 (1987), overruled in Dart, Pavne v. Tennessee, 111 S.Ct. 2597 (1991).[62]

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[61]The prosecutor told the jury that Mrs. Waynes' "brains were stomped out." R. 1042. The victim's external injuries were primarily bruises, R. 391-2, with hemorrhage beneath the skin but no breaking of the skin. R. 393, 421. Her skull was intact, not fractured. R. 395.

[62]Booth held that permitting the introduction of testimony concerning the impact of a crime on the victim's survivors or the characteristics of the victim violates the Eighth Amendment. Booth, 482 U.S. 504-509. At the time of Mr. Cherry's trial, Booth was clearly the law. Additionally, at the time of Mr. Cherry's trial, victim impact evidence and argument was impermissible under longstanding Florida law because it constitutes a non-statutory aggravating factor upon which the death sentence cannot be

The prosecutor next argued that the death sentence was required pursuant to Biblical law.

> In the 35th Chapter of Numbers, Verse 33: God told Moses, murder defiles the land and except by the death of the murderer, there is no way to perform the ritual of purification for the land in which a man has been murdered.

R. 1047 (emphasis added). Such arguments have been routinely condemned. In Meade v. State, the court reversed a manslaughter conviction based on the prosecutor's reference in closing argument to the "thou shalt not kill" commandment. Meade, 431 So. 2d 1031 (Fla. 4th DCA 1983); see also Harper v. State, 411 So. 2d 235 (Fla. 3d DCA 1982) (argument referring to Bible and victim's wife and children impermissible appeal to sympathy, bias, passion or prejudice).[63]

Finally, the prosecutor called on the jurors to express their own frustrations with the criminal justice system by voting to kill Mr. Cherry. R. 1048. Such argument does not fall into any of the statutory factors and was clearly intended to appeal to the emotions and fears of the jury. See, e.g., Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985).

A sentence of death cannot stand when it results from prosecutorial comments which may mislead the jury into imposing the sentence for irrelevant or impermissible reasons. Caldwell v. Mississippi, 472 U.S. 320 (1985); Wilson v. Kemp, 777 F.2d 621, 626 (11th Cir. 1985), cert. denied, 476 U.S. 1153 (1986). The cumulative effect of the pronounced and persistent misconduct in this case was to deprive Mr. Cherry of his fundamental right to a fair sentencing proceeding, in violation of due process and the prohibition against cruel or unusual punishments. Such egregiously improper conduct constitutes fundamental error

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based. Grossman v. State, 525 So. 2d 833, 842 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989).

[63] See Pennsylvania v. Chambers, 599 A.2d 630, 644 (Pa. 1991) ("reliance in any manner upon the Bible or any other religious writing in support of the imposition of a penalty of death is reversible error[.]").

that requires reversal of the death sentence, even in the absence of an objection by trial counsel. Pait v. State, 112 *So.* 2d 385 (Fla. 1959).

Even if the Court determines trial counsel's failure to object has waived Mr. Cherry's rights with regard to this claim, the Court still must consider Mr. Cherry's claim that the failure to object constituted ineffective assistance of counsel. See Claim II.A, supra.

CLAIM XIII

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. CHERRY'S CLAIM THAT THE SENTENCERS CONSIDERED NONSTATUTORY AGGRAVATING CIRCUMSTANCES IN VIOLATION OF *MAGGARD V. STATE*, 399 *So.* 2d 973 (FLA. 1981), AND IN VIOLATION OF MR. CHERRY'S CONSTITUTIONAL RIGHTS.

Longstanding Florida law precludes the introduction of evidence, or consideration of such evidence by the sentencing jury or trial court, of circumstances in aggravation of the offense not contained within the statutory list of aggravators. See, e.g., Mikenas v. State, 367 *So.* 2d 606 (Fla. 1978), cert. denied, 456 U.S. 1011 (1982); Elledae v. State, 346 *So.* 2d 998 (Fla. 1977), cert. denied, 459 U.S. 981 (1982). The requirement that non-statutory aggravating factors be excluded is constitutionally necessary to eliminate arbitrariness and capriciousness in the imposition of the death penalty. Elledae v. State, 346 at 1002; Miller v. State, 373 *So.* 2d 882, 885 (Fla. 1979).[64]

The Florida Statutes provide for the admission of a defendant's prior record at penalty phase to rebut evidence presented by the defendant to support the mitigation of lack of significant prior criminal activity. Fla. Stat. § 921.141 (5). However, if a defendant expressly waives reliance on that mitigating factor, the state may not produce such evidence. Maaaard v. State, 399 *So.* 2d 973, 977 (Fla.), cert. denied, 454 U.S. 1059 (1981). While Mr.

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[64]This state law establishes a constitutionally-protected liberty interest. Ford v. Wainwriaht, 477 U.S. 399,427-28 (1986) (O'Connor, J., concurring); see also, Hewitt v. Helms, 459 U.S. 460 (1963). The due process clauses of the state and federal constitutions prohibit arbitrarily depriving an individual of such liberty interest. Hicks v. Oklahoma, 447 U.S. 343, 346 (1980); Vitek v. Jones, 445 U.S. 480, 488-89 (1980).

Cherry's prior robbery convictions, if constitutionally valid, see Claim XV, could be considered with respect to the prior violent felony aggravator, consideration of the remainder of his criminal record violated the rule against reliance on non-statutory aggravating factors. Mikenas v. State, 367 So. 2d 606, 610 (Fla. 1978).

At the penalty phase, Mr. Cherry expressly waived any reliance on the mitigating factor of no significant history of prior criminal behavior and offered no character evidence. R. 1034. Nevertheless, the trial court instructed the jury that it could consider Mr. Cherry's record, the State argued to the jury that they should do *so,* and the trial court actually considered his record in sentencing Mr. Cherry to death.

At the outset of the penalty phase, the court instructed the jury it could consider the "evidence that you have already heard[.]" R. 1036.[65] The court's jury instruction regarding aggravating circumstances included the following:

> Conviction of robbery is not an aggravating circumstance to be considered in determining the penalty to be imposed upon the Defendant, but a conviction of that crime may be considered in determining whether the Defendant has a sinnificant history of prior criminal activitv.

R. 1057 (emphasis added). This instruction informed the jury that it could consider whether Mr. Cherry had a significant history of prior criminal activity as an aggravating factor. It therefore violated Mikenas and Maggard.

The State's closing argument also violated Maanard. The prosecutor argued that the jury should issue the death sentence because of the prior conviction for introduction and possession of contraband in prison. R. 1049. This was nothing more than a plea to the jury to recommend a death sentence based upon a non-statutory aggravating factor.

Finally, the court's own Findings of Facts in Support of the Death Penalty violated the rule against consideration of non-statutory aggravating factors. The court found that:

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[65]Evidence of Mr. Cherry's previous convictions was introduced during the guilt phase of the trial for impeachment purposes. See Claim V suora.

> the Defendant, ROGER LEE CHERRY, has a significant history of prior criminal activity as reflected by eight prior adjudications of Guilty , . . [and] that the Defendant, ROGER LEE CHERRY, is a menace to society as his past actions have indicated beyond doubt.

R. 1243. Thus, in imposing the death sentence, the trial court relied on the non-statutory aggravating factor of significant history of prior criminal activity in derogation of Maaaard.

The consideration of a non-statutory aggravator was error "of such magnitude as to require a new sentencing hearing before the jury and court." Maaaard, 399 *So.* 2d at 977. In the present case, just as in Maggard, the court and jury clearly relied upon non-statutory aggravating factors in sentencing Mr. Cherry. This error was a fundamental constitutional violation, and Mr. Cherry is entitled to a new sentencing hearing. Even if this Court finds this claim barred, it must consider Mr. Cherry's claim that counsel's failure to object to this information was ineffective. See Claim II.A, supra.

CLAIM XIV

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. CHERRY'S CLAIM THAT THE STATE AND COURT MISLED THE JURY INTO BELIEVING ITS SENTENCING VERDICT WAS MERELY ADVISORY IN VIOLATION OF MR. CHERRY'S CONSTITUTIONAL RIGHTS.

The United States Supreme Court has held that:

> it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere.

Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985). This Court has consistently declined to recognize Caldwell as controlling because the Florida procedures grant the judge the final sentencing authority. See, e.g., Combs v. State, 525 *So.* 2d 853 (Fla. 1988). Those decisions, however, conflict with Espinosa v. Florida, 112 S.Ct. 2926 (1992), and are no longer valid.

In Espinosa, the United States Supreme Court found that Florida's death sentencing procedure "split[s] the weighing process" between the sentencing jury and the trial court,

requiring that the jury be properly instructed and guided with respect to aggravating factors. Espinosa, 112 S.Ct. at 2928. Espinosa makes clear that Florida has placed part of the "capital sentencing authority," id. at 2929, in the hands of the jury. That being the case, any comments or instructions from the court that diminish the jury's sense of responsibility for imposing sentence clearly violate the eighth amendment, and Caldwell applies with full force to Florida.

As such, Espinosa constitutes a fundamental change in Florida law, overruling prior decisions of this Court holding Caldwell error inapplicable to capital sentencing in Florida.[66] Because Espinosa is a fundamental change in Florida law, Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980), its holding should be applied retroactively to permit consideration of the merits of Mr. Cherry's Caldwell claim.

In the present case, both the prosecutor and the court minimized the jury's sense of responsibility. See R. 1036 ("Final decision as to what punishment shall be imposed rests solely with the Judge of this Court."); see also R. 1038, 1039, 1040, 1041, and 1049. The comments and instructions described could only be for the purpose of reducing the jury's concerns about returning a death verdict by telling jurors that their role was minor, and that the judge could do whatever he wanted at the time of sentencing. Espinosa makes clear that this error was fundamentally unconstitutional. Even if this Court finds this claim barred, however, it must consider Mr. Cherry's claim that failure to object to this information constituted ineffective assistance of counsel, particularly since Caldwell was decided before Mr. Cherry's trial. See Claim II.A, supra.

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[66] See Grossman v. State, 525 So. 2d 833, 839 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989); Combs v. State, 525 So. 2d 853 (Fla. 1988); Aldridae v. State, 503 So. 2d 1257, 1259 (Fla. 1987); Pope v. Wainwriaht, 496 So. 2d 798, 804-05 (Fla. 1986), cert. denied, 480 U.S. 951 (1987); Darden v. State, 475 So. 2d 217, 221 (Fla. 1985).

CLAIM XV

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. CHERRY'S CLAIM THAT HIS SENTENCE OF DEATH WAS BASED UPON ONE OR MORE UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTIONS AND THEREFORE VIOLATES HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THEIR FLORIDA COUNTERPARTS.

In Johnson v. Mississippi, 486 U.S. 578 (1988), the Supreme Court held that basing a death sentence in part on evidence of a prior conviction that was reversed because it was unconstitutionally obtained violates the principle that a death sentence may not be "predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" Johnson, 486 U.S. at 585, quoting Zant v. Stephens, 462 U.S. 862, 884-85 (1983). A conviction obtained in violetion of a defendant's fundamental constitutional rights provides "no legitimate support," Johnson, 486 U.S. at 586, for a death sentence.[67]

Mr. Cherry's death sentence was based in part on the aggravating circumstance that he had a prior violent felony conviction, R. 1242, and the jury was instructed to consider that aggravator. R. 1056. The record does not clearly reflect whether the court found the aggravating factor based on one or both of Mr. Cherry's prior robbery convictions. Nevertheless, both of Mr. Cherry's robbery convictions were unconstitutional, for two reasons. First, in neither case does it appear that he was adequately informed of the rights he was waiving by pleading nolo contendere, or that his plea was voluntary, knowing and intelligent. Second, his counsel were ineffective for failing to investigate his mental condition to determine whether he was competent to stand trial or to plead guilty.[68] Because Mr. Cherry's death sentence is based in substantial part on the prior robbery convictions, this

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[67] See also United States v. Tucker, **404 U.S. 443, 447 (1972)** (invalid prior conviction is "misinformation of constitutional magnitude").

[68] As indicated elsewhere in this brief, Mr. Cherry has been diagnosed as mentally retarded, brain damaged, and suffering from mental illness. See Claims II and III supra.

Court is required to review his claim that those convictions, and thus his death sentence, were unconstitutionally obtained. Johnson, supra; see Malena v. Cook, 490 U.S. 488 (1989) (petitioner in action under 28 U.S.C. § 2254 could challenge prior conviction used to enhance sentence for subsequent conviction).

On July 2, 1976, and October 29, 1979, Mr. Cherry pled nolo to robbery. See R. 1213, 1217. There is no record of any plea hearing with respect to Mr. Cherry's plea in those cases. App. 76. Nor is there any record of any hearing, any waiver of rights form, or any other indication that Mr. Cherry was made aware of the rights which he waived by entering nolo pleas or that he waived those rights voluntarily and intelligently. Due process requires a careful inquiry as to the defendant's understanding of the plea, and the record must contain "an affirmative showing that the plea was intelligent and voluntary." Koenig v. State, 597 So. 2d 256, 258 (Fla. 1992), citing Bovkin v. Alabama, 395 US. 238 (1969).

Here, the record of the plea colloquy in both the 1976 and 1979 cases is even more deficient than in Koenig, where this Court vacated the defendant's first degree murder conviction. Koenia, supra. The absence of any plea colloquy or other evidence that Mr. Cherry's pleas were voluntary, knowing and intelligent establishes that the robbery convictions violated Mr. Cherry's due process rights under both the Florida and United States Constitutions. Id.; see Fox v. Kelso, 911 F.2d 563, 569-70 (11th Cir. 1990).

In a situation like Mr. Cherry's where the defendant was represented on those charges by counsel, he may also attack the voluntariness of his plea by showing that his counsel failed to provide effective assistance, and that he was prejudiced by counsel's failures. Hill v. Lockhart, 474 U.S. 52 (1985); Tollett v. Henderson, 411 U.S. 258, 267 (1973).

Mr. Cherry's disabling mental impairments were present in both 1976 and 1979, as they are today. As Mr. Cherry would have demonstrated if granted a hearing on this claim (see also Claims II and III), mental health experts have concluded that he suffers from

organic brain damage and mental retardation, both of which are of longstanding duration. Given those facts, Mr. Cherry's counsel had a duty to investigate *so* that counsel could make a reasoned decision concerning whether to raise his client's competency. See Strickland v. Washinnton, 466 U.S. 668, 690-91 (1984). However, it is clear that neither 1976 nor 1979 counsel conducted any investigation of Mr. Cherry's competence. Counsel's failure to investigate Mr. Cherry's mental health was clearly unreasonable.

Having failed to determine whether his client was competent, Mr. Cherry's 1976 and 1979 counsel could not possibly have given him advice on his plea that was "within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. 759,771 (1970). Mr. Cherry was prejudiced by his counsel's deficiencies. Based on the evidence set forth above, it is reasonably likely that if competency evaluations had been performed in 1976 and 1979, Mr. Cherry would have been found incompetent to stand trial. If *so,* Mr. Cherry would also have been incompetent to plead guilty, for a guilty plea must be "intelligent and voluntary." Bovkin, supra, 395 U.S. at 242.

Because Mr. Cherry's death sentence rests in part on evidence of one or more prior convictions that were obtained in violation of his fundamental constitutional rights, it violates his rights under the eighth and fourteenth amendments. At a minimum, he is entitled to an opportunity to show at an evidentiary hearing that his prior convictions were unconstitutionally obtained.

CLAIM XVI

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. CHERRY'S CLAIM THAT THE PENALTY PHASE JURY INSTRUCTIONS IMPROPERLY SHIFTED THE BURDEN TO MR. CHERRY TO PROVE THAT DEATH WAS INAPPROPRIATE, IN VIOLATION OF MR. CHERRY'S CONSTITUTIONAL RIGHTS.

The State has the burden to prove all elements of the offense in a capital murder prosecution, and a shift of this burden of proof violates a defendant's due process and

Eighth Amendment rights. Mullaney v. Wilbur, 421 U.S. 684 (1975); see also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Duaaer, 837 F.2d 1469 (11th Cir. 1988).

The Colorado Supreme Court recently held unconstitutional its death penalty statute which -- like Florida's statute -- required that the jury return a sentence of death if it found that there were insufficient mitigating factors to outweigh the aggravating factors.

> [T]o authorize the imposition of the death penalty when the aggravators and mitigators weigh equally, as does the current version of section 16-11-103, violates fundamental requirements of certainty and reliability under the cruel and unusual punishment and the due process clauses of the Colorado Constitution.

People v. Young, 814 P.2d 834, 846 (Colo. 1991).

During Mr. Cherry's penalty phase instructions, the court directed the jury "to determine whether mitigating circumstances exist that outweigh the aggravating circumstances." R. 1057. Hence, the jury was instructed to return a death sentence unless the mitigating factors outweighed the aggravators. Under this instruction, if the jury found equally balanced aggravating and mitigating considerations, it was required to return a death sentence. The instruction in question unconstitutionally shifted the burden to the defendant to prove more mitigating factors rather than requiring the prosecution to prove more aggravating factors, requiring that this case be remanded for resentencing.

In the proceedings below, Mr. Cherry argued that newly-discovered evidence not available at trial establishes that Florida jurors clearly do not understand the weighing process and erroneously believe that under the sentencing instructions, the defendant has the burden of proving that the death penalty is not warranted. P.R. 2225-86. Mr. Cherry is entitled to present this evidence at an evidentiary hearing, in order to establish that his sentencing proceeding was unconstitutionally skewed in favor of a death sentence.

CLAIM XVII

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. CHERRY'S CLAIM THAT THE COURT AND PROSECUTOR IMPROPERLY ASSERTED THAT SYMPATHY AND MERCY WERE IMPROPER CONSIDERATIONS FOR THE JURY, DEPRIVING MR. CHERRY OF A RELIABLE AND INDIVIDUALIZED SENTENCING DETERMINATION, IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

In a capital sentencing proceeding, the United States Constitution requires that a sentencer not be precluded from "considering, as a mitigating factor, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978); Hitchcock v. Duaaer, 481 U.S. 393 (1987). Instructing the jurors to disregard any sympathy for the defendant undermines their ability to weigh and evaluate the mitigating evidence. Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988) (en banc), rev'd on other grounds sub. nom., Saffle v. Parks, 494 U.S. 484 (1990).[69] An admonition to disregard the consideration of sympathy improperly suggests to the sentencer "that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U.S. 538 (1987) (O'Connor, J., concurring).

In the present case, just prior to the guilt phase the court instructed the jury not to consider sympathy. R. 1018. At the penalty phase, the court never instructed the jury that it was appropriate to consider sympathy or mercy. In fact, the court reiterated that the jury had to base its sentencing recommendation solely on the law and the evidence relating to aggravating and mitigating factors, which did not include any reference to sympathy or mercy. R. 1036-37, 1056-1058.

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[69] In Saffle v. Parks, the United States Supreme Court refused to reach the merits of this claim, holding that Parks was seeking the benefit of a "new rule" in habeas corpus proceedings and was precluded from doing *so* by the doctrine of Teague v. Lane, 489 U.S. 288 (1989). The en banc Tenth Circuit opinion in Parks thus stands as the most thorough, reasoned and persuasive discussion of the issue on its merits. The Court should adopt the reasoning of Parks as a matter of Florida constitutional law.

Further, during penalty phase arguments, the prosecutor explicitly told the jury that they should not consider mercy as part of their sentencing verdict, but only "justice," which he defined as the "impartial adjustment of conflicting claims or the assignment of merited rewards or punishment." R. 1048.

The court and prosecutor's statements undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the mitigation reflected in the record of Mr. Cherry. The wrongful actions of the court and prosecutor were compounded by trial counsel's failure to object to these statements. Competent trial counsel would have known that sympathy and mercy are correct considerations in the penalty phase of a capital murder case. Counsel's failure to object denied Mr. Cherry the effective assistance of counsel. An evidentiary hearing is appropriate.

CLAIM XVIII

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. CHERRY'S CLAIM THAT THE SENTENCING JURY WEIGHED INVALID AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court instructed the jury to find and weigh the "especially heinous, atrocious or cruel" aggravating circumstance if they determined that the homicides were "especially wicked, evil, atrocious or cruel." R. 1056-57. It is now clear that this instruction violated the Eighth Amendment. Espinosa v. Florida, 112 S.Ct. 2926, 2928 (1992).

Mr. Cherry contends that Espinosa constitutes a fundamental change in Florida law, see Witt v. State, 387 So. 2d 922 (Fla. 1980), which should be applied retroactively regardless of whether the error was preserved at trial. This Court, however, held in James v. State, 615 So.2d 668 (Fla. 1993), that it would apply Espinosa retroactively only where the error was preserved by a contemporaneous objection. If the Court continues to adhere to James, it must consider whether counsel's failure to object to the invalid instructions was constitutionally ineffective. See Claim II.A, supra.

This error was not harmless. The court's instructions permitted the jury to consider absolutely anything about the offense in deciding whether the crime was "especially heinous, atrocious or cruel," and then to vote for death on the basis of that factor alone. The all-white, elderly jury could well have decided that it was "especially heinous" that two elderly white people died as the result of a young black man's actions.[70] The prosecutor also urged the jury to find the crimes heinous, atrocious and cruel because Mrs. Wayne (although unconscious) may have survived several minutes before she died and because the State is not permitted to "stomp" murderers' brains out. R. 1043. Finally, the jury voted for death on both murder counts, R. 1239, 1240, even though the death penalty was disproportionate as to the death of Mr. Wayne. These facts strongly suggest that a majority of the jury, given unlimited discretion to vote for death based on the heinous, atrocious or cruel factor, relied heavily on that factor in voting for death.

Only if this Court could find beyond a reasonable doubt that Mr. Cherry's death sentence "was surely unattributable to the error," Sullivan v. Louisiana, 124 L.Ed.2d 182, 189 (1993), could it hold the error harmless. Such a finding cannot be made in this case absent the "speculation" that the Eighth Amendment forbids. See Strinner, 112 S.Ct. at 1137. Mr. Cherry should receive a new sentencing hearing before a properly instructed jury.

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[70]Certainly, the prosecution encouraged such a result by injecting issues of age and race into the proceedings and focusing the jury on the characteristics of the victim and the impact of the crime on the victim's family. See Claims I & XII.

CLAIM XIX

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. CHERRY'S CLAIM THAT THE TRIAL COURT'S FAILURE TO CONDUCT AM INDEPENDENT EVALUATION OF THE MITIGATING EVIDENCE OFFERED BY MR. CHERRY DEPRIVED HIM OF HIS RIGHT TO AN INDIVIDUALIZED SENTENCING DETERMINATION IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

Under the Eighth Amendment, "the sentencer may not refuse to consider or be precluded from considering 'any mitigating evidence.'" Skipper v. South Carolina, 476 U.S. 1, 4 (1986) (quoting Eddinas v. Oklahoma, 455 U.S. 104, 114 (1982)). This fundamental precept was violated here when the trial judge failed to consider uncontroverted mitigating evidence before imposing death. Accordingly, the trial court's decision to impose death was fundamentally unfair, unreliable and in violation of the Florida Constitution and the Eighth Amendment.

At the penalty phase, the defense offered, and the court admitted without objection, a report prepared by psychiatrist George Barnard, M.D. R. 1037-38, 1166-69. The report, which was prepared after the most cursory investigation, nevertheless contained evidence supporting a number of mitigating circumstances. included in the report was evidence of: (1) a history of drug and alcohol abuse; (2) intoxication and/or impairment at the time of the offense; and (3) physical and psychological abuse as a child.

A history of substance abuse and the defendant's intoxication at the time of the offense are both well recognized mitigating circumstances." Such information may also support the statutory mitigating circumstances of extreme mental or emotional disturbance and substantially impaired capacity. Nibert v. State, 574 *So.* 2d 1059, 1063 (Fla. 1990).

"See, e.g., Savaae v. State, 588 So. 2d 975 (Fla. 1991), cert. denied, 112 S. Ct. 1493 (1992); Wright v. State, 586 So. 2d 1024 (Fla. 1991).

Further, extreme physical and psychological abuse is a valid non-statutory mitigating factor that may form a reasonable basis for a life sentence.[72]

During the guilt/innocence phase of the trial, additional mitigating evidence was presented. Such evidence included proof that no weapon was used, lack of premeditation,[73] and difficult family situation. Lack of premeditation can be mitigating, White v. State, 403 *So.* 2d 331, 336 (Fla. 1981), cert. denied, 436 U.S. 1229 (1983); Norris v. State, 429 *So.* 2d 688, 690 (Fla. 1983). Further, the uncontroverted evidence that Roger Cherry was raised in a deprived, unstable and chaotic family setting is clearly mitigating. See, e.g., Stevens v. State, 552 *So.* 2d 1082, 1085 and n. 8 (Fla. 1989); Amazon v. State, 487 *So.* 2d 8 (Fla. 1986), cert. denied, 479 U.S. 914 (1986); Hill v. Singletary, No. TCA 90-40023-WS, Slip op., at 72-74 (N.D. Fla. August 31, 1992)(attached as Appendix A to Evidentiary Hearing Memorandum, P.R. 1965-2049).

Pursuant to Florida law, the trial court is required to enter its sentence of death only "after weighing the aggravating and mitigating circumstances." Fla. Stat. § 921.141(3). This requirement seeks to ensure that death is imposed only on reasoned judgment after careful weighing of the applicable aggravators and mitigators. Patterson v. State, 513 *So.* 2d 1257 (Fla. 1987); Lucas v. State, 417 So. 2d 250 (Fla. 1982), cert. denied, 114 S. Ct. 136 (1993). Moreover, this requirement is mandated by the United States and Florida Constitutions *so* as to ensure that a death sentence is not arbitrary, capricious, or unreliable, and to guarantee meaningful appellate review. See Proffitt v. Florida, 428 U.S. 242, 251 (1976); Campbell v. State, 571 *So.* 2d 415, 419 (Fla. 1990).

Despite the evidence presented and in contravention of the statutory requirements, the court made no findings concerning the mitigating factors presented. The court's

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[72]See Campbell v. State, 571 So. 2d 415, 419 n.4 (Fla. 1990); Buford v. State, 570 So. 2d 923 (Fla. 1990); Nibert, sugra; Brown v. State, 526 So. 2d 903 (Fla.), cert. denied, 488 U.S. 944 (1988).

[73]The jury specifically acquitted Mr. Cherry of the charge of premeditated murder. R. 1237, 1238.

consideration of mitigating factors was limited to stating that the jury had rejected the mitigating circumstances presented by Mr. Cherry, something that the judge could not possibly know. R. 1067, 1243.

Thus, the court totally abdicated its responsibility to "exercise a reasoned judgment in weighing the appropriate aggravating and mitigating circumstances in imposing the death sentence." Lucas v. State, 417 *So.* 2d 251 (Fla. 1982). Rather than engaging in its own reasoned weighing process, the trial court inexplicably assumed that the jury had rejected the mitigation proposed by Mr. Cherry, although it was equally or more likely that the jury found some mitigation but gave the aggravating factors equal or greater weight.[74] In any event, the jury's decision in no way relieved the trial court of its duty to independently examining the evidence regarding mitigating and aggravating factors. In the instant case, the trial court's order makes it clear that the court never performed that duty. That failure was a fundamental error which rendered the death sentence lawless and meaningful review impossible.[75]

When a defendant presents a reasonable amount of uncontroverted evidence of a mitigating circumstance, the trial court must find the mitigating circumstance present. Nibert v. State, 574 *So.* 2d 1059, 1062 (Fla. 1990); Hill, supra. Once a mitigating circumstance is found, it must be accorded some weight. Campbell v. State, 571 *So.* 2d 415, 420 (Fla. 1990). The mitigating circumstances here were significant enough that if the trial court had properly considered them, a life sentence would have been required.

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[74]Those aggravating factors, of course, included the factors of murder for pecuniary gain and murder committed during a burglary, which this Court found to have been improperly doubled, Cherry v. State, 544 So. 2d 184, 187 (Fla. 1989), extremely heinous, atrocious or cruel, on which they were given an unconstitutionally vague instruction, see Claim **XVIII,** and prior violent felony conviction, based on unconstitutionally obtained convictions. See Claim **XV.**

[75]Where the trial court fails to make specific finding concerning the mitigation presented by the defendant, the Supreme Court is prevented from carrying out its "crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." Parker v. Dunaer, 112 L.Ed.2d 812, 826 (1991); Campbell v. State, 571 So. 2d 415, 420 (Fla. 1990).

~~See~~, ~~Nibert~~, 574 So. 2d at 1063. As a result, Mr. Cherry's fundamental constitutional rights have been violated, and his sentence should be vacated and remanded for resentencing.

F. **CONCLUSION**

For the foregoing reasons, Mr. Cherry respectfully requests that this matter be reversed and remanded for an evidentiary hearing and proper consideration of his substantial constitutional claims by an impartial judge.

Dated: September 26, 1994.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail, postage prepaid, Office of the Attorney General, The Capitol, Tallahassee, FL 32399-1050, on the 26th **day of** September, **1994.**

Anne F. Jacobs
Attorney