IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,562

GEORGE PORTER, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

AMY C. SETTLEMIRE
Assistant CCRC
Florida Bar No. 0788724

LINDA McDERMOTT
Staff Attorney
Florida Bar No. 0102857

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
405 N. Reo Street
Suite 150
Tampa, FL 33609-1004
(813) 871-7900

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Porter's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied several of Mr. Porter's claims without an evidentiary hearing. The circuit court held a limited evidentiary hearing on the ineffective assistance of counsel regarding counsel's failure to pursue mental health evaluations for the purpose of developing mitigating evidence and counsel's failure to present matters in mitigation.

The following symbols will be used to designate references to the record in this instant cause:

"R." -- record on direct appeal to this Court;

"PC-R." -- record on the first 3.850 appeal to this Court;

"PC-R2." -- record on the second 3.850 appeal to this Court;

"SPC-R2." -- supplemental record on the second 3.850 appeal to this Court.

"T" --transcript of the evidentiary hearing held on January 4-5, 1996.

REQUEST FOR ORAL ARGUMENT

Mr. Porter has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Porter, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

The Circuit Court of the Eighteenth Judicial Circuit, Brevard County, entered the judgments of conviction and sentence under consideration. Mr. Porter was charged by indictment dated October 28, 1986, for the first degree murders of his ex-lover, Evelyn Williams, her boyfriend and other related offenses (R. 2578-79).

The record does not contain any proceeding at which Mr. Porter initially requested to represent himself. The only pretrial hearing contained in the record are hearings conducted February 25, 1987 (R. 2473), March 13, 1987 (R. 2495), November 20, 1987 (R. 2506), November 24, 1987 (R. 1544), and November 30, 1987 (R. 1569). At the February and March hearings, Mr. Porter was represented by Assistant Public Defender Brian Onek; at the November hearings, Mr. Porter appeared pro se. No request by him to do so appears in the record.

Mr. Porter was initially represented by the Public Defender's Office, whose motion to withdraw as counsel was granted on March 17, 1987 (R. 2642). Throughout May and June of 1987, Mr. Porter made numerous requests for assistance to the Public Defender's Office. On June 1, 1987, Mr. Porter filed several pro se motions (R. 2645-59), which had been provided to him by the Public Defender's Office.

On June 17, 1987, Sam Bardwell entered an appearance as Mr. Porter's counsel (R. 2660). On June 22, 1987, Mr. Bardwell, the State, and Judge Antoon signed a "stipulation" that Mr. Bardwell

was "full counsel" for Mr. Porter (R. 2661). The record reflects no other action regarding Mr. Porter's counsel until the November 20, 1987, hearing at which Mr. Porter appeared pro se.

As his jury trial began, Mr. Porter was representing himself. Throughout the guilt phase Mr. Porter became increasingly agitated about his case. Suddenly, in the midst of his jury trial, Mr. Porter pled guilty to all charges (R. 1523). After entering the guilty pleas, Mr. Porter attempted suicide twice by throwing himself off a second story walkway in the county jail (R. 1653-1699).

Thereafter, Mr. Porter attempted to withdraw his guilty pleas on the basis that they were made while he was under the threat that his family was in danger. The court denied his motion to withdraw the guilty pleas and continued on to penalty phase with standby counsel now acting as defense counsel (R. 1654, 1780, 1781).

After a penalty phase conducted exclusively by Mr. Bardwell, the jury recommended the death sentence (R. 2273). On March 4, 1988, the trial court imposed, inter alia, a sentence of death on one count of first-degree murder and a sentence of life imprisonment on the other count of first-degree murder (R. 2452-53).

On direct appeal, this Court affirmed Mr. Porter's convictions and sentences. Porter v. State, 564 So. 2d 1060 (Fla. 1990). The United States Supreme Court denied certiorari on February 19, 1991. Porter v. Florida, 111 S. Ct. 1024 (1991).

Mr. Porter, in compliance with a demand by the Governor of the State of Florida, initiated his Rule 3.850 motion eight months early on June 22, 1992 (PC-R.21-32). The initial Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend specifically pled that it was incomplete due to the failure of state agencies to comply fully with Chapter 119 (PC-R. 21-32).

On February 15, 1993, the circuit court granted leave to amend the initial 3.850 motion within 60 days of the date that all documents were produced (PC-R. 80-82). Subsequently, an Amended Motion to Vacate was filed on June 28, 1993. The Amended Motion set out detailed claims for relief including issues such as competence, Brady violations, ineffective assistance of standby counsel, and prosecutorial misconduct by the state (PC-R. 7-183). The motion was verified by Mr. Porter's attorney on behalf of his incompetent client. On August 18, 1993, the court summarily denied the motion because the oath was not signed by Mr. Porter himself (PC-R. 186-89).

A Motion to Reconsider Order Denying Defendant's Motion for Post-Conviction Relief was filed with another Amended Motion to Vacate which was verified by Mr. Porter himself (PC-R. 1-6). Even though the motion had been verified by Mr. Porter, the circuit court summarily denied the Motion to Reconsider and the Amended Motion to Vacate without an evidentiary hearing (PC-R. 193-218). Notice of Appeal timely followed on October 5, 1993 (PC-R. 218-219). After the State conceded that the circuit

court's denial of Mr. Porter's amended Rule 3.850 motion was without prejudice and that Mr. Porter could simply file a verified pleading, this Court dismissed Mr. Porter's appeal and remanded Mr. Porter's case to the circuit court.

Following remand, Mr. Porter filed another verified amended Rule 3.850 motion (PC-R. 1). The lower court held a Huff hearing on May 22, 1995. Thereafter, the lower court entered an order denying all but two (2) of Mr. Porter's claims (PC-R2. 322-354).

On January 4-5, 1996, the circuit court held a hearing on two issues: (1) whether Mr. Porter received ineffective assistance of counsel regarding counsel's failure to pursue mental health evaluations and (2) whether Mr. Porter received ineffective assistance of counsel regarding counsel's failure to present matters in mitigation.

On May 10, 1996, the lower court denied Mr. Porter relief (PC-R2. 1203-15). Notice of Appeal timely followed on July 15, 1996.

SUMMARY OF ARGUMENT

1. At the sentencing phase of his trial, Mr. Porter was denied effective assistance of counsel. As a result, counsel's performance was deficient and Mr. Porter's death sentence is unreliable as a consequence.

2. Mr. Porter is entitled to another Huff hearing on the claims he raised in his Rule 3.850 motion. The trial court erred in summarily denying these claims without allowing Mr. Porter the benefit of argument on his claims contrary to Huff v. State.

3A. Due to omissions in the record on appeal, Mr. Porter has been denied a proper direct appeal from his judgment of conviction and a proper appeal from his sentence of death contrary to the U.S. and Florida Constitutions. Mr. Porter and collateral counsel cannot effectively evaluate and raise claims based on this defective record.

3B. Mr. Porter was incompetent to stand trial and undergo capital sentencing. The trial court failed in its duty to conduct an adversarial hearing on Mr. Porter's competency despite clear indications by the state attorney and court-appointed mental health experts that Mr. Porter was incompetent.

3C. Mr. Porter's constitutional rights were violated because an adequate and thorough Faretta hearing, that was required to ensure that Mr. Porter was competent to make a knowing and intelligent waiver of his right to counsel, was not conducted. Mr. Porter could not make a voluntary, knowing and intelligent waiver of his right to counsel because he was incompetent.

3D. Mr. Porter's right to a reliable, fair and individualized sentencing proceeding was denied because the mental health experts who evaluated him failed to conduct professionally competent and appropriate evaluations. Defense counsel, likewise, failed to render effective assistance of counsel resulting in proceedings at which Mr. Porter was allowed to proceed pro se and waive his right to counsel when he was incompetent.

3E. Because the state withheld evidence which was material and exculpatory in nature and/or presented misleading evidence, Mr. Porter was deprived of his right to due process under the U.S. and Florida Constitutions. Interference by the trial court and standby counsel made it impossible for Mr. Porter to effectively represent himself during guilt phase and prevented Mr. Porter from adequately investigating or preparing to defend his case and challenge the state's evidence. A full adversarial testing could not occur due to the state's omissions and the trial court's interference.

4. Mr. Porter's death sentence was fundamentally unfair and unreliable because of the introduction of non-statutory aggravating factors and the state's arguments upon those factors. Defense counsel's failure to object or argue effectively against these non-statutory aggravating factors was ineffective assistance which prejudiced Mr. Porter.

5. The penalty phase jury instructions were incorrect under Florida law because they unconstitutionally shifted the burden to Mr. Porter to prove that death was inappropriate. The trial court used this presumption of death to sentence Mr. Porter to die. Defense counsel was ineffective for failing to object or argue this issue. The resulting prejudice to Mr. Porter is manifest.

6. Mr. Porter's death sentence was tainted by unconstitutionally vague and overbroad instructions to the jury and by improper application of the statutory aggravators of

"heinous, atrocious or cruel", "cold, calculated and premeditated", "prior violent felony", and "during the course of a felony" contrary to the holdings in Espinosa v. Florida and Richmond v. Lewis, and in violation of the Eighth and Fourteenth Amendments.

7. Mr. Porter was denied his rights under the sixth, eighth and fourteenth amendments to the U.S. Constitution when his death sentence rests upon an unconstitutional automatic aggravating circumstance. Defense counsel's failure to object to this aggravating circumstance was ineffective assistance of counsel.

8. Mr. Porter's judge failed to consider mitigating factors which are clearly set out in the record in violation of the eighth and fourteenth amendments.

9. In penalty phase of trial, the prosecutor's argument was improper and his inflammatory comments rendered Mr. Porter's death sentence fundamentally unfair and unreliable.

ARGUMENT I

THE LOWER COURT ERRED IN DENYING MR. PORTER RELIEF ON HIS CLAIM THAT TRIAL COUNSEL FAILED TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE.

A. INTRODUCTION

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversary testing process. Id, at 688. Specifically, counsel has a duty to investigate in order to make the adversarial testing process work in the particular case. Id. at 690.

Beyond the guilt-innocence stage, defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

Counsel's highest duty is the duty to investigate and prepare. Where counsel does not fulfill that duty, the defendant

is denied a fair adversarial testing process and the proceedings' results are rendered unreliable.

No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. See Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986). Mr. Porter's sentence of death is the resulting prejudice. It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trial would have been different if the evidence discussed below had been presented to the sentencer. Strickland, 466 U.S. at 694. The key aspect of the penalty phase is that the sentence be individualized, focused on the particularized characteristics of the individual defendant. Penry v. Lynaugh, 488 U.S. 74 (1989); Gregg v. Georgia, 428 U.S. 153 (1976). This did not occur in Mr. Porter's case.

At the evidentiary hearing, Mr. Porter proved both that trial counsel's performance was deficient and that prejudice resulted. Rule 3.850 relief is appropriate.

B. COUNSEL FAILED TO DEVELOP MITIGATION

1. Military service

Trial counsel failed to present any evidence regarding Mr. Porter's military service. At the evidentiary hearing documentary and testimonial evidence was introduced which established that George Porter, Jr. is a war hero. Mr. Porter served his country and fought bravely in the Korean War.

Mr. Porter's military records indicate that he enlisted in the U.S. Army at 16[1] years of age, on August 30, 1949 (Defense Exhibit 3). He was awarded the National Defense Service Medal for enlisting in time of conflict. Id. He also was awarded the United Nations Service Medal for serving with United Nations forces in the Korean conflict. Id.

Mr. Porter also earned several combat medals. Those awards include the Korean Service Medal with three (3) Bronze Service Stars. Id. To be awarded this medal Mr. Porter had to meet the following criteria:

> **Korean Service Medal.** Awarded for combat service within the Korean Theater between 27 June 1950 and 27 July 1953, one bronze service star for each campaign under any of the following conditions:
>
> (1) Assigned or attached to and present for duty with a unit during the period in which it participated in combat.
>
> (2) Under orders in the combat zone, in addition, meets any of the following requirements:
>
> (a) Awarded a combat decoration.
>
> (b) Furnished a certificate by a commanding general of a corps, higher unit, or independent force that he actually participated in combat.
>
> (c) Served at a normal post of duty (as contrasted to occupying the

[1] His birth certificate shows his actual date of birth to be February 18, 1933, not 1932 as shown on his DD-214. His mother misrepresented his age and signed for him to enlist when he was actually only 16 years old.

status of an inspector, observer, or visitor).

(3) Was an evader or escapee in the combat zone or recovered from a prisoner of war status in the combat zone during the time limitations of the campaign. Prisoners of war will be accorded credit for the time spent in confinement or while otherwise in restraint under enemy control.[2]

It is noted above that the Bronze Stars with the Korean Service Medal are for subsequent awards, a total of three times Mr. Porter served in significant campaigns.

Another award bestowed upon Mr. Porter is the Combat Infantryman's Badge, which is a unique award earned only by those who bear the brunt of combat -- the infantry. Mr. Porter's DD-214 indicates that he was awarded this badge November 17, 1950 and he therefore met the following requirements.[3]

COMBAT INFANTRY BADGE

a. Eligibility requirements

(1) An individual must be an infantry officer in the grade of colonel or below, or an enlisted man or a warrant officer with infantry MOS, who subsequent to 6 December 1941 has satisfactorily performed duty while assigned or attached as a member of an infantry unit of brigade, regimental, or smaller size during any period such unit was engaged in active ground combat. Battle participation credit alone is not sufficient; the unit must have been in active ground combat with the enemy

---

[2]From: Guide for the Preparation and Submission of Post Traumatic Stress Disorder Research Requests, (P.68)(undated) U.S. Army and Joint Services Environmental Support Group, 1230 K Street, N.W., Washington, D.C. 20006-3868 (hereafter, Guide).

[3]See Guide, pp. 60, 61.

during the period. Awards may be made to assigned members of ranger infantry companies assigned or attached to tactical infantry organizations.

. . .

(4) One award of the Combat Infantryman Badge is authorized to each individual for each separate war in which the requirements prescribed have been met. Second and third awards are indicated by superimposing 1 and 2 stars respectively, centered at the top of the badge between the points of the oak wreath.[4]

At the evidentiary hearing, Lieutenant Colonel Sherman Pratt testified that, this "is a very prized medal awarded for combat infantrymen who served satisfactorily. They are not issued automatically. He could have only gotten it upon my recommendation as his commanding officer" (T. 159).

The DD-214 also indicates Mr. Porter was awarded a Purple Heart (with first cluster) on June 15, 1951. Mr. Porter was wounded in combat twice. The requirements for award of the Purple Heart are as follows:

PURPLE HEART

a. The Purple Heart is awarded in the name of the President of the United States to any member of an Armed Force or any civilian national of the United States who, while serving under competent authority in any capacity with one of the U.S. Armed Services after 5 April 1917, has been wounded, or killed, or who has died or may hereafter die after being wounded --

(1) In any action against an enemy of the United States;

---

[4]See Guide, pp. 60, 61.

(2) In any action with an opposing armed force of a foreign country in which the Armed Forces of the Untied States are or have been engaged;

(3) While serving with friendly foreign forces engaged in an armed conflict against an opposing armed force in which the United States is not a belligerent party;

(4) As a result of an act of any such enemy or opposing armed forces;

. . .

(b) A Purple Heart is authorized for the first wound suffered under conditions indicated above, but for each subsequent award an Oak Leaf Cluster shall be awarded to be worn on the medal or ribbon. Not more than one award will be made for more than one wound or injury received at the same instant or form the same missile, force, explosion, or agent. For the purpose of considering an award of this decoration, a "wound" is defined as an injury to any part of the body from an outside force or agent sustained under one or more of the conditions listed above. A physical lesion is not required, provided the concussion or other form of injury is directly due to enemy, opposing armed force, or hostile foreign force action. It is not intended that such strict interpretation of the requirement for the wound/injury to be caused by direct result of hostile action be taken which would preclude the award being made to deserving personnel. For example, in a case such as an individual injured while making a parachute landing from an aircraft that had been brought down by enemy fire, or an individual injured as a result of a vehicle accident caused by enemy fire, the decision will be made in favor of the individual and the award will be made.

(c) A wound for which the award is made must have required treatment by a medical officer, and records of medical treatment for wounds or injuries received in action as

> described above must been made a matter of official record.[5]

The DD-214 also specifically sets out what the purple hearts awarded to Mr. Porter were for:

22 September 50, Bullet wound left leg

15 February 51, Pos Fracture Left wrist

Further investigation of this one document indicates that while Mr. Porter lost 365 days due to legal problems in the service, his additional total service for the three years, two months and twenty-one days is reflected in his "Honorable" discharge. Despite the lost time for AWOL (after serving in combat), Mr. Porter was still recommended for the Good Conduct Medal and other honors.

On November 20, 1953, Mr. Porter's records reflect that he was favorably considered for the Good Conduct Medal. This was his last day in the service and the medal has yet to be awarded. The Good Conduct Medal is awarded for persons whose conduct over a three-year period reflected no major disciplinary problems.

Mr. Porter's records further indicate that he is "entitled to award of (the) Korean Presidential Unit Citation" as of January 8, 1951. Following are the reasons for awarding this honor:

---

[5] See Guide, pp. 54, 55.

UNIT LEVEL DECORATIONS DENOTING COMBAT PARTICIPATION

PRESIDENTIAL UNIT CITATION

(Army)

> The Presidential Unit Citation is awarded to units of the Armed Forces of the United States and cobelligerent nations for extraordinary heroism in action against an armed enemy occurring on or after 7 December 1941. The unit must display such gallantry, determination and esprit de corps in accomplishing its mission under extremely difficult and hazardous conditions as to set it apart and above other units participating in the same campaign. The degree of heroism required is the same as that which would warrant award of a Distinguished Service Cross to an individual. Extended periods of combat duty or participation in a large number of operational missions, either ground or air, is not sufficient. This award will normally be earned by units which have participated in single or successive actions covering relatively brief time spans. It is not reasonable to presume that entire units can sustain Distinguished Service Cross performance for extended time periods except under the most unusual circumstances. Only on rare occasions will a unit larger than battalion qualify for award of this decoration.[6]

As noted above, the Presidential Unit Citation is compared to the Distinguished Service Cross -- for an entire unit. The Distinguished Service Cross is second only to the Medal of Honor, and the requirements for the Distinguished Service Cross are applied to an entire unit. Those requirements are:

. . .

---

[6]Guide, pp. 69, 70 (emphasis added).

> (d)istinguished by extraordinary heroism, not justifying the award of a Medal of Honor; while engaged in an action against an enemy of the United States; while engaged in military operations involving conflict with an opposing/foreign force or engaged in an armed conflict against an opposing armed force in which the United States is not a belligerent party. The act or acts of heroism must have been so notable and have involved risk of life so extraordinary [sic] as to set the individual(s) apart from one's comrades.[7]

Colonel Pratt testified that Mr. Porter's regiment did receive that award for its engagement at Chipyong-ni (sic)(T. 160).

Lieutenant Colonel Sherman Pratt testified extensively at Mr. Porter's evidentiary hearing. Colonel Pratt reviewed Mr. Porter's military records and testified that Mr. Porter began his military career at Fort Lewis and was sent to Korea in August, 1950 (T. 126; Defense Exhibit 3). In October, 1950, Mr. Porter was transferred to the 23rd Infantry Regiment; the same unit as Colonel Pratt (T. 126; Defense Exhibit 3). Colonel Pratt testified:

> The records indicate that, (sic) my records at home also that I have obtained from St. Louis Army Records Center, (sic) establish that he was a member of Company B of the 1st Battalion of the 23rd Regiment of the 2nd Division which is the rifle company that I commanded during that period of time.
> So this -- this -- this fella served as one of my troopers in Baker Company of the 23rd Regiment.

(T. 126-27).

---

[7]Guide, p. 52 (emphasis added).

Colonel Pratt testified about the movement and battles in which he and Mr. Porter's unit were engaged. Colonel Pratt stated that shortly after the war broke out, the North Koreans crossed the 38th Parallel. Mr. Porter was sent to Korea in order to help sustain the Pusan Perimeter (T. 128). After a few months, enough troops had been assimilated and the High Command felt that the troops were ready to "break out of the Pusan Perimeter" (T. 129). "In the days that followed that, there was rapid advancement northward and linking up of the two forces. And they reached the 38th Parallel in days" (T. 129).

On November 25, 1950, the army prepared to advance beyond the 38th Parallel (T. 131). Colonel Pratt explained the attack and the actions his Regiment was ordered to take:

> [S]uddenly the Chinese descended in hundreds of thousands and encompassed the whole area. And that was the point of the active Chinese intervention in the Korean War.
>
> * * *
>
> At that point the problem was it was quickly realized by General Walker and General MacArthur that there was a need to evacuate because we could not -- a whole new war with a whole new enemy with hundreds of thousands of new troops, the problem was to see whether or not the Eighth Army could be saved at all. And so the orders were given to a start a withdrawal.
>
> * * *
>
> Well, the -- the challenge at that time was to try to save the Eighth Army so it could fight another day -- save it from complete development and perhaps annihilation.

And to do that, the tactical plan or strategic plan of attack was to leave one division behind to fight a rear guard action.

* * *

That was the 2nd Division.

* * *

That division was left behind to be the last unit out. And whether or not the save - the Eighth Army could be saved depended to a large extent on how long that division could hold the Chinese back long enough to let the rest of the Eighth Army escape.

They did so but at a (sic) ghastly price. The division was -- had over 50 percent casualties. It was rendered combat ineffective (sic). And on the -- it stayed in position.

And on November the 28th, while the rest of the Eighth Army was rapidly deploying southward to and below the 38th Parallel, two of the regiments of the 2nd Division -- the 9th and the 38th Regiments -- start -- finally got their permission to withdraw because the Chinese had already hit the division frontally and were filtering around the right and left flanks. We could see them from the top of our positions way out five miles to the right and left -- long, black columns of Chinese streaming around. And we knew that they were -- trying to encircle and cut us off.

* * *

The 9th and the 38th Regiments, two regiments of the 2nd Division, leaving behind the 23rd Regiment which was my regiment and - -

* * *

It was Mr. Porter's regiment.

* * *

... [O]ur regiment was still in position back forward trying to hold off to let these two regiments get out.

(T. 131-34).

Colonel Pratt also answered several questions regarding the effect of the 2nd Division's stand:

> Q (by Mr. Kissinger): Approximately how many troops were at the Yalu when the Chinese Army crossed? ...
>
> A: Well, the whole Eighth Army. I would say a hundred thousand.
>
> * * *
>
> Q: Approximately how many of those men were able to escape because of -- were able to effectively retreat because of the rear guard action of the 2nd Division?
>
> A: Well, some of the units had pretty heavy casualties on a small unit level -- companies and battalions -- but essentially the whole Eighth Army escaped relatively mostly intact.
>
> Q: And how many men --
>
> A: Except for the 2nd Division.
>
> Q: How many men all told were in the 2nd Division -- were left behind in the 2nd Division to conduct this rear guard action?
>
> A: The whole division. Most of the units were at low strength. Casualties had been heavy. They had never been built up to full strength, but I would say the total combat strength of the 2nd Division at that point was between three and six thousand.
>
> Q: So without being overly dramatic, these three to six thousand men essentially allowed hundreds of thousands of men to get back below the 38th Parallel. Is that a fair statement?
>
> A: There may be veterans from other units who would not put it quite that way, but I think that is essentially true; yes. And I

> think -- I think the military records of the day will bear me out on that.

(T. 134-35). In effect, and as recognized by the medals with which Mr. Porter has been honored, his bravery and courage allowed much of the Eighth Army to retreat safely when the Chinese attacked.

Colonel Pratt also testified more specifically about the conditions Mr. Porter and the 2nd Division encountered during this stand with the Chinese. On November 28th, the 2nd Division continued to "hold the rear" and battle the Chinese (T. 138).

> A: ... I had my company, Baker Company, of which Mr --
>
> * * *
>
> A: -- Porter was assigned. We were in position on the main north/south road through a -- came across the river, across the bridge, across from some rice paddies, and cut through the high ground on which my company was on one side and Able Company was of the 1st Battalion of the 23rd Regiment was on the left side.
>
> We went into position there in the bitter cold night, terribly worn out, terribly weary, almost like zombies because we had been in constant -- for five days we had been in constant contact with the enemy fighting our way to the rear, little or no sleep, little or no food, literally as I say zombies.
>
> We went into position around midnight, just worn out. And the troops, we occupied -- set up their positions. And my instructions were (sic) that the units to the front were pulling through us and we were to guard their withdrawal and that they -- when they finished withdrawing, we would be notified.
>
> Along about one o'clock in the morning by radio, my battalion commander in the valley below radioed to me at the top of the hill. Said, Pratt, all of the friendly units

> have now withdrawn. There are no more ahead of you. If you hear anything out to the front, it will be the enemy. And I said, okay, fine.
>
> So the rest of the night went through quiet, nothing happened. We could hear banging and so forth in the cold, crisp winter air. We could hear lots of noise out to our front but banging around, people shouting, and so forth.
>
> Just as dawn -- the first, gray, rosy fingers of dawn were coming through the eastern horizon, suddenly the Chinese were on us by the hundreds. And there developed for the next hour or so a fierce hand-to-hand fight with the Chinese on our position on top of the hill.
>
> Later in the day when we took a body count, we counted between three and five hundred Chinese that we had killed there on the hill . . .
>
> By late in the day as we were getting more and more antsy, we finally got -- about four o'clock in the afternoon, finally got permission to withdraw ourselves. It made us the last unit of the Eighth Army to withdraw from North Korea.
>
> Q: How many Chinese troops were -- did you engage -- the six thousand men -- these three to six thousand men engage approximately?
>
> A: I don't think that will ever be determined with accuracy. General Willoby, the G2 for General MacArthur, estimated that a million two hundred thousand Chinese had intervened; but later historians believed that he was -- he panicked and he overestimated that. They later adjusted that down to around six hundred thousand; but of course we didn't have all six hundred thousand at that time on us but we had a hefty percentage of them -- we felt.

(T. 138-40).

After this confrontation the Eighth Army continued to fight the Chinese (T. 141). However, in early February, 1951, "evacuation plans had been drawn up to evacuate Korea all

together" (T. 142). Colonel Pratt described the next major battle in which his battalion and Mr. Porter engaged:

> A: ... So in (sic) mid February 1951, early February, our regiment -- the 23rd Regiment of which the [Mr. Porter] was a member -- and at that point, my records show he was still in my Baker Company of the 23rd -- we found -- the regiment found itself in a little communication crossroads area about forty miles east of Seoul in the foothills of the mountains.
>
> ... At that point, the intelligence reports showed that the Chinese were amassing a tremendous build up of troops to the front just to the north of this regiment -- the 23rd Regiment Combat Team commanded by Colonel Paul Freeman.
>
> At that point, Colonel Freeman began to wire back and say -- radio back and say, boy there's a tremendous build up of enemy troops here, isn't it time for me to start withdrawing and relocating. And to his great surprise, the High Command says, no, you're not going to withdraw. I want you to go into perimeter defense, an all around defense because you're going to be cut off from the rest of the Eighth Army. Dig in deep, lay in ammunition and supplies, and prepare to stand and fight.
>
> * * *
>
> A: Well, if I may dwell on this a little bit because I feel -- I have always felt and I have written and so asserted -- that this was one of -- first off, I think that the Pusan Perimeter was one of the decisive elements of the whole Korean War. They would have been pushed off into the sea and the Korean War would have been over. So the Pusan Perimeter was a very decisive period of the Korean War.
>
> Secondly, the battle at Kunu-Ri that we participated in and held off the rest of the Chinese those precious few hours until the rest of the Eighth Army could withdraw, that was a very decisive thing because if we had not held off for just those few hours, the Chinese very likely would have gotten behind the whole Eighth Army. And if they had cut the roads behind them, they would have wound

up -- most of the Eighth Army would have wound up so badly devastated that the Korean War, I feel and many historians agree with me, would have been over at that point.

Thirdly, having extracted themselves and saved themselves and fallen back to where they were south of the 38th Parallel, there came the time then when it needed to be determined, as General Ridgeway realized, as to whether or not the Eighth Army, The United Nations Command, could prevail against the Chinese. These little fall back, rolling with the punch operations weren't really deciding that.

So it was at this little town of Chipyong-ni (sic) where the 23rd Regiment Combat Team found itself in early February of 1951. That was to be the testing point. If that battle had been lost, I think there's no question that the Eighth Army Command would have decided, well, we can't hack it, we're going to withdraw out of Korea before we have a huge disaster.

* * *

A: All right. The Battle of Chipyong-ni (sic) developed, as I say, we spent a week or ten days everybody digging in deep, preparing their foxholes, laying in extra grenades, ammunition, preparing their fields of fire.

So the instructions to the regimental command, the regimental combat team, Colonel Freeman, was that not to worry, that you stand and fight . . .

And on the night of February the 13th, 1951, the Chinese began to attack shortly after dark hitting on the northwest corner of that perimeter. Every unit on the front line was under constant fire; but they were dug in well, had their positions well located. They had their fields of fire laid out in textbook Fort Benning Infantry School Techniques.

So they defended themselves effectively for two days and two nights. It was almost unrelenting. Constantly. Air -- air box car came in and resupplied them. As the box cars swooped low and dropped their parachutes and pulled up, the Chinese fired through the bellies of the planes as they pulled away.

* * *

> . . . So along about noon, the Baker Company moved out . . . to retake enemy positions.
>
> As you can well imagine, they were under direct open fire of the enemy forces on top of the hill. They immediately came under mortar, artillery, machine gun, and every other kind of fire that you can imagine and they were just dropping like flies as they went along. Baker Company on that occasion lost -- we lost -- I lost all three -- three of the platoon sergeants were killed. All of the -- almost all of the officers were wounded and casualties for the company was over 50 percent. But we did get back up to the hill and were (sic) hanging on by our fingernails when about that time the airforce came through with some help and they dropped some napalm and by dark we had reoccupied the top positions and had closed the gap there. But that was the -- that was the operation that took place on that day.
>
> * * *
>
> . . . After Chipyong-ni (sic), the Chines -- there was never question that whether or not how the war was going to turn out. The Chinese had lost the initiative. And for -- thereafter, they went on the defensive and they were gradually pushed back north of the parallel ...

(T. 142-51).

Colonel Pratt testified that these events "were very trying, horrifying experiences" (T. 152) and that Mr. Porter's experiences would have been even worse since his company "sustained the heaviest casualties of any troops at the Chipyong-ni (sic) Battle" (T. 153). Mr. Porter clearly suffered both physically and mentally because of his courageous service for his country. This evidence should have been presented to the sentencer in Mr. Porter's case.

Mr. Porter's attorney at the penalty phase, Sam Bardwell, did not investigate Mr. Porter's military history (T. 86, 91). He failed to investigate Mr. Porter's military service despite the fact that he felt he would have to proceed to the penalty phase (T. 71). Trial counsel's investigation was limited to collecting sentencing orders in other capital cases (T. 58).

Trial counsel testified that had he known of Mr. Porter's military history, he would have presented it (T. 93). Certainly trial counsel was ineffective for not investigating and presenting this evidence. Had he done so, Mr. Porter would have received a life sentence.

The lower court discounted Mr. Porter's military experiences by saying that Mr. Porter was absent without leave (AWOL) during his military tenure. The court held that "[t]hese periods of desertion would have significantly impacted upon any mitigating effect that the evidence would have had, and indeed they would have reduced this impact to inconsequential proportions" (PC-R2. 1212). This finding is clearly not supported by the evidence.

As Mr. Porter's records indicate, despite these periods of absence, Mr. Porter was awarded several service and combat medals and was **honorably discharged** from the Army. (Defense Exhibit 3). Colonel Pratt testified that the two early, short periods of Mr. Porter's absence extracted no punishment (T. 157). Colonel Pratt suggested that Mr. Porter may have even been "lost" for these periods. Colonel Pratt testified:

> Maybe he was lost. That happens. You get -- you get disoriented. You get separated from

> your unit and you wander around and you get a hot meal and eventually you come back to your unit. Well, he's absent and no one gave him leave to be absent but it could be an open question as to whether that is a type of absence that constitutes a violation of the AWOL requirement.

(T. 157).

Furthermore, a third, longer period of absence resulted in minimal punishment. (Defense Exhibit 3). Mr Porter's courageous service for three years, two months and twenty-one days is reflected in his "**Honorable**" discharge. Despite the lost time for AWOL (after serving in combat), Mr. Porter was still recommended for the Good Conduct Medal and other honors. Obviously, the Army felt that Mr. Porter's absence was insignificant in comparison to his courageous service. Had a jury heard this evidence, they would have felt the same way.

This Court has held that an individual's military service may be considered in mitigation. Campbell v. State, 571 So. 2d 415, n.4 (Fla. 1990)(finding military service was valid nonstatutory mitigation);
Masterson v. State, 516 So. 2d 256, 258 (Fla. 1987)(holding that a defendant's having served in Viet Nam, along with other factors was sufficient for a jury to recommend a life sentence). Evidence of an honorable discharge alone constitutes mitigation. Walker v. State, 22 Fla. L. Weekly S537 (Sept. 4, 1997)(circuit court should have considered honorable discharge as nonstatutory mitigation). Certainly Mr. Porter's military service, including his significant combat history should have been brought to the

attention of the sentencer and would have changed the outcome in this case.

In Jackson v. Dugger, the court held that, "Jackson's military service is in and of itself a significant mitigating circumstance." 931. F.2d 712, 717 (11th Cir. 1991). In Jackson, the defense produced evidence that Mr. Jackson served in the military for eight years, this included three tours in Viet Nam, and he was wounded in combat. Similarly, Mr. Porter's military service in the Korean War is a significant mitigating factor. Trial counsel was ineffective for failing to investigate and present this evidence. The resulting prejudice is Mr. Porter's death sentence.

2. Childhood

George Porter, Jr. enlisted in the Army at the tender age of sixteen and at the time of the Korean War so that he could escape the brutal attacks that were occurring in his own home (Defense Exhibit 2, James Porter Deposition p. 14)(hereinafter J. Porter Depo). George witnessed combat from a very early age, when his father and mother would fight and his mother would be sent to the hospital (J. Porter Depo p. 10-11). George attempted to protect his mother, but in order to do so, he would have to take the brunt of his father's beatings (Id. at 11) George's father's rage seemed to accompany his daily activity of getting drunk (Id. at 9, 14). George's father, George Porter, Sr., was violent with all of the members of his family (Id. at 10). However, George had the misfortune of being one of his father's "picks"; he was

more often the target of his father's rage than his other siblings (Defense Exhibit 1, Eileen Wireman Deposition p. 6, 28-29 (hereinafter Wireman Depo); J. Porter Depo p. 27).

Rather than use grenades or canons, George's father preferred hand-to-hand combat with his hands doing the only striking. George Sr's. enemy was his own wife and children. His weapons included his fists, a belt or a switch (Wireman Depo p. 6-7). George would be hit in the head or in the stomach (Wireman Depo p. 7; J. Porter Depo p. 12). None of this evidence was presented to the judge and jury that sentenced Mr. Porter to die.

Trial counsel failed to speak with any of Mr. Porter's family members. He admitted that he did no investigation into Mr. Porter's background. This evidence should have been presented to the judge and jury that sentenced Mr. Porter to death. Trial counsel was ineffective for failing to present this evidence. Had he done so, the outcome would have been different.

Despite significant evidence that Mr. Porter's father abused him, the lower court discounted the evidence because Mr. Porter was fifty four years old at the time of the trial (PC-R2. 1211). This Court has held that an abused childhood is a mitigating factor. See Chandler v. State, 702 So. 2d 186, 200 (Fla. 1997); Campbell v. State, 571 So. 2d 415, 419 n.4 (Fla. 1990); Elledge v. State, 613 So. 2d 434 (Fla. 1993); Nibert v. State, 574 So. 2d 1059 (Fla. 1990).

In Nibert, the circuit court judge discounted the defendant's evidence of child abuse because he had not lived with

his mother (the abuser) since he was eighteen. 574 So. 2d at 1061. This Court held that:

> The fact that a defendant had suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept this analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary.

574 So. 2d at 1062. Similarly, a "reasonable quantum of competent proof" of the physical abuse Mr. Porter suffered was presented at the evidentiary hearing. 574 So. 2d at 1062. The lower court erred in disregarding it.

3. Alcohol abuse

As to Mr. Porter's history of alcohol abuse, the lower court found that the evidence presented at the evidentiary hearing was insignificant (PC-R2. 1211). The lower court relied on the trial court's finding that:

> [t]he defendant was sober the night before the murders and he was sober immediately after the murders. He was able to drive and transact business. There is nothing in the record which would support a finding that this mitigating circumstance exists.

(PC-R2. 1211).

The lower court clearly erred by relying on the trial court's finding that Mr. Porter was not under the influence of alcohol on the night of the offense to discount his history of alcohol abuse as nonstatutory mitigation. Recently, in Mahn v. State, this Court held that "evidence that Mahn was 'not under

the influence of drugs or alcohol' when committing the offenses is not the correct standard for determining whether long-term substance abuse is mitigating." 23 Fla. L. Weekly S219, p.10 (April 16, 1998); see also Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985)(finding the defendant's past drinking problems could be considered a significant mitigating factor despite the fact that the defendant was sober on the night of the murder).

A defendant's history of alcohol abuse has supported a nonstatutory mitigating factor in and of itself. Clark v. State, 609 So. 2d 513, 516 (Fla. 1992)(finding defendant's extensive history of substance abuse constituted strong nonstatutory mitigation); Robinson (Michael) v. State, 684 So. 2d 175, 179 (Fla. 1996)(holding that a lengthy and substantial history of substance abuse should be considered a nonstatutory mitigating factor); Besaraba v. State, 656 So. 2d 441, 447 (Fla. 1995)(considering history of drug and alcohol abuse as mitigation); Wuornos v. State, 644 So. 2d 1000 (Fla. 1994)(finding that trial court should have weighed Wuornos' alcoholism in mitigation).

The lower court also incorrectly found that Mr. Porter's siblings' depositions were conflicting about the issue of Mr. Porter's alcoholism. Eileen Wireman, Mr. Porter's sister, testified that Mr. Porter had a drinking problem (Wireman Depo p. 11). Ms. Wireman testified that Mr. Porter was closest to their

brother James (Wireman Depo p. 13). James Porter also testified that George, or Boone as he referred to him, had a drinking problem (J. Porter Depo p. 23). James Porter stated:

> Q: (by Mr. Kissinger) How much was Boone drinking when he came back from Korea?
>
> A: Well, he was -- he used to party quite a bit.
>
> Q: When you say, "party quite a bit," on a daily basis? A weekly basis? How often?
>
> A: Three or four times a week, maybe five.
>
> Q: When he'd party, how much would he drink?
>
> A: Quite a bit.
>
> Q: When you say, "quite a bit," about how much do you mean, on the average?
>
> A: Well, he liked whiskey.
>
> Q: Okay.
>
> A: Whiskey to him was like water.
>
> Q: How much whiskey would he drink?
>
> A: Sometimes a fifth, two fifths.
>
> * * *
>
> Q: How much was he drinking in 1983 when you quit drinking?
>
> A: Well, I ain't never -- when he go some place I never seen him without a bottle. It was either a fifth or a pint, a half pint. I've seen him put a pint of whiskey to his lips and kill half of it before he brings it down.

J. Porter Depo, pp. 22-24). James Porter testified that George had a serious drinking problem ever since he had returned from Korea (Id. at 25).

Ms. Wireman and James Porter's testimony are corroborative of Mr. Porter's alcohol use. Ms. Wireman was unable to provide as many details because she did not associate with George as much as her brother, James, did (Wireman Depo p. 19). George knew she didn't approve of his drinking so he didn't drink around her as much as he did his brother (Wireman Depo p. 19). The lower court's finding that Ms. Wireman and James Porter's testimony contradicted each other is blatantly erroneous.

Ms. Wireman and James Porter also testified that George Porter's personality changed significantly when he was drinking (Wireman Depo p. 11, 12, 19; J. Porter Depo p. 18). Ms. Wireman testified that Mr. Porter's "temper would flare up" when he was drinking (Wireman Depo p. 20). James Porter recalled that Mr. Porter "didn't know what he was doing when he was drinking" (J. Porter Depo p. 18). James Porter testified:

> A: Well, me and him was -- got kind of close and one time we was out and he tore the heck out of a cigarette machine because it wouldn't give him a pack of cigarettes, and he didn't even remember doing that.
>
> Q: How did he learn about tearing up the cigarette machine?
>
> A: I told him.
>
> Q: What was his reaction?
>
> A: "I didn't do that," "I don't remember doing that," that's what he said.
>
> Q: Did he ever make any kind of reparation or did he ever try to set things straight with the owner of the cigarette machine?
>
> A: Yeah. He went down and paid the owner for the cigarette machine.

> Q: Do you recall any other incidents of him doing these kind of actions and then not being able to remember them?
>
> A: He'd come to my house and do things he say he didn't do. Fighting, he couldn't remember fighting. He'd be all black and blue, bloody and the next day he'd ask, how did I get like this.
>
> * * *
>
> Q: And the incidents where he couldn't remember things that happened, were these incidents when he had been drinking?
>
> A: Yes, sir.
>
> Q: Would George become disoriented or lose his sense of where he was or that type of thing when he became drinking -- when he was drinking?
>
> A: Yeah.
>
> Q: Okay.
>
> A: I've known him to drive and call me up, couldn't even remember where he was at, how he got there.

(J. Porter Depo pp. 18-20). James Porter also testified about the changes in George due to his service in Korea:

> A: ... [W]e used to go hunting together and I've seen him jump in the air to shoot a rabbit. And when he come back from Korea, my mother and father took all the knives and hid them because he used to try to climb the walls.
>
> Q: When you say, climb the walls, do you mean literally climb the walls?
>
> A: Yeah.
>
> Q: As if they were a mountain or something like that?
>
> A: Yup.

> Q: Did he do this when he was sober or just when he was drunk?
>
> A: Sometimes he did it when he was sober and sometimes he did it when he was drunk.

(J. Porter Depo pp. 20-21). When George would talk about his experiences he was "[l]ike a wild man" (Id. at 22).

Evidence of Mr. Porter's alcoholism was available at the time of the trial. Had Mr. Bardwell conducted any investigation he could have found it. Similar evidence has been held to establish valid statutory mitigation. Mahn, Ross, Clark, Robinson (Michael),Besaraba, Wuornos. Mr. Bardwell was ineffective for failing to present this evidence.

4. Conclusion

In Mr. Porter's capital penalty proceedings, substantial mitigation, both statutory and nonstatutory, never reached the judge or jury, both of whom are sentencers in Florida. See Espinosa v. Florida, 112 S. Ct. 2926 (1992). Mr. Porter was sentenced to die by a judge and jury who knew very little about him. Counsel failed to adequately investigate and present the plethora of available mitigation. Because available mitigation was not presented to the sentencers, the resulting death sentence is rendered unreliable.

Mr. Bardwell was ineffective for failing to investigate. Rather than instruct his investigator to interview Mr. Porter's family, Mr. Bardwell only directed his investigator to collect sentencing orders (T. 60). Mr. Bardwell did not speak to any of Mr. Porter's family members (T. 77). In fact, in his penalty

phase preparation, **Mr. Bardwell only spent a little over fifteen minutes preparing subpoenas and interviewing witnesses** (T. 68).

Mr. Bardwell indicated that Mr. Porter did not want him to speak to his wife or son (T. 90). Mr. Bardwell unreasonably interpreted Mr. Porter's limited request to mean that he should not speak to **any** of his family members.

Although counsel presented extremely brief family member testimony during penalty phase, this testimony in no way forms a coherent picture of Mr. Porter's years as a significant alcohol abuser. Mr. Porter's family members were never asked to testify, but would have been able to give a clear picture of his alcohol abuse, background, and mental problems resulting from the Korean War.

As the unfolding tragedy of George Porter's life clearly shows, substantial additional mitigation was amply available. None of this compelling evidence reached the jury or the court. Counsel's performance was deficient. The Florida Supreme Court has affirmed the necessity of appropriate background investigation at the penalty phase of the trial. A new sentencing is required when counsel fails to adequately investigate and, as a result, substantial mitigating evidence is never presented to the judge or jury. Stevens v. State, 552 S. 2d 1082 (Fla. 1989).

In Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989), the two defense attorneys each thought the other was preparing for penalty phase; consequently neither investigated Harris'

background, neither obtained school and military records, and neither traveled from Miami to Jacksonville to meet with relatives, employees and neighbors to learn whether they could provide beneficial mitigation evidence. The State argued that the proffered "good character" evidence would have provided a "spring-board" for the prosecutor to inquire into Harris' numerous prior crimes. The Eleventh Circuit acknowledged that an attorney is not obligated to present mitigation evidence if, after reasonable investigation, he determines that the evidence would do more harm than good. But, he has to investigate first. The court added:

> However, such decision must flow from an informed judgment. Here, counsel's failure to present or investigate mitigation evidence resulted not from an informed judgment, but from neglect. Each lawyer testified that he believed that the other was responsible for preparing the penalty phase of this case. Thus, prior to the day of sentencing, neither lawyer had investigated Harris' family, scholastic, military and employment background, leading to their total-and-admitted-ignorance about the type of mitigation evidence available to them. Such ignorance precluded Williams and Echarte from making strategic decisions on whether to introduce testimony from Harris' friends and relatives. We conclude, therefore, that the lawyers rendered inadequate assistance of counsel.

874 F.2d at 763.

Furthermore, in Heiney v. State, 620 So. 2d 1 (Fla. 1993), a unanimous court held that Heiney's trial attorney could not have made a reasonable strategic choice not to present mitigation because he did not investigate his client's background and did

not even know that mitigation existed in the form of testimony about drug and alcohol abuse, a personality disorder, and physical and emotional abuse as a child. Counsel was in the same position in the instant case. He did not investigate Mr. Porter's past, and thus did not know what evidence was available and was in no position to make strategic decisions.

As explained above, mitigating evidence could and should have been presented at Mr. Porter's penalty phase. Because of counsel's failure to properly investigate and prepare for the penalty phase, Mr. Porter received inadequate assistance. Cunningham v. Zant, 928 F.2d 1006, 1017 (11th Cir. 1991). The resulting prejudice is clear -- "[b]y failing to provide such evidence to the jury, though readily available, trial counsel's deficient performance prejudiced . . . [Mr. Porter's] ability to receive an individualized sentence." Id. at 1019 (citations omitted). Relief is appropriate.

C. COUNSEL FAILED TO DEVELOP MENTAL HEALTH MITIGATION

In Mr. Porter's case, defense counsel did not request the assistance of a mental health expert, despite the fact that he knew Mr. Porter had an extensive history of alcohol abuse, and thus, the possibility of significant statutory and non-statutory mental health mitigation.

Defense counsel failed to adequately investigate this obvious potential avenue of mental health mitigation; this failure cannot be tactical, because it was based upon ignorance. When trial counsel's failure to present mitigating evidence

"result[s] not from an informed judgment, but from neglect," trial counsel has rendered constitutionally ineffective assistance. Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989); Stevens v. State, 552 So. 2d 1082, 1087 (Fla. 1989).

Had he investigated, counsel's efforts clearly would have led to the existence of statutory and nonstatutory mitigation. Regarding mental health mitigation, an adequate investigation into Mr. Porter's past would have provided a defense expert with critical and necessary information in order to render a professionally adequate assessment of Mr. Porter's mental condition.

At the evidentiary hearing, Dr. Dee testified that Mr. Porter suffers from brain damage and post traumatic stress disorder (T. 211, 220, 234). Post traumatic stress disorder has been defined as:

> . . . PTSD is a complex of distressing emotional reactions that can follow the experiencing of any kind of traumatic event, such as . . . combat. It can ensue directly from a breakdown in the course of the traumatic event . . . or it can develop independently after the event has come to an end and the individual is no longer in danger.
>
> In either case, PTSD casualties remain embroiled in the traumatic event. They continue to suffer from the anxiety it induced and to relive the experience in frequent nightmares and intrusive images, thoughts, and recollections that bring back the strong, painful emotions of the traumatic moment.

Zahava Solomon, Combat Stress Reaction, The Enduring Toll of War 55 (Plenum Press, 1993).[8]

Because Mr. Porter suffers from post traumatic stress disorder and brain damage, Dr. Dee concluded that Mr. Porter suffered from extreme mental or emotional disturbance at the time of the crime (T. 233), and his ability to conform his conduct to the requirements of the law was substantially impaired (T. 234). Dr. Dee testified that Mr. Porter's condition included "impaired memory, difficulty in impulse control, impulsive acting out without sufficient thought or deliberation regarding the consequences of his behavior..." (T. 234).

Dr. Dee based his conclusions on the results of the extensive testing he conducted on Mr. Porter (T. 209, 212-14). He also relied upon the background materials he was given (T. 209-10, 229; see Defense Exhibit 4).

Dr. Dee hypothesized that the brain damage could have stemmed from Mr. Porter's significant alcohol abuse (T. 216). He also said that it could stem from a head injury sustained by Mr. Porter during the Korean War (T. 216), or from the abuse he suffered as a child (T. 252). In any event "[t]he effects are the same whether it's a concussion or alcohol abuse. Its all

---

[8]See also **Traumatic Stress** (Bessela A. van der Kolk, Alexander C. McFarlane & Lars Weisaeth, eds., The Guilford Press, 1996); **David W. Foy, Treating PTSD** (The Guilford Press, 1992)("Classic symptom patterns in PTSD consist of intrusive thoughts about traumatic experience(s) and psychological efforts to avoid reminders of cues related to the trauma. . . . Symptom patterns in PTSD include physiological, cognitive, and behavioral manifestations.")

going to lead to the same structural and functional impairment and brain function, memory impairment, probably frontal lobe impairment" (T. 216).

The lower court found that Dr. Dee's testimony was speculative and not supported by the evidence (PC-R2. 1207). This finding is clearly in error. Furthermore, the lower court confined its opinion to whether this testimony supported finding statutory mitigation. The lower court did not consider whether Dr. Dee's testimony would have supported finding non-statutory mitigation.

In discussing the statutory mental health mitigating factors, the Florida Supreme Court recognized that

> A defendant may be legally answerable for his actions and legally sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state.

Perri v. State, 441 So. 2d 606, 609 (Fla. 1983). The Eleventh Circuit has also recognized that "[o]ne can be competent to stand trial and yet suffer from mental health problems that the sentencing jury and judge should have had an opportunity to consider." Blanco, 943 F. 2d at 1503. Counsel's failure to present this mental health testimony was deficient performance and clearly prejudicial. See Bunney v. State, 603 So.2d 1270 (Fla. 1992). This evidence would have made a difference.

The lower court accepted the opinion of the State's expert witness, Dr. Riebsame. However, in accepting Dr. Riebsame's opinion, the court overlooked that Dr. Riebsame did not even

examine Mr. Porter and admitted that he could not offer a diagnosis. (T. 345, 373). Furthermore, Dr. Riebsame agreed with Dr. Dee that Mr. Porter's test results indicated that he had some mental impairment. Dr. Riebsame testified that "there's been a lot of alcohol consumption I'm assuming on his part so there would be some damage" (T. 328). Also, despite the fact that Dr. Riebsame criticized some of Dr. Dee's testing he also conceded that "we shouldn't disregard [Dr. Dee's test results]. In fact, it gives us good information about Mr. Porter (T. 356).

Dr. Riebsame also testified that the doctor's who saw Mr. Porter at the time of his trial did not notice or mention any extreme emotional disturbance (T. 330). However, as Dr. Dee stated, these doctors only evaluated Mr. Porter for competence to stand trial and not for mental health mitigation (T. 225-26).

Mr. Porter has proven that he was suffering from serious mental deficiencies that rose to the level of statutory mitigation. This mitigation would have been considered in the weighing process had it been presented. Mr. Porter also suffered from a lifelong addiction to alcohol which went largely unpresented due to the ineffective investigation and performance of his trial counsel.

Both statutory and nonstatutory mitigating factors were readily supportable, yet they were not argued during the penalty phase because the information had never been gathered. Had defense counsel adequately investigated, a wealth of mitigation would have been discovered, and a mental health expert would have

been able to testify to these conclusions. Without their testimony the jury was not permitted to view Mr. Porter as an individual.

In fact, at the penalty phase of Mr. Porter's trial, absolutely no mental health mitigating evidence (and very limited family character evidence) was offered to the judge or jury for their consideration.

Mr. Porter's judge and jury were not able to "make a sensible and educated determination about the mental condition of the defendant at the time of the offense." Ake, 105 S. Ct. at 1095. A wealth of compelling mitigation was never presented to the jury charged with the responsibility of whether Mr. Porter would live or die. Important, necessary, and truthful information was withheld from the jury, and this deprivation violated Mr. Porter's constitutional rights. See Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

D. CONCLUSION

Failure to investigate available mitigation constitutes deficient performance. Rose v. State, 675 So. 2d 567 (Fla. 1995); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Deaton v. Singletary, 635 So. 2d 4 (Fla. 1994); Heiney v. State, 620 So. 2d 171 (Fla. 1993); Phillips v. State, 608 So. 2d 778 (Fla. 1992); Mitchell v. State, 595 So. 2d 938 (Fla. 1992); State v. Lara, 581 So. 2d 1288 (Fla. 1991); Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Bassett v. State, 541 So. 2d 596 (Fla. 1989).

Defense counsel's ineffective assistance prejudiced Mr. Porter. Strickland's prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694 (1984).[9] Confidence in the outcome is undermined when the court is unable "to gauge the effect" of counsel's omissions. State v. Michael, 530 So. 2d 929, 930 (Fla. 1988). Prejudice is established when trial counsel's deficient performance deprives the defendant of "a reliable penalty phase proceeding." Deaton v. Singletary, 635 So. 2d 4 (Fla. 1994). Mr. Porter was not provided with a reliable penalty phase proceeding due to trial counsel's failure to investigate.

The mitigation established by post-conviction counsel could not have been ignored had it been presented to the judge and jury. Prejudice is established under such circumstances. See Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995)(prejudice established by "substantial mitigating evidence"); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992) (prejudice established by "strong mental mitigation" which was "essentially unrebutted"); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991)(prejudice

---

[9]A defendant is not required to show that counsel's deficient performance "[m]ore likely than not altered the outcome in the case." Strickland, 466 U.S. at 693. The Supreme Court specifically rejected that standard in favor of a showing of a reasonable probability. A reasonable probability is one that undermines confidence in the outcome.

established by evidence of statutory mitigating factors and abusive childhood); Bassett v. State, 541 So. 2d 596, 597 (Fla. 1989)("this additional mitigating evidence does raise a reasonable probability that the jury recommendation would have been different").[10] Mr. Porter is entitled to relief.

ARGUMENT II

MR. PORTER IS ENTITLED TO ANOTHER HUFF V. STATE HEARING ON CLAIM 11 IN HIS RULE 3.850 MOTION.

Mr. Porter filed an amended postconviction motion on February 24, 1995 (PC-R2. 1-182). After Mr. Porter had filed his amended Rule 3.850 motion, he filed a pro se motion to determine whether his collateral counsel was competent (PC-R2. 199-255). The lower court denied that motion on April 27, 1995. In denying the motion, the court recognized that "[t]he Defendant contends that despite repeated requests counsel has failed to include various facts and allegations in the pending 3.850 motion" (PC-R2. 259). In that order, the lower court agreed to "consider these claims as part of the pending 3.850 motion" (PC-R2. 260) and ordered the state to respond to the claims.

Subsequently, the lower court set a Huff hearing so that the parties could argue their claims. Mr. Porter requested to be present for the Huff hearing (PC-R2. 262-265). The lower court

[10]Prejudice was found in these cases despite the existence of numerous aggravating factors. See Hildwin v. Dugger, 20 Fla. L. Weekly at S39 (four aggravating factors); Phillips v. State, 476 So. 2d 194 (Fla. 1985)(four aggravating factors); Mitchell v. State, 527 So. 2d 179 (Fla. 1988)(three aggravating factors); Lara v. State, 464 So. 2d 1173 (Fla. 1985)(same); Bassett v. State, 449 So. 2d 803 (Fla. 1984)(same).

denied Mr. Porter's request because "[e]vidence concerning the merits of the claims will not be heard. Therefore, the Defendant's presence is not required" (PC-R2. 272-273).

Again, at the Huff hearing, Mr. Porter's counsel argued that Mr. Porter should be present for the hearing so that he could argue his claims to the court:

> MR. KISSINGER: The second matter, and it goes to claim 11 as well as the number of pro se pleadings which Mr. Porter has filed in this matter, and what it goes to is the court's order denying Mr. Porter the opportunity to appear here today.
>
> * * *
>
> Mr. Porter's letters and pleadings have all become part of the record and have been considered by the court on the merits.
>
> Also, claim 11, which I mentioned before, is a claim which consists as I believe the court observed in its order denying the motion to find post-conviction counsel incompetent which noted these were the same ones which Mr. Porter attempted to raise on a pro se basis. Those are in fact what those allegations are.
>
> Our acquiescence to Mr. Porter's demand that certain claims that he claims to be valid, which he insists to be valid claims, and need not to be presented to this court are included within this 3.850 motion.
>
> Given that fact, Your Honor, I submit again it's a matter of due process. Mr. Porter has a right to be present to argue those claims, whether legal or factual in nature, which this court is considering on the merits despite the pro se nature.

(SPC-R2. 105-107).

Rather than allow Mr. Porter the opportunity to argue his claims, the lower court could only assure Mr. Porter's counsel that he would consider those claims (SPC-R2. 109). However, the

state was allowed to argue that the judge should deny the claim at the Huff hearing (SPC-R2. 167-169, 174-176).

On July 12, 1995, the trial court summarily denied several claims in the motion without allowing Mr. Porter to argue them before the court. (PC-R2. 323-354). Because, the court was going to consider claims that Mr. Porter had submitted pro se, the court should have allowed Mr. Porter to argue those claims at the Huff hearing or at a later date. Mr. Porter was never afforded that opportunity.

Under Huff v. State, 622 So.2d 982 (Fla. 1993), this Court held:

> Because of the severity of punishment at issue in a death penalty postconviction case, we have determined that henceforth the judge must allow the attorneys the opportunity to appear before the court and be heard on an initial 3.850 motion.

Huff v. State, 622 So.2d at 983.

Contrary to Huff, this procedure was not followed on Mr. Porter's pro se claims. As a result, Mr. Porter was not given "fair notice and a reasonable opportunity to be heard." See, Huff at 983, quoting Scull v. State, 569 So.2d 1251, 1252 (Fla. 1990). This cause should be remanded back to the circuit court for an opportunity to conduct a Huff hearing on several of Mr. Porter's claims in accordance with the law.

ARGUMENT III

THE LOWER COURT ERRED WHEN IT DENIED MR. PORTER A HEARING ON SEVERAL OF HIS CLAIMS THAT WERE NOT REFUTED BY THE RECORD.

A. NEWLY DISCOVERED EVIDENCE REVEALS THAT DUE TO OMISSIONS IN THE RECORD MR. PORTER WAS DENIED A PROPER DIRECT APPEAL FROM HIS JUDGMENT OF CONVICTION AND A PROPER APPEAL FROM HIS SENTENCE OF DEATH IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ART. 5, SEC. 3 (b) (1) OF THE FLORIDA CONSTITUTION AND FLORIDA STATUTES ANNOTATED, SEC. 921.141 (4).

The circuit court is required to certify the record on appeal in capital cases, Fla. Stat. Ann. sec. 921.141(4), Fla. Const. art. 5, sec. 3(b)(1), and when errors or omissions appear, re-examination of the complete record in the lower tribunal is required. Delap v. State, 350 So. 2d 462 (Fla. 1977).

Newly discovered evidence reveals that portions of the record were missing or altered from Mr. Porter's appeal including, but not limited to, the testimony of the trial pathologist, Dr. Dunn, Time Palymale, Otto Lenke, Sandra Corey, and Amy Ambrose. These errors of constitutional magnitude extend throughout the entire transcript of Mr. Porter's trial.

This is particularly significant in that Mr. Porter claims that the trial court, his own standby counsel, and the state prevented him from presenting evidence and arguing his case to the jury. Post-conviction counsel has no way of knowing what occurred during any phase of trial without a complete record. Further, attempts to correctly supplement the record would be futile unless counsel already knows what is in the record and what is missing so that she can direct the court reporter and the

circuit clerk to re-investigate the record on appeal. Post-conviction counsel is at the disadvantage of not having been present at trial. Therefore, it is incumbent upon the trial court and trial counsel to insure that a proper record is before this Court. Mr. Porter asserts that his former trial and appellate counsel rendered ineffective assistance in failing to assure that the record was correct.

The lower court denied this claim because it was procedurally deficient and should have been raised on direct appeal (PC-R2. 327). However, the lower court misunderstood Mr. Porter's claim. Mr. Porter did not realize that the transcript this Court reviewed on direct appeal was inaccurate. It was only **after** post-conviction counsel provided Mr. Porter with the official record, and he compared it to the record he received from the clerk of the court in Titusville, that he realized the record was deficient. Because this defect was unknown at the time of the direct appeal, Mr. Porter properly raised this information as newly discovered evidence.

The transcripts Mr. Porter received from the Titusville clerk are clearly different from the record on appeal given to this court and post-conviction counsel. One glaring inaccuracy between the transcripts concerns the plea colloquy that occurred during Mr. Porter's trial. The transcript filed with the Titusville Clerk of the Court contains the following exchange:

> Q: You want to talk to Mr. Bardwell?
>
> A: Yes, sir. In Count 1, it's in my best interest.

(Mr. Porter's exhibit "P", certified January 18, 1988 by Denise Clark; filed with the Clerk of the Court in Titusville on January 20, 1988 in Titusville).

However, the record on appeal, provided to this Court for review upon Mr. Porter's conviction and sentence contained the following:

> Q: Do you want to talk to Mr. Bardwell?
>
> A: Yes, sir.
>
> (Whereupon , a discussion was held off the record between Mr. Bardwell and Mr. Porter.)
>
> MR. PORTER: In Count 1 it's in my best interest.

(R. 1499-1500).

Mr. Porter's previous post-conviction counsel attempted to explain the situation to the lower court at the evidentiary hearing:

> I just wanted to make one quick mention of or one addendum to his comments of -- one of the claims which he raised, I recall, Your Honor, is one about the transcript which he -- which has been generated in this case as being materially inaccurate. There's just a very short but perhaps salient example of that.
>
> There was -- in Mr. Porter's -- Mr. Porter's plea, in the early transcript -- the transcript which was prepared first and provided to Mr. Porter -- there was an incident where the question was asked do you want to talk to Mr. Bardwell. In the early version of that transcript, there's an answer by Mr. Porter, yes, sir, in Count I it's in my best interest. And that's the transcript which was provided first and was provided to Mr. Porter.
>
> However, the transcript that this Court's relied on and that the Florida Supreme Court relied on and every Court that

> has examined this has relied on has something different. It has the question, (sic) do you want to talk to Mr. Bardwell. Yes, sir. And in this version it says yes, sir, and then goes directly on to Count I it's in my best interest. There is a parentheses insert section where it says -- like an aside would be put into a transcript -- whereupon a discussion was held off the record between Mr. Bardwell and Mr. Porter. Then it continues Mr. Porter, colon, in Count I it's in my best interest.
>
> Now, I think Your Honor can see kind of why we raise this issue in the first place. In one version you have Mr -- in the original version -- which just like every other, Court Reporter, was true and accurate transcription to the best of my ability, signed by the Court Reporter. We have Mr. Porter saying he wants to talk to his attorney. And without any indication that he ever had the opportunity, going on it's in my best interest. And in the version which everyone relies on when we're trying to determine whether he entered a voluntary plea, all of a sudden appears this discussion which wasn't in the first version.
>
> So these are -- these are material matters and we will outline them all specifically in our proffer. I just wanted the Court to know these are serious errors in the transcript and it's not a -- it's not an unfounded claim or a bogus claim. There are real problems in this transcript.

(T. 195-97). Even after Mr. Porter's counsel provided the lower court with an example of an inaccuracy, the court still denied Mr. Porter a hearing on his claim (T. 199).

Mr. Porter has sent this Court the transcripts he received from the Clerk of the Court in Titusville and the record on appeal filed with the Melbourne Clerk of the Court. Even a cursory comparison of the volumes filed in Titusville with the

record on appeal, received from Melbourne, will illustrate the errors in the transcript.[11]

---

[11]Mr. Porter sent several exhibits to this Court. This Court has supplemented the record with these exhibits. Mr. Porter's exhibit, marked "AD", is dated January 22, 1988. On March 1, 1988, this exhibit was certified as a true and correct transcription of the proceedings. It was filed with the Titusville Clerk of Court on March 11, 1988. However, a comparison to Mr. Porter's exhibit, marked "AC", which is a volume of the original record on appeal sent to this court, illustrates a significant difference between the transcripts. Exhibit "AD" represents the proceedings that occurred on January 22, 1988, but exhibit "AC" indicates that the proceedings occurred on January 21, 1988. Furthermore, the proceedings that occur in exhibit "AD", from pages two (2) through nine (9), are similar to those in exhibit "AC" from pages 1783-90; however, the next portion of what occurs in exhibit "AC" is not included in "AD". In the record on appeal sent to this Court, the transcript proceeds from this point with "preliminary matters" regarding witness management. In Mr. Porter's transcript these "matters" do not occur, instead the court discusses jury instructions.

Similarly, in Mr. Porter's exhibit "AD", pages twenty three (23) through thirty-seven (37) appear on pages 2126 through 2140 of the record on appeal sent to this Court. Again, the difference appears in what precedes and follows these pages. Both transcripts indicate that at this point the parties were "back in chambers"; however, the matters taken up in chambers are not the same. Instead, entirely different matters are discussed in Mr. Porter's transcript than what was recorded in the record on appeal.

Also, in the record on appeal the matter discussed regards an issue that arose during the examination of a guilt phase witness, Dr. Dunn. At this point, Mr. Porter had already pled guilty and the court was conducting a penalty phase. Such a conference could not have occurred at this stage because Judge Antoon specifically says that the issue occurred "this morning" (R. 2141). Dr. Dunn testified on December 2, 1987 (R. 926 - 971). Clearly, the record that was sent to this Court to review is inaccurate.

Another inaccuracy can be found in the transcripts Mr. Porter received from the clerk in Titusville. Mr. Porter received a transcript that was said to be proceedings that occurred on November 25, 1987 (Mr. Porter's exhibit "L"). This transcript was certified as a true and correct transcript on February 8, 1988, by Denise Clark and was filed with the Clerk of Court, in Titusville, on March 7, 1988. This transcript included the testimony of Dr. Dunn. Mr. Porter's capital trial didn't even begin until December 1, 1987. Furthermore, the record on appeal that this Court reviewed indicates that Dr. Dunn testified

In Delap, the record was incomplete. 350 So. 2d 462. Similarly, Mr. Porter's record is replete with additions, deletions and substitutions when compared to the transcript he received from the court. Since the official record on appeal is inaccurate, Mr. Porter is entitled to a hearing to reconstruct the record. Mercer v. State, 638 So. 2d 534 (Fla. 2nd DCA, 1994). Thereafter, if the lower court cannot determine which record is accurate Mr. Porter should receive a new trial. Id.; see also, Estopian v. State, 710 So. 2d 994, 996 (Fla. 2nd DCA, 1998); Swain v. State, 701 So. 2d 675 (Fla. 3rd DCA, 1997); Lipman v. State, 428 So. 2d 733 (Fla 1st DCA, 1983).

B. MR. PORTER WAS INCOMPETENT TO STAND TRIAL AND UNDERGO CAPITAL SENTENCING, AND THE TRIAL COURT FAILED TO CONDUCT AN ADEQUATE ADVERSARIAL HEARING ON MR. PORTER'S COMPETENCY DESPITE INDICATIONS THAT MR. PORTER WAS INCOMPETENT, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The conviction of an incompetent defendant denies him or her the due process of law guaranteed in the Fourteenth Amendment. Pate v. Robinson, 383 U.S. 375 (1966). "A defendant's allegation that he or she was tried while incompetent therefore claims that the state, by trying him or her for and convicting him or her of a criminal offense, has engaged in certain conduct covered by the Fourteenth Amendment, namely without due process of law." James v. Singletary, 957 F.2d 1562, 1573 (11th Cir. 1992). Mr. Porter

---

only once, on December 2, 1987. Several more serious errors are apparent upon review of the exhibits Mr. Porter sent to this court and received from the Clerk of the Court in Titusville.

was denied his constitutional right not to be tried while incompetent. Further, the trial court's erroneous failure to conduct an adequate adversarial competency hearing despite the numerous indicia of incompetency and defense counsel's ineffectiveness in failing to advocate the competency issue deprived Mr. Porter of the adversarial competency hearing to which he was entitled. Pate.

Mr. Porter was incompetent to stand trial. He lacked a rational and factual understanding of the proceedings and was incapable of dealing with counsel with a reasonable degree of rational understanding. Dusky v. United States, 362 U.S. 402 (1960). Substantial evidence exists now which demonstrates that he lacked competency.

According to his motion, at the time of his trial, Mr. Porter was plagued by longstanding mental disorders. He was besieged by organic brain damage, grossly defective memory, and paranoid delusional ideation. These illnesses affected him in such a way that he could not deal with counsel or enter a rational plea of guilty. His chronic expectation of hidden meanings or motives, and expectation of harm or trickery rendered him unable to represent himself pro se or enter a guilty plea. Mr. Porter could not relate to any attorney in a rational or meaningful way. It follows then that Mr. Porter would request to represent himself.

The superficial inquiry conducted by the judge failed to disclose the extent of Mr. Porter's incompetency. The bizarre

behavior of Mr. Porter was evident before the court. On December 5, 1987, four days into the trial, Mr. Porter abruptly stopped the trial and announced he wanted to plead guilty to all charges (R. 1469-75). During the plea colloquy that followed, Mr. Porter could not make an adequate factual basis for the plea (R. 1501-02). Judge Antoon refused to accept the plea and suggested Mr. Porter consult with Mr. Bardwell, his stand-by counsel. Thereafter, a guilty plea was entered with the state making the factual basis (R. 1507-09). Judge Antoon accepted the plea stating that the defendant was alert, able, intelligent, and understood the consequences of his plea (R. 1522-23). That night, the able and intelligent defendant threw himself head first from the second level of the jail to the concrete floor (R. 1659). He tried twice but succeeded only in breaking his leg (R. 1659-60).

On December 8, 1987, the state attorney himself petitioned the court to conduct a competency evaluation because "the defendant's demeanor and conduct cast doubts upon his present mental condition." (R. 2756-57). That "conduct" was that Mr. Porter had attempted suicide twice, the same day he entered his plea of guilty. The trial court granted the motion and Mr. Porter was examined by Dr. Constance Kay and Dr. J. Lloyd Wilder (R. 2758-2760, 2800, 2802-03). Mr. Porter moved to set aside the guilty pleas because he had received threats to enter the pleas or his son would be harmed.

Dr. Wilder examined Mr. Porter in the hospital after the suicide attempts (R. 1707). Unbelievably, Dr. Wilder determined that Mr. Porter "did not appear depressed or mentally impaired." (R. 1710-11).[12] At the hearing to withdraw the guilty pleas, Dr. Wilder opined that Mr. Porter was not depressed and that the suicide attempts were nothing more than "reacting in a normal manner" to bad news (R. 1711). This diagnosis was true if the threats to his son were real. If the threats to Mr. Porter's son were not real, then he was suffering from delusional thinking (R. 1733). Dr. Wilder admitted that he did not know whether the threats to Mr. Porter's son were real or imagined (R. 1733). However, the state presented the testimony of a prison guard who supposedly watched Mr. Porter the night of his suicide. She testified that no threats were conveyed to Mr. Porter (R.1680-1702). Thereafter, Judge Antoon made a factual finding that the threats were not made (R. 1773). Judge Antoon refused to allow Mr. Porter to withdraw his guilty pleas because during the plea colloquy Mr. Porter said he was not being threatened (R. 1780-81, 2766-67). The only logical reasoning then, is that Mr. Porter suffered from irrational paranoid delusions that his son was going to be harmed if he did not plead guilty.

The only witnesses called on to determine competency were the State's psychiatrist and psychologist, Dr. Wilder and Dr. Kay. After cursory examinations, both found Mr. Porter competent

[12]Dr. Wilder admitted that he did not ask what medication Mr. Porter was on at the time he evaluated him in the hospital (R. 1766, 1711).

to stand trial, represent himself and enter guilty pleas (even after two suicide attempts). Dr. Kay expressed the opinion that it was questionable whether the defendant would be able to maintain self-control in the courtroom because of the stress of trial. He further noted that Mr. Porter was "very defensive over his inability to handle the written and spoken word. He will not admit his inadequacies, but feels he needs to cover them up. This may be relevant to his handling his own defense." This fact was relevant in that Mr. Porter cannot read and was expected to represent himself with a grade school education. Not surprisingly, both doctors relied mainly on self-report by the defendant as a basis for their diagnosis.[13] The court relied on these experts and Mr. Porter's self report to determine if he had the ability to proceed pro se.

Mr. Bardwell, stand-by defense counsel, was ineffective for failing to investigate background materials or obtain a mental health evaluation exclusively for the defendant. At one point, Mr. Porter, the subject of the competency issue, was expected to read the reports of Dr. Wilder and Dr. Kay, then argue in favor of his own sanity (R.1571-73). Defense counsel stood mute as

[13]Later, Dr. Kay went so far as to indicate that he felt Mr. Porter's memory was "adequate" and that he had "the capacity to cope with stress of incarceration prior to trial." This was after two suicide attempts. The only test he conducted was an Incomplete Sentence Blank test done verbally because Mr. Porter "had an intense investment in appearing more academically learned and intellectual than he really is." and a Mental Status Exam which Mr. Porter exhibited "a flavor of grandiosity, poor self-insight, as well as rigidity."

this farce unfolded in the courtroom. Clearly, defense counsel was ineffective.

Mr. Porter has alleged that he has retained mental health experts to evaluate Mr. Porter on the issues of competency to stand trial, ability to represent himself, and ability to enter guilty pleas. These experts, when provided with relevant background materials, were able to determine that Mr. Porter was not competent at the time he entered his guilty pleas. Sufficient background material was readily available at the time of trial if only defense counsel had taken a minimum amount of time to investigate the basic issues of the case.

Mr. Porter was simply not competent to undergo criminal judicial proceedings. His lack of competency should have been obvious to the court, defense counsel, and the state's psychiatrist and psychologist. The rights of this mentally ill capital defendant were simply not protected.[14]

Collateral counsel pled specific facts in the Amended Motion to Vacate which, unless clearly refuted by the record, must be accepted as true. See Harich v. State, 484 So. 2d 1239, 1240 (Fla. 1986). This cause should be remanded for an evidentiary hearing on this issue.

C. AN ADEQUATE FARETTA INQUIRY AS TO WHETHER MR. PORTER MADE A VOLUNTARY, KNOWING AND INTELLIGENT WAIVER OF THE RIGHT TO COUNSEL WAS NOT HELD, IN VIOLATION OF THE FIFTH, SIXTH,

[14]Accordingly, Mr. Porter's conviction and sentence of death stand in stark violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution. See, e.g., Pate v. Robinson, 383 U.S. 375 (1965); Hill v. State, 473 So. 2d 1253 (Fla. 1985).

EIGHTH, AND FOURTEENTH AMENDMENTS. FURTHERMORE, MR. PORTER'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WERE ABROGATED BECAUSE HE WAS PERMITTED TO PROCEED WITHOUT COUNSEL ALTHOUGH HE WAS NOT LEGALLY COMPETENT TO EXECUTE A WAIVER OF COUNSEL.

1. Introduction

The constitutional right of a defendant in a criminal proceeding to the assistance of counsel is beyond cavil. Gideon v. Wainwright, 372 U.S. 335 (1963). It has also been established that a criminal defendant may waive the right to counsel and has the constitutional right to represent himself. Faretta v. California, 422 U.S. 806 (1975). However, in order to represent himself, the defendant must "knowingly and intelligently" relinquish the right to counsel. See also Johnson v. Zerbst, 304 U.S. 458, 464-465 (1938); Johnston v. State, 497 So. 2d 863, 868 (Fla. 1986).

2. An Adequate Faretta Hearing Was Not Held

The trial court should consider the following factors in determining whether a criminal defendant is aware of the dangers of proceeding pro se:

> (1) the background, experience and conduct of the defendant including his age, educational background, and his physical and mental health; (2) the extent to which the defendant had contact with lawyers prior to trial; (3) the defendant's knowledge of the nature of the charges, and the possible defenses, and the possible penalty; (4) the defendant's understanding of the rules of procedure, evidence and courtroom decorum; (5) the defendant's experience in criminal trials; (6) whether standby counsel was appointed, and the extent to which he aided the defendant; (7) whether the waiver of counsel was the result of mistreatment or coercion;

> or (8) whether the defendant was trying to manipulate the events of the trial.

United States v. Fant, 890 F.2d 408, 409-10 (11th Cir. 1989)(per curiam). "The ultimate test is not the trial court's express advice, but rather the defendant's understanding." Fitzpatrick v. Wainwright, 800 F.2d 1057, 1065 (11th Cir. 1986).

"While the right to counsel is in force until waived, the right of self-representation does not attach until asserted. In order for a defendant to represent himself, he must 'knowingly and intelligently' forego counsel, and the request must be 'clear and unequivocal.'" Brown v. Wainwright, 665 F.2d 607, 610 (5th Cir. 1982)(emphasis in original).[15] Because the demand must be clear and unequivocal, the waiver must be equally clear and unequivocal.

A waiver of counsel requires that the accused know, and the court ensures that he knows, the full ramifications of such a waiver. See Faretta, 422 U.S. at 836; Johnson v. Zerbst; Fitzpatrick v. Wainwright, 800 F.2d at 1065-67; United States v. Fant, 890 F.2d at 409-10.

In a Faretta hearing, the trial judge has an affirmative duty to protect the essential rights of a defendant. As the Court explained in Holloway v. Arkansas, "`[u]pon the trial judge rests the duty of seeing that the trial is conducted with

---

[15]See also Faretta, 422 U.S. at 835; United States v. Brown, 591 F.2d 307 (5th Cir.), cert. denied, 442 U.S. 913 (1979); United States v. Jones, 580 F.2d 785 (5th Cir. 1978); Chapman v. United States, 553 F.2d 886, 893 (5th Cir. 1977); Raulerson v. Wainwright, 732 F.2d 803, 808 (11th Cir. 1984); Fitzpatrick v. Wainwright, 800 F.2d 1057 (11th Cir. 1986).

solicitude for the essential rights of the accused.'" 435 U.S. 475, 484 (1978).

The trial court committed fundamental constitutional error. Mr. Porter's waiver of counsel was an involuntary, uninformed and mentally deficient waiver of his right to counsel which had attached under the sixth and fourteenth amendments. Such error is presumed to be prejudicial per se, and not subject to a harmless error analysis. Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963); United States v. Cronic, 446 U.S. 648 (1984). Mr. Porter's subsequent trial, conviction and sentence of death violated his rights to counsel and due process as guaranteed by the sixth and fourteenth amendments. Only by conducting a full and fair evidentiary hearing can these issues be elucidated for the Court.

A defendant competent to stand trial, may, nonetheless, be incompetent to waive counsel and to represent himself. Compare ABA Standard 7-4.1 with ABA Standard 7-5.3(d)(iii)[16]; see Westbrook v. Arizona, 384 U.S. 150 (1966); Pate v. Robinson, 383 U.S. 375 (1966). The Court failed to make an adequate Faretta inquiry, the need for which was clearly indicated by the record then before the Court thus depriving Mr. Porter of his constitutional right to a fair trial.

The test for competency to stand trial is "whether . . . [the defendant] has sufficient present ability to consult with

[16]Standing Committee on Association Standards for Criminal Justice, Proposed Mental Health Standards (1984).

his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960)(emphasis supplied); Hill v. State, 473 So. 2d 1253 (Fla. 1985).[17] However, the mental competency required to waive counsel and for self-representation is greater and of a different kind than that required to stand trial. See ABA Standard 7-5.3(d)(iii); Fitzpatrick v. Wainwright, 800 F.2d at 1066; Moran v. Godinez, 972 F.2d 263 (9th Cir. 1992). The court failed to adequately determine Mr. Porter's competency in this context.

For an accused to waive counsel, a higher mental state is required than what is required merely for a finding of competency to proceed with counsel. The record here does not disclose that Mr. Porter ever "knowingly and intelligently" waived his right to be represented by counsel.

Precedent is replete with criteria for determining whether an accused has waived his right to counsel. In Faretta, supra, there existed no evidence that the defendant was mentally ill before the Court. Even so, a heightened level of understanding and cognition was required. Footnote 3 of the Faretta opinion quotes the exchange between the court and the defendant. Mr. Faretta was questioned, inter alia, on his understanding of the hearsay rule, how peremptory challenges and challenges for cause are used, and how to conduct voir dire. Mr. Faretta responded in

[17]Mr. Porter did not meet even this lower standard in that his mental illness made it impossible for him to communicate with counsel and make rational decisions regarding his defense.

narrative fashion to many of the questions, and indicated that he had been doing his own legal research to prepare for his trial. Id., 95 S. Ct. at 2528.

Likewise, the Eleventh Circuit discussed the various criteria for a valid waiver of the right to counsel in Fitzpatrick v. Wainwright, 800 F.2d 1057, 1065 (11th Cir. 1986). Some of the factors discussed in Fitzpatrick for analyzing the validity of a purported waiver include the background, experience and conduct of the accused; whether the defendant was represented by counsel prior to trial; whether the defendant knows the nature of the charges and the possible penalties; whether he understands that he will be required to comply with the rules of procedure at trial; whether the waiver is a result of coercion or mistreatment; whether he has knowledge of some legal challenges that might be raised in his case; and whether the waiver is for the purpose of delay or manipulation.

The Court in Fitzpatrick held that the defendant had made a valid waiver, while recognizing "that only rarely will the Faretta standards be satisfied absent a hearing at which the defendant is expressly advised of the risks and disadvantages of self-representation." Fitzpatrick v. Wainwright, 800 F.2d 1057, 1068 (11th Cir. 1986).

Finally, courts have noted that it is preferable for the court to ask questions designed to elicit from the accused a narrative statement of his understanding rather than "pro forma answers to pro forma questions." United States v. Billings, 568

F.2d 1307, 1309 (9th Cir. 1978); cf. United States v. Curcio, 680 F.2d 881 (2nd Cir. 1982). In Mr. Porter's case, all that was elicited were pro forma answers to pro forma questions.

Thus, the record does not reflect that Mr. Porter asserted his right to self-representation, and therefore does not reflect a knowing, voluntary and intelligent waiver of counsel.

Further, while the record contains no initial request for self-representation by Mr. Porter and no initial Faretta inquiry, the subsequent inquiries were inadequate to establish a knowing, intelligent and voluntary waiver of the right to counsel. As noted above, a Faretta inquiry must consist of more than "pro forma answers to pro forma questions." However, that is the extent of the inquiries conducted in Mr. Porter's case.

In light of Mr. Porter's mental health impairments, the court's failure to conduct an adequate Faretta inquiry or adequate hearing on Mr. Porter's competency to waive counsel, the inadequate mental health evaluations, and the indications that Mr. Porter's waiver of counsel was not knowing, voluntary and intelligent, the record does not affirmatively demonstrate that Mr. Porter was "literate, competent, and understanding," or that he was acting intelligently and knowingly and as a result of his psychological impairments. Faretta, 95 S. Ct. at 2541. The Court therefore erred in allowing Mr. Porter to waive counsel.

The postconviction court likewise must take these facts as true, because they cannot be refuted by the record. See Harich v. State.

3. Mr. Porter Was Not Legally Competent to Execute a Waiver of Counsel

As discussed previously, the Faretta inquiries made by the court regarding Mr. Porter's waiver of counsel were inadequate to establish a knowing, voluntary and intelligent waiver. More importantly, Mr. Porter was not competent to execute a waiver of counsel.

The legal standard for determining a defendant's competency to waive specific constitutional rights such as the right to counsel is different from the standard for determining a defendant's competency to stand trial. Moran v. Godinez, 972 F.2d 263, 266 (9th Cir. 1992). A waiver of counsel must be knowing and voluntary and can be denied based upon the defendant's mental condition. Johnson v. State, 497 So. 2d 863 (Fla. 1986). See also Fitzpatrick v. Wainwright, 800 F.2d 1057 (11th Cir. 1986).

Mr. Porter lacked the ability to make a "reasoned choice" at the time he was allowed to waive counsel. Mr. Porter suffered and suffers from numerous intellectual and mental health impairments which made it impossible for him to enter a knowing, voluntary and intelligent waiver. Mr. Porter suffers from organic brain damage, post-traumatic stress disorder, alcoholism, and paranoid disturbances. Mr. Porter is also functionally illiterate. As a result of these impairments, Mr. Porter was

unable to engage in any form of rational decision-making and was incompetent to waive counsel.

The mental health evaluations conducted at the time Mr. Porter was permitted to waive counsel did not address the proper standard for determining whether Mr. Porter was competent to waive counsel. Dr. Wilder's evaluation clearly only addresses Mr. Porter's competency to stand trial under Florida's competency criteria. Dr. Kay's evaluation also addresses only the Florida criteria for competency to stand trial. Indeed, the orders appointing Dr. Wilder and Dr. Kay only direct them to address the Florida criteria for competency to stand trial (R. 2662-64, 2671-73, 2758-60).

Additionally, Dr. Kay's evaluation indicates that Mr. Porter did not have the capacity for "reasoned choice." Dr. Kay's November 16, 1987, evaluation stated that Mr. Porter had an "intense investment in appearing more academically learned and intellectual than he really is," and that Mr. Porter showed "borderline insight and judgment," "grandiosity" and "poor self-insight." Dr. Kay also had serious questions about Mr. Porter's ability to handle stress.

Even if Dr. Wilder's and Dr. Kay's evaluations had addressed the proper standard, those evaluations were inadequate to assess Mr. Porter's competency to waive counsel. Dr. Wilder and Dr. Kay were provided no information regarding Mr. Porter's history and thus were not alerted to the extent of his mental health

impairments and the need for appropriate testing.[18] Dr. Wilder and Dr. Kay were required to rely solely on Mr. Porter's self-report and inadequate data. Thus, Dr. Wilder later testified that he could not provide any diagnosis of Mr. Porter's mental condition based on the contacts he had with Mr. Porter (R. 1714). Adequate mental health evaluations based on a review of Mr. Porter's history and necessary testing would have revealed that Mr. Porter was not competent to waive counsel. These facts cannot be refuted by the record.

This cause should be remanded back to the trial court to consider the substance of Mr. Porter's claim.

D. MR. PORTER WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE MENTAL HEALTH EXPERTS WHO EVALUATED HIM DURING THE TRIAL COURT PROCEEDINGS FAILED TO CONDUCT PROFESSIONALLY COMPETENT AND APPROPRIATE EVALUATIONS, AND BECAUSE DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE, RESULTING IN PROCEEDINGS AT WHICH MR. PORTER WAS INCOMPETENT AND ENTITLED TO AN ADVERSARIAL COMPETENCY HEARING AND AT WHICH MR. PORTER WAS PERMITTED TO REPRESENT HIMSELF ALTHOUGH HE WAS INCOMPETENT TO DO SO OR TO WAIVE HIS RIGHT TO COUNSEL.

A criminal defendant is entitled to expert psychiatric assistance when the state makes his or her mental state relevant to the proceeding. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and

[18]The doctors were not apprised as to the amount or kind of medication Mr. Porter was on at the time of trial (R. 2662-2758).

minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation.[19]

The mental health expert must also protect the client's rights, and the expert violates these rights when he or she fails to provide adequate assistance. State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); Mason v. State. The expert also has the responsibility to obtain and properly evaluate and consider the client's mental health background. Mason, 489 So. 2d at 736-37.

Generally accepted mental health principles require that an accurate medical and social history be obtained "because it is often only from the details in the history" that organic disease or major mental illness may be differentiated from a personality disorder. R. Strub & F. Black, Organic Brain Syndrome, 42 (1981). This historical data must be obtained not only from the patient but from sources independent of the patient.

In Mr. Porter's case, counsel failed to provide his client with "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake, 105 S. Ct. at 1096 (1985).

---

[19]See Fessel; Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Mason v. State, 489 So. 2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

The state made Mr. Porter's mental state an issue at all phases of the trial. He should have been provided with adequate expert assistance pre-trial and during the guilt and penalty phases of the trial.

Three mental health experts had been appointed by the court at various stages to determine the competency of Mr. Porter to stand trial (R.1469, 2662, 2752-60). They were court-appointed and not provided with the necessary background materials to make a thorough and competent evaluation. They relied instead on brief interviews by Mr. Porter and observations during the court proceedings.

Both the experts and trial counsel have a duty to perform an adequate background investigation. When such an investigation is not conducted, due process is violated. The judge and jury are deprived of the facts which are necessary to make a reasoned finding. Information which was needed in order to render a professionally competent evaluation was not investigated. Mr. Porter's judge and jury were not able to "make a sensible and educated determination about the mental condition of the defendant at the time of the offense." Ake, 105 S. Ct. at 1095.

As a result of the experts' and counsel's failures, the judge was not provided expert opinions establishing that Mr. Porter was not competent to stand trial, to enter a guilty plea or to waive counsel.

The prejudice to Mr. Porter resulting from the expert's deficient performance is clear. Mr. Porter's competency was a

central issue during the proceedings. The failure to obtain competent mental health evaluations directly related to Mr. Porter's competency to stand trial, enter a plea, and waive counsel. A thorough mental health evaluation which included adequate testing and consideration of background information would have revealed Mr. Porter's incompetence. The record cannot refute these facts.

Furthermore, Mr. Porter was entitled to adequate mental health assistance at the guilt and penalty phases of his trial. Mr. Porter was denied his fundamental right to adequate mental health assistance. This cause should be remanded back to the trial court to consider the substance of Mr. Porter's claim.

E. MR. PORTER WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE. INTERFERENCE BY THE TRIAL COURT AND MR. PORTER'S STANDBY COUNSEL RENDERED IMPOSSIBLE AN EFFECTIVE SELF REPRESENTATION BY MR. PORTER DURING THE GUILT PHASE OF HIS CAPITAL TRIAL AND PREVENTED MR. PORTER FROM ADEQUATELY INVESTIGATING AND PREPARING HIS DEFENSE CASE AND CHALLENGING THE STATE'S CASE. THE STATE'S OMISSIONS AND THIS INTERFERENCE PREVENTED A FULL ADVERSARIAL TESTING.

A criminal defendant is entitled to a fair trial. As the United States Supreme Court has explained:

> ... a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to ensure that an adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon both the prosecutor

and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and `material either to guilt or punishment'". United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland.

Here, Mr. Porter was denied a reliable adversarial testing. The jury never heard the considerable and compelling evidence that was obviously exculpatory as to Mr. Porter. In order "to ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential for the jury to hear the evidence.

The actions of the state, the trial court, and Mr. Porter's own standby counsel prevented this evidence from coming before the jury. At the behest of the trial court, and of his own volition, standby counsel refused to investigate facts and secure evidence critical to Mr. Porter's chosen defenses. The state presented materially false evidence which Mr. Porter was unable to effectively rebut. Were it not for the actions of the state, the trial court, and Mr. Porter's standby counsel, Mr. Porter would have presented this evidence to the jury and the result would have been different.

Had Mr. Porter been allowed to pursue his chosen defenses, he would not have pled guilty, but rather would have placed

before the jury evidence and/or argument which would have militated against his two convictions and sentences of death.

Mr. Porter would have presented evidence to support his argument that law enforcement officers investigating the death of Evelyn Williams and Mr. Burrows, or some unknown party other than Mr. Porter, moved the body of Ms. Williams, three (3) feet or more, so as to buttress the alleged eye witness testimony of Amber Williams. Amber Williams testified that she was awakened by the sound of a scuffle and the sound of gunfire and proceeded to the front portion of the Williams' residence where she slipped in blood and fell on the floor (Amber Williams Deposition p. 31, 37). She also stated that she saw Evelyn Williams' body lying just inside the door to the den (R. 730). Undisclosed blood splatter evidence from a rainbow blanket on a couch located in the den where Ms. Williams body was found demonstrated that Amber Williams' testimony was false. This evidence was never analyzed or even gathered by the police department. Substantial physical and blood splatter evidence went untested and uncollected, including the rainbow blanket in the den, blood found on the windowsill behind the couch in the den, blood found on the round table in front of the couch in the den and blood found on the speaker four (4) feet from the body on the floor in the den. The failure to adequately collect and test this evidence prevented Mr. Porter from putting on a proper defense.

Mr. Porter would have presented evidence to support his argument that law enforcement officers investigating the death of

Evelyn Williams and Mr. Burrows, or some unknown party other than Mr. Porter, changed the clothes Evelyn Williams was wearing after she had been fatally wounded. The state failed to reveal to Mr. Porter that the blue jeans in which the victim was allegedly found had no bullet holes in them and that the bullet wound to Evelyn Williams' abdomen had an entry point which was below the upper edge of said blue jeans. Such evidence would have demonstrated that Evelyn Williams was not killed in the manner described by Amber Williams, but rather, that she was shot in the den and the clothing she was wearing on her lower limbs, to wit, a pair of shorts, see Page 15, line 11, Deposition of Glen Williams, were thereafter removed and replaced with the blue jeans in which she was allegedly found, or, alternatively, that law enforcement officers altered the crime scene in order to buttress the testimony of Amber Williams, the main witness against Mr. Porter.

Mr. Porter would have presented evidence to support his argument that the reports of law enforcement officers investigating the death of Evelyn Williams and Mr. Burrows contained numerous misstatements of fact, misstatements detrimental to Mr. Porter's case. Mr. Porter would have contended that the video tape of the crime scene was actually two video tapes spliced together. He would have supported his contention by pointing out that Captain Short stated in his deposition that he began to video tape the crime scene at approximately 7:30 A.M. (Deposition of John Short, P. 3, lines

21-15), but that the audio portion of the video tape, which is less than 45 minutes long, reflects that it is still being filmed at 10:06 A.M.

Mr. Porter would have testified that he was familiar with the writing of Evelyn Williams and that the writing on the written statements allegedly made by Evelyn Williams which accompanied police reports of prior threats by Mr. Porter were not in her writing and were made at a time that he and Evelyn Williams maintained a cordial and close relationship. He would have then argued that they were the fraudulently executed by agents for the state for the sole purpose of assisting the state in obtaining a conviction in this matter.

Had he not been prevented from doing so, Mr. Porter would have introduced the testimony of Manuel Rubio who would have stated that Detective Carrasquillo attempted to coerce or entice Mr. Rubio into testifying falsely that Mr. Porter had confessed committing the subject offenses to him during the period of Mr. Porter's pre-trial incarceration.

Had he not been prevented from doing so, Mr. Porter would have shown to the jury that Amber Williams told the 911 operator at a time allegedly contemporaneous with the shootings that Mr. Burrows had chased Mr. Porter out of the house, which directly contradicted her trial testimony to the effect that she saw Mr. Porter shoot Mr. Burrows from near the front door of the house and saw Mr. Burrows fall (A. Williams' Depo at p. 43).

Had he been permitted to do so, Mr. Porter would have shown to the jury that Jennings .22 caliber automatic pistols are neither 10 land/groove, but rather 6 land/groove or 7 land/groove nor will they fire a .22 long, long caliber bullet. In addition, Doe's Cascade Cartridge Industries does not make a .22 long, long caliber bullet. Further he would have shown to the jury that Davis .25 caliber automatic pistols are 5 land and 6 land groove. Such testimony would have severely impeached the testimony offered by the state which tied a Jennings pistol which Mr. Porter allegedly stole from one Dennis Gardner to the killings of Ms. Williams and Mr. Burrows.

Had he been permitted to do so, Mr. Porter would have shown to the jury that Dennis Gardner had been involved in numerous criminal enterprises, thefts, and burglaries, that he had a direct connection to the Melbourne Police Department, and that his testimony was false and had been given in exchange for the Melbourne State Attorney's and Police Department's continued acquiescence to such criminal enterprises.

Had he been permitted to do so, Mr. Porter would have shown to the jury that both the original incident report and the original BOLO indicated that the assailant of Ms. Williams and Mr. Burrows was 6'2" tall and weighed over 245 lbs. Such evidence, standing alone or in conjunction with that other evidence which Mr. Porter would have presented would have made a difference in the guilt phase of his capital trial.

All of these omissions prevented Mr. Porter from investigating and preparing his own defense. More significantly, the State's misconduct in withholding such evidence and the trial court's failure to prevent such overreaching was reversible error. This cause should be remanded back to the trial court to consider the substance of Mr. Porter's claim.

ARGUMENT VI

THE STATE'S INTRODUCTION AND ARGUMENTS ABOUT NON-STATUTORY AGGRAVATING FACTORS WAS UNCONSTITUTIONAL AND VIOLATED MR. PORTER'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS RIGHTS. DEFENSE COUNSEL'S FAILURE TO OBJECT OR ARGUE EFFECTIVELY CONSTITUTED INEFFECTIVE ASSISTANCE.

The trial judge in sentencing Mr. Porter considered non-statutory aggravating circumstances and relied upon them in his order. The judge relied upon the fact that the crime occurred at 5:45 in the morning; that the path of the bullet somehow indicated how much suffering the victim felt; and the number of shots were all aggravating factors (R. 2775-86).

The judge's consideration of improper and unconstitutional non-statutory aggravating factors starkly violated the Eighth Amendment, and prevented the constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S.Ct. 1130 (1992); Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). As a result, these impermissible aggravating factors evoked a sentence that was based on an "unguided emotional response," a clear violation of Mr. Porter's constitutional rights. Penry v. Lynaugh, 108 S.Ct. 2934 (1989). This cause should be remanded

back to the trial court to consider the substance of Mr. Porter's claim.

ARGUMENT V

FLORIDA'S PENALTY PHASE JURY INSTRUCTIONS VIOLATE THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THEY SHIFTED THE BURDEN TO MR. PORTER TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING MR. PORTER TO DEATH. FAILURE TO OBJECT OR ARGUE EFFECTIVELY RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE.

Under Florida law, a capital sentencing jury must be:

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

<u>State v. Dixon</u>, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Porter's capital proceedings. To the contrary, both the court and the prosecutor shifted to Mr. Porter the burden of proving whether he should live or die.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of <u>Mullaney v. Wilbur</u>, 421 U.S. 684 (1975), and <u>Dixon</u>, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating

Caldwell v. Mississippi, 472 U.S. 320 (1985), Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

Prosecutorial argument and judicial instructions at Mr. Porter's capital penalty phase required that the jury impose death unless mitigation was not only produced by Mr. Porter, but also unless Mr. Porter proved that the mitigation he provided outweighed and overcame the aggravation (R. 2262-63, 2266). The trial court then employed the same standard in sentencing Mr. Porter to death. This standard obviously shifted the burden to Mr. Porter to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the aggravation. The standard given to the jury violated state law. According to this standard, the jury could not "full[y] consider[]" and "give effect to" mitigating evidence. Penry, 109 S. Ct. 2934, 2951 (1989).

Counsel's failure to object to the clearly erroneous instructions was deficient performance which prejudiced Mr. Porter. Harrison v. Jones, 880 F.2d 1277 (11th Cir. 1989); Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). This cause should be remanded back to the trial court to consider the substance of Mr. Porter's claim.

ARGUMENT VI

AGGRAVATING CIRCUMSTANCES WERE OVERBROADLY AND VAGUELY ARGUED AND APPLIED, IN VIOLATION OF STRINGER V. BLACK, SOCHOR V. FLORIDA, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

At the penalty phase of Mr. Porter's trial, the jury was instructed to consider four aggravating circumstances:

> As to Count 1, the murder of Evelyn Meyer Williams, the aggravating circumstances that you may consider are limited to any of the following that is establish [sic] by the evidence. 1. The defendant had been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person. a. The crime of first degree murder is a capital felony. b. The crime of aggravated assault is a felony involving the use or threat of violence to another person. c. The defendant's convictions for the murder of Walter Burrows and for the aggravated assault of Amber Williams may be considered by you with regard to this aggravating circumstance.
>
> 2. The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of, an attempt to commit or flight after committing or attempting to commit the crime of burglary.
>
> 3. The crime for which the defendant is to be sentenced is especially wicked, evil, atrocious, or cruel.
>
> 4. The crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(R. 2263-64). The instructions as to Count II for the Walter Burrows murder included the same aggravating circumstances as above with the exception of number three, the especially wicked, evil, atrocious, or cruel aggravator (R. 2264-65).

On direct appeal, this Court struck the "especially wicked, evil, atrocious, or cruel" aggravator. Porter v. State, 564 So.2d 1060 (Fla. 1990). Thus, not only were the jury instructions on this factor erroneous but the jury was erroneously instructed to consider this aggravating factor. Under Stringer v. Black, 112 S. Ct. 1130 (1992), this Court erred in not ordering a new jury sentencing.

The instruction on the third aggravating circumstance in this case was also unconstitutionally vague. Espinosa v. Florida, 112 S. Ct. 2926 (1992). The instructions rendered it so vague or misleading as to leave the sentencer without sufficient guidelines for determining the presence or absence of the factor. Shell v. Mississippi, 498 U.S. 1 (1990); Maynard v. Cartwright, 486 U.S. 356 (1988); Godfrey v. Georgia, 446 U.S. 420 (1980). The use of this vague aggravator was illusory and thus Eighth Amendment error. Stringer v. Black. Counsel's failure to object to the unconstitutionality of these vague instructions was deficient performance.

Under Florida law aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 528 (Fla. 1989). In fact, Mr. Porter's jury was so instructed. Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988).

Unfortunately, Mr. Porter's jury received no instructions regarding the elements of the aggravators even though defense counsel argued that the aggravators were unconstitutionally vague (R. 2696-2709). Counsel intended that this objection would preserve the issue for appellate review. If counsel failed to carry out his decision, he was ineffective. Over objection, the standard instructions were read and it was implied that the aggravators had already been found to apply and that the jury was obligated to accept that finding (R.2145). On direct appeal, the this Court rejected the trial court's finding of "especially wicked, evil, atrocious, or cruel" but failed to remand the case for resentencing before a properly instructed jury. Porter v. State, 564 So.2d 1060 (Fla. 1990).

Here, Mr. Porter's jury was given the same inadequate instruction condemned in Espinosa. No narrowing construction was given even though defense counsel objected to the application of the instruction. Later, the Florida Supreme Court addressed the issue on the merits in Mr. Porter's direct appeal and rejected it. Porter, 564 So.2d at 1062. Therefore, relief is proper.

As to the fourth aggravating factor submitted for the jury's consideration, the jury was simply told "the crime . . . was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification" (R. 2264, 2265). The jury was not provided with further instructions defining these terms on the application of this aggravator. As the record

reflects, the jury was never given a limiting construction on the cold, calculated and premeditated aggravating circumstance.

Aggravating circumstance (5)(i) of Section 921.141, Florida Statutes, is also unconstitutionally vague, overbroad, arbitrary, and capricious on its face. Jackson v. State, 648 So. 2d 85 (Fla. 1994). This circumstance is to be applied when:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Section 921.141(5)(i), Fla. Stat.

As to the second aggravating factor submitted to the jury, the jury was simply told "the crime . . . was committed while he was engaged in the commission of the crime of burglary" (R. 2264, 2265). However, the jury was not told that this aggravating factor standing alone was insufficient to support a death sentence. Proffitt v. State, 510 So. 2d 896 (Fla. 1987). As a result, the penalty phase instruction on this aggravating circumstance "fail[ed] adequately to inform [Mr. Porter's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 108 S. Ct. at 1858. Accordingly, this factor must be stricken.

This Court has produced considerable case law regarding the import of instructional error to a jury regarding the mitigation it may consider and balance against aggravation. In Mr. Porter's case the jury received no guidance as to the "elements" of the aggravating circumstances against which mitigation was to be balanced. Therefore, the sentencing jury was left with vague

aggravating circumstances contrary to Sochor and Espinosa. Yet, the pivotal role of a Florida jury in the capital sentencing process demands that the jury be informed of such limiting construction so their discretion is properly channeled.

This Court refused to find that the murder was "heinous, atrocious and cruel". Yet, the jury instructions told the jury to weigh this aggravating factor. The sentencing jury never knew that as a matter of law one of the four aggravators it was instructed upon could not be considered in weighing the aggravating circumstances against the mitigating circumstances. As a co-sentencer, the jury was entitled to be properly instructed under Espinosa.

Under Richmond v. Lewis, 506 U.S. 40, (1992), the Florida Statute, setting forth the aggravating circumstances of "heinous, atrocious or cruel" and "cold, calculated and premeditated," is facially vague and overbroad under the Eighth Amendment. At issue there was the constitutionality of an Arizona aggravating factor, statutorily defined as "especially heinous, atrocious, cruel or depraved."[20]

---

[20]In analyzing the issue, the Court stated:

> The relevant Eighth Amendment law is well defined. First, a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty. See e.g., Maynard v. Cartwright, 486 U.S. 356, 361-364 (1988); Godfrey v. Georgia, 446 U.S. 420, 427-433 (1980). Second, in a "weighing" State, where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the

In Mr. Porter's case, the Florida Statute defines the two aggravating factors at issue as follows: "[t]he capital felony was especially, heinous, atrocious or cruel . . . [t]he capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." Fla. Stat. section 121.141(5)(h), (i)(1981). The statute does not further define these aggravating factors. Accordingly, this statutory language is facially vague. Richmond, 52 Cr.L. at 2018 ("Arizona's especially heinous, cruel or depraved factor was at issue in Walton v. Arizona, supra. As we explained, `there is no serious argument that [this factor] is not facially vague.'").

In Mr. Porter's case, the penalty phase jury was not given "an adequate narrowing construction," but instead was simply instructed on the facially vague statutory language. As previously explained in Walton v. Arizona, 110 S. Ct. 3047, 3057

> sentencer to give weight to an unconstitutionally vague aggravating factor, even if other valid aggravating factors obtain. See e.g., Stringer v. Black 503 U.S. ___, ___ (1992) (slip op., at 6-9); Clemons v. Mississippi, supra, at 748-752. Third, a state appellate court may rely upon an adequate narrowing construction of the factor in curing this error. See Lewis v. Jeffers, 497 U.S. 764 (1990); Walton v. Arizona, 497 U.S. 639 (1990). Finally, in federal habeas corpus proceedings, the state court's application of the narrowing construction should be reviewed under the "rational factfinder" standard of Jackson v. Virginia, 443 U.S. 307 (1979). See Lewis v. Jeffers, supra, at 781.

52 Cr.L. at 2018.

(1990): "It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face." The facially vague statutory language was applied by the sentencer in Mr. Porter's case. Thus, Richmond controls: "Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand" (52 Cr.L. at 2019). Simply finding that "an adequate narrowing construction" exists is not enough, according to Richmond. The narrowing construction must have been applied in a "sentencing calculus."[21]

Mr. Porter presented this issue on direct appeal where this Court rejected it on the merits. In light of Espinosa and Richmond, Mr. Porter's Rule 3.850 clearly established his entitlement to relief. This cause should be remanded back to the trial court to consider the substance of Mr. Porter's claim.

[21]Compare this opinion to this Court's opinion in Johnson v. Singletary, 612 So. 2d 575 (1993), wherein this Court stated that Florida has already adopted a narrowing construction of heinous, atrocious, and cruel which is all that Richmond requires. Id., at 577.

ARGUMENT VII

MR. PORTER WAS DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE HIS DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, LOWENFIELD V. PHELPS, HITCHCOCK V. DUGGER, AND THE EIGHTH AMENDMENT. COUNSEL'S FAILURE TO OBJECT WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Porter was convicted of aggravated assault and two counts of first degree murder, with burglary being the underlying felonies. The jury was instructed on the "felony murder" aggravating circumstance:

> 2. The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of, an attempt to commit, or flight after committing or attempting to commit the crime of burglary.

(R. 2265). The trial court subsequently found the existence of the "felony murder" aggravating factor (R. 2777).

The jury's deliberation was obviously tainted by the unconstitutional and vague instruction. See Sochor v. Florida,

112 S. Ct. 2114 (1992). Trial counsel was ineffective for not objecting. The use of the underlying felonies as an aggravating factor rendered the aggravator "illusory" in violation of Stringer v. Black, 112 S.Ct. 1130 (1992). The jury was instructed regarding an automatic statutory aggravating circumstance, and Mr. Porter thus entered the penalty phase already eligible for the death penalty, whereas other similarly (or worse) situated petitioners would not.

The death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for conviction. The prosecutor, in his closing argument, even told the jury that this the aggravating circumstance must be automatically applied (R. 2226-27).

Aggravating factors must channel and narrow sentencers' discretion. A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black. The use of this automatic aggravating circumstance did not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983), and therefore the sentencing process was rendered unconstitutionally unreliable. Id. "Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988). This cause should be remanded back to the trial court to consider the substance of Mr. Porter's claim.

ARGUMENT VIII

THE SENTENCING JUDGE FAILED TO FIND THE EXISTENCE OF MITIGATION ESTABLISHED BY THE EVIDENCE IN THE RECORD WHICH DENIED MR. PORTER A RELIABLE SENTENCING IN HIS CAPITAL TRIAL, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

At the sentencing phase of his capital trial, Mr. Porter presented evidence that he had a good relationship with his son (R.2043); that he had a drinking problem (R.2046); that the crime occurred as a result of a domestic dispute (R. 2202); that he underwent a drastic personality change when he drank (R. 2075); and that he had been drunk just five hours before the offense (R. 2081). This evidence was uncontradicted and unimpeached.

Each of these factors constitute a mitigating circumstances. Cheshire v. State, 568 So. 2d 908 (Fla. 1990). The jury and judge were required to weigh the same against the aggravating factors. According to his sentencing order the judge did not weigh this mitigation or misunderstood the law and refused to consider it (R.2784). Mr. Porter was deprived of the individualized sentencing required by the Eighth and Fourteenth Amendments and is entitled to a new sentencing hearing. Zant v. Stephens, 462 U.S. 862, 879-80 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

ARGUMENT IX

MR. PORTER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE PROSECUTOR'S INFLAMMATORY AND IMPROPER COMMENTS AND ARGUMENTS.

Throughout Mr. Porter's trial, the prosecutor injected improper, and inflammatory matters into the proceedings when he laughed at Mr. Porter's attempts to represent himself (R. 1023-23); purposefully made sarcastic responses to Mr. Porter before the jury (R.570, 698); laid on the floor to illustrate the position of the victim (R.957-58); refused to allow Mr. Porter to pick up any evidence or approach any witness during his direct and cross examinations (R.556); became so irate at the Judge's adverse ruling that the courtroom was cleared and the Judge was compelled to calm him down in the hall outside the courtroom (R. 2096, 2141-45); directed witnesses to look at the State's counsel table for answers to Mr. Porter's cross examination questions (R. 860, 1842-44); refused to control his family witnesses in the audience who were crying and making such a commotion in the courtroom that the judge was forced to admonish them (R.933-34, 2222-23); and purposefully violated a pre-trial order to proffer evidence of bad acts because he knew Mr. Porter didn't know legal procedures (R. 1272).

Sua sponte, the trial court attempted to keep control of the proceedings, even risking ex parte communication with Mr. White to return order to the circus-like atmosphere that descended over Mr. Porter's trial (R.2141-45). The court , however, denied Mr. Porter's motion for mistrial (R. 2145) and attempted to cure the

problems with instructions to the jury to disregard some of the courtroom antics (R. 1024, 570, 698, 2223, 934, 1272, 2145).

Throughout the trial, the prosecutor urged consideration of improper matters into the proceedings and deprived Mr. Porter of Due Process. The prosecutor's conduct was so unfairly prejudicial that a mistrial was the only proper remedy. Garron v. State, 528 So. 2d 353 (Fla. 1988). While isolated incidents of overreaching may or may not warrant a mistrial, the cumulative effect of one impropriety after another is so overwhelming that they preclude a fair trial. See Nowitzke v. State, 572 So. 2d 1346, 1350 (Fla. 1990). In Garcia v. State, 622 So. 2d 1325, 1332 (1993), this Court explained," Once again, we are compelled to reiterate the need for propriety, particularly where the death penalty is involved. See also Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985).

As alleged, Mr. Porter was not only constrained from conducting his own defense by his own ignorance of the law but was forced to endure the overreaching of the prosecutor. Mr. Porter was also forced to endure the physical hardship of the trial, in that he was hobbled with a heavy soled boot to supposedly restrain him from escaping from the courtroom and would hobble with the boot whenever he moved around counsel table; he was threatened by the victim's family members so that heightened security was ordered by the Judge for the courtroom; he was deprived of pain medication for the first half of the trial; he was suffering from lack of sleep because the trial

would continue until 9 P.M. at night and Mr. Porter would be awakened at 5 A.M. in the morning for trial with little or no time to prepare for his defense (R.1034-36, 1565, 1608, 647-54, 1521, 1585). All of these factors amplified the prejudice suffered by Mr. Porter. "A prosector's concern `in a criminal prosecution is not that it shall win a case, but that justice shall be done.' While a prosecutor `may strike hard blows, he is not at liberty to strike foul ones.'" Rosso v. State, 505 So. 2d 611, (Fla. 3rd DCA 1987) (quoting Berger v. United States, 295 U.S. 78 (1935)).

The prosecutor distorted Mr. Porter's trial and sentencing with improper commentary and actions, thus destroying any chance of a fair determination. Had Mr. Porter been competent at the time of trial, or had he not been improperly allowed to represent himself, either he, or competent counsel would have objected. Penalty phase counsel was ineffective for not objecting to this gross overreaching. This cause should be remanded back to the trial court to consider the substance of Mr. Porter's claim.

CONCLUSION

The circuit court improperly denied Mr. Porter Rule 3.850 relief. It's decision denying relief should be overturned and it's decision denying Mr. Porter a hearing on several claims must be reversed and this matter remanded for an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appellant's Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on August 28, 1998.

Amy C. Settlemire
Florida Bar No. 0788724
Assistant CCRC

Linda McDermott
Florida Bar No. 0102857
Staff Attorney

CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE
405 North Reo Street
Suite 150
Tampa, FL 33609-1004
(813) 871-7900
Attorneys for Mr. Porter

Copies furnished to:

Kenneth Nunnelley
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Boulevard, Fifth Floor
Daytona Beach, Florida 32118-3951

Christopher White
Assistant State Attorney
Office of the State Attorney
100 East First Street
Sanford, Florida 32771