IN THE SUPREME COURT OF FLORIDA

ROGER LEE CHERRY, Appellant, v. STATE OF FLORIDA, Appellee.	CASE NO. **83,773**

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

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Appellant, ROGER LEE CHERRY, respectfully submits his reply brief on appeal of the summary denial of his motion to vacate conviction and sentence of death pursuant to Fla. R. Crim. P. 3.850.

The State spends much of its Answer Brief accusing Mr. Cherry and his pro bono counsel of improper tactics and reliance on "biased" expert reports, "conclusory" and "hyperbolic" allegations, "incredible" and "curious" omissions, and "disingenuous" statements. See, e.g., Answer Brief at 24, 28, 31, 35, 36 and n.8, 39, 44 n.9. These attacks nevertheless fail to obscure the basic facts that require remand of this case and an evidentiary hearing. First, Mr. Cherry has made specific and amply supported allegations of numerous violations of his constitutional rights -- including his right to effective assistance of counsel and Bradv violations -- allegations that can properly be ruled on only after full and fair evidentiary resolution. Second, the court below purported to dispose of those allegations not only without an evidentiary hearing, but without oral argument, and without attaching any record excerpts whatsoever in support of its judgment. The actions of the court below clearly violated Rule 3.850(d); remand for an evidentiary hearing is required. In what follows, Mr. Cherry will address only the most obvious and significant misstatements contained in the State's Answer Brief. With respect to all other issues, Mr. Cherry relies on the arguments set forth in his initial Brief.

ARGUMENT I

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING RELIEF WITHOUT AN EVIDENTIARY HEARING

Mr. Cherry's Rule **3.850** motion alleged twenty (20) separate constitutional violations and was supported by a four volume appendix. While the court below rejected many of those claims as procedurally barred, it acknowledged that Mr. Cherry's ineffective assistance of counsel and Brady claims are not barred. P.R. 2211 - 2212. It nevertheless summarily denied all of Mr. Cherry's claims, without attaching portions of the record, without citing the record, and without providing anything but the most cursory explanation of how it could possibly arrive at the conclusion that "the motion, files and record in the case conclusively show that the prisoner is entitled to no relief," Rule **3.850**(d), as it was required to do before denying the motion without a hearing. As this Court has clearly and unequivocally stated, "[U]nless the trial court's order states a rationale based on the record, the court is required to attach those portions of the record that directly refute each claim raised." Hoffman v. State, **571** So.2d **449, 450** (Fla. 1990).

It is obvious that the court below did not do so. Rather than confess error, however, the State attempts to create a rationale for the trial court out of thin air. Even if the State could do that -- which it obviously cannot -- its attempt would fail, because it is trying to persuade this Court to make factual findings on the basis of a cold record. For example, the State asks this Court -- an appellate court -- to find that trial

counsel's penalty phase investigation was reasonable. Answer Brief, at **28.** Because there was no evidentiary hearing below, there is not a scintilla of evidence in the record concerning the scope of counsel's penalty phase investigation (apart from sworn affidavits from numerous witnesses that counsel did not contact them, *gee,* e.g., Apps. **14, 18, 24, 27, 28, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45).** Not only was there no finding on this issue by the court below, there is no principled way for this Court to assess the reasonableness of counsel's investigation when this Court has no way of knowing what counsel in fact did.

Similarly, the State asserts that trial counsel had a strategy for putting on no evidence at penalty phase, other than a single psychiatrist's report, which counsel did not argue as mitigation either to the jury or the sentencing judge. See R. **1050-55.** But a finding that the strategy imagined by the State was counsel's strategy would be sheer speculation, as would any finding that such a strategy (if it was counsel's strategy) was arrived at either after a reasonable investigation or a reasonable decision not to investigate further. See Strickland v. Washinston, **466** U.S. **668, 691 (1984);** Middleton V. Dugger, **849 F.2d 491, 493** (11th Cir. **1988).** In the absence of such findings, it is impossible to determine whether Mr. Cherry was deprived of the effective assistance of counsel. The trial court made no such findings, and neither cited to nor attached portions of the record that would support such findings. Consequently, this Court cannot make such findings either.

The State goes even further by asking this Court to make findings regarding the credibility of experts relied on by Mr. Cherry. See Answer Brief at 24 (University of Florida sociology Professor Michael Radelet is "not credible" and bias "permeates" his study of race and the death penalty[1]); 44 n.9 (affidavit of geneticist Diane Lavett, Ph.D., "reflects the bias of the author"). The State's suggestion that this Court should determine the credibility of potential witnesses who have never had the opportunity to testify is not only audacious, but would totally usurp the functions of the trial court.

Mr. Cherry's allegations state meritorious claims of violations of his constitutional rights. The court below failed to hold any type of hearing on those claims, not even oral argument, failed to attach any portions of the record refuting those claims, failed to cite the record, and failed to articulate anything more than the most conclusory rationale for its decision. Remand for a full evidentiary hearing is required. Hoffman, supra.

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING MR. CHERRY'S MOTIONS FOR RECUSAL

In its argument, the State relies heavily on the assertion that Mr. Cherry's original recusal motion was untimely and was not properly filed under Florida Rule of Judicial Administration 2.160,

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[1] Professor Radelet was selected by this Court's Racial and Ethnic Bias Study Commission to study similar issues. See Radelet and Pierce, Choosins Those Who Will Die: Race and the Death Penaltv in Florida, 43 Fla. L. Rev. 1 (1991).

which became effective three weeks before the motion was filed.[2] The State concedes that Judge Blount did not deny the motion to recuse based on any untimely filing, Answer Brief at 21, yet asserts that this Court should nevertheless deny the motion on that basis. Mr. Cherry's pro bono counsel relied upon Rule 3.230 of the Florida Rules of Criminal Procedure in moving to recuse Judge Blount because of their unawareness that Rule 2.160 had just taken effect. As this Court may be aware, Mr. Cherry's counsel are from Colorado and have taken this case on a pro bono basis; counsel were unaware of the recent change in procedure for filing recusal motions. In any event, Judge Blount did not deny the motion on the basis of untimeliness but instead considered the merits of the motion. P.R. 2116, 2203. This Court should do likewise.

The State's other major argument is that it was appropriate in this case for Judge Blount to reach the merits of the recusal motion because it was based on an attempt to relitigate an issue already raised on direct appeal concerning the exclusion of a defense witness. The State cites no authority for its argument that in these circumstances it was appropriate, despite Rogers v. State, 630 So.2d 513 (Fla. 1993), and Bundy v. Rudd, 366 So.2d 440

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[2]The State also asserts that this issue was not briefed properly and was "not mentioned in the summary of argument section of the initial brief." Answer Brief, at 16. Apparently, counsel for the State failed to read the following statement from the Summary of the Argument:

> 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.

Brief of Appellant, at 2.

(Fla. 1978), for Judge Blount to consider the merits of the motion. More fundamentally, the State mischaracterizes the claim with respect to which Judge Blount is a material witness.

At trial, Judge Blount excluded a proffered defense witness, without stating any reason for doing so. R. 814-16. On appeal, this Court held that the proffered witness was immaterial. Cherry v. State, 544 So.2d 184, 186 (Fla. 1989). The claim in Mr. Cherry's Rule 3.850 motion is based on newly discovered evidence that Judge Blount actually excluded the defense witness for an improper reason -- that testimony by the proffered witness that Leonard Wayne did not possess a driver's license would offend the elderly of the community. Because that evidence was newly discovered, it was appropriately presented in a Rule 3.850 proceeding. Otherwise, it would never be possible to present newly discovered evidence of innocence after an appellate court had determined that there was sufficient evidence to support a conviction.

Given that the underlying Rule 3.850 claim was properly presented based on the newly discovered evidence, it is clear that the only way in which Judge Blount could deny that claim and the recusal motion was for him to consider the merits of the claim, despite the fact that he was a material witness with respect to the claim. It was improper for Judge Blount to do so. The Court should remand these proceedings for assignment to an impartial judge.

ARGUMENT III

ROGER CHERRY WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL

The court below summarily denied Mr. Cherry's claim that he received constitutionally ineffective assistance of counsel at the penalty phase of his capital trial, despite allegations that 1) counsel conducted virtually no investigation for possible mitigating evidence; 2) the only penalty phase evidence presented by counsel was a report by a psychiatrist who conducted a pretrial competency and sanity evaluation; and 3) abundant mitigating evidence was available and would have been discovered and presented had counsel performed competently, including evidence of Roger Cherry's mental retardation, brain damage, deprived and horribly abusive background, emotional disorders, and intoxication at the time of the offense. The court below summarily dismissed these allegations, merely stating that they "fail to set forth the standards set by" Strickland v. Washinston, 466 U.S. 668 (1984), and failed to show that but for counsel's errors, "the results of the proceeding would have been different." P.R. 2212. Nothing in the order suggests that the court below gave serious consideration to the ineffective assistance of counsel claims, in addition to its failure to attach portions of the record supporting its summary denial.

In the absence of a record that would allow reliable conclusions concerning either counsel's performance or the prejudice suffered by Mr. Cherry, the State in its Answer Brief relies on bare assertions about the facts, assertions that are

often inaccurate and misleading. In the most breathtaking example, the State simply asserts, "Counsel's penalty phase investigation was reasonable, and can be adequately assessed based upon the record." Answer Brief, at 28.

Although it fails to mention it, the State cannot escape the fact that trial counsel conducted absolutely no penalty phase investigation whatsoever. Counsel knew nothing about his client, his client's life or his client's mental infirmities. Due to his failure to interview a single person who knew Mr. Cherry -- friends, family, neighbors, teachers or acquaintances -- and to obtain any records on his client, no mitigation was presented or arsued at penalty phase except for the four-page report of a court-appointed expert who knew nothing about Roger Cherry or his life except what Mr. Cherry -- who is mentally retarded and has organic brain damage -- told him. In essence, the State's argument is that it is "reasonable" to conduct no penalty phase investigation in a capital case. That is not the law. See, e.g., Torres-Arboleda v. State, 636 So.2d 1321 (Fla. 1994) (counsel ineffective for failing to conduct reasonable background investigation and provide results to mental health expert); Deaton v. Dusger, 635 So.2d 4 (Fla. 1994) (affirming grant of relief where counsel only began penalty phase investigation after conviction); State v. Lara, 581 So.2d 1288, 1290 (Fla. 1991) (finding ineffectiveness where counsel "virtually ignored the penalty phase of the trial"); Bassett v. State, 541 So.2d 596 (Fla. 1989) (defendant prejudiced by counsel's failure to investigate his background).

Because counsel conducted no investigation, he was not able to provide any background information to the pretrial mental health expert. The State twice asserts that "all of the experts have relied upon substantially the same evidence," Answer Brief at 14-15, and that the "experts reached different results based upon substantially identical information." Id. at 29. These assertions are simply untrue, at least if the State is using the common and ordinary meaning of the word "substantially." Counsel certainly did not provide Dr. Barnard with any information from family, friends, school officials or anybody else concerning Roger Cherry's life. Nor did he inform Dr. Barnard that Roger Cherry was placed in special education classes as a child. Counsel could not have informed Dr. Barnard of such crucial information because he did not know it himself. In fact, all Dr. Barnard received were police reports provided by counsel.[3]

The only information that Dr. Barnard had concerning Roger Cherry's background and life history (and thus the only information provided to the jury) came from Roger Cherry himself. That information was quantitatively much less than that uncovered by the post-conviction investigation. Compare R. 1167 (Dr. Barnard's report) with Brief of Appellant, at 14-21 and Motion to Vacate, at

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[3]In August 1987, Dr. Barnard requested information about the offense from counsel. Motion to Vacate, App. 66. In his report, Dr. Barnard stated without elaboration that he "reviewed material provided by the defense counsel...." R. 1168. A citation to this remark, buried in a footnote, is the State's only support for the notion that Dr. Barnard based his opinion on the same material as the post-conviction experts. In fact, the post-conviction experts had available to them the materials contained in the four volume appendix attached to the Rule 3.850 motion. Dr. Barnard had only his retarded and brain damaged patient's self report, and the police reports.

71-94. Even more important, much of the information that Mr. Cherry did provide to Dr. Barnard was inaccurate, as is often the case with self report. See Mason v. State, 489 So.2d 734, 737 (Fla. 1986). For example, Mr. Cherry (presumably not wanting to admit his own retardation) denied having been in special education classes, R. 1167, whereas in fact he was in special education. See Motion to Vacate, Apps. 44, 50. Similarly, he did not inform Dr. Barnard that his parents were alcoholics, and he drastically minimized both his history of drug and alcohol dependence and his massive consumption of drugs and alcohol at the time of the offense. Compare R. 1166, 1168 (drank six beers and four ounces of liquor the day of the offense; history of some drinking but no abuse of alcohol, limited pot and crack use) with Motion to Vacate, Apps. 62, 64 (Roger drank a quart of moonshine and smoked as much as $250 worth of crack the night of the offense) and Apps. 27, 34-35, 62 (abuse of alcohol, huffing of gasoline, dependence on crack cocaine). Moreover, Dr. Barnard did not perform any intelligence testing, whereas the tests performed by neuropsychologist Glenn Caddy, Ph.D, indicate that Mr. Cherry is mentally retarded. Motion to Vacate, at 139, 152.

Because Dr. Barnard did not have the information available to the post-conviction experts, this is not simply a case of disagreement among experts, as the State contends. Answer Brief, at 29. Indeed, on many critical issues, Dr. Barnard now agrees with the post-conviction experts, based on the additional information now brought to light. See Motion to Vacate, at 157-58

(based on background information now provided to him, Dr. Barnard would have testified that Mr. Cherry's intelligence is lower than it appeared to him; that he had been in special education classes; that the history of child abuse given to him by Mr. Cherry is now corroborated; and that Mr. Cherry was using crack as well as alcohol the night of the offense).

Similarly, the fact that counsel conducted no investigation makes meaningless the State's sheer speculation as to possible strategies counsel might have had for not introducing any evidence other than Dr. Barnard's report and not giving Dr. Barnard more information. Answer Brief, at 29 and 30-31 n.4. First, there is absolutely no record from which it could be concluded that counsel had any strategy whatsoever -- there has been no evidentiary hearing. Second, counsel had no information about Roger Cherry's life history, and therefore was in no position to make strategic decisions about what to do with such information. Third, the notion that counsel had a strategy for getting in mitigating evidence through Dr. Barnard's report is less than credible, given the fact that counsel never argued that anything contained in the report was mitigating, neither at penalty phase, R. 1050-55, nor before the sentencing judge. R. 1065.[4] Finally, the State cannot escape the fact that counsel conducted no penalty phase investigation. Trial counsel's "failure to investigate and present

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[4]In fact, counsel did not argue any mitigation whatsoever. Instead, counsel's primary argument was that in biblical times felony murder was not recognized as a capital offense, and that the death penalty should not be used as an instrument of vengeance. R. 1050-55.

mitigating evidence was not the result of an informed decision because trial counsel was unaware the evidence existed." Stevens v. State, 552 So.2d 1082, 1087 (Fla. 1989).

The State also argues that Mr. Cherry has failed to show that he was prejudiced by counsel's deficient performance. The State makes two primary assertions in support of this argument: first, that the case is so aggravated that nothing anybody could have done would have made a difference in the outcome, Answer Brief at 29, 31; and second, that the additional evidence presented in the court below is merely "cumulative" of that contained in Dr. Barnard's report. Id. at 28.

The State's first contention ignores the fact that this was not a highly aggravated case. Only three aggravating factors were found valid by this Court: prior conviction of a robbery; committed during a burglary/committed for pecuniary gain; and heinous, atrocious or cruel. Cherry, 544 So.2d at 187. Of those, the first was a status factor, and the felony murder aggravating factor applied automatically if Mr. Cherry was guilty of the crime as charged. If counsel had performed adequately, he could have negated the HAC aggravating factor by investigating and presenting psychiatric mitigating evidence. It is well recognized that such evidence can rebut or significantly weaken the aggravating factors, thus helping to provide a basis for a life sentence. Hallman v. State, 560 So.2d 223, 227 (Fla. 1990); Huckaby v. State, 343 So.2d 29, 33-34 (Fla. 1977). Moreover, counsel also failed to argue that the State had failed to prove that Mr. Cherry intended to cause

either victim great pain, failed to argue the evidence that more than one person was involved, and failed to object to the vague HAC jury instruction. If counsel had performed adequately, the weight of the aggravation would have been far less. Moreover, even under the State's theory of the case, it was clear that this was a simple case of a burglary gone wrong, not one of the highly aggravated cases for which the death penalty is supposed to be reserved. The State's argument is belied by the fact that three jurors voted for life with respect to the homicide of Mrs. Wayne, despite counsel's abject failure to present and argue mitigating evidence.

The State's argument also ignores the fact that in numerous highly aggravated cases this Court has found prejudice resulting from counsel's deficient performance, see, e.g., Deaton v. Dugger, 635 So.2d 4 (Fla. 1994) (cold and calculated strangulation murder of robbery victim); Heiney v. State, 620 So.2d 171 (Fla. 1993) (bludgeoning murder of robbery victim); State v. Lara, 581 So.2d 1288 (Fla. 1991) (cold and calculated murder of witness against defendant on pending charges of robbery and rape; defendant also convicted of second degree murder and rape of the victim's girl friend); Stevens v. State, 552 So.2d 1082 (Fla. 1989) (kidnapping, robbery, rape and murder by strangulation and stabbing of convenience store clerk). The instant case is less aggravated than any of those. The question, as always, is whether there is a reasonable probability -- a "probability sufficient to undermine confidence in the outcome," Strickland, 466 U.S. at 694 -- that a majority of the jury would have recommended life if the evidence

presented below had been presented at trial. Since the evidence presented below would have favorably affected both sides of the aggravation/mitigation balance, the answer is clearly yes.

The State's second contention -- that the post-conviction evidence is cumulative -- is much like saying that the Rocky Mountains are only slightly bigger than a molehill. The Court has before it the Motion to Vacate and the supporting appendices, and can easily compare the huge volume and compelling quality of the mitigating evidence contained therein with the few pages of Dr. Barnard's report, bearing in mind that even the paltry mitigation contained in that report was not argued to the jury.

In this context, the State attacks Mr. Cherry for not attaching affidavits from the three experts who evaluated Mr. Cherry in post-conviction, and asserts that Mr. Cherry did not identify those experts by name. Answer Brief, at 31. (This last assertion is simply untrue: Mr. Cherry identified psychiatrist Robert Phillips, M.D., and psychologist Glenn Caddy, Ph.D. in the Motion to Vacate, at 150-51). The State fails to recognize, however, that nowhere in Rule 3.850 is there any requirement that movants attach anything to a Rule 3.850 motion. Mr. Cherry alleged specific facts, based on oral reports to counsel from the mental health experts. Among those facts are that Mr. Cherry has been diagnosed with mental retardation, organic brain damage, a chronic mood disorder and severe substance abuse, all of which render him substantially disabled and impaired. Those allegations must be assumed to be true, and they entitle Mr. Cherry to an evidentiary

hearing.

The State contends that these allegations are "conclusory statements" by counsel that "establish nothing." State's Brief at 28. That is simply wrong. The facts Mr. Cherry relied upon below and in this Court were sworn to by Mr. Cherry (not simply asserted by counsel) and must be assumed to be true unless conclusively rebutted by the record. Harich v. State, 484 So.2d 1239, 1241 (Fla. 1986); Montgomery v. State, 615 So.2d 226, 228 (Fla. 5th DCA 1993). Mr. Cherry's allegations are specific and detailed, not conclusory. The cases relied upon by the State -- Duest v. Dusser, 555 So.2d 849, 851-52 (Fla. 1990), rev'd on other grounds, Duest v. Singletary, 997 F.2d 1336 (11th Cir. 1993), and Schneider v. Currey, 584 So.2d 86, 87 (Fla. 5th DCA 1991), are inapposite. In Duest, the movant had relied on citations to the Rule 3.850 motion without making any additional argument in his brief on appeal. The State does not and cannot contend that Mr. Cherry has done the same here. Schneider involved an attempt by the appellant in a civil case to present as facts assertions made in the trial court in a memorandum of law. The court stated that it could not "depart from the rule that unproven utterances documented only by an attorney are not facts that a trial court or this court can acknowledge." Id. at 87. That rule is irrelevant here, where this Court has and the trial court had before it not unproven utterances of counsel, but sworn allegations.

Next, the State contends that Mr. Cherry cannot establish prejudice in the "absence of proof that it was reasonably probable

that such favorable experts could have been located at the time of trial...." Answer Brief, at 27 (emphasis added). Proof, of course, is what evidentiary hearings are for. Mr. Cherry has alleged that such experts were available and should have testified at trial. Motion to Vacate, at 137 ("In 1987, a licensed social worker could and should have testified about the long-term effects of child abuse, abandonment, and institutionalization."); id. at 139 ("At trial, the jury should have heard from a neuropsychologist who had tested and interviewed Roger, reviewed all of his life history materials, and formulated diagnoses and related legal conclusions."); id. at 140 ("Roger Cherry should also have been able to present his jury and judge with a psychiatrist who had reviewed the neuropsychologist's findings, examined all background materials, and performed a physical examination and an extensive psychiatric interview."); id. at 156-57 ("Dr. Phillips and Dr. Caddy believe and would have testified at trial that Roger Cherry was born with a diminished capacity and that his capacity was further impaired by chronic, ongoing, powerful substance abuse.").

The key point, however, is that Dr. Barnard himself would have testified as to mitigating circumstances if he had been asked to and if he had been given the necessary information:

> Dr. Barnard has confirmed that he had almost no communication with defense counsel, and that counsel never asked him for an opinion concerning the existence of mitigating factors, based on his examination of Mr. Cherry. Dr. Barnard will testify that if he had been asked to do so, he would have testified to the mitigating factors that Roger Cherry told him about and which were set forth in his report, including the facts that Roger Cherry told him about abuse as a child, chaotic family circumstances and heavy consumption of alcohol on the

> night of the offense. Moreover, if he had been provided the background data that he requested and that have now been provided to him, he would have realized and testified to the facts that Roger's intelligence is much lower than it appeared to be to Dr. Barnard; that Roger was using crack as well as alcohol the night of the offense (despite Roger's denial of crack use to Dr. Barnard); that Roger was in special education classes and had learning problems (again despite Roger's denials); and that the history of child abuse that Roger recounted to Dr. Barnard is now firmly corroborated. In Dr. Barnard's opinion, all of those facts are mitigating circumstances and he would have so testified if the results of the current investigation had been provided to him.

Motion to Vacate, at **157-58**. As Dr. Barnard now realizes, Mr. Cherry was not of "average intelligence" as he had earlier opined -- relying on nothing but an interview with Mr. Cherry, having conducted no IQ testing, and having no knowledge of his placement in special education classes, his history of severe head trauma, his mental disturbances, his mother's alcohol abuse while Roger was in utero, and his severe and chronic substance abuse. Roger was in fact -- through no fault of his own -- mentally disturbed, mentally retarded, and saddled with a defective brain.

Finally, the State refers to Mr. Cherry's "hyperbolic discussion of his abuse as a child...." Answer Brief at 28. To the extent that the State is suggesting that the torture to which Cherry was subjected as a child is exaggerated, untrue and overly dramatic, it is a curious suggestion in light of the facts that the trial Court did not hold an evidentiary hearing to test the evidence or address the evidence in its order. Moreover, what the State calls hyperbole is in fact true. Indeed, the examples cited and quoted in Mr. Cherry's brief are but a few of those documented

by family and friends. Such evidence is not merely cumulative, and the impact of testimony from live witnesses would be far greater on the jury than a few lines in a report which they may not have read, since nobody -- especially Mr. Cherry's lawyer -- drew any attention to it.

The bottom line is that the Rule 3.850 motion clearly sets forth specific facts showing entitlement to relief, including the fact that Mr. Cherry has been diagnosed with mental retardation, organic brain damage, a chronic mood disorder and severe substance abuse, all of which render him substantially disabled and impaired. Such evidence, far from "establish[ing] nothing," would have informed the jury that Roger Cherry was not the kind of person for whom death by electrocution is reserved. Dixon v. State, 283 So.2d 1, 7 (Fla. 1973) ("death penalty reserved for "only the most aggravated and unmitigated of most serious crimes."); Fitzpatrick v. State, 527 So.2d 809, 812 (Fla. 1988) (murder committed by "emotionally disturbed man-child" not the kind of case contemplated in Dixon; death sentence disproportionate based on live expert testimony, although it was affirmed on initial direct appeal).

Mr. Cherry has alleged specific facts demonstrating that his counsel's penalty phase investigation and presentation were substantially below that expected of a reasonably competent capital defense attorney, and that there is a reasonable likelihood that he would not have received the death sentence if counsel had performed adequately. *An* evidentiary hearing is required.

ARGUMENT IV

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. CHERRY'S CLAIM THAT HE WAS DENIED A COMPETENT MENTAL HEALTH EXAMINATION

The State's primary argument with respect to this claim is that it is procedurally barred. The court below ruled on the merits of the ineffectiveness component of this claim. P.R. 2211-2212. There was clearly no bar to consideration of the merits of that component of the claim; Mr. Cherry addresses the merits in Arguments III and V.

With respect to the due process component of the claim, the State argues that it is barred because it was not raised at trial or on appeal. Answer Brief, at 33. That argument ignores that in State v. Sireci, 502 So.2d 1221 (Fla. 1987), this Court held that Mr. Sireci was entitled to an evidentiary hearing on a similar claim, and affirmed the grant of relief on the claim in State v. Sireci, 536 So.2d 231 (Fla. 1988), although in Sireci the claim was raised for the first time in a successor Rule 3.850 motion. With respect to the "substantive" or Dusky v. United States, 362 U.S. 402 (1960), incompetency claim, this argument further ignores the fact that the claim alleges that Mr. Cherry's due process rights were violated by the simple fact that he was tried while incompetent. The due process violation does not depend on any error by the trial court, and therefore cannot be held to be barred for failure to raise at trial or on appeal. See James v. Singletary, 957 F.2d 1562, 1572-75 (11th Cir. 1992).

With respect to the merits of the claim, the State again

complains that Mr. Cherry failed to attach expert affidavits or present evidence concerning his mental state. Answer Brief, at **35-36.** Mr. Cherry has already addressed the issue of expert affidavits. See **p.14-15,** supra. Obviously, Mr. Cherry has had no opportunity to present evidence, because he has been denied a hearing. Mr. Cherry has, however, alleged with specificity actual incompetency. His allegations must be taken as true unless conclusively rebutted by the record, which they are not.[5] The State's argument suggests that this Court should accept as true the findings in the pre-trial report rather than petitioner's allegations. This Court, however, would have no basis for doing so. See James, **957** F.2d at **1574-75.**

ARGUMENT 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

The State argues that all of Mr. Cherry's claims of ineffective assistance amount to no more than second-guessing counsel's defense at the guilt phase. This argument ignores the fact that counsel never investisated and thus never uncovered readily available evidence that Roser Cherry had consumed substantial amounts of crack cocaine, moonshine and marijuana just prior to the offense. See Motion to Vacate, Apps. **62, 64.** Nor did

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[5]The State suggests that Mr. Cherry's "coherent" testimony rebuts any claim of incompetency. Answer Brief, at 35. In fact, Mr. Cherry's testimony was rambling, inconsistent and at times affirmativelyharmful. See Motion to Vacate, at 234-36. Moreover, Drs. Phillips and Caddy have concluded that Mr. Cherry was not competent to testify, as well as to stand trial. See Motion to Vacate, at 155-56. This issue, too, requires evidentiary resolution.

counsel investigate Mr. Cherry's background, and thus he was unaware that Mr. Cherry is mentally retarded and brain damaged. In order for an attorney to render effective assistance, he must first conduct a reasonable investigation or make a reasonable decision that no such investigation is necessary. Strickland v. Washington, 466 U.S. 668, 691 (1984). Trial counsel did neither.

The fact that Mr. Cherry denied any drug use on the day of the crime did not relieve counsel of the duty to investigate. It is well recognized that substance abusers often understate or deny drug usage and that the self-report of the client is inherently unreliable. See Mason v. State, 489 So.2d 734, 737 (Fla. 1986) (noting patients' "inability to convey accurate information" about their history and "general tendency to mask rather than reveal symptoms"); Torres-Arboleda v. State, 636 So.2d 1321 (Fla. 1994)(counsel ineffective for failing to supply corroboration to mental health expert, who relied solely on self-report). If counsel had conducted a reasonable investigation, counsel would have discovered that Mr. Cherry had in fact been using substantial amounts of drugs and alcohol at the time of the crime and that his client is mentally retarded and brain damaged. Counsel would then have been able to make an informed decision regarding what defense to raise. Counsel's failure to conduct such an investigation was deficient performance, and Mr. Cherry was prejudiced as a result.[6]

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[6]The State makes a mysterious reference to "records" of trial counsel's private investigator, which the State says reflect that that investigator interviewed State witness Lorraine Neloms. Answer Brief, at 39-40. The relevance of this assertion is not apparent. Moreover, the State does not cite (continued...)

The State further argues that it was reasonable to rely on a totally uncorroborated alibi defense, established only by the testimony of a mentally retarded man who, according to Drs. Phillips and Caddy, was incompetent to testify. The State contends that this defense was reasonable because counsel attempted to explain the absence of any alibi witnesses because testifying would have implicated the witnesses in a crime, i.e. gambling. See R. 990. That explanation, however, strained credulity and obviously was not "successful[]." Cf. Answer Brief, at 45.

The primary issue, however, is not whether it would have been reasonable for counsel to rely on the alibi defense or some other defense, assuming counsel was adequately informed both of Mr. Cherry's mental limitations and impairments and of his massive consumption of intoxicants on the night of the offense. Instead, the issue is whether it was reasonable for counsel to fail to investigate and discover any of the evidence that was reasonably available to support either a voluntary intoxication or a reasonable doubt defense. On that issue, an evidentiary hearing is clearly required.

ARGUMENT VI

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING THE BRADY CLAIM.

With respect to several components of Mr. Cherry's Brady claim, the State argues that the withheld evidence was not

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[6](...continued)
to anything in the record to support the assertion, nor is counsel for Mr. Cherry aware of any support for it. Conclusory statements by counsel establish nothing, as the State is fond of pointing out.

exculpatory because it was either different from or cumulative to testimony actually adduced by the defense at trial. Answer Brief, at 49, 51.[7] Obviously, however, whether evidence is exculpatory cannot be determined by comparison with the testimony presented at trial, for neither the prosecutor nor the police know what the defense will show at trial. Under Bradv, the State must disclose to the defense evidence that is "favorable to [the] accused." Bradv v. Maryland, 373 U.S. 83, 87 (1963). All of the evidence discussed in this claim was favorable to Mr. Cherry, particularly evidence of intoxication, which not only could establish a defense to first degree murder, but is also well known to establish a mitigating factor with respect to sentencing. See, e.g., Gardner v. State, 480 So.2d 91 (Fla. 1985)(defense to specific intent crimes); Buford v. State, 570 So.2d 923, 925 (Fla. 1990)(mitigating factor).

The State is also mistaken about the significance of the photographs of James Terry's shoes. The police questioned Mr. Terry because he was seen in the area of the victims' stolen car. He allowed them to take his shoes to photograph them and "luminal" them for the presence of blood, which they did. Appendix 72, P.R. 1601. The shoes were then returned to Mr. Terry, who threw them away. Appendix 80, P.R. 1639. The police also took photographs of the footprints made in the sand around the victims' car by Mr.

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[7]The State seems to think that the lead sheet places Baumgartner at the Circle K store at the same time that a witness testified that his van had been seen at a Handy Way store. Answer Brief, at 49. The State is mistaken; no time is given on the lead sheet, while the Handy Way incident was early in the morning after the offense was committed. R. 790-91.

Terry's shoes. R. 1170 (defense Exhibit F, marked but not introduced). The photographs of the footprints in the sand were turned over to the defense. The photographs of the soles of Mr. Terry's shoes, which would be far clearer and easier to compare with the tread marks in the victims' house and on Mrs. Wayne's pajamas, were never turned over to the defense and are no longer in the possession of the DeLand Police Department. This is significant because the photographs of the footprints in the sand show that the treads are similar to those associated with the victims. See Appendix 71, P.R. 1592.

The State mistakenly contends that the defense had photographs of Mr. Terry's (not Cherry's) shoes when deposing Terry. Answer Brief, at 50. In fact, it is clear that counsel was referring to the footprint photographs. Appendix 80, P.R. 1640 (counsel hands witness photographs "of the prints that those shoes make."). The shoe photographs were never provided to the defense and likely contained critical exculpatory evidence.

At a minimum, Mr. Cherry has made a prima facie showing of a Bradv violation. Remand for an evidentiary hearing is required.

ARGUMENT VII

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. CHERRY'S CLAIM THAT HE WAS SENTENCED TO DEATH AS A RESULT OF INTENTIONAL RACE DISCRIMINATION

The State first wrongly asserts that Mr. Cherry never relied on fundamental error or newly discovered evidence as a basis for excusing any procedural bar until his appeal to this Court. In fact, Mr. Cherry raised the fundamental error argument in his

Memorandum in Support of Request for Evidentiary Hearing. See P.R. 1937-38. He asserted that Professor Radelet's study (which had not previously been available) constituted newly discovered evidence in his Motion for Rehearing. See P.R. 2227-28. Both issues are properly before this Court.

The State then asserts that Mr. Cherry "makes 'hyperbolic' claims as to what his 'evidence' will show..." Answer Brief, at 23. Mr. Cherry has a good faith basis for his allegations; if given the opportunity, he will prove his allegations. Indeed, as indicated in the initial Brief, at 9 n.7, such evidence has been presented in another Volusia County case. The evidence that Mr. Cherry proffers in support of this claim is also substantially different from the insignificant statistical evidence presented in Foster.

Nor is this claim procedurally barred, as the evidence supporting it was not available at the time of trial and could not have been discovered with reasonable diligence. The in-depth and methodologically sound study by Professor Radelet is at the heart of this claim. Professor Radelet's supposed "bias" is something to be determined at a hearing, not in this appeal. This claim alleges facts not available at the time of trial which, when proven, will establish fundamental constitutional error. Nothing in the record rebuts those allegations; an evidentiary hearing is required.

ARGUMENT VIII

THE CIRCUIT COURT ERRED IN HOLDING THAT MR. CHERRY'S REMAINING CLAIMS ARE PROCEDURALLY BARRED.

The court below held, and the State argues, that all of Mr.

Cherry's remaining claims are procedurally barred because they could have been or should have been raised on direct appeal. For the reasons set forth in the initial Brief and discussed herein, the court below erred.

With respect to a number of claims, see Claims VII, IX, XI, XII, XIII, XIV, XVII, and XVIII, Mr. Cherry alleged both that his constitutional rights were violated and that counsel was ineffective for failing to object or otherwise properly raise and preserve the issues at trial. The State contends that the allegations of ineffective assistance are nothing more than a ruse to avoid the procedural bar and that, essentially, any claim that counsel was ineffective for failure to object is barred because the (unpreserved) issue could have been or should have been raised on appeal. See, e.g., Answer Brief at 33, 61. That contention cannot withstand close scrutiny.

Mr. Cherry had a right to the effective assistance of counsel at his trial. Strickland v. Washington, 466 U.S. 668 (1984). If counsel, by failing to object, to make a timely motion, or otherwise failing to preserve a meritorious issue, rendered assistance that fell below that expected of a reasonably competent criminal defense attorney, and Mr. Cherry was prejudiced thereby, then counsel failed to render effective assistance, violating Mr. Cherry's rights under the Sixth Amendment to the United States Constitution and Article I, § 16(a) of the Florida Constitution. Id.; see Kimmelman v. Morrison, 477 U.S. 365 (1986) (failure to file suppression motion could constitute ineffective assistance of

counsel); Smith v. Dugger, 911 F.2d 494 (11th Cir. 1990) (failure to file suppression motion was ineffective). Florida courts have likewise repeatedly held that failure to preserve issues for appellate review can constitute ineffective assistance of counsel. Rhue v. State, 603 So.2d 613, 615 (Fla. 2d DCA 1992); Martin v. State, 501 So.2d 1313 (Fla. 1st DCA 1986); Crenshaw v. State, 490 So.2d 1054 (Fla. 1st DCA 1986).

To say that counsel, by failing to provide effective assistance, can also bar any future attempt to redress the resulting violation of Mr. Cherry's constitutional rights, is to deny that the right to effective assistance has any meaning or validity. It is also to deny Mr. Cherry's fundamental right of access to the courts of this State to achieve redress for the constitutional violation, in derogation of Art. I, s 21 of the Florida Constitution. There is no other forum in which Mr. Cherry can achieve redress for the violation of his right to the effective assistance of counsel.

The State is also incorrect in asserting that as to Claims XIV and XVII, Mr. Cherry has raised ineffective assistance of counsel for the first time on collateral appeal. In his claims of ineffective assistance of counsel, Mr. Cherry specifically cross-referenced to the other claims as additional errors committed by counsel. See Motion to Vacate, at 312-13; see generally Claim XIII, P.R. 344-67.

With respect to the merits of the remaining claims, Mr. Cherry relies on the arguments set forth in his initial Brief.

Dated this 27th day of December, 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 27th day of December, 1994.

Attorney