IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Appellant,

v. CASE NO. 84,977

DONALD GUNSBY,

Appellee.

_____/



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

**INITIAL BRIEF OF APPELLANT**

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## STATEMENT OF THE CASE

This appeal is from the December 20, 1994 order entered by Marion County Circuit Judge Thomas Sawaya vacating Gunsby's sentence of death.[1]

On November 9, 1988, a Marion County trial jury found Gunsby guilty of first-degree murder. *(PCR 324).*[2] Following the penalty phase proceedings, that jury recommended that Gunsby be sentenced to death by a vote of nine to three. On January 3, 1989, the trial judge followed that recommendation and imposed a sentence of death. This court affirmed Gunsby's conviction and death sentence on January 15, 1991. *Gunsby v. State,* 574 So. 2d 1085 (Fla. 1991). On October 7, 1991, the United States Supreme Court denied certiorari review. *Gunsby v. Florida,* 112 S.Ct. 136 (1991).

On January 29, 1993, Gunsby filed his motion to vacate judgement and sentence pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. *(PCR 320 et seq).* An evidentiary hearing was conducted during the week of March 14, 1994, during which evidence was presented as to certain claims set out in that motion. Both parties submitted proposed findings of fact following the conclusion of the hearing, and final argument was conducted on June 30, 1994. On December 20, 1994, the 3.850 trial court entered its order vacating Gunsby's death sentence

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[1] Circuit Judge Raymond McNeal was the judge at Gunsby's capital trial. Judge Sawaya presided over the 3.850 proceedings.

[2] The citation form "*PCR___*" refers to the record of the 3.850 proceedings. The citation form "*TR___*" refers to the direct appeal record.

based upon a finding of two specific instances of ineffective assistance of counsel. The state gave notice of appeal from the granting of sentence stage relief on January 3, 1995. *(PCR 3566-67).* The record was certified as complete and transmitted on April 13, 1995. *(PCR 3579).*

## STATEMENT OF THE FACTS

In affirming Gunsby's conviction on direct appeal, this Court summarized the evidence against Gunsby in the following way:

> The relevant facts established at trial are as follows. On April 20, 1988, Donald Gunsby was attending a party in Ocala where he was told that a friend had been in an altercation with one of the proprietors of a nearby grocery store. Gunsby and others went to the store, and they learned that the man who had supposedly fought with their friend was no longer at the store. Gunsby threatened to hurt the man if he returned to the store. After a visit to the hospital to see their friend, Gunsby and the others returned to the party. While there, according to one witness, Gunsby stated that he was "tired of those damn Iranians *FN* messing with the black." Gunsby then left the party again, and when he returned he was wearing a camouflage suit. According to one witness, Gunsby had a gun.
>
> The evidence at trial established that at 9:30 p.m. Donald Gunsby entered the grocery store wearing camouflage clothing. Without saying anything, he fired one shot from a shotgun at the victim, who was the brother of the man who had supposedly fought with Gunsby's friend earlier that day. Gunsby immediately ran from the store, followed unsuccessfully by the victim's brother, who fired three shots from a pistol at Gunsby as he fled.

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*FN* The proprietors of the grocery store were Iranian.

> Gunsby returned to the party briefly and, according to one witness, said that he had taken care of the problem. He was later identified from a photo lineup and at trial by the cashier of the convenience store and by the victim's brother, both of whom were eyewitnesses to the shooting.
>
> The medical examiner testified that the victim died of a shotgun wound to the right side of the chest. The wound was one and three-quarter inches in diameter and caused massive hemorrhaging and injury to the right lung, liver, and heart. The victim's body contained dozens of shotgun pellets, and the doctor rendered an opinion that the victim had been conscious for up to a minute and had died within two to three minutes after being shot.
>
> Gunsby presented several alibi witnesses who testified that he was away from the scene on the evening of the offense. He also presented a police officer who testified that he had overheard the victim's father identify another man as the murderer, and Gunsby presented a man who had been in jail with him who testified that Gunsby had told him that one of the state's witnesses was lying to protect her boyfriend, whom Gunsby believed was the killer. The jury found Gunsby guilty of first-degree murder, as charged in the indictment.

*Gunsby v. State*, 574 So. 2d at 1086-87.

At the penalty phase of Gunsby's trial, as found by this Court, the state introduced documentary evidence "concerning Gunsby's prior offenses involving violence, specifically, an aggravated assault committed in 1967, for which he was sentenced to three and one half years in the state prison system, and an armed robbery committed in 1971, for which he was sentenced to ten years in the state prison system." *Id.* Additionally,

evidence was presented that Gunsby had been convicted of possession of a firearm by felon, carrying a concealed firearm, and having an improper license plate. *Id.* For the two felony offenses, Gunsby was to have served 18 months in prison, followed by two years of community control. *Id.* At the time of the murder (April 20, 1988) there was an outstanding warrant for Gunsby's arrest because he had failed to report to jail on March 9, 1988, as ordered. *Id.*

This Court further found that:

> The state also presented a witness who was an acquaintance of Gunsby and who testified that he saw Gunsby at the party on the day of the murder and that Gunsby was behaving normally. In addition, the state presented a court-appointed psychiatrist who testified that Gunsby did not suffer from mental illness, was competent to stand trial, and was able to distinguish right from wrong on the day of the murder.
>
> Gunsby presented two witnesses in the penalty phase who testified that he was a good neighbor who liked children. He also presented two mental health experts. The first testified that Gunsby was mildly retarded, with spelling skills at third-grade level, reading skills at a fourth-grade level, and an IQ of less than fifty-nine. However, he also testified that Gunsby was not schizophrenic or otherwise mentally ill. The other mental health expert testified that Gunsby was, indeed, schizophrenic, incompetent to stand trial, insane at the time of the offense, and a candidate for involuntary hospitalization. This psychologist also testified that Gunsby's reading comprehension was at a third-grade level and his verbal skills were at an eighth-grade level. The state extensively cross-examined this witness, in light of the obvious conflict with the other mental health experts.

*Gunsby v. State*, 574 So. 2d at 1087-88.

The jury returned an advisory sentence of death by a nine to three vote, and, in following that recommendation, the trial court found the following three aggravating circumstances:

1. That the murder was committed in a cold, calculated, and premeditated manner;

2. That Gunsby had been previously convicted of felonies involving the use or threat of violence;

3. That Gunsby was under sentence of imprisonment when he committed the murder. *Id.* As non-statutory mitigation, the trial court found that Gunsby is mildly mentally retarded and functions intellectually at the third or fourth grade level. *Id.* In weighing the aggravation against the mitigation, the trial court found that "viewed in the light of the defendant's past history of violence and the circumstances of this case, *defendant's mental condition carries little weight.*" *Id.* (emphasis added).

The Post-Conviction Hearing Evidence

At the post-conviction hearing, approximately forty witnesses testified and approximately 100 documentary exhibits were introduced. *See, e.g., PCR 3545*. The bulk of that evidence does not pertain to the narrow issue before this court and is not discussed at length herein.

The circuit court granted sentence stage relief based upon two specifications of ineffective assistance of counsel:

> 1) Trial counsel provided ineffective assistance of counsel in failing to object to false and improper statements made by the prosecutor about Mr. Gunsby's prior criminal history;

> 2) Trial counsel rendered ineffective assistance in investigating and presenting evidence of the mitigating circumstances of the defendant's mental condition to the jury.

*PCR 3550-51*. As to the first component of this issue, the 3.850 evidence (which is found in the direct appeal record) is that Gunsby was charged with assault with intent to murder in 1967 and ultimately pleaded guilty to the lesser included offense of aggravated assault. A firearm was used by Gunsby in the commission of the offense. *State's Exhibit 12-A*.[3] The evidence also established that Gunsby had been charged, in 1971, with the offenses of robbery and possession of a firearm during a felony. *State's Exhibit 12-B*. Gunsby pleaded guilty to the robbery charge. *Id., see also, State's Exhibit 12-C*. Judgements of conviction, which were a part of the direct appeal record and which are also exhibits in this appeal, indicate both the original charge and the final disposition in each case. *Id.*

In closing argument, the prosecutor argued that Gunsby had been convicted of assault with intent to murder, robbery, and use of a firearm during a felony. Trial counsel did not object to that argument, and the 3.850 trial court found "that such omissions ... deprived Mr. Gunsby of the right to effective assistance of counsel." *(PCR 3555)*. The lower court found that the absence of an objection was deficient performance and (by

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[3] Exhibits 12-A, 12-B, and 12-C are appended to this brief for the convenience of the Court. The original exhibit numbers are used herein for consistency. These exhibits are contained in Volume 7 of the direct appeal record, but the pages are not numbered.

inference) that, had counsel objected, there was a reasonable probability of a different result. *(PCR 3557-58).*

The lower court also found that "the failure of [trial counsel] to have Mr. Gunsby examined by qualified mental health experts concerning the mitigating factors of his mental condition, especially his organic brain damage, and to accurately present that mitigating evidence to the jury was deficient and constituted an error so serious that Mr. Gunsby was denied the counsel guaranteed by the 6th Amendment...". *(PCR 3563-64).*

The evidence at the 3.850 hearing was that Gunsby's full scale IQ score was 57 on a test administered in October of 1988, and, in February of 1994, Gunsby attained a full scale IQ score of 66. *(PCR 3558).* Those full scale IQ scores fall within the range of mild mental retardation.

The lower court found that Gunsby "suffers from organic brain damage and a personality disorder with immature and dependent features." *(PCR 3558).* That court also found that "[e]vidence of Mr. Gunsby's *organic brain damage* was never presented to the jury *because* the orders appointing the three expert witnesses, Dr. Mhatre, Dr. Poetter, and Dr. Conley, did not order or request that they evaluate the defendant for statutory and non-statutory mitigating factors." *(PCR 3559-60).* (emphasis added).

## SUMMARY OF THE ARGUMENT

The Marion Circuit Court's grant of sentence stage relief based upon two specifications of ineffective assistance of counsel is an abuse of discretion which should be reversed. That court did not properly apply the *Strickland v. Washington* standard, and erroneously found not only deficient performance but also prejudice. The lower court did not give proper deference to trial counsel's performance, instead evaluating trial counsel based on hindsight. Of course, that sort of evaluation of trial counsel's performance is flatly prohibited by *Strickland* and the cases that have followed it.

Rather than demonstrating that the approach taken by trial counsel would not have been used by a reasonable attorney, Gunsby has done no more than demonstrate that his post-conviction counsel would have tried the case differently. That is not enough to establish deficient performance, and the trial court's finding in that regard is erroneous. The lower court also erroneously found that there was a reasonable probability of a different result. Gunsby's case is heavily aggravated, and the evidence of guilt, and the evidence concerning the aggravating circumstances that are indisputably present, is overwhelming. The lower court's finding of *Strickland* prejudice is contrary to settled case law which has recognized that, in extremely aggravated cases, additional "mitigation" would not produce a different result. The first ground relied on by the lower court to set aside Gunsby's death sentence turns upon that court's determination that counsel could have prevented a misstatement by

the prosecutor concerning Gunsby's criminal history. The lower court's decision is erroneous for three reasons. First, there is no dispute that, under Florida's Death Penalty Act, the state has an absolute right to introduce the facts and circumstances of a defendant's prior felony convictions during the penalty phase of a capital trial. In this case, each of the violent felonies for which Gunsby has been convicted was disposed of by the plea of guilty to a lesser included offense of the one charged in the information. While the prosecutor did in fact misspeak as to the charges for which Gunsby was convicted, the fact that remains inescapable is that Gunsby pleaded guilty to aggravated assault which rose out of an original charge of assault with intent to murder involving a firearm, and that Gunsby pleaded guilty to robbery in which a firearm was used. Obviously, both aggravated assault and robbery are violent felonies under Florida law, and, likewise, there would have been no way for trial counsel to prevent the jury from learning that a firearm was used in both of those crimes. The second reason that the lower court's order is erroneous is that the lower court ignored the presumption that juries follow the instructions given by the court. The penalty phase jury was specifically instructed that arguments of counsel are not evidence, and that robbery and aggravated assault are felonies involving the use or threat of violence under Florida law. This aggravator is established beyond any reasonable doubt, and no inaccurate or misleading *evidence* was placed before the jury. It makes utterly no sense to find ineffectiveness of counsel in this case when, under settled law, the *improper*

admission of a prior conviction cannot establish prejudice when there is another properly admitted prior conviction in existence. The third reason that the lower court's order should be vacated is because the reliance placed by that court on *Johnson v. Mississippi* is improper. There is no *Johnson* error in this case because none of Gunsby's prior convictions have ever been set aside. Even if *Johnson* was applicable to this case, that would not be dispositive because harmless error analysis is properly applied in the case of *Johnson* error. If harmless error applies when the jury is given wrong information concerning the defendant's criminal history, it makes absolutely no sense to find ineffective assistance of counsel in this case, when the evidence before the jury was unquestionably accurate.

The second component of the trial court's order granting relief dealt with what the lower court determined to be deficient performance and (presumably) prejudice in the presentation of mental state mitigation at the penalty phase of Gunsby's capital trial. The lower court's order granting relief is an abuse of discretion because that court placed far too much emphasis on the claimed "organic brain damage" which Gunsby's newest expert witnesses have diagnosed. What the trial court did not consider is that the evidence at the penalty phase of Gunsby's capital trial indicated that Gunsby was far worse off psychologically than does the evidence presented at the 3.850 hearing. The penalty phase jury heard evidence that Gunsby was a paranoid schizophrenic, that he came from a dysfunctional family, and that he was mildly mentally retarded. In contrast, the 3.850 evidence

was that Gunsby was not paranoid schizophrenic, but rather suffered from "diffuse organic brain damage", and was mildly mentally retarded. Of course, paranoid schizophrenia is a far stronger mitigator than is "diffuse organic brain damage", particularly under the facts of this case. The paranoid schizophrenia fit the defense theory that Gunsby committed the crime under a delusion, while the organic brain damage has utterly nothing to do with the facts of the crime.

The lower court improperly evaluated the performance of trial counsel through hindsight, rather than from counsel's perspective at the time of trial. The testimony of the most recently selected mental state experts is inconsistent, a factor which greatly diminishes the force of that testimony. In addition, the lynch pin of the lower court's order granting relief is that trial counsel did not specifically request the mental state experts (at trial) to evaluate Gunsby for organic brain damage. Organic brain damage is a mental disorder that would be detected by a mental health expert in the course of an evaluation, just as would any other mental disease or disorder. There is no evidence in the record to support the trial court's conclusion that the mental state experts who testified at trial would not have detected organic brain damage in the absence of instructions to look for that disorder. Perhaps the best explanation for the original mental state experts "failure" to diagnose organic brain damage is the fact that it does not exist or has such a minimal effect on Gunby's behavior as to be insignificant. The trial court's ruling that Gunsby is entitled

to a new penalty phase based upon the enumerated specifications of ineffective assistance of counsel is an abuse of discretion which should be reversed. The death sentence should be reinstated.

## ARGUMENT

### I. THE LOWER COURT ERRONEOUSLY GRANTED SENTENCE STAGE RELIEF ON INEFFECTIVE ASSISTANCE OF COUNSEL GROUNDS

The issues on appeal before this Court deal solely with the lower court's finding of ineffective assistance of counsel at the penalty phase of Gunsby's capital trial. While the two findings of ineffective of assistance are based upon different operative facts, they are governed by the same legal standard. For the reasons set out below, the ineffective assistance of counsel finding should be reversed and the death sentence reinstated.

A. The Legal Standard

The legal standard for evaluating ineffective assistance of counsel claims is the familiar two-part test set out in *Strickland v. Washington,* 466 U.S. 668 (1984). Under the *Strickland* standard, the defendant must show not only deficient performance on the part of counsel, but also that but-for counsel's deficient performance, there is a reasonable probability of a different result. *Id.*, at 687. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Sims v. State*, 602 So.2d 1253, 1256 (Fla. 1992). As stated by this Court in *Maxwell v. Wainwright,*

> A claim of ineffective assistance of counsel, to be considered meritorious, must include two general components. First, a claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and the

> reliability of the proceeding that confidence in the outcome is undermined. *Strickland v. Washington,* 466 U.S. 668 (1984); *Downs v. State,* 453 So. 2d 1102 (Fla. 1984). A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.

*Maxwell v. Wainwright,* 490 So. 2d 927, 932 (Fla. 1986). As *Maxwell* makes clear, *both* components must be established before the petitioner has met his burden of proof.

It is well-settled law that the *Strickland* standard is highly deferential toward trial counsel's performance, and it is likewise well-settled that intensive scrutiny and second-guessing of attorney performance are flatly prohibited. *Strickland v. Washington,* 466 U.S. at 689-90; *Mills v. State*, 603 So.2d 482 (Fla. 1992); *Accord, Atkins v. Singletary,* 965 F.2d 952, 958 (11th Cir. 1992) ("most important, we must avoid second-guessing counsel's performance."); *White v. Singletary,* 972 F.2d 1218, 1220 (11th Cir. 1992) ("courts also should at the start presume effectiveness and should always avoid second-guessing with the benefit of hindsight."). As the courts have repeatedly stated, the range of performance that is constitutionally adequate is quite wide, with the result that prevailing claims of ineffective assistance of counsel are few and far between. *Spaziano v. Singletary,* 36 F.3d 1028, 1039 (11th Cir. 1994); *Rogers v. Zant,* 13 F.3d 384, 386 (11th Cir. 1994); *See also, Waters v. Thomas,* 46 F.3d 1506 (11th Cir. 1995) (en banc).

In applying the *Strickland* standard to the facts of this case, this Court must begin by "reconstruct[ing] the circumstances of counsel's challenged conduct, and [evaluating] the conduct from counsel's perspective at the time." *Strickland v. Washington,* 466 U.S. at 689. In order to establish that trial counsel's performance was deficient (the first prong of *Strickland*), Gunsby must demonstrate "that the approach taken by defense counsel would not have been used by professionally competent counsel." *Harich v. Dugger,* 844 F.2d 1464, 1470 (11th Cir. 1988), *cert. denied,* 489 U.S. 1071 (1989). Gunsby has not made that showing -- he has done no more than establish that his present attorneys would have tried the case differently, a showing that is not sufficient to establish any right to relief. *See, e.g., Rivera v. Dugger,* 629 So.2d 105, 107 (Fla. 1993). As the Eleventh Circuit stated in *White v. Singletary,* 972 F.2d 1218 (11th Cir. 1992), "[t]he question is not what the best lawyers would have done, nor even what most good lawyers would have done, but instead is only whether a competent attorney reasonably could have acted as this one did *given the same circumstances.*" *Id.,* at 1220-21 (emphasis added); *See also, Spaziano v. Singletary, supra.*

When the proper analytical framework is used to evaluate counsel's performance in this case, it is apparent that the lower court's grant of sentence stage relief was an abuse of discretion. In addition to his failure to establish deficient performance on the part of trial counsel, Gunsby has also failed to establish the prejudice component of the *Strickland* test. As set out at pp. 3-6, above, Gunsby's murder is heavily aggravated,

given the undisputed application of the cold, calculated, and premeditated aggravating circumstance in addition to Gunsby's history of violent felonies. In weighing the aggravation and mitigation, the sentencing judge expressly found that, under the particular circumstances of this case, Gunsby's mental state carries little weight as a mitigator. *Gunsby,* 574 So.2d at 1088. The evidence of Gunsby's guilt, and the aggravating circumstances which are indisputably present, can best be described as overwhelming. As this court has often noted in heavily aggravated cases, additional "mitigation" would not produce a different result. *See, e.g., King v. State,* 597 So.2d 780, 782 (Fla. 1992) (overwhelming aggravation -- no possible sentence other than death); *Johnson (Terrell) v. State,* 593 So.2d 206, 209 (Fla. 1992) (even if evidence of statutory mitigators presented, death would still be the result); *Mendyk v. State,* 592 So.2d 1076, 1079-80 (Fla. 1992) ("new" mitigation would not change the sentence); *Buenoano v. State,* 559 So.2d 1116, 1119 (Fla. 1990) (same); *see also, Elledge v. Dugger.* 823 F.2d 1439, 1447 (11th Cir.), *modified,* 823 F.2d 250 (11th Cir. 1987), *cert. denied,* 108 S.Ct. 1487 (1988).

For the reasons set out below, Gunsby fails both prongs of *Strickland* -- he cannot demonstrate deficient performance and he cannot demonstrate a reasonable probability of a different result. The lower court's contrary finding is an abuse of discretion which should be reversed.

B. The Prosecutorial Argument Component

The lower court found that trial counsel's performance was deficient based upon counsel's "failure" to object to the prosecutor's misstatements in closing argument concerning Gunsby's prior criminal record,[4] and also inferentially found that there was a reasonable probability of a different result had counsel objected. There is no claim that the prior violent felony aggravator does not apply -- only that trial counsel's "failure" to object during closing argument rendered his performance ineffective. The lower court's finding of ineffectiveness of counsel should be reversed for three independently adequate reasons.

The first reason that the lower court should be reversed is because it is undisputed that the state has a right to introduce the facts and circumstances of a defendant's prior violent felony convictions at the penalty phase of a capital trial. *See, Dufour v. State,* 495 So.2d 154 (Fla. 1986); *Delap v. State,* 440 So. 2d 1242, 1255 (Fla. 1983); *See also, Lucas v. State,* 568 So. 2d 18, 20 (Fla. 1991); *Elledge v. State,* 346 So. 2d 998, 1001-2 (Fla. 1977). It is undisputed that Gunsby pleaded guilty to the lesser included offense of aggravated assault arising out of an original charge of assault with intent to murder, and there is no dispute that a firearm was used in that offense. Insofar as Gunsby's robbery conviction is concerned, the record is clear that a firearm was

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[4] Two prior convictions are involved here -- the same argument applies to both.

also used in that offense, that Gunsby pleaded guilty to robbery, and that the weapons charge was dismissed.

There can be no argument by Gunsby that aggravated assault and robbery are not violent felonies, and, under Florida law, it is absolutely clear that defense counsel would not have been able to keep the fact that a firearm was used in both of those offenses from the penalty phase jury. *Delap, supra; Lucas, supra; Elledge, supra.* It makes little sense to suggest that counsel's performance was deficient for failing to prevent the mention of that which was admissable, especially when, as here, the most that an objection would have accomplished would have been a correction of a misstatement which made utterly no difference. The jury was clearly instructed that Gunsby's prior robbery and aggravated assault convictions were for felonies involving the use or threat of violence to another, and it is axiomatic that juries are presumed to follow their instructions. *See, e.g., Walton v. Arizona,* 110 S.Ct. 3047 (1990). The absence of an objection by defense counsel was not deficient performance, and the misstatement by the prosecutor cannot reasonably be said to have affected the result. Because there is no reasonable probability of a different result even had counsel objected, the lower court abused its discretion in setting aside Gunsby's death sentence.

The second reason that the lower court's grant of relief should be reversed is because that court's finding of prejudice under *Strickland* is erroneous, in that the court failed to consider the presumption that juries follow the instructions given by the court. In this case, the penalty phase jury was

specifically instructed that statements by counsel in closing are not evidence *(PCR 666)*, and that robbery and aggravated assault are felonies involving the use or threat of violence. *(PR 693)*. Gunsby does not contest the applicability of this aggravator, and indeed he cannot -- the prior convictions establish the aggravating circumstance beyond a reasonable doubt. Likewise, neither Gunsby nor the lower court disputes that the *evidence* before the jury accurately set out the nature of Gunsby's prior convictions. The evidence of those prior convictions was properly before the jury, and the presumption is (and must be) that the jury was aware of the precise nature of those prior violent felonies. *See, e.g., Sochor v. Florida,* 112 S.Ct. 2114 (1993) (jury presumed not to have relied on aggravating circumstance not proven beyond a reasonable doubt). Gunsby cannot establish the prejudice prong of *Strickland* because the prior violent felony aggravator was proven beyond any doubt and because it was not error to admit the fact that Gunsby had been convicted of two prior violent felonies as well as the underlying facts and circumstances of those offenses.

Moreover, if there can be no prejudice (for ineffectiveness of counsel purposes) in the *erroneous* admission of a prior conviction when another properly admitted prior conviction exists, and that is the law, then there can be no prejudice here when the previous convictions are properly admitted, and the only "prejudice" is based upon a misstatement by the prosecutor in closing argument. *See, e.g., Sims v. State,* 602 So. 2d 1255, 1258 (Fla. 1992) (error to admit unsubstantiated prior conviction, but

no prejudice for ineffectiveness purposes because separate substantiated prior conviction supports the prior violent felony aggravating circumstance). If there was no prejudice in *Sims*, and that is the law, then Gunsby cannot establish prejudice, either. The lower court abused its discretion in granting sentence stage relief.

The third reason that the lower court's order granting relief should be set aside is, that court's reliance on cases dealing with *Johnson v. Mississippi*, 486 U.S. 578 (1988), is erroneous. *Johnson*, and the cases based upon it, deal with the situation presented when a prior conviction relied upon in aggravation is subsequently set aside. That is not the situation in this case, and, under settled law, *Johnson v. Mississippi* is totally inapplicable to Gunsby's case. *See, e.g., Henderson v. Singletary*, 617 So.2d 313, 316 (Fla. 1993) (collecting cases). Gunsby's penalty phase jury did not receive one item of inaccurate, vague, or unverified evidence concerning Gunsby's criminal history. Instead, every shred of evidence about that subject was properly admitted under settled law. *Johnson v. Mississippi* has nothing to do with this situation, and reliance on that decision is completely inapposite.

Moreover, the law is settled that harmless error analysis is properly applied to *Johnson* error. *See, e.g., Duest v. Singletary*, 997 F.2d 1336 (11th Cir. 1993). Because the harmless error doctrine applies when the jury is given incorrect information regarding the defendant's priors, it makes little sense to find ineffectiveness of counsel in this case because the evidence

before Gunsby's sentencing jury unquestionably was accurate. Gunsby cannot demonstrate a reasonable probability of a different result, and the lower court's grant of relief should be set aside and the death sentence reinstated.

Insofar as the prejudice component of *Strickland* is concerned, the lower court's finding of prejudice (which is set out in a single sentence at *PCR 3558)* turns on the premise that trial counsel could have "prevent[ed] these misstatements by the prosecutor." While not set out in the order, the lower court must have found a reasonable probability of a different result had trial counsel objected. However, that ruling does not consider the miniscule benefit of an objection (which would only have resulted, at most, in a correction by the prosecutor),[5] nor does it consider the undisputed fact that the jury instructions correctly listed Gunsby's prior felonies. The finding of *Strickland* prejudice totally ignores the jury instructions; the fact that the underlying facts of the prior felonies were properly admitted; and implicitly assumes that closing argument took precedence in the mind of the jurors over the documentary evidence and the sentencing instructions given by the court. Even if counsel was deficient in failing to object, there is no reasonable probability of a different result because the aggravator at issue clearly exists. The State's closing argument cannot be said to have affected the outcome, and an objection by

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[5] If trial counsel had objected, the jury's attention would obviously be focused on the prior offenses and it would have emphasized that Gunsby's prior charges had been disposed of quite favorably to him, but that he had not been rehabilitated.

the defense would not have had any effect, either. The lower court should be reversed.

C. The Mental State Component

On pages 18-24 *(PCR 3558-64)* of the order vacating Gunsby's death sentence, the lower court set out its basis for finding ineffective assistance of counsel in connection with trial counsel's presentation of mental state mitigation. The lower court abused its discretion in granting relief for at least four independently adequate reasons, each of which standing alone is a proper basis for reversal.

The primary defect in the lower court's finding of ineffectiveness is found in the court's evaluation of Gunsby's purported "organic brain damage". The lower court found that no testimony concerning organic brain damage was presented *because* the orders appointing the experts to evaluate Gunsby's competence to stand trial did not specify that that evaluation be directed toward mitigation evidence as well. While possessed of some facial appeal, that finding does not withstand scrutiny because the *ratio decidendi* of the lower court is erroneous. The lower court apparently did not recognize that organic brain damage (or, properly labeled, organic brain syndrome) is a mental condition as is schizophrenia, mental retardation, anti-social personality disorder, or personality disorder not otherwise specified. Further, the lower court did not recognize that there is no linkage between the claimed brain damage and the murder. The lower court's order leaves no doubt that that court placed great

weight on the organic brain syndrome testimony.[6] However, that court erroneously viewed organic brain syndrome as some sort of magical condition that can only be discerned by a mental state expert when that expert is specifically directed to evaluate the patient for mitigation purposes as well as for purposes of a competency determination.[7]

As set out at page 31 of this brief, organic brain syndrome is the descriptive term applied to a wide range of conditions which very greatly in terms of their severity. Even if Gunsby does have some degree of organic impairment, he is not so impaired that he was unable to plan and carry out the murder for which he was convicted and sentenced to death.[8] Because there is no connection between Gunsby's purported brain damage and the murder at issue in this case, the mitigating value of that testimony is, at best, minimal.

Accepting *arguendo* the existence of organic brain damage, Gunsby still fails to establish prejudice under *Strickland.* The mitigating value of the organic brain damage is so minimal that, even if it is taken as being true, it does not outweigh the heavy aggravation present in this case. For that reason, Gunsby cannot

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6 This Court need not concern itself of whether paranoid schizophrenia and organic brain syndrome are inconsistent with each other because the experts who testified at the 3.850 hearing that Gunsby has organic brain syndrome testified that he is not paranoid schizophrenic. See pp. 31-33, below.

7 The lower court's complaints about the content of the orders directing mental evaluation place form over substance. See pp. 36-37, below.

8 Moreover, as discussed at pp. 31-33, below, the organic brain syndrome/mental retardation dichotomy is a red herring upon which the lower court placed far too much weight.

establish prejudice under *Strickland* and is, therefore, entitled to no relief. The judgment of the lower court vacating Gunsby's death sentence should be set aside.

Moreover, insofar as the lower court criticizes trial counsel for relying upon testimony that Gunsby was a paranoid schizophrenic at the penalty phase rather than presenting evidence that Gunsby suffers from diffuse organic brain syndrome, it is worthy of note that the mental state testimony presented at the penalty phase (that Gunsby is schizophrenic) was totally consistent with Gunsby's defense theory that he was functioning under the delusion that he was a protector of the black community. *Gunsby v. State,* 574 So.2d at 1089. Such a delusion is entirely consistent with paranoid schizophrenia, *Diagnostic and Statistical Manual, Third Edition-Revised at 187,* (hereinafter *DSM-III-R)* while it is utterly inconsistent with the newly-proffered testimony of organic brain syndrome. In other words, without the testimony that Gunsby is paranoid schizophrenic, the argument cannot be made that Gunsby was delusional at the time of the murder. Consequently, the net result is that there is no argument against the applicability of the cold, calculated, and premeditated circumstance, and there is nothing in mitigation which would attack that aggravator. On direct appeal, this Court noted that "the evidence reflects that Gunsby's delusion seemed to be directed toward ridding his neighborhood of drug dealers". *Gunsby,* 574 So.2d at 1090. Given the 3.850 evidence, it now seems that Gunsby is not delusional at all. If Gunsby is not delusional, and he cannot continue to claim that he is given his

own 3.850 evidence, then he is far better off mentally than the jury (and this Court) were led to believe. Because that is the case, there is no factual support for the lower court's finding of ineffective assistance of counsel. That ruling is wrong as a matter of law, is an abuse of discretion, and should be reversed.

It is contrary to reason to find trial counsel ineffective for not trading off testimony that his client was schizophrenic (which fit hand-in-glove with the defense theory) in exchange for testimony that his client suffered from "diffuse organic brain damage", when there was utterly no way to connect the murder to the claimed brain damage. Without the schizophrenia testimony, Gunsby had no credible argument to explain his actions. Trial counsel did the best he could with what he had, and the lower court's order finding ineffectiveness is erroneous. That order should be vacated and the death sentence be reinstated.

The second reason that the lower court should be reversed is because that court did not properly apply the *Strickland v. Washington* analysis. As set out at pp. 14-17, above, trial counsel is presumptively effective, and decisions of counsel are entitled to great deference. *Strickland v. Washington,* 466 U.S. at 689 ("... it is all to easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable"). Likewise, a hindsight-based evaluation of trial counsel's performance is flatly prohibited by *Strickland* itself and the enumerable decisions following it. Most recently, in *Waters v. Thomas,* the *en banc* Eleventh Circuit stated that "nothing is

clearer than hindsight except perhaps the rule that we will not judge trial counsel's performance through hindsight". *Waters v. Thomas,* 46 F.3d at 1514. In *Waters,* the Eleventh Circuit expressly stated that the tactic Gunsby has used, which is to show "what might have been" had the penalty phase been presented in the manner in which his most recent lawyers deem correct, is flatly prohibited. *Waters, supra.* In this case, the lower court was misled into believing that Gunsby established more than he did. In fact, the only thing that Gunsby has been able to do is demonstrate that through "the luxury of time and the opportunity to focus resources on specific parts of a made record" he has been able to identify what he (and the lower court) categorize as deficiencies in the performance of trial counsel. *See, Waters, supra.*

Gunsby's 3.850 presentation, and the trial court's order, are based upon an evaluation based solely upon hindsight, which, as is axiomatic, is 20/20. The United States Supreme Court, the Eleventh Circuit Court of Appeals, and this Court have unequivocally rejected that hindsight-based evaluation of trial counsel's performance which, years after the fact, focuses not upon the performance of counsel at the time, but rather upon a speculative presentation of "what might have been" if trial counsel had proceeded as the defendant's most recently engaged attorneys have determined, in their wisdom, to be the appropriate defense. That is not the law, and it should not be. The lower court abused its discretion in finding deficient performance on the part of Gunsby's trial counsel.

The lower court made much of trial counsel's testimony, at the 3.850 hearing, that he wished he could have done better and that, in hindsight, he would have done things differently. That testimony is entitled to little weight, and, in granting sentence stage relief, the lower court gave it far too much weight. The law is settled that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's *perspective at the time.*" *Francis v. State,* 529 So. 2d 670, 672 n.4 (Fla. 1988). The lower court wholly failed to consider counsel's perspective at the time of trial, relying instead on counsel's after-the-fact testimony.

Ineffectiveness of counsel is a question of law which must be decided by the court, and, consequently, "admissions of deficient performance by attorneys are not decisive." *Harris v. Dugger,* 874 F.2d 756, 761 n.4 (11th Cir. 1989). *See also, Mills v. State,* 603 So.2d 482 (Fla. 1992); *Kellog v. State*, 569 So.2d 754, 761 (Fla. 1990). Of course, "[i]n retrospect, one may always identify shortcomings", *Cape v. Francis,* 741 F.2d 1287, 1302 (11th Cir. 1984), *cert. denied*, 474 U.S. 911 (1985), and, as the Eleventh Circuit pointed out in a pre-*Strickland* decision, "it is proverbial that the finest ideas emerge on the way back from the courthouse." *Stanley v. Zant,* 697 F.2d 955, 970 n.12 (11th Cir. 1983). Few trials are perfect, and "[i]t is almost always possible to imagine a more through job being done than was done". *Maxwell,* 490 So.2d at 932; *see also, White v. State,* 559 So.2d 1097, 1100 (Fla. 1990).

In a similar case, in which trial counsel had executed an affidavit disparaging his trial performance, the Fifth Circuit stated:

> [t]he greatest irony is that present counsel secured an affidavit from [trial counsel] which recites a litany of "I-did-not's" and "in-hindsight, I should haves," and that in his recent testimony he felt it necessary to say, "I wish I could have done better." This self-deprecation by [trial counsel] is both uncalled for and inaccurate. The reason [petitioner] faces death at the hand of the State of Louisiana is because he murdered a police officer of that state who stopped his defectively lighted car while he was driving drunk. Killing an officer who is in the process of taking a drunken driver off the highways has got to be one of the hardest of all crimes to defend.

*Prejean v. Smith*, 889 F.2d 1391, 1405 (5th Cir. 1989).

While trial counsel's performance may not have measured up to his expectations, it was constitutionally adequate. *See, e.g., Raulerson v. Wainwright*, 732 F.2d 803, 810 (11th Cir. 1984). The lower court placed far too much weight on the testimony of trial counsel, and in so doing failed to "eliminate the distorting effect of hindsight" despite a decade's worth of cases which have reaffirmed that fundamental premise. *Strickland v. Washington*, 466 U.S. at 689; *see also, Mills v. State*, 603 So. 2d 482, 485 (Fla. 1992); *Raleigh v. State*, 590 So. 2d 397, 401 n.4 (Fla. 1991); *Stano v. State*, 520 So. 2d 278, 281 n.5 (Fla. 1988).

The hindsight-based nature of the lower court's evaluation of trial counsel's performance is clear when the penalty phase presentation is compared to the 3.850 presentation. At the

penalty phase of Gunsby's capital trial, trial counsel presented evidence that Gunsby came from a dysfunctional family, was mentally retarded, and was paranoid schizophrenic. *(PCR 628-632)*. At the 3.850 hearing, Gunsby presented testimony from his most recently engaged experts to the effect that he has "*organic brain syndrome*", mild mental retardation, and a "personality disorder not otherwise specified."[9] *(PCR 934-38; 947)*.

Obviously, this is not a case in which no mental state mitigation was presented at the penalty phase of the defendant's capital trial. Instead, the situation presented by this case is one in which the defendant is using a new mental state diagnosis in the post-conviction proceeding in the hope that it will be successful when the original one was not. Of course, "psychiatric testimony is typically a battle of experts", *Harris v. Vasquez*, 901 F.2d 724, 726 (9th Cir. 1990), and the disputatiousness of after-the-fact mental state experts is well-recognized. *Engle v. Dugger*, 576 So. 2d 696, 703 (Fla. 1991). Gunsby "cannot now obtain 'a second bite of the apple' because he believes a new group of psychiatrists would offer a different defense than the psychiatrists originally chosen by [defense counsel]...". *Harris v. Vasquez*, 943 F. 2d 930, 950-1 n.18 (9th Cir. 1991); *see also, Provenzano v. Dugger*, 561 So.2d 541, 546 (Fla. 1990) ("The mere fact that Provenzano has now secured an expert who might have offered more favorable testimony is an insufficient basis for relief.") When the psycho-legal jargon of

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[9] The trial court labels organic brain syndrome as "organic brain damage".

the new experts is stripped away, the 3.850 testimony is of less mitigation value than the evidence put before the jury at trial.

At trial, the jury heard that Gunsby came from a dysfunctional family. Such evidence is, of course, potentially mitigating. *See, e.g., Walton v. State,* 19 Fla. L.Weekly S639, 641 and n.6 (Fla., Dec. 1, 1994). Likewise, the penalty phase jury heard that Gunsby was mentally retarded. Once again, that evidence is of potential mitigating value. *Fitzpatrick v. State,* 527 So. 2d 809, 811-12 (Fla. 1988); *Wickham v. State,* 593 So. 2d 191, 194 (Fla. 1991). Finally, the penalty phase jury heard expert testimony that Gunsby suffered from paranoid schizophrenia. Of course, a diagnosis of paranoid schizophrenia is extremely powerful mitigation, *Id* and, in this case, that diagnosis dovetailed into the penalty phase defense theory remarkably well. See pp. 24-26, above.

In contrast, the 3.850 evidence established the *possibility* of "organic brain syndrome".[10] Under questioning from the trial court, one of Gunsby's handpicked experts testified that "brain damage" is a descriptive term that can properly be applied to a mentally retarded individual. That expert stated "brain damage is used so loosely even by myself and other colleagues as by lay people that you always -- you are never sure what people are talking about". *See, PCR 936.* That observation is quite apt in

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[10] Under the *DSM-III-R* diagnostic criteria, "organic mental syndromes" range from those symptoms caused by nicotine withdrawal *(DSM-III-R at 150)* and excessive caffeine consumption (*Id.*, at 138) up to those symptoms caused by Alzheimer's Disease and temporal lobe epilepsy (*Id.*, at 94).

this case, when, at worst, Gunsby merely suffers from diffuse brain damage which had little or no effect on his behavior.

The psychologist selected by Gunsby for testimony at the 3.850 hearing testified that Gunsby falls within the range of *mild mental retardation*. *(PCR 810)*. That witness agreed that the mental retardation testimony presented at the penalty phase of Gunsby's capital trial was accurate. *(PCR 842)*. That expert testified that alcohol consumption by Gunsby had little effect on his behavior. *(PCR 845)*.

In contrast, Gunsby's *other* expert testified that alcohol consumption had much effect on the defendant's behavior. *(PCR 935-938)*. Moreover, one of Gunsby's most recent experts testified that whatever "brain damage" he has is explained by his mental retardation, his alcohol abuse, or both *(PCR 935)*. The *other* expert unequivocally testified that any "brain damage" he had caused the presence of mental retardation and that alcohol had little or no effect.[11] *(PCR 843-45)*.

The psychologist who testified for Gunsby in the 3.850 hearing testified that he only suffered from "diffuse" brain damage. *(PCR 819)*. Finally, as the trial court stated in the order granting sentence stage relief, Gunsby's full scale IQ tested at 57 in October of 1988, and at 66 in February of 1994.

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[11] The mental retardation/brain damage issue is a red herring, and the trial court erred in treating the claimed brain damage as a major factor because the two components are so intertwined. The State suggests that, in this case, the mental retardation trumps the brain damage. Because of that, Gunsby cannot prevail on the ineffectiveness claim because that evidence was, as Gunsby's new expert admits, accurately presented to the penalty phase jury.

*(PCR 3558)*. The lower court did not recognize that both of those IQ scores fall within the mild range of mental retardation, and, moreover, did not recognize that while the 1988 IQ score could in fact fall within the moderate range of mental retardation given the error of measure present in IQ testing, the most recently obtained IQ score of 66 cannot fall within that range. *See e.g., PCR 2964.* In other words, the mental retardation testimony presented at the penalty phase of Gunsby's capital trial is more favorable to Gunsby than the most recently presented testimony. In fact, the more recent testimony indicates that Gunsby is better off than the 1988 score indicated. In any event, the jury that recommended a death sentence in this case heard testimony that Gunsby's IQ was lower than did the 3.850 judge who granted sentence stage relief.

Finally, with regard to the most recently applied diagnosis of personality disorder not otherwise specified, that diagnosis is extremely nebulous, and includes "disorders of personality functioning that are not classifiable as a specific personality disorder." *(DSM III-R at 358)*. Such a catchall diagnosis is obviously of less import than is a diagnosis of paranoid schizophrenia, which is what the penalty phase jury heard.[12] The trial court abused its discretion in granting relief because that court found that trial counsel did not present the penalty phase in the "right" way which is, according to the order granting

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[12] Schizophrenia is defined as a disorder which exhibits "characteristic psychotic symptoms." *DSM III-R at 187.* Personality disorder not otherwise specified is defined as being "[d]isorders of personality functioning that are not classifiable as a specific personality disorder." *Id.*, at 358.

relief, the way in which the penalty phase "might have been" had Gunsby's present lawyers tried it. As set out above, that is not the standard, and a grant of relief based upon such hindsight is an abuse of discretion.

The courts have frequently noted that psychiatric testimony is little more than a "battle of experts", *Harris v. Vasquez, supra,* and, in a Florida case, the Eleventh Circuit stated "[p]artisan psychiatrists and psychologists will often disagree in courts of law". *Bertolotti v. Dugger,* 883 F.2d 1503, 1518 (11th Cir. 1989), *cert. denied,* 110 S.Ct. 3296 (1990). Merely because Gunsby has now found mental state experts who will testify in a manner different from that of the penalty phase experts, establishes nothing other than that psychology and psychiatry are inexact sciences. *See, Provenzano, supra.* The fact that trial counsel did not continue to look for another expert after he located an expert who would testify that Gunsby was mentally retarded and paranoid schizophrenic does not demonstrate deficient performance. *See, Medina v. State,* 573 So.2d 295, 297-8 (Fla. 1990) (No finding of ineffectiveness even though no penalty phase experts and 3.850 experts testified to presence of organic brain damage and paranoid schizophrenia with psychosis). It would be unreasonable to expect trial counsel to discard such testimony when that evidence was more favorable than the most recently introduced testimony. Gunsby was not even entitled to a favorable physiatric opinion, *Ake v. Oklahoma,* 470 U.S. 82, 83 (1985), and it is an abuse of discretion to determine that trial counsel was ineffective because he did not continue to shop for an expert after finding one whose testimony was very favorable.

Yet another defect in the 3.850 evidence, which was ignored by the lower court, is the inconsistency between the testimony of Gunsby's handpicked experts. See, pp. 31-32, above. Those inconsistencies blunt the impact of that testimony, with the result that it is less favorable to Gunsby than the testimony presented to the penalty phase jury.

Insofar as the 3.850 testimony of the original trial experts is concerned, Dr. Poetter testified that "questions could have been asked to clarify issues that were raised." However, Dr. Poetter was in fact prepared to testify concerning potential mitigation *(PCR 905)* and testified that regardless of the party posing the questions, his testimony concerning mitigation would have been the same. *(PCR 906)*. Moreover, Dr. Poetter testified that Gunsby may well meet the criteria for antisocial personality disorder. (*Id.*). Of course, antisocial personality disorder is not a mitigator that is entitled to more than very minimal weight. *See, e.g., Carter v. State,* 576 So. 2d 1291, (Fla. 1991). Insofar as Dr. Mhatre is concerned, his testimony was that his absolute office practice is that anyone with a full scale IQ score below 70 is incompetent to stand trial. *(PCR 1038)*. However, with all respect to Dr. Mhatre, that is not the law in this state. In fact, Dr. Mhatre also testified that, when he evaluated Gunsby in person, he had absolutely no doubt about his competence to stand trial. *(PCR 1040)*.[13] Regardless of what Dr. Mhatre's office practice may be, it does not comport with the

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[13] Dr. Mhatre testified unequivocally that his finding of incompetence would be based *solely* on the IQ score. *(PCR 1041).*

standard of the profession in reaching even a diagnosis of mental retardation, which requires, in addition to a full scale IQ score below 70, concurrent deficits in adaptive functioning as well as onset prior to age 18. *DSM III-R* at 31-32. If an IQ score standing alone is insufficient to make a diagnosis of mental retardation, it stands reason on its head to suggest that an individual may be determined incompetent to stand trial solely upon that score. Dr. Mhatre's testimony in this regard is wholly arbitrary and is entitled to absolutely no weight. The order granting relief should be reversed.

The third reason that the trial court's grant of sentence stage relief is an abuse of discretion is, the lynch pin of the court's decision that counsel's performance was deficient is predicated upon the fact that trial counsel did not specifically request that the mental state experts evaluate Gunsby for organic brain damage.[14] *(PCR 3561)*. To the extent that the lower court's order suggests that trial counsel is obligated to request the mental state experts to conduct specific sorts of testing, that ruling is palpably wrong. The role of the lawyer is not to function as the expert witness, nor is the lawyer's role to direct that the expert conduct certain sorts of tests. In fact, if trial counsel had done what the court seems to suggest that he should have, it would leave the unmistakable impression of

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[14] The lower court's apparent belief that "organic brain damage" would only be detected by an expert who was specifically ordered to look for it is not correct. See pp. 23-24, above.

testimony that had been determined prior to the completion of any testing whatsoever.

To the extent that the lower court based its decision on the claimed deficiencies in the orders directing that Gunsby be evaluated, the lower court's resolution of that issue is an abuse of discretion because it elevates form over substance. Regardless of whether or not the orders specifically directed that the defendant be evaluated for possible mitigating factors, the result, as demonstrated in the penalty phase testimony, is clear that he was. *See, e.g., TR591-650*. Trial counsel presented mental state mitigation, and, regardless of any lack of specificity in the order appointing the expert, the end result was the presentation of mental state mitigation testimony. The lower court abused its discretion in granting relief based upon the content of the order when the content of the testimony presented to the penalty phase jury was clearly directed toward mitigation.

In granting sentence stage relief, the lower court found that trial counsel did not provide any background information to the mental state experts who testified at the penalty phase. However, there is no evidence that anything trial counsel did not provide to those experts would have affected their opinions. *See, e.g., Johnston v. Dugger,* 583 So.2d 657, 661 (Fla. 1991) (no *Strickland* prejudice from failure to provide information -- mental state evaluations adequate); *Engle v. Dugger,* 576 So.2d 696, 701 (Fla. 1991). Moreover, Doctors Mhatre and Poetter were not confidential experts, and it could well have been improvident to

reveal too much information to those experts.[15] In any event, both of those experts were aware of Gunsby's family history, and the fact that schizophrenia ran in that family. *See, e.g., TR609; TR874.* At no time did Dr. Poetter testify that either statutory mental mitigator was applicable to Gunsby *(PCR 890; 893-4),* and, moreover, testified only that any further information concerning Gunsby *might* have given him a *slightly* different perception of Gunsby insofar as the diagnosis of antisocial personality disorder was concerned. *(PCR 900).*

At trial, Dr. Poetter testified that Gunsby exhibited slow cognitive thinking *(TR594)* and fell within the mild range of mental retardation *(TR596).* Dr. Poetter further testified that Gunsby would be eligible for SSI *(TR598),* that Gunsby was not mentally ill *(TR602),* and was not suffering from an extreme mental or emotional disturbance at the time of the murder *(TR601).* Further, he summarized his diagnostic impressions as including mild mental retardation, continuous alcohol abuse, and antisocial personality disorder. *(TR607-8).* Regardless of Dr. Poetter's testimony concerning the speculative effect that some unspecified information might have on his diagnosis of antisocial personality disorder, Dr. Poetter never identified what sort of information would have any effect whatsoever on that diagnosis. Indeed, the criteria for a diagnosis of antisocial personality disorder are quite specific *(DSM III-R at 344-6)* and, while Gunsby may not over-

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[15] Drs. Mhatre and Poetter were not confidential experts and their purpose in being involved in this case was not to evaluate Gunsby for mitigation purposes, anyway. Those experts become involved after the confidential expert evaluated the defendant for *competency* purposes. *See, TR774-778.*

meet those criteria, he still falls well within them given his clear pattern of antisocial behavior.

In his closing argument to the jury, trial counsel emphasized that only Dr. Conley (the confidential expert) spent enough time with Gunsby to conduct an adequate evaluation *(TR684)*, that both mental state mitigating circumstances existed *(TR687)*, and that Gunsby should not be executed because he is mentally retarded *(TR691)*. Moreover, in his final sentencing memorandum to the trial court, trial counsel demonstrated that Dr. Mhatre's evaluation could not have lasted any longer than 45 minutes. *(TR873)*. Trial counsel was not deficient in his handling of the mental state component of the penalty phase, and the trial court's grant of sentence stage relief should be reversed. While the court made much of trial counsel's "admission" that Dr. Conley's background did not equip him to conduct an adequate evaluation *(PCR 3562)* that is not the standard for evaluating a claim of ineffectiveness of counsel. See pp. 28-29, above. Dr. Conley's testimony was the most favorable of any of the expert witnesses, and, had he been successful, trial counsel's strategic decision could well be regarded as brilliant. However, the converse is not true. Counsel was not ineffective because his client was sentenced to death: Gunsby received that sentence because it is appropriate in this case. Trial counsel is under no circumstances obligated to "shop" for an expert, even though

trial counsel's testimony at the 3.850 hearing was that, given his subsequent experience, he would do exactly that. *(PCR 276).*[16]

The fourth reason that the lower court's order granting a new penalty phase should be reversed is because that court erroneously found that Gunsby had satisfied the second (prejudice) prong of *Strickland v. Washington*. As set out at pp. 31-33, above, the mitigation testimony presented at the penalty phase of Gunsby's capital trial was actually more favorable to Gunsby than the testimony upon which the lower court granted relief. In finding *Strickland* prejudice, the lower court necessarily determined that testimony of mild mental retardation, diffuse "brain damage", and personality disorder not otherwise specified would have been sufficient to offset the heavy aggravating circumstances present in this case. See pp. 3-6, above. When the extremely aggravated nature of this case is considered, it is readily apparent that "...'[t]he mitigating circumstances in no manner ameliorate the enormity of [petitioner's] guilt.'" *Tafero v. Dugger,* 873 F.2d 249, 252 (11th Cir. 1989). Moreover, whatever mitigating effect the newly-proffered "mitigation" has "does not begin to tip the balance of aggravating and mitigating factors in favor of [a] petitioner who has simply failed to show that counsel's performance was so deficient during the sentencing phase that this court cannot rely

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16 Trial counsel handled the executive clemency proceeding in the *Daniel Eugene Remeta* case, and prepared a case for mitigation in that proceeding. *(PCR261).* *Remeta* preceded the trial in this case.

on the result as being just." *Bolender v. Singletary,* 16 F.3d 1547, 1561 (11th Cir. 1994).

Finally, even if the newly-proffered "mitigation" had been introduced at the penalty phase, that evidence would not have been sufficient to produce a life sentence after proportionality review by this Court. *See, e.g., Wuornos v. State,* 644 So. 2d 1000, 1005 (Fla. 1994); *Bowden v. State,* 588 So.2d 225 (Fla. 1991); *Hayes v. State,* 581 So.2d 121 (Fla. 1991); *Freeman v. State,* 563 So.2d 73 (Fla. 1990). What the "mitigation" presented at the 3.850 hearing does establish is that Gunsby was not at all delusional, and that he does not in fact have the mind of a child. The recently presented evidence establishes that he is psychologically better off than the trial evidence suggested, and the decision of the lower court should be set aside.

The evidence of Gunsby's guilt was overwhelming, and the aggravating factors present in this case are not even the subject of debate. Given the weight of the aggravation, the speculative nature of the mental state evidence, and the outright conflict as to some of that evidence, there is no reasonable probability of a different result had the "new mitigation" been presented to the penalty phase jury. The lower court abused its discretion in finding that there was a reasonable probability of a different result. That order should be set aside and the death sentence reinstated.

## CONCLUSION

Based upon the foregoing, the State respectfully submits that the order granting sentence stage relief should be reversed and Gunsby's death sentence reinstated.

Respectfully submitted,

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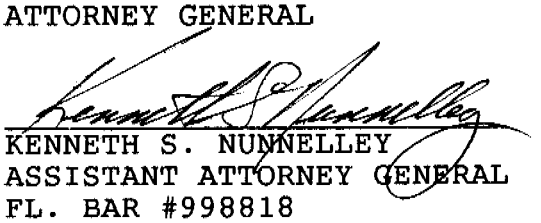
ATTORNEY GENERAL



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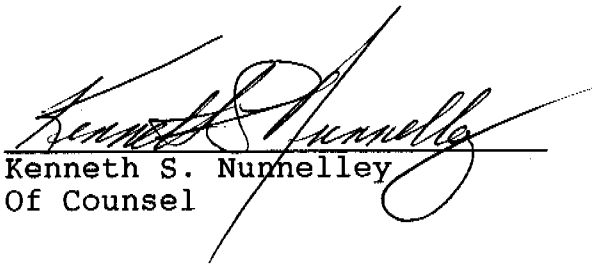
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U.S. Mail to: Bruce A. Peterson, Esq., Popham, Haik, Schnobrich & Kaufman, Ltd., 222 S. 9th St., Ste. 3300, Minneapolis MN 55402, and Douglas J. Chumbley, Popham, Haik, Schnobrich & Kaufman, Ltd., 4000 International Pl., 100 S.E. 2nd. St., Miami, Fl. 33131, on this the 7th day of June, 1995.



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