IN THE SUPREME COURT OF FLORIDA

WILLIAM M. WHITE,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 88,686
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

William White (appellant), Richard DiMarino, and Guy Ennis were charged with first degree murder of Gracie Crawford. After being convicted of third degree murder, DiMarino testified against appellant and Smith in separate trials. Smith was convicted of first degree murder and sentenced to death over a life recommendation. This court reduced the sentence to life. Smith v. State, 403 So. 2d 933 (Fla. 1981). Appellant was convicted and sentenced to death, and this Court affirmed. White v. State, 415 So. 2d 719 (Fla.), cert. denied 459 U.S. 1055 (1982), reh. denied 459 U.S. 1189 (1983).

Appellant filed his Rule 3.850 motion in 1983, and it was later amended and supplemented. The state was ordered to respond, but the process was interrupted by a death warrant. The court stayed the warrant, SR 165, 183, and at the same hearing struck several claims. SR 174, 177, 182-83. In 1987 trial court proceedings were suspended for filing of a Hitchcock claim in this Court. White v. Dugger, 523 So. 2d 140 (Fla. 1988) (denying relief as to in-the-record mitigation). In 1992 the court heard evidence, and denied relief in 1996. R 1062-80. Motion for rehearing was denied, and this appeal follows.

1. THE RECORD OF ORIGINAL TRIAL PROCEEDINGS

This Court related the facts from the record of the trial proceedings in its opinion on direct appeal (415 So. 2d at 719-720):

> White was a member of a Kentucky chapter of the Outlaws, a motorcycle gang, but was visiting the Orlando chapter. A group of the Outlaws, accompanied by some girl friends, visited an Orlando nightclub where they met Gracie Mae

> Crawford. Gracie Mae accompanied some of the Outlaws back to their Orlando clubhouse. Soon after returning to the clubhouse, White retired to a bedroom with his girl friend. Sometime thereafter White was called by DiMarino who stated that Crawford liked blacks and that they had to teach her a lesson. White dressed and went into the kitchen area where he joined DiMarino and Guy Ennis Smith in severely beating Crawford. Whether DiMarino or White led the assault is unclear, but one witness testified of White's hitting Crawford with his fist and knocking her to the floor. After the beating, DiMarino and White placed Crawford in the middle of the front seat of White's girl friend's car. White started driving but along the way stopped the car and DiMarino drove the car to the end of a deserted road. (The victim, White and DiMarino had done a lot of drinking that evening, but White's girl friend testified that he knew what he was doing.) After they stopped the car, DiMarino and White pulled Crawford from the car, passed her over a barbed wire fence, and laid her on the ground. White then straddled her, took out his knife, stabbed her fourteen times and slit her throat. Crawford died as a result of the wounds inflicted upon her.
>
> While leaving the area White and DiMarino ran out of gas at the Seaworld parking lot and were later identified by Seaworld security guards who had given them gas. White and DiMarino went back and picked up the body of the deceased and thereafter discarded it at a different place. The body was discovered that afternoon.

As for penalty phase: "No testimony was presented of any mitigating circumstances, statutory or nonstatutory, ..." Id. 720.

At jury selection, the judge told the venire about the second part of the trial where the jury would be called upon to hear mitigating or aggravating circumstances. TR 10. The state told them:

> I don't mean to be repetitious, but it is important that you understand it.
>
> Each of you understand, in the second phase, assuming we found the person guilty of the First Degree Murder in the first phase; in the second phase, there will be certain guidelines. <u>There is a statute listing aggravating circumstances</u>

> and some mitigating circumstances. And that you would follow those for the second phase in making your recommendation to the Court.
>
> So, you have some guidelines based again on that law and the evidence presented. Each of you understand that? So, you are not left to wonder what to do. You have some guidelines as to what to do in the second phase.

TR 16-17 (e.s.). The state asked if they could base the sentencing decision on the law and evidence, reminding them of the statute. TR 17, 26-27, 28. Defense counsel did not object to these comments.

At the penalty trial, the judge began by telling the jury that "this is the part in which we will talk about the aggravating and mitigating circumstances." TR 803. The state argued to the jury:

> And again, you are going to be given jury instructions outlining in detail exactly what the aggravating circumstances are that you're to consider. And they will outline in detail those mitigating circumstances that you're to consider. So you'll be told by the judge what they are. You'll have a written copy of them to take back with you and read verbatim as to what he will tell you.

TR 805 (e.s.). The state displayed a chart of aggravating circumstances and "the" mitigating circumstances:

> I have prepared for the purpose of our discussion here an outline of the aggravating and mitigating circumstances. And I would like to go through these with you one at a time to show you what we're talking about and what applies and what doesn't.
>
> I don't know if you can see this or not, but, anyway, you'll have these instructions with you.
>
> What we've done is prepared just an outline. And don't go by this verbatim, but go by the instruc-

> tions. But this is an outline to essentially what they are, with the aggravating circumstances in this column and the mitigating circumstances in this column.

TR 806 (e.s.). The state listed only statutory mitigating factors. It was "going to go over the mitigating circumstances and show why they apply or why they don't apply." TR 805 (e.s.).

There was no objection to any of this from defense counsel, who agreed with the state's statements of law. His argument did not contradict the limitation to the statutory list because (while his argument began with factors that involve non-statutory mitigation in response to aggravation), after saying "now we get to the mitigation" he only referred to the statutory factors. TR 819. He concluded his argument with an entreaty: "When you go back, look at that list in the jury room. Weigh the mitigating factors. Weigh the aggravating factors." TR 820 (e.s.).

After counsels' argument, the Court charged the jury that:

> The mitigating circumstances which you may consider, if established by the evidence, are these: [reciting statutory list of mitigating factors (a) - (g)].

TR 823. In sentencing Mr. White the judge stated:

> This Court, after weighing the aggravating and mitigating circumstances, finds that sufficient aggravating circumstances exist as enumerated in Florida Statute 921.141(5) to require imposition of the death penalty, and that there are insufficient mitigating circumstances as enumerated in subsection (6) to outweigh the aggravating circumstances.

TR 831 (e.s.). The separate written sentence contains the identical reasoning, TR 1638-39, and the finding of fact also refers to the "certain enumerated" aggravating and mitigating circumstances, TR 1648, and reviews only statutory mitigators (referring to them by statutory paragraph letter). TR 1649-50.

2. THE RECORD ON POSTCONVICTION

(a) Evidence respecting counsel.

The Public Defender was appointed, and responsibility for representation fell to Lehn Abrams; this was his first capital case, though he assisted in others. PC 56-57. Although he had been told that other counsel would be retained, he filed capital motions and deposed nearly everyone on the witness list. PC 59, 60. According to discovery, White and DiMarino were seen at Sea World in the early hours the day the body was found in that area. White, DiMarino, and other Outlaws were at the Inferno bar with Crawford that evening. As White drank continuously that night, the most plausible defenses would be intoxication and to point the finger at DiMarino. R 60, 61. There were no incriminating statements, and no codefendant listed as a witness. R 61. Abrams considered it important to get, and did get, a statement of particulars. R 59, TR 1520.[1]

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[1] On the third day of trial, the state provided an amended statement of particulars without objection. TR 453, 1536. Appellant discusses this matter in detail at Point III below.

As trial neared, David Kaplan, a Louisville, Kentucky, attorney, called Abrams to say he was taking over. R 67.[2] Giving him the file and the criminal rules, Abrams stopped work on the case. R 68-69.

Kaplan[3] testified that the first time he worked on the case, or even saw the depositions, was when he flew down to get substituted, about a month before trial. R 101.[4] The sum of his investigation was: "Other than talking to the members of the club and those people who were down there, that was it." R 102.[5] He did not review Florida law, except by looking at the "statutes" given by Abrams. R 103. Asked about not enforcing a prior order for individual voir dire, he said, "I never seen all those motions", though Abrams "may have mentioned it." R 107. The judge made Kaplan agree not to seek a continuance; he was "duty-bound" not to move for a continuance. R 118-19.

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[2] Kaplan testified he took the case "gratis," because he had represented a number of members of the Outlaws for years and knew Bill personally. R 99-100. The club took care of his hotel expenses and driving him down from Louisville. R 101.

[3] Kaplan has been a member of the Kentucky bar since 1969; his practice is 75% criminal law. He is not licensed to practice law in Florida and never has been. R 97-8.

[4] Kaplan filed his Notice of Appearance October 23, 1978. TR 1515. The court withdrew the Public Defender the next day. TR 1518, 1519. Trial began November 27, 1978. TR 6.

[5] This is borne out by the trial testimony of defense witness John DiMarino who testified he had told Kaplan about his testimony only the day before he testified. TR 612. Kaplan reiterated this in his closing. TR 743.

Kaplan's view of the case was similar to Abrams': either Bill didn't do it or he was intoxicated. R 103. Kaplan was to focus on Bill's state of mind and point the finger at DiMarino. R 104, 105.

Shortly before trial,[6] Abrams received discovery naming Richard DiMarino, who had been convicted of third degree murder a week before. That was the first indication that DiMarino might testify.

Kaplan alone represented appellant the first day of trial, during which the jury was chosen, TR 6-103, and testimony began. His questioning of prospective jurors covers five pages. TR 98-102.[7] That afternoon, he waived opening statement, TR 118, and cross examined the first witness. TR 133-142.[8]

The next morning, the judge had Abrams sit with Kaplan because he was not a Florida Bar member (the Integration Rule required association of a Florida lawyer), and because "there might be some technicality that he would not be familiar with..." TR 151. Abrams objected, but said he would "comply with the court's request to sit in there." TR

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[6] The state served the notice by mail on November 20, 1978. TR 1528. Trial began November 27. TR 1.

[7] Though the court had granted Abrams' motion for individual voir dire, Kaplan did not enforce it. TR 6-103.

[8] At noon, the judge called the parties to chambers to make sure White was satisfied with Kaplan as his attorney. TR 49.

153. The court initially obtained White's agreement,[9] but then Kaplan said appellant was not waiving any issues. TR 153.

Abrams related that the evening of the trial's first day, he was told to appear the next day as local counsel. R 70. He had strong reservations, but appeared because his boss made a commitment to the judge. R 70. When he got there, the jury was already chosen. R 71.

Abrams testified: "My understanding -- my role was to advise Mr. Kaplan of any questions that were peculiar to Florida law or procedure that he might ask." R 71, 89.[10] His role did not include strategy, jury instructions, or educating Kaplan on substantive law. R 71-72. Kaplan "had been retained to handle the case and it was his to do with as he and Mr. White decided." R 72. Abrams did not sit in on any discussion between appellant and Kaplan, and did not discuss strategy with Kaplan: "If he would ask a question and it was something about the case that I knew up to the point and time where I was no longer responsible for it, I would try to respond to it as best I could. Was I sitting there at his elbow suggesting questions for cross-examination of the witnesses or anything like that, no." R 72.

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[9] The judge explained the arrangement to Mr. White as "Mr. Kaplan, from Kentucky, doing your case and Mr. Abrams sitting at counsel table with him to give him any assistance that he deems necessary". TR 153.

[10] For example, Abrams testified that the state made a Golden Rule argument and he knew that "in Florida if you didn't object at that time and ask for mistrial you waived that argument." He "had to almost push him [Kaplan] up to get him to object, because he either didn't recognize it or wasn't aware of that rule." R 71.

Kaplan had a different view of Abrams' role:[11] "The understanding was, I was going to go through the mechanics of the trial and Lenny was going to tell me the procedural aspects and whatever law there was on the subject." R 106. Kaplan says Abrams discussed strategy and defenses, and that, since jury instructions were his "forte'," Abrams took an active role in that discussion. R 107. Kaplan relied on the judge, the state, and Abrams to tell him the law. R 108. Abrams denied such an extensive role, R 70-72, and as for Kaplan's contention that Abrams was responsible for jury instructions, he testified: "That was Mr. Kaplan's job." R 71.

Abrams did nothing to prepare for penalty phase. R 65-66.[12] This is because he believed he was just a "substitute" for the true trial counsel, and at the point he was replaced there were over thirty days until trial. R 66. He has no specific recall of discussing penalty phase law or procedure with Kaplan: "It wasn't my obligation. We may have discussed it, but it was his case to try." R 73. He believes he gave Kaplan a copy of the death penalty statute. R 72-73.

Kaplan had no experience in preparing and presenting a separate penalty phase. While he had tried capital cases before, they were all during the time when guilt and penalty were decided in one proceeding. He had never had a bifurcated capital case. R 99-100. Aside from reading the statute Abrams gave him, he did no legal research into

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[11] The trial court did not resolve conflicts in their testimony.

[12] He thought he was limited to statutory mitigation. R 66-67.

Florida death penalty law. R 102. He relied on the judge, the state and Abrams to advise him of the law.[13] On postconviction he was surprised no one had told him a life sentence carried a 25 year mandatory minimum, and testified it was his understanding that a life sentence in Florida meant appellant would have only had to have served eleven or twelve years:

> Q Do you recall, during the course of the trial -- you and I have talked about it -- that the jury wasn't told that there was a mandatory 25 year minimum?
>
> A That was never brought up. It was never brought up in chambers in conversation. Never brought up at all.
>
> Q Do you feel that someone should have brought that to your attention?
>
> A At least in the penalty stage I could have argued that.
>
> Q. What back then was the punishment in a capital case in Kentucky, back in '78, if you were convicted of first degree murder?
>
> A It was life or death.
>
> Q What did life mean in Kentucky?
>
> A 8 years. As a matter of fact, it was reduced to six right after that. So it was six years for awhile.
>
> Q Did you understand Florida law to be any different?

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[13] " Q. Were you sort of relying on the prosecutor and the Judge and Mr. Abrams to tell you the law of the case? A. In essence. Q. So if the prosecutor would say something to the jury about what the law was, unless Mr. Abrams tod you that wasn't true, you would have accepted it? A. Well, I'm not naive, but I could only assume that if a prosecutor has his mantle of authority and he is going to quote some law to the jury and quote some law to the judge, he's not going to make it up. He's not a fool, I don't think, and I would have accepted it." R 108.

A I knew it was more. I thought it was something like 11 or 12.

R 115-116.[14] He thought the jury had "no function" at sentencing (R 116):

Q Did you have any understanding as to whether the jury's recommendation meant anything as to penalty?

A You know, you learn that the jury is an advisory capacity, and whether that advisory capacity is a mandate to a judge, I wouldn't believe it would be. But just being there for an advisory capacity and having no function, because what a judge is going to do -- he's going to do what he wants anyway. I didn't know how emphatic of how important it was, whatever their advisory opinion would be.

Q You didn't know that? You only knew it had some import?

A Right.

Q And that, in fact, it carried great weight?

A Yes.

He devoted no time to separate penalty investigation. Id. Though White's mother and sister (and other witnesses) lived near Orlando and were available, neither attorney spoke with them. R 294, 304, 318. Kaplan said he spoke with Abrams about penalty evidence between phases, but came up with nothing. R 116-17. Abrams said Kaplan never spoke to him about penalty, either about substantive law, R 72, or factual matters. When Kaplan went to Kentucky after the conviction, Abrams never spoke with him again until perhaps the evening before the penalty phase; Abrams did not see it as his role to develop

[14] The jury was never told the life sentence option carried a 25 year mandatory minimum. At penalty phase it was referred to as a "life sentence." TR 803-835.

witnesses. R 74-5. Kaplan put on no evidence at penalty phase, did not object to any argument made by the state, suggested no instructions, and failed to argue for life to the judge at the sentencing which occurred in the jury's presence immediately upon receipt of the recommendation. TR 803-834.

(B) Evidence respecting mitigation and appellant's background.

The postconviction record sets out evidence Kaplan could easily have found. To avoid confusion, the following discussion will refer to William Melvin White, Jr., (appellant) as "Bill" or "Billy". It will refer to his father, William Melvin White, Sr., as "Melvin".

Billy was born May 23, 1945, in the central Florida hamlet of Plymouth, the third child born to Melvin and Jennie Monk White. Def. Ex. 11. Life had once been kind to the "soft spoken, very gentle" (R 280, 301) Jennie White and her first-born daughter, Nadine. They lived a refined, "calm, peaceful", R 307, existence in the home of Mrs. White's mother and father, along with Mrs. White's sister, who was close to Nadine's age. R 280. Nadine remembers that their life centered around "church and Sunday school, and my mother was very dedicated to education. We knew our ABC's and multiplication tables before we ever started school." R 280.

This serene setting changed when Nadine was about nine, and Jennie married Melvin White. R 307. On the wedding day, at the wedding dinner, Melvin became enraged at "some very simple childish

thing," caused a scene, and "disappeared." R 281. But he returned, to torture his family.

Those who know him best -- his former wife, step-daughter, and daughter -- describe Melvin as "very cruel" (R 282), "mean" (R 285), "abusive" (R 286), "very childish, very petty and sick" (R 292-93), "a sick, mental case" (R 294), "mean, sick and sadistic" (R 303), "a sick man" (R 304), and "mean and cruel." R 321.[15]

Nadine was horrified by the downturn in their lives. "We didn't know there was such abuse and unconcern for your fellow man in the world." R 290. Like his father (R 321)[16], Melvin was an extreme alcoholic, "a drunk" who couldn't hold a job and whose sole pleasures in life were drinking, extramarital affairs, and terrorizing his wife, young step-daughter, and later, his own children. Mrs. White and Nadine repeatedly fled, hiding in barns (R 282), in bushes on the side of the road (R 310-11), in the washroom behind their home, (R 311), with friends (R 282), or wherever they could find to wait until he passed out or left. Melvin killed Nadine's pet owl and forced her to bury the animal. R 286. She saw Melvin beat her mother, as well as

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[15] In addition to the harshness inflicted on Jennie and her children, Melvin later formed a new family (and had a second son also named William Melvin White, Jr.). His continued cruelty is evidenced by his arrests and convictions for battery and child abuse towards this second set of children and step-children. Def. Exs. 16-18.

[16] Mrs. White's brother also exhibited traits of alcoholism later in life. R. 321.

Mrs. White being pushed down steps, resulting in the fracture or sprain of her ankles. R 283.

In one drunken spree, as Mrs. White and Nadine were running from the home, Melvin shot himself in the face in a suicide attempt which left him scarred. R 283. Nadine was in fear of their lives on occasions when Melvin "literally choked me half to death," R 284, while telling her "that I would never see my mother again, and I was afraid that he had killed her." R 284-85. Nadine's anxiety over Melvin became so great that, seeing remains of a bottle of ketchup he had thrown and broken, she mistook the ketchup for blood and became convinced that her mother had been killed. R 284.

Mr. and Mrs. White's first child was Wilma Jeanette. After the toddler was killed by a truck, the trucking company paid the family $500. Rather than consoling his wife in her grief, Melvin used the money to buy a boat "to take the place of the child." R 289-90, 316.

When Nadine was 12, Carmelita, was born, and four years later, Billy was born. Around the time of Billy's birth, 16-year-old Nadine "escaped" that poisonous environment by marriage, a union that has lasted for 50 years. R 279, 285.

Carmelita and Billy could not escape. They were yet small children needing protection and nurturance. Melvin's nature precluded any positive caring for the children. Melvin stymied Jennie's attempts to train them. He undermined efforts to have them attend Sunday school and church and do well in school (R 288, 291, 309-10), and fostered

cursing, smoking, and drinking in his pre-adolescent children. Their lifelong alcoholism began as he had them drink and smoke with him at bars. R 299-300. Vying for his approval, Billy and Carmelita outdid one another: "We would see who could drink the most and who could smoke the most. That made him happy." R 299. If they resisted, they were backhanded off their barstools, and "[h]e would make us drink, and if we didn't drink he would get upset and we'd get a beating." R 298.

Mrs. White was beaten; Carmelita was beaten; Billy was beaten. Melvin used "his fist, a belt, belt buckle, whip handles" to beat them "on shoulders and back, and stomach and legs," although he was careful that "he never bruised [them] where it showed." R 297. The first time Jennie recalls Billy being hit was when he was only two, and his father hit him on the head because he was crying. R 308. Dr. Caddy explained Bill thought he must have done something to deserve beating, and tended to accept a tremendous amount of responsibility for his lack of control in dealing with his father. R 326.

The "reasons" for these beatings were never clear. Mrs. White says, "That's something I've never known. I couldn't understand it." R 308. Nadine recalls, "I don't know. You never knew. You just didn't know what would set him off." R 284. Carmelita remembers that the family was beaten "when people didn't do what Mr. White wanted you to do." R 304. Carmelita does recall one instance when she knew the reason Mr. White "beat the tar out of" her: she refused to participate when he planned to steal the deposit she was taking to the bank for his

friends. He wanted her to turn over the deposit to him and "make it look like a robbery." R 303.

Childhood friends knew of the beatings. Sharon Price recalls:

> One day I remember, which epitomizes Billy's life for me, is the day I witnessed Billy's dad giving him a beating. We kids were walking around town and decided to stop by and get Billy. His house had a large picture window in the front, and, as we walked up to the house, we could see right inside. I was truly shocked by what we saw going on inside.
>
> Billy's dad was beating Billy with a big leather belt. Melvin White used both the leather end and the buckle end to hit Billy all over his body. We were simply stunned, because none of us had ever seen anyone being beaten like that, and I could tell that Bill was being hurt very badly. Though we'd all been punished from time to time, this was way beyond such spankings as we'd had. We sure didn't stay around but instead left quickly. We didn't want to embarrass Billy by his knowing we had seen him being beaten.
>
> The next day, I remember that Billy had big, red welts on him. They looked terrible and looked like it must have hurt very much. As far as I know, no one ever said anything to him about it.

Aff. of Sharon Price, attached to Motion to Supplement Record.

Mrs. White was physically and emotionally unable to stand up to this bullying "because she had never seen anything like it." R 290. She "didn't dare" (R 310) confront him, not only from fear for herself, but because he threatened to harm or even kill the children:

> A. If it would have been me I would have been out in a flash, but when a man or anybody goes to threatening you [about] doing things to your children, you will take a whole lot.

Q. Did you believe that he could carry out those threats?

A. Oh, definitely. You couldn't help but believe it.

R 313. Nadine knew of the threats:

She was not only afraid for her life, but he would threaten what he would do to the children.

R 284. Mrs. White tearfully recalled the advice of her father-in-law who, seeing the bruises Mr. White had inflicted, said (R 312):

A. I know what put those bruises there, and he said what you should have done was pick up a chair and broke it over his head the first time he ever did anything like that.

I'm all right. Go ahead.

Mrs. White's concern for her children was all the greater because of the boy's timid, gentle personality. Billy "kind, sympathetic, loving", R 309, "sweet, loving", R 287, and a "very sweet, caring, concerned, and loving person." R 293. Nadine, remembers: "He loved especially his family and friends, and would do anything for them. Very tenderhearted." R 287. An aunt predicted "he would probably be a preacher because he was so concerned for others." R 287. Carmelita recollects Billy as "a good kid. He never wanted to hurt anybody. He didn't like to see anybody or anything in pain." R 296.

Billy loved and cared for his animals: cats, dogs, horses, and a calf which he was raising for 4-H. Def. Ex. 8. Melvin destroyed these helpless creatures who relied on Billy and on whom Billy relied to fulfil his need for love. Cats and dogs disappeared; Billy's

cherished calf was sold to pay for Melvin's drinking. R 234, 287, 301-02, 309. Melvin's attitude to Billy's education had not reached its nadir, and school records show he did his best despite a dull normal intelligence (overall IQ of 88).[17] Def. Exs. 12, 13, R 290, 328.

Billy developed asthma, and, though the asthma was diagnosed by a doctor, Melvin refused to believe he was ill. He ignored instructions to keep Bill "quiet and calm as possible, especially when he was having an attack," exacerbating the problem. R 319-20.

Jennie often could not be home to protect the children. Melvin's inability to keep a job required that she work long and hard at citrus packing houses and in stores. R 289, 300, 314.

Nadine testified: "verbally he abused them, as well as physically." R 285. She believes this explains why she is so different from her Billy and Carmelita:

> I think that it's obvious that your early years [are] your formative years -- I have the same mother that they have, and my goals and standards and values were set early, and I think that Billy and Carmelita had no self-esteem. They didn't believe they had any self-worth, just because of the way that he abused them and spoke to them and put them down.

R 287. Melvin sexually abused Nadine (R 292); there is evidence he also sexually abused Carmelita (R 317).

The family's home burned down in a fire which "took everything. We didn't get out with very much." R 300. "We saved very little,

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[17] School records show that his grades worsened after his father began taking him to bars and making him drink alcohol.

because it was at 4:00 in the morning and the fire was well on the way when we smelt [sic] smoke." R 314.

After the fire, as Melvin's alcoholism made it impossible for him to keep a job (R 217, 281-82, 300, 314), the family moved from Plymouth to Mt. Dora and then to Sorrento, a lawless village consisting only of a post office, a service station, a grocery store, and two bars, with the bars being the most-frequented spots in town, by adults and children alike. Johnny Mahon, Bill's best friend in Sorrento and now a businessman and revivalist preacher, recalls:

A. There wasn't anything to do in Sorrento but just drink and party.

* * *

A. All there was to do was just to stand around and run around that area and drank [sic] and party.

* * *

Q. Were there any police departments out there at the time?

A. No, sir, there was not.

Q. Did you say you were driving?

A. I was driving. I had a '47 Chevrolet. I drove about two years.

Q. That's when you were 13 or 14?

A. 14 to 15.

Q. And that was okay out there in Sorrento?

A. Well, nobody ever bothered me.

* * *

A. There certainly wasn't any role models that ever came around . . . .

* * *

A. The Sorrento bunch was just a wild bunch of people . . . .

* * *

R 212-17. Sharon Price remembers:

> I knew Billy White when we were growing up together in Sorrento, Florida.
>
> Sorrento was a very small town when we were growing up. There was literally nothing there, except a little grocery store, the filling station, the Hill Top bar, and our few houses. We kids had nothing to do with our free time and usually spent it just wandering around together in the town.
>
> It was common knowledge in Sorrento that Billy's father, Melvin White, drank a lot and spent most of his time either in the Hill Top or at the bar that was further out of town, the Goat's Inn.

Aff. of Sharon Price. With the backdrop of his father's introducing him to alcohol and Sorrento's alcohol-saturated lifestyle, Bill began drinking on his own. Rev. Mahon recalls: "when I was about 13 and a half to 14, I was drinking heavy, and then Bill was also." R 212. Rev. Mahon is "about a year and a half" (R 211) older than Bill, so by the time Bill was 12 or so, he was "drinking heavy."

Rev. Mahon and Bill, with two other young men, got in trouble for a shooting spree for which Rev. Mahon takes full blame:

A. So I got my shotgun, I didn't want to kill anybody, I didn't want to hurt them, but I wanted to shoot their lights out, and that's what I did. I shot out all the lights in Sorrento in their

homes, street lights. I just tried to make it dark, and Bill went along with me. It was not his idea. It was not Merrill Christian or Floyd Bagman's. They did not shoot. It was my gun and my bullets, and when I give this deep thought, I would have to be the reason that Bill went to reform school, to start with, because I was just so violent.

Q. I [don't] think you need to take all of that on yourself, but you went to Marianna with Bill because of this?

A. Yes, sir, I did.

Q. And actually you were put on probation for that, right?

A. I was put on probation and we were whipped in court before Judge Troy Hall. We were all given 50 licks.

Q. Bill was given licks also?

A. Yes, Bill was, too, yes.

Q. They gave licks in court back then?

A. They did then.

R 221-22. Breaking probation by drinking at the Hilltop Bar, Bill and Mahon and were sent to Dozier School for Boys in Marianna, notorious for inhumane treatment of boys in its care. Rev. Mahon recalls:

Q. Tell Judge White how Marianna was -- what kind of place that was for children back then when you went?

A. As far as punishment, about the second day that I was there, there was a boy that came into the shower and there was about 40 -- about 40 to 50 boys would stay in one dorm, and they would put about 8 or ten of us in the shower at the same time, and one boy was in there with his underwear matted to his rear end, and it was like hamburger meat, and he was in there crying.

> We were there helping him to pull his underwear aloose, and he had been punished at a place they had down behind the kitchen, at a place they had on campus called the White House.
>
> * * *
>
> Many times on many occasions you would see their rear ends busted. One boy ran from our cottage, and he was a chubby boy, and he didn't have the will to lay down and take the punishments, and their system was -- and their idea was that if you broke some kind of rule or done something bad, smoking or sexing off, or anything, that if you would lay there and take it, that that was all right, take the punishment.
>
> But if you were a person that could not take the punishment, then they would really take it out. This one chubby boy, he got 84 licks and the common amount of licks was from seventeen to thirty, in there.
>
> I listened to them many times spanking the boys, and the only reason, I guess -- I was the only person that ever had the opportunity while I was there, and I worked in a laundry, and it was my duty to wash the diapers of all the women that worked on campus that had children and delivered them to the homes.
>
> So as I would leave like at 4:30 in the afternoon to make my diaper route, they would be punishing the boys at that time of day, and I would stop there and just hear the licks, and many times I would stand there and wait until they come out. They would all come out at one time.
>
> This one boy that was in my cottage that got the 84 licks, he was -- he just could not take the punishment, and I don't know if they held him down, but I know they beat the daylights out of him. . . .

R 222-24. Though Melvin had not bothered to attend any court hearings nor attempted any other intervention to help his son avoid commitment

to Marianna (R 218-19), he did visit him at Marianna, and on that sole occasion, he smuggled in beer, a flagrant violation of rules which surely meant harsh punishment for Bill. R 316-17.

On Bill's return from Marianna, the family split apart. Carmelita, tired of having to drive around town with her father and his girlfriends in the back seat (R 301), told her mother of his affairs. While Melvin had no grounds for divorce as then required by Florida law, Jennie had ample grounds of mental and physical cruelty and obtained a divorce. Def. Exs. 14, 15; R 291, 313-15. She was allowed to "keep everything" (R 315), but "everything" was so little that she had only $104 after paying her lawyer. R 316.

Jennie and Carmelita moved to California. Bill gave in to Melvin's "crying and begging him to stay, saying that everybody else had thrown him away, and Billy decided to stay." R 320. He hoped he and his father could begin to mend their broken relationship. Beverly Pickren, a neighbor, recounted (R 233):

A. I could hear the blows being thrown, and I heard Bill ask his Daddy not to do that.

Q. Was he pleading with him to stop beating him?

A. Yes.

Q. And did you hear that often?

A. Yes.

Q. Let me give you a few minutes.

(Witness crying).

Eventually, Bill joined his mother in California. After working at low-skill, low-paying jobs, he returned to Florida to work on shrimp boats. Leonard Hughs, a captain who employed Bill, recalls:

> I knew Bill White in the late 1960's, when he worked for me on my shrimping boat for two years. My boat was based in Mayport, Florida, but we left from Ft. Myers and followed the Gulf Coast all the way to Texas.
>
> I could tell Bill had a drinking problem. When the ship was in port, it was drinking time all the time. Bill stayed intoxicated whenever we were in port. When it was time to go to sea, however, Bill was always there to go with us. At sea, I strictly controlled the amount of alcohol allowed on the boat and limited everyone to no more than one or two beers a day. With strict limits placed on his alcohol consumption, Bill was a very good worker. I never had any problems or complaints about his work.

Def. Ex. 9.

Bill has an intense need to belong, to fit in and be part of something. His "affiliative needs", as described by Dr. Glen Caddy (R 345-46, 355, 358, 363), led him to the Outlaw motorcycle club in Louisville, Kentucky. His drinking worsened. Mark Merrill remembers: "You know, you got the town drunk, and we had the club drunk." R 179, 196. He was "a mascot" who "reminded [others] of Yosemite Sam . . . stumbling around." R 186-87. He drank "constant and heavy" (R 176), and "a lot." R 184. He "usually [had] a drink in his hand" (R 186), and Rosie Merrill recalls that "when [she] got up [Bill was] always usually drinking." R 184. Jim Carpenter relates:

> A. At that time he was a pretty heavy drinker.

* * *

A. As soon as he got up out of bed he had a drink; straight to the bar as soon as it would open at 7:00.

R 189-90. George McMahon recalls many times when Bill would be drunk before noon; Bill drank "like a fish." R 195.

Bill's reputation as a drinker was not limited to those within the club. A Louisville businessman related:

> My name is Charles W. Stonefield, and I live in Louisville, Kentucky. I am the former owner of the Oaken Bucket Bar. My bar was located just half a block from William White's home in Louisville, and Bill was a regular customer.
>
> Bill came to my bar almost daily and was usually waiting when I got there to open up at 6:00 a.m.. Often, it seemed to me that Bill had been drinking all night. This didn't surprise me because, as far as I could tell, Bill was <u>always</u> drinking. Bill would usually drink at the bar for a few hours in the morning, go home, then return later that night, still drunk. He always drank a considerable amount and was always in a drunken state. I remember telling Bill on numerous occasions that he had had too much to drink. I never saw Bill without a drink in his hand.

Def. Ex. 10. He drank "anything he could get his hands on." R 184. Club members recall that he drank "whiskey, beer, vodka ... what was around" (R 176); "V.O. ... blended whiskey ... anything he could get his hands on, beer, schnapps, anything the fellows were drinking" (R 184); "blended Canadian whiskey, beer, anything, a lot of anything" (R 202). Dillard Eigel said, "to function he drank". R 203.

As to drugs, George McMahon states: "It would be easier probably to name the ones he didn't [take]." R 197. Rosie Merrill remembers

Bill using "pills a lot, barbiturates" and cough syrup with codeine. Jim Carpenter declares that "if it was available, he took it." Carpenter saw Bill take "uppers, speed, smoke a joint . . . valium . . . [and] terpin hydrate [codeine]." R 190. Bill would become disoriented, forget how many he had already taken, and begin taking more. Bill was fortunate to have friends like Mark Merrill:

> When he got to taking too many of them, I didn't want to see him o.d. on them, so I would take them away from him.

R 181. George McMahon recalls (R 197):

> There's a vet supply in Louisville and most people -- livestock town -- and most people would go over to the vet supply and get whatever, pills or medicine they need for their animals, which they sold other drugs, too, but it was for animals, but the same thing they give people.
>
> Bill would go in and tell them he had a hyper-active St. Bernard and he needed some valium to calm him down, and the guy would go ahead and sell them to him.

One phenomenon, reported by all who knew him, occurred when, coming to a stop sign or red light on his bike, he would <u>forget</u> to put his feet down to hold the bike up. It would fall over, spilling him to the ground. Not wearing a helmet, he would land on his unprotected head. He not only injured himself in this manner but caused injuries to those riding alongside him. R 177, 187, 190-91, 196.

He was injured "pretty regular and fairly often" (R 177). Rosie Merrill says it "happened quite frequently," and she "would bandage him up and clean him up from where he had fallen." R 186. Her husband

Mark recalls that Bill would "sometimes fall down on the way and [Rosie] would patch him up." R 180. Jim Carpenter "picked him and the bike up off the street" and recalls:

> Q. What was the incident where he drove his motorcycle up a ramp?
>
> A. He was in the backyard ... and he started up it and tried to put his bike in the house, and he got halfway up it, and it just turned over on him.
>
> Q. The bike fell on him?
>
> A. Yeah.

R 191. Dillard Eigel recalls being told by many people of one night when Bill was

> flopping around like a dead fish. They said he got ready to leave one bar and he fell over. He was just going down the street.
>
> He fell over two or three times between the first bar and the second bar, and they were afraid he would hurt himself.

R 204. Because of his inability to stay on his feet, friends:

> A. ... would sabotage his motorcycle so he wouldn't ride.
>
> Q. Why is that?
>
> A. Because he was drunk and he couldn't hold it up and he would forget to --
>
> Q. You would sabotage it so he wouldn't get hurt?
>
> A. Right ... rather than see him die.

R 196-97 (George McMahon). He didn't have to be on a motorcycle to fall and hurt himself. Rosie Merrill remembers that "[h]e banged his

head a lot. I was worried about him falling down the stairs because it was so steep." Mark Merrill reports (R 181):

> It got to one stage there at the clubhouse where we'd make him wear a helmet [when] he would get good and drunk, so he wouldn't bust his head going down the stairs or something.

His memory was severely impaired. "We lived right next door to him in the same house, next door bedroom. He used to come in our bedroom all the time, stumble in, pass out, wouldn't know he was there." R 185 (Rosie Merrill). "He couldn't remember anything. Most times he'd forget that there was a party coming up and somebody would have to remind him." R 198 (George McMahon). Forgetting a date for a party, though, is very different from the "hours and days and weeks" (R 192) Bill lost because he was so intoxicated that he simply never processed the information into memory. Testimony of Dr. Caddy, e.g., R 347-49, 350-53. He often could not remember recent events:

> Q. At times did he forget about accidents on his motorcycle that you know of?
>
> A. In '76 I sold him a bike, and when he picked it up -- it was at a friend of mind [sic] garage -- I didn't realize that the front end was so long, because I'm six-three, and when we got it out of the garage I asked Bill if he wanted us to haul it in, and he said, no, I'm going to ride it.
>
> Later on that night he called us from out on 7th street, that he had fell over and wrecked it and it wasn't rideable. He was complaining to me that I sold him a wrecked motorcycle because he fell down on one side and stuff was tore off of the other side.
>
> Well, I said, it wasn't that way, and a night or two later I was down on Jefferson Street, another

street that has a lot of bars, and as soon as I showed up, people asked me if he was okay.

Q. Why is that?

A. They said he had been down there that night flopping around like a dead fish. They said he got ready to leave one bar and he fell over. He was just going down the street.

He fell over two or three times between the first bar and the second bar, and they were afraid he would hurt himself. And when I questioned him about it, he told me he wasn't down there that night.

Q. Because of you, yourself, being an alcoholic, is that true about the blackouts and about memory losses when somebody --

A. And you will lose days at a time. One night -- and people don't realize that you're so drunk that you don't know what you are doing.

One night I ran into Bill somewhere, and he said come by and pick me up tomorrow morning, my bike is in the shop, I want you to drop me off there.

I went to his apartment and he was sitting there mumbling about something, and I said what's wrong. And he said that old S.O.B. I rented the place from is stealing my food.

I said, Bill, he ain't stealing your food. He said, yes, he is. I said, you know, you are his only tenant, you take him to the grocery store. He knows if it came up and he asked you for food, you would give it to him.

He says, my wife and I filled up the refrigerator before she flew off to her wedding yesterday and my refrigerator is empty. I said Bill that was ten days ago. I said your refrigerator is full. I said you will -- he was functioning during those ten days.

His mind may have been on automatic pilot, just going through the motion, but he was riding a

motorcycle. He took the motorcycle in to get it fixed, told them what he wanted to do, but he didn't remember ten days.

Q. Did you not sell him a Ranchero?

A. I sold him a 1960, that's a Falcon pickup truck. Someone had stuffed a 289 four-speed in it, and we were back out on 7th street again.

I was at one nightclub and he came in with two or three out-of-towners, and he said he was going across the street to the other nightclub. Well, the show was over I was watching and I went across the street and they asked me for a ride home. I said where did Bill go and they said I don't know, that he just got up and left.

On the way back to the house -- 7th Street is a wide street and got a four-lane viaduct. The ranchero had spun around backwards, and there was a telephone pole embedded in the back of it against the tire, and so we checked to see if there was any blood, and there wasn't any blood.

So we got back to the house and asked if Bill was there, and they said, yeah, he came in a little while ago and went to bed.

The next day he got up he wanted to know who stole his truck, and we took him back to where the wreck was, and it wasn't there, it was at the towing lot.

When he came from the towing lot I asked him, what are you going to do with the truck. He said it was a piece of junk, I gave it away.

Two or three days later he wanted me to take him to the towing lot to pick it up. I said Bill you gave it away. I said show me the title. He didn't have the title.

We had to take him to the towing lot and ask the guy at the towing lot to see if somebody had given somebody a truck, and they said, yeah, the black one with the big motor in it.

R 203-06 (Dillard Eigel).

A. I was griping about it the next day, and he says what are you talking about.

R 178 (Mark Merrill).

Q. Did he remember some of this stuff after it happened?

A. No, not really. You talk to him two days later and he would say I didn't do that.

R 191 (James Carpenter).

Q. Do you remember if Bill would lose hours and days and weeks?

A. Several days.

Q. He would just not know what happened?

A. Like drank for several days and then he would not be able to remember anything.

R 192 (same).

A. He would be off in space somewhere. Most times he didn't even remember me talking to him.

R 196 (George McMahon).

Despite his near-constant drunken state, the "tenderhearted (R 287), "very sweet, caring, concerned, and loving person" (R 293) Billy had been as a child shone through:

Q. Do you recall if he ever gave neighbors rides to go get groceries and things? . . .

A. Yeah, there was an old man that he rented a room from that he would take care of, and he would take care of old Pearl.

R 179 (Mark Merrill).

Q. Did he help you out when you got into some kind of financial problem?

A. Yeah. The place I was working for went out of business and I was out of work, and he would bring over motorcycle parts and have me clean them up, and he would pay me for cleaning them up, and most time they didn't even need cleaning. He was just helping me out without embarrassing me.

Q. What about sometimes with groceries?

A. Yeah. Sometimes he would say what's for supper tonight, and I would say probably bologna sandwiches, and he would give me and my girlfriend some money and say go get some steaks, and we would have steaks and stuff.

R 195-96 (James Carpenter).

The Outlaws "had a president, vice-president, secretary, treasurer." R 178. Bill never held office, "didn't have no responsibilities", R 193, but was a "patch holder", id, or "peon", R 178, "one of the fellows, but he wasn't a leader". R 186. He was such a joke that they gave him the undignified nickname "Snivelhead." No one would have expected him to assume any responsibilities.

Q. From what you know of Bill, for the time that you knew him, which was on a steady basis, was he a leader in the club of any sort? Did people come to him at the club when they wanted something done or when they wanted something organized?

A. No.

Q. Why is that?

A. Because he was usually too drunk to organize anything. He was lucky to organize himself a lot of times.

R 178 (Mark Merrill). Bill was "definitely" a follower. R 178-79.

Q. Was he more of a follower than a leader?

A. Yeah, if he was sober. If you could keep him sober long enough.

Q. If a member of the group told him to do something or gave him some task to do, would he do it like everybody else?

A. Not generally. That's why he didn't get too much to do.

Q. What if he was sober, would he generally do what he was told to?

A. If you could catch him sober, but that was a real rarity.

R 199 (George McMahon).

The Outlaws motorcycle club has a rigid structure. Members of one chapter may visit other chapters but the business of each chapter remains separate and apart. As Dillard Eigle puts it (R 208):

> There's a lot of politics in the club, and out-of-towners are nice guests, they are fun to have, you like them to party, but some places wouldn't even let out-of-towners come to the meetings because they weren't from there. It's just -- your friends are welcome, but you couldn't get into politics.

Kaplan did not seek or present expert testimony on the intoxication defense[18] or expert evidence concerning mitigation. Dr. Glen Caddy, a clinical psychologist, testified on post-conviction to matters not presented at trial. His extensive vitae is defense exhibit 21. A psychologist, his two main areas of practice involve the effects of

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[18] Kaplan thought he asked for an intoxication instruction, R 105, but the record shows that he did not. He claimed no strategic reason for not obtaining a theory of defense instruction.

drugs and alcohol on human behavior and the effects of head trauma on human behavior. R 325. He was qualified as an expert in forensic psychology. R 326.

Dr. Caddy performed testing and a comprehensive examination of White November 4, 1992. R 327. Intellectual assessment showed limited insight and some impairment in mental functioning. R 328. Bill has major difficulties in memory, R 329, and much of his memory loss is from gross, persistent intoxication rather than an organical base. Alcohol has caused tremendous losses of memory and information throughout his life. R 331.

It was clear to Dr. Caddy from massive background data[19] that appellant has a pattern of poly-substance abuse focusing on alcoholism. His profound impairment extremely limits his memory. He began abusing alcohol at an early age and later mixed with it barbiturates, producing a gross inability to recollect events and major blocks daily of amnesic episodes. He is 47, but his memory of his life doesn't have 47 years in it because large chunks are lost. R 332.

Dr. Caddy recounted how in grades 5 and 6, school records show Bill's grades deteriorated markedly, corresponding with reports that he was drinking "heavily" by age 11. His father took him to bars by

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[19] Dr. Caddy reviewed affidavits of family and acquaintances plus trial transcripts, R 334, was given history and records of Bill's school life; medical records, prison records, pretrial evaluation by Herrera and Kirkland, the testimony of DiMarino, the Florida Supreme Court opinion in this case, the School for Boys records that were available, R 335, in addition to his own diagnostic testing.

age 8 or 9. R 339. Bill never used alcohol unless he got drunk; he would obliterate through drunkenness, and he was quite good at it. R 343. Drink was the only consistent thing in his life; work was only to get money to survive; he could only survive if he drank. R 345.

From review of trial testimony, background materials, and his own diagnostic testing, Dr. Caddy concluded that appellant could not have formed the specific intent to kidnap or murder Crawford. R 351, 355, 364. Bill was in an alcoholic blackout from around the time he left the bar that night until his arrest several days later. He has no recollection of getting out of bed, of being in the car with DiMarino, of being with the victim, or of being at Seaworld. R 352. He has no memory of any of the things to which DiMarino testified, and his story now is consistent with what it was in 1978. R 353.

While Bill's blood alcohol was not tested that evening, Dr. Caddy reconstructed his likely blood alcohol by comparing it with Gracie Crawford, with whom he was drinking that evening. Ms. Crawford's level of alcohol at time of death was .32; using that as a guide to measure Mr. White's level, we can assume he was badly impaired. R 355. Mr. White was a practiced drunk; due to his diminutive size, he didn't have to drink a lot to reach those high levels. R 355.

Dr. Caddy also recounted the testimony of drunkenness by Mr. White on the night of the crime from Deputy Depp. With Mr. White's history of alcohol abuse, he would have to be very drunk for someone to notice. R 356. In Dr. Caddy's opinion, it is extremely unlikely

that White had the capacity to form the intent to kidnap and murder Gracie Crawford in his state of intoxication. R 364.

Dr. Caddy attested to the statutory mitigator of diminished capacity, saying Bill's drunken comportment would have been a powerful mitigator raising questions of his ability to form intent, to know what he was doing, and to know the consequences of his acts. In his state of mind, he could hardly be an active participant in the crime. R 360.

Dr. Caddy summarized his view of the factors, statutory and otherwise, calling for a sentence less than death. He identified numerous nonstatutory mitigators, all available at the time of trial: childhood abuse, lack of direction, limited intellectual functioning, sense of acquiescence (which supports the nonstatutroy mitigator that he was dominated and had little role in this crime), affiliative needs (leading to his joining the Outlaws), well documented and substantial pattern of alcohol and drug abuse, listless and nonproductive lifestyle and sense of relative worthlessness, and that Bill thought he gained value only through drinking. R 361-63.

(c) Evidence on not informing jury of meaning of life sentence.

Michael L. Radelet, Ph.D., testified at a video deposition used as substantive evidence about prejudice from the failure to inform the jury of the 25-year mandatory minimum. A professor at the University of Florida since 1979, Dr. Radelet holds several degrees -- B.A. in Sociology from Michigan State University; Master's Degree in Sociology from Eastern Michigan University; Ph.D. in Sociology from Purdue

University; two years of post-doctoral study in the Psychiatry Department at the University of Wisconsin Medical School (R 4). He teaches at the University of Florida and at its medical school (R 4). As of 1989, Prof. Radelet had published about 30 papers on criminal justice and mental health, about 20 related to capital punishment (R 5). In preparing an annotated bibliography titled Capital Punishment in America, he read every published article or book on the death penalty (R 5-6). He has testified as an expert in 30 capital cases.

Dr. Radelet conducted a telephone survey using accepted methodology (R 8). Participants were registered voters who could consider the death penalty, under some circumstances, in Orange County (R 11). When 105 respondents were asked, "If a person is convicted of first-degree murder in Florida and sentenced to life imprisonment, about how much time do you think the average inmate would serve before being eligible for parole?," only 11 believed life imprisonment meant at least 25 years before parole elibitility (R 12). The remaining 89.5% of those sampled believed that a defendant sentenced to life imprisonment for first degree murder would be eligible for parole in less than 25 years (R 13). Averaging the number of years given by the 94 respondents, he concluded that the average estimate of when a defendant would be eligible for parole was 11.6 years (R 13).

An additional survey question was: "If you were on a jury in a first-degree murder case, would you be less willing to vote for the death penalty if you were absolutely sure that the prisoner would serve

at least 25 years in prison before being eligible for parole?" (R 13). That question was asked of the respondents who believed that life imprisonment meant less than 25 years (R 14). Of the people asked, 44% would be less apt to vote for death if they knew that there was a 25 year period before parole eligibility (R 14).

Prof. Radelet testified that the "Slovik" phenomenon (no one believed that Private Slovik would be executed; they believed someone in command would commute the death sentence to a term of years, (R 18-19)) applies to jurors; if jurors believe that life means fairly quick release, they will be more apt to vote for death to ensure a longer incarceration, not because they believe that death is the only proper alternative (R 19).

(d) Evidence about Giglio/Brady claims.

i. Additional favors given DiMarino.

Richard DiMarino testified that he became a witness in exchange for providing him and his wife protection from the Outlaws and running concurrently his five-year sentences on two pending charges with his 15 year sentence for the Crawford murder. TR 517-518, 555-556. He did not mention a written agreement, or any other promises.

The record shows undisclosed benefits promised and delivered to DiMarino and his girlfriend. Appellant's counsel did not know that the state would give $1000 to DiMarino's girlfriend to relocate. R 85; 113. DiMarino faced forty years of pending charges, and the state

agreed not to file additional charges.[20] R 160, 163. Further, with five to ten prior violent felony convictions, R 723-724, he qualified for habitual offender treatment, Fla. Stat. § 775.084(4)(a), but did not receive such enhanced penalties. The jury did not know this.

The state and DiMarino's counsel signed a memorandum of some terms of the arrangement. Def. Ex. 6. Abrams and Kaplan testified they had never before seen it. R 63-64, 108. The clerk's stamp shows it was not filed until March 27, 1979, well after the trial. The agreement refers to an important consideration for his testimony -- on one of his pending charges, "the State would not seek enhanced punishment." Def. Ex. 2, Par. 5.

Abrams and Kaplan did not know habitual offender treatment had been an issue with DiMarino, and they would have found that very helpful on cross, in addition to using the written agreement itself. R 64, 65; R 110, 112.

ii. Evidence concerning Ann Hicks.

Officer Martin testified he and Harrelson had taken a statement from Ann Hicks during investigation of the case, on October 20, 1978, R 92-96, in which she told the detectives that in several phone calls, Gracie Crawford told Hicks she feared the Outlaws because she knew they had recently killed another woman and that the Outlaws knew she knew:

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[20] This is corroborated by this Court's finding that testimony in the Smith trial, which occurred after Mr. White's trial, demonstrated that in exchange for DiMarino's testimony, "the state had dismissed two additional felony charges against him," Smith, 403 So. 2d at 934 (e.s.).

> She called me, I guess it was on Sunday, I guess; and she said that she, uh, was asked to get a girlfriend to go into the gang with her; she said she did. Well, when she called back she told me she did; and she said that they beat her up; and then she called back; well, she said that the thought they'd killed her; and then she called back she said that she was in fear of her life; they was looking for her and was pretty sure that they was going to kill her.

Hicks Statement, p.1, Def. Ex. 1. (e.s.). Hicks thought the name of the woman killed was "Sandy or Sherry or Sharon or something like that" and that her body had been "dumped" near 5A Auto Parts. Id. p.3.

The last call from Crawford came the day she was killed. "Monday about 5 o'clock", Crawford told Hicks she feared for her life. When Hicks tried to talk Gracie into leaving the area for her safety, Gracie said she wouldn't right then:

> She said that she was going to come back, but first she was, had to get even with them for beating her girlfriend up and pos ... possibly killed her and for the things they'd done to her; I don't know what she meant.

Id., p.4. Crawford was to call Hicks later that night but never did.

During the conversations, Hicks wrote the names of the Outlaws that Crawford feared: "Sam, Tim, Tom, and Sleep, ... that meant the mean one because she talked about him a lot and Sleep; those two she talked about a lot, quite often; and I don't know if that Van was one of them or not." Id., p. 3. She also mentioned Wolf (Guy Ennis Smith) as an Outlaw she feared. Id., p. 2. No mention was made of White or his nickname "Snivelhead."

The detectives interviewed Hicks on October 13, 1978, over one month before appellant's trial. The tape of the interview was transcribed October 20, 1978. The defense never knew of the interview and never got a copy of the tape or transcript or a summary of Hicks' information. R 62, 63, 113. Her name was first disclosed November 21, 1978, in a supplemental witness list served on the defense less than a week before trial. TR 1578. The state's entire disclosure was:

> Ann Hicks
> St. George, Georgia
> (c/o John Harrielson)
> OCSO
> Orlando, Florida

(e) Evidence concerning the trial judge.

Immediately after receiving the death recommendation and polling the jury, but before discharging the jury, the court pronounced sentence. TR 830 ff. The court's oral pronouncements are verbatim identical with a written order filed with the clerk that day. TR 1638-39.[21] At the postconviction hearing, Judge Pfeiffer revealed that the recitation was prepared for him ex parte by the state. Shown the order, the judge testified: "I'm not the author of this." and "The whole order was done by Mr. Hart [prosecutor], right." R 139. He said he "would be very positive that probably" Hart prepared the order

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[21] Although the order states that it was signed on December 21, TR 1640, the clerk's stamp shows that it was actually filed on December 20. TR 1638. Further, the order contains a space to cross out whether the judge "concurs in" or overrules the jury recommendation, indicating that it had been prepared beforehand. TR 1638.

before the jury's recommendation, as evidenced by the fact that it shows an alternative of whether the death sentence was imposed in concurrence with or over the jury's sentencing recommendation. R 137-38; TR 1638.

Abrams testified that at the guilt phase, Judge Pfeiffer would make electrical "bzzz" sounds in chambers. R 76-7. Another time (he was unsure if it was during DiMarino's or White's trial), the judge made a locomotive sound. Though he did not take it to mean the judge had made up his mind, Abrams took the sounds to refer to the electric chair. R 89, 90. The sounds were never on the record.

Marc Lubet, DiMarino's counsel, testified that Judge Pfeiffer made the same electrical sounds during DiMarino's trial the month before. R 169. He thought they did not necessarily mean his client would not get a fair trial but took them to mean that, if the jury convicted DiMarino or White, Judge Pfeiffer meant to sentence them to death. R 170, 171. The judge denied making buzzing sounds. R 91. The order denying postconviction relief does not resolve this factual dispute.

In a post-trial letter to the Parole Commission, Judge Pfeiffer "protest[s] vigorously any clemency for William Melvin White." Def. Ex. 2. He "was convinced from hearing `Snivelhead' and DiMarino relate the facts of the killing that as the police who investigated the case told me, had many, many other murders to their credit." Id. (e.s.).

At the start of each day of trial, the judge read prayers calling for punishment of and protection from "wicked" people and themes of vengeance. R 73, 148, 168. He instructed the court reporter to exclude them from the record. Judge Pfeiffer identified the set of prayers he was reading at the time of Bill White's trial as including:

> ALMIGHTY GOD, WHO HAST GIVEN US THIS GOOD LAND FOR OUR HERITAGE; WE HUMBLY BESEECH THEE THAT WE MAY ALWAYS PROVE OURSELVES A PEOPLE MINDFUL OF THY FAVOR AND GLAD TO DO THY WILL. BLESS OUR LAND WITH HONORABLE INDUSTRY, SOUND LEARNING, AND PURE MANNERS.
>
> SAVE US FROM VIOLENCE, DISCORD, AND CONFUSION; FROM PRIDE AND ARROGANCY, AND FROM EVERY EVIL WAY. DEFEND OUR LIBERTIES, AND FASHION INTO ONE UNITED PEOPLE THE MULTITUDES BROUGHT HITHER OUT OF MANY KINDREDS AND TONGUES.
>
> ENDUE WITH THE SPIRIT OF WISDOM THOSE TO WHOM IN THY NAME WE ENTRUST THE AUTHORITY OF GOVERNMENT, THAT THERE MAY BE JUSTICE AND PEACE AT HOME, AND THAT THROUGH OBEDIENCE TO THY LAW, WE MAY SHOW FORTH THY PRAISE AMONG THE MANY NATIONS OF THE EARTH.
>
> IN THE TIME OF PROSPERITY, FILL OUR HEARTS WITH THANKFULNESS, AND IN THE DAY OF TROUBLE, SUFFER NOT OUR TRUST IN THEE TO FAIL; ALL OF WHICH WE ASK THROUGH JESUS CHRIST OUR LORD, AMEN.
>
> From the Protestant Episcopal Prayer Book and each day of his eight years of the presidency, and every day thereafter until his death, President Thomas Jefferson recited this prayer.

Def. Ex. 5. Other days, the Judge would read this prayer:

> (AMOS 5:7; THE JERUSALEM BIBLE)
>
> TROUBLE FOR THOSE WHO TURN JUSTICE INTO WORMWOOD, THROWING INTEGRITY TO THE GROUND; WHO HATE THE MAN DISPENSING JUSTICE AT THE CITY GATE AND DETEST THOSE WHO SPEAK WITH HONESTY. WELL THEN,

> SINCE YOU HAVE TRAMPLED ON THE POOR MAN, EXTORTING LEVIES ON HIS WHEAT - THOSE HOUSES YOU HAVE BUILT OF DRESSED STONE, YOU WILL NEVER LIVE IN THEM; AND THOSE PRECIOUS VINEYARDS YOU HAVE PLANTED, YOU WILL NEVER DRINK THEIR WINE. FOR I KNOW THAT YOUR CRIMES ARE MANY, AND YOUR SINS ENORMOUS; PERSECUTORS OF THE VIRTUOUS, BLACKMAILERS, TURNING AWAY THE NEEDY AT THE CITY GATE. NO WONDER THE PRUDENT MAN KEEPS SILENT, THE TIMES ARE SO EVIL. SEEK GOOD AND NOT EVIL SO THAT YOU MAY LIVE, AND THAT YAHWEH, GOD OF SABBATH, MAY REALLY BE WITH YOU AS YOU CLAIM HE IS. HATE EVIL, LOVE GOOD, MAINTAIN JUSTICE AT THE CITY GATE.

Def. Ex. 5. Judge Pfeiffer also testified that the prayers referred to in a case in which he was criticized were the same ones he used during the time of Bill White's trial. R 149-150. March v. State, 458 So. 2d 308, 309 n.1 (Fla. 5th DCA 1984) recited Judge Pfeiffer's objectionable prayer/instructions to jurors:

> Almighty God, we make our earnest prayer that thou wilt keep the United States in thy Holy protection; that thou wilt incline in the hearts of the citizens a spirit of subordination and obedience to government, and entertain a brotherly affection and love for one another for their fellow citizens of the United States at large and finally that thou wilt most graciously be pleased to dispose us all to do justice, to love mercy and to demean ourselves with that charity, humility and pacific temper of mind which were the characteristics of the divine author of our blessed religion, and without a humble imitation of whose example in these things we can never hope to be a happy nation. Grant our supplication, we beseech thee, through Jesus Christ our Lord, Amen.

Also:

> Almighty God, father of all men: To thee we raise thankful hearts for deliverance from forces of evil.... Deliver us also, we beseech thee,

> from the greater danger of ourselves. Have mercy upon us and forgive us for our part in the present desolation of the world. Awake us each one to a sense of our responsibility in saving the world from ruin. Open our minds and eyes and hearts to the desperate plight of millions. Arouse us from indifference into action. Let none of us fail to give his utmost in sympathy, understanding, thought and effort... . Fulfill in us and through us thy glorious intention: that thy peace, thy love and thy justice may enter into the regeneration of the world.

Judge Pfeiffer said the "Jewish judge over there on the appellate court" was misled about the nature of the prayers. R 148-49.

Abrams said many of the prayers called for vengeance, such as "an eye for an eye." R 73, 74. Judge Pfeiffer said, "all of these prayers relate to justice." R 147. Lubet corroborated that the judge read vengeance prayers, with sentiments to the effect that "he who lives by the sword dies by the sword." R 167-168.

SUMMARY OF THE ARGUMENT

1. In this pre-Songer case, Hitchcock[22] error occurred where counsel did not present nonstatutory mitigation to the sentencing judge and jury, who, in any event, would not consider such mitigation. There was abundant nonstatutory mitigation which could have been presented and which the sentencer would have had to consider. The lower court erred at bar in refusing to consider appellant's claim that constitutional error occurred in that nonstatutory mitigation was not considered during the penalty phase and counsel failed to present such mitigation. The court refused to consider the claim because this Court had rejected appellant's Hitchcock claim pointing to in-the-record mitigation based on a finding of no prejudice. Under Hall v. State, 541 So. 2d 1125 (Fla. 1989), this Court's rejection of a claim involving in-the-record mitigation does not bar litigation of a claim concerning out-of-the-record mitigation in a motion for postconviction relief. Thus Court should reverse because it cannot be said that the Hitchcock error was harmless beyond a reasonable doubt.

2. The court rejected the claim of ineffective assistance of counsel at sentencing primarily on the ground that appellant failed to show prejudice. In this regard, it employed an incorrect standard, requiring that appellant show that the result would actually have been different but for counsel's performance. Under the correct standard

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[22] Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

(which does not even require that the result would more likely than not have been different), appellant was prejudiced. Further, although the court did not determine whether counsel's performance was deficient, the record shows that it was deficient. The court erred in rejecting some of appellant's arguments as procedurally barred.

In representing appellant at sentencing, Kaplan was flying blind and doing it badly. The sentencing jury heard no mitigating evidence. It could only consider statutory mitigation. It did not know the importance of its penalty verdict. It did not know that a life sentence would have a 25-year mandatory minimum. The court notified the jury that appellant had the right to appeal. These errors were the product of appellant's representation by a non-Florida lawyer ignorant of the law governing penalty proceedings. This lawyer did not investigate or develop a case of mitigation. Out of ignorance of Florida law he made no objection to the limitation of mitigation to statutory factors, and failed to alert the jury of the mandatory minimum portion of the life sentence option. This Court should reverse the order denying post-conviction relief.

3. Counsel was ineffective as to guilt, and the court used an incorrect standard in finding no prejudice. Had Kaplan limited the state's case to the original statement of particulars before the jury, appellant would likely have been acquitted. The failure to object to the amended statement of particulars prejudiced appellant. The failure to seek an intoxication instruction and to present evidence supporting

it also prejudiced him since, under the amended statement of particulars, the state was able to place appellant at the scene of the murder as a participant. He was also prejudiced by failure to object to improper evidence and argument. Counsel's performance was deficient.

4. Appellant made a sufficient showing to require review and disclosure of grand jury proceedings. The court erred in denying his motion.

5. The state presented false testimony minimizing the consideration it gave it main witness, and failed to disclose exculpatory or impeaching evidence.

6. The court decided to sentence appellant to death beforehand and secretly had the state prepare an order sentencing him to death.

7. Given the disparate treatment of the co-defendant's, including the subsequent life sentence of the "enforcer" who ordered the murder, and the substantial unrebutted mitigation now in the record, this Court should reduce the sentence to life imprisonment.

8. The court erred in striking claims alleging constitutional error.

ARGUMENT

I. WHETHER HITCHCOCK ERROR OCCURRED AT SENTENCING AND WHETHER SUCH ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

Constitutional error occurs where the sentencing jury and judge are precluded from considering nonstatutory mitigation. Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), Songer v. State, 365 So. 2d 696, 700 (Fla. 1978) (order on rehearing).

Where Hitchcock error occurs, the court must determine if it is harmless beyond a reasonable doubt after considering both mitigating evidence present at sentencing and evidence presented on a post-conviction motion of mitigating evidence that could have been presented had counsel investigated and developed it. Mason v. State, 597 So. 2d 776, 780 (Fla. 1992) quoted with approval the trial court's ruling that:

> The Court cannot say beyond a reasonable doubt that the jury in the original trial would not have returned a life sentence recommendation if the nonstatutory mitigating evidence had been presented.... Had the jury recommended a life sentence, the sentencing judge may have been required to conform his sentencing decision to Tedder v. State, 332 So. 2d 908 (Fla. 1975), which requires that if there is a reasonable basis for the recommendation of a life sentence, the sentencing judge is bound by the recommendation. Therefore, this Court cannot say that the Hitchcock error in this case was harmless.

Accord Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989) (followed in Mason), and Bottoson v. State, 674 So. 2d 621, 623 (Fla. 1996).

Under Hall, this Court's finding of harmlessness as to in-the-record mitigation on the habeas petition does not bar a finding of prejudice on this review of the Rule 3.850 motion. As appellant did in White v. Dugger,[23] Hall filed a habeas petition alleging a Hitchcock violation pointing to in-the-record mitigation which had not been considered at sentencing, which this Court denied Hall v. Dugger, 531 So. 2d 76 (Fla. 1988). Then, like appellant, he filed a rule 3.850 motion alleging a Hitchcock violation based on "additional non-record facts" had not been presented at sentencing. 541 So. 2d at 1126. As at bar, the trial court denied Hall's motion, reasoning that Hall v. Dugger barred relief. This Court reversed, writing in part:

> We do not agree with the trial court's ruling that our denial of relief in Hall VI constitutes a procedural bar under the law of the case and res judicata. This case involves significant additional non-record facts which were not considered in Hall VI because that was a habeas corpus proceeding with no further development of evidence beyond the record. In this case, however, we are aided by the trial court's findings of fact at the rule 3.850 hearing. Moreover, as we have stated on several occasions, Hitchcock is a significant change in law, permitting defendants to raise a claim under that case in postconviction proceedings. [Cit.]

541 So. 2d at 1126. See also Alvord v. State, 694 So. 2d 704 (Fla. 1997) (distinguishing Hall where 3.850 claim presented no substantially different evidence or mitigators not found at the original trial).

A. Hitchcock error occurred at sentencing.

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[23] 523 So. 2d 140 (Fla. 1988).

Before this Court's December 21, 1978 decision on rehearing in Songer,[24] Florida forbade nonstatutory mitigation. Meeks v. Dugger, 576 So. 2d 713, 717 (Fla. 1991) (Kogan, J., specially concurring). See also Hargrave v. Dugger, 832 F.2d 1528, 1531-32 (11th Cir. 1987) (en banc); Elledge v. Dugger, 823 F.2d 1439, 1448 (11th Cir. 1987). The court sentenced appellant to death before the Songer rehearing decision. Hence all of the trial court proceedings and pre-trial activities occurred before Songer.

Consistent with pre-Songer law, Kaplan thought he could not present nonstatutory mitigation. He based this view on discussion with Abrams and review of the statute:

> Q And in the two or three weeks between guilt and penalty phase did you try to dig up any evidence to put together?
>
> A We talked about it, but we didn't come with anything.
>
> Q You and Mr. Abrams?
>
> A Right.
>
> Q So that was -- then you decided just to go and argue what you just to go and argue what you argued to the jury?
>
> A Right.
>
> Q Did you look through the statute as it existed then?
>
> A Right.

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[24] The order on rehearing appears at 365 So. 2d 700.

> Q Is it your understanding that you would have been limited to the mitigating factors. If there was?
>
> A Yes, right -- at the time.

R 117. Abrams, Kaplan's mentor,[25] agreed that nonstatutory mitigation would not be allowed:

> I believe the understanding of the -- my personal understanding was that we were limited to the factors stated in the statutes.
>
> Hitchcock, which is a case that was decided by the Supreme Court later, had been tried by Charlie Tabscott in front of Judge Pfeiffer, I believe, before this case, but, of course, it hadn't come back on appeal yet. My understanding was we were limited to the factors in the statute.
>
> * * *
>
> Q Did you actually have an understanding as to whether Judge Pfeiffer permitted evidence that wasn't specifically relevant to statutory mitigating factors?
>
> A I don't believe he would have.
>
> Q Why is that?
>
> A We were assigned to a specific judge for an indefinite period, and just from having observed Judge Pfeiffer and knowing how he operated, no, I don't believe he would have allowed anything additional.

R 66-67. In addition to Abrams, Kaplan relied on the state and judge to tell him the law, R 107-108, noting: "Well, I'm not naive, but I

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[25] Kaplan testified that "I was going to go through the mechanics of the trial and Lenny was going to tell me the procedural aspects and whatever law there was on the subject." R 106.

could only assume that if a prosecutor has his mantle of authority and he is going to quote some law to the jury and quote some law to the judge, he's not going to make it up. He's not a fool, I don't think, and I would have accepted it." R 108.

Since he relied on the judge's statement of the law, it is significant that, in instructing the jury as to "The mitigating circumstances which you may consider, if established by the evidence, are these: [reciting statutory list of mitigators (a) to (g)]." TR 823.[26] The court considered only statutory circumstances in reaching the sentencing decision. TR 831 ("... there are insufficient mitigating circumstances as enumerated in subsection (6) to outweigh the aggravating circumstances."), 1638-39 (verbatim the same), 1648-50.

The state told the jury at voir dire that they were to use the statutory circumstances at sentencing. TR 16-17,[27] 28. At penalty, it said they would be given instructions which would "outline in detail those mitigating circumstances you're to consider." TR 805. It

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[26] Identical instructions were found unconstitutional in Downs v. Dugger, 514 So. 2d 1069, 1072 (Fla. 1987), Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988), Aldridge v. Dugger, 925 F.2d 1320, 1329 (11th Cir. 1991), among other cases. As to the combined effect of the instruction and the state's argument, see Riley.

[27] "There is a statute listing aggravating circumstances and some mitigating circumstances. And that you would follow those for the second phase in making your recommendation to the Court."

displayed a list showing only statutory circumstances, TR 806, and discussed each in turn.[28]

Thus, insofar as Kaplan relied on the state and court's statements of the law to the jury, he also viewed mitigation as limited to the statutory list. Hence, he told the jury to "look at that list in the jury room. Weigh the mitigating factors. Weigh the aggravating factors." TR 820 (e.s.).

Thus, Kaplan's actions were based on the belief that only statutory mitigation was allowed. The argument and instructions to the jury allowed consideration of only statutory mitigation, and the judge considered only statutory mitigation. Hitchcock error occurred at bar.

B. The postconviction record contains abundant mitigation.

The state must prove Hitchcock error harmless beyond a reasonable doubt. Mason, Hall, Bottoson, Copeland v. Dugger, 565 So. 2d 1348, 1350 (Fla. 1990) ("we conclude that the state has failed to meet its burden of proving harmless error beyond a reasonable doubt"). Given the copious mitigation at bar, the state cannot show the error was harmless beyond a reasonable doubt.

The record shows three of the five Campbell[29] categories of nonstatutory mitigation: abused or deprived childhood, disparate

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[28] As to the unconstitutional effect of such argument, see Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987) ("In closing argument, the prosecutor discussed `the' mitigating circumstances to see if `they' exist and then checked off the statutory list"), and Thompson v. Dugger, 517 So. 2d 173, 175 (Fla. 1987).

[29] Campbell v. State, 571 So. 2d 415, 419, n.4 (Fla. 1990).

treatment of an equally culpable codefendant; and charitable or humanitarian deeds. The record further shows overwhelming evidence of chronic alcohol abuse, substantial mental impairment, and a subservient personality easily dominated by the likes of DiMarino and Smith. The record also shows other compelling mitigation.

* Appellant indisputably had an abused and deprived childhood.

Like his own father, Melvin was an alcoholic, who became drunk and had uncontrollable rages which he took out on Mrs. White and the children. Melvin was mean and abusive when sober; when drunk, he was mean, sick and sadistic. He created for Bill an emotionally unstable life with an acute sense of worthlessness. This emotionally unstable and insecure family life is a mitigator.

Melvin had Bill and Carmelita drink to the point of drunkenness; he would take them to bars and knock them off the stool if they did not drink. Bill was an alcoholic by age 11.

Melvin would use his fist, a belt, a belt buckle, whip handles, to beat the family; however, he was always careful not to leave marks. Bill's abuse at the hands of his father was documented by his family and by a childhood friend, Beverly Pickren, who heard the severe beatings Bill would receive when he lived alone with his father. Another childhood friend, Sharon Price, saw Bill being beaten by his father and begging him to stop.

Although the family was not destitute, they were poor; the father could not hold a job; when a fire burned their house and all their

belongings, they had no insurance to replace them. Childhood poverty and hardship is a mitigator.

Bill did not receive the nurturing and positive care a child needs. Melvin thwarted Mrs. White's efforts to train Billy and Carmelita, as she had Nadine, to go to Sunday school and church and to be educated. Due to the low emphasis that Melvin placed in education (he only had a 6th grade education himself), Bill dropped out of school in grade 7. Lack of education is a mitigator. Id.; State v. Corbett, 602 So. 2d 1240 (Fla. 1992); State v Reilly, 601 So. 2d 222 (Fla. 1992).

* DiMarino was found guilty of third degree murder and received 15 years. Guy Smith, the "enforcer" who ordered the murder, received a life sentence. Disparate treatment is a mitigator. Lamb State, 532 So. 2d 1051 (Fla. 1988); Omelus v. State, 584 So. 2d 563 (Fla. 1991); Pentecost v. State, 545 So. 2d 861 (Fla. 1989). Disparate treatment alone was enough to require post-conviction relief in O'Callaghan v. State, 542 So. 2d 1324, 1326 (Fla. 1989):

> ... We have previously held that the disparate sentencing of individuals involved in the same offense may be considered in determining an appropriate sentence. [Cit.] Although the jury knew that Tucker would be sentenced for second-degree murder, that Cox had been granted immunity, and that LaPointe had not been charged with a crime, it did not know that this information could be considered in recommending an appropriate sentence for O'Callaghan. Applying the test set forth in State v. DiGuilio, 491 So. 2d 1129 (1986), we are unable to say that the error in this case was harmless.

Maxwell v. State, 603 So. 2d 490 (Fla. 1992) followed O'Callaghan. Maxwell produced nonstatutory mitigation at trial relevant to his background and childhood. This Court found Hitchcock error harmful based on this evidence and disparate treatment:

> All of these clearly are valid nonstatutory mitigating factors upon which a properly instructed jury reasonably could have relied. We also note that the case for aggravation is less severe, and the case for mitigation greater, here than in O'Callaghan v. State, 542 So. 2d 1324 (Fla. 1989) ("O'Callaghan I"). The facts of O'Callaghan were similar in that Mr. O'Callaghan was the actual triggerman who shot the victim, but was assisted by other perpetrators who did not receive a death sentence. The penalty phase jury had recommended death for O'Callaghan, and the trial court had concurred. On direct appeal in O'Callaghan, this Court sustained four valid aggravating factors: (1) murder committed during the course of a kidnaping; (2) heinous, atrocious, or cruel; (3) prior conviction of a violent robbery; and (4) cold, calculated premeditation. O'Callaghan v. State, 429 So. 2d 691, 696-97 (Fla. 1983) ("O'Callaghan II").
>
> On collateral challenge, this Court reconsidered O'Callaghan in light of an acknowledged Hitchcock error. We let stand all four aggravating factors as stated in the direct appeal, but concluded that a single nonstatutory mitigating factor had been excluded improperly form the jury's consideration--the fact that lesser penalties had been imposed on the coperpetrators. Despite the existence of four aggravating factors--including two of the most serious--we concluded that the error was not harmless. O'Callaghan I, 542 So. 2d at 1326.
>
> By comparison, the present case involves only two aggravating factors. These do not include the more serious factors of heinous, atrocious or cruel, or cold, calculated premeditation. The latter two we expressly rejected on direct appeal based on the facts of Maxwell's crime. Maxwell, 443 So. 2d at 971. Simultaneously, we have found that the record supports at least five valid nonstatutory mitigating factors that this Court previously has recognized and applied in other cases. If the error in O'Callaghan was harmful, it surely must be so in a case such as this, where

> the mitigating evidence is weightier and that aggravating evidence less severe.

Maxwell, 603 So. 2d at 492-93. Appellant's case lies between O'Callaghan and Maxwell. He has three aggravators, unlike O'Callaghan who had four, and Maxwell, who had two. He has strong disparate treatment mitigation, and childhood mitigation, like Maxwell. Cooper v. State, 526 So. 2d 900, 902-903 (Fla. 1988), found harmful Hitchcock error based in part on the domination and violent nature of the accomplice:

> Similarly, we find the proffered testimony concerning the codefendant Ellis' reputation for violence, and Coopers' relationship with Ellis, relevant to petitioner's character as well as to the circumstances of the offense. This testimony was proffered to show Ellis' violent nature and dominant relationship to petitioner. By introducing evidence of Ellis' violent character and domination of petitioner, defense counsel sought to persuade the jury that petitioner was easily led by Ellis and likely played a follower's role in the commission of the crime. This evidence, if accepted by the jury, along with the other evidence clearly would have been relevant to whether petitioner was deserving of the death penalty for his crime. See Troedel v. Wainwright, 667 F.Supp. 1456 (S.D. Fla. 1986), affirmed, 828 F.2d 670 (11th Cir. 1987) (finding counsel ineffective in failing to investigate the background of a codefendant where defense theory is that codefendant, who had dominated and coerced defendant, was responsible for the murders). See also, Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1986, 95 L.Ed.2d 825 (1987).
>
> The state has not demonstrated that the error in this case was harmless beyond a reasonable doubt or had no effect on the jury or judge. Under these circumstances, petitioner is entitled to a new sentencing hearing. Hitchcock.

Accord Downs v. Dugger, 514 So. 2d 1069, 1072 (Fla. 1987)(Hitchcock error harmful where instructions did not let jury consider disparate treatment: "This Court previously has recognized as mitigating the fact

that an accomplice in the crime in question, who was of equal or greater culpability, received a lesser sentence than the accused").[30]

There is new evidence on the disparate treatment at the post-conviction hearing, and Smith's sentence was reduced to life after White's sentencing. The record at bar is that appellant was a subservient, clownish drunk who would readily have fallen under the dominating influence of the men who had the murder committed.

Dr. Caddy stated that, due to his relationship with his father, appellant acquiesces to males. Domination by another is a mitigator, especially where, as here, the dominant person does not receive a death sentence. A strong argument could have been made that appellant was under DiMarino's and Smith's control. Duboise v. State, 520 So. 2d 260 (Fla. 1988); Smalley v. State, 546 So. 2d 720 (Fla. 1989).

* As an adult, Bill would drive older neighbors to the store for groceries. He would give friends rent and grocery money. Good deeds rendered Hitchcock error harmful in Way v. Dugger, 568 So. 2d 1263, 1266 (Fla. 1990). In Jones v. Dugger, 867 F.2d 1277, 1280 (11th Cir. 1989), the mitigating testimony was from the petitioner's sister and a jailer. The sister testified that before his criminal troubles, he

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[30] See also, Aldridge v. Dugger, 925 F.2d 1320, 1330 (11th Cir. 1991)(Hitchcock error harmful in part due to "disproportionate lenience compared to Aldridge, even considering his role in the crime", to supplier of murder weapon, in addition to impoverished childhood, lack of prior violent conviction, hard work and military service); Smith v. Singletary, 61 F.3d 815, 817-818 (11th Cir. 1995)(lighter sentence for cooperating accomplice, long history of alcohol and substance abuse, childhood deprivation and abuse, and mistaken incarceration in adult facility when 15).

was "a very nice person [who] got along well with people [and] never was no trouble." His jailer testified petitioner was a model prisoner who "got along with him well [and] never had any trouble." This "nice guy" mitigation alone made the Hitchcock error harmful.

* The postconviction record shows that appellant was a chronic drunk who became an alcoholic in pre-adolescence under the dominating influence of his father. His drinking and substance abuse caused profound defects in his memory and his behavior reflected lack of judgment and even want of care in such habitual matters as remembering to put his foot down when stopping his motorcycle. Chronic substance abuse is a mitigator especially if, as here, combined with mental problems. E.g., McKinney v. State, 579 So. 2d 80 (Fla. 1991) (error not to consider history of alcohol and drug use, and mental deficiencies).

* Dr. Caddy testified that expert testimony would have shown Bill could not be an active participant in the crime. R 360. He identified nonstatutory mitigators, all of which were available at the time of trial. These included, in addition to circumstances, already discussed above: limitations of intellectual functioning, sense of lack of direction, limitations of intellectual functioning, affiliative needs (leading to his joining the Outlaws), and listless and nonproductive lifestyle and sense of worthlessness. R 361-63.

* Bill had a uniquely timid and gentle personality as a young boy; he was kind, sympathetic, and loving and a very sweet, caring and

concerned loving person. Nadine remembers Bill as a very tenderhearted child; Carmelita remembers he never wanted to hurt anybody or to see anybody in pain. He loved and cared for the family animals. See Hegwood v. State, 575 So. 2d 170 (Fla. 1990) (evidence of a good and obedient child found to be mitigators).

* Appellant was drinking before the murder. Evidence of intoxication is a mitigator. Wright v. State, 586 So. 2d 1024 (Fla. 1991); Buford v. State, 570 So. 2d 923 (Fla. 1990). In Buford, the Court also found the father's alcoholism to be a mitigator; see also, Downs v. State, 572 So. 2d 895 (Fla. 1990). The combination of alcoholism, being under the influence, severe childhood abuse, and a head injury resulting in brain damage made the Hitchcock error harmful in Waterhouse v. State, 522 So. 2d 341, 344 (Fla. 1988).

* Appellant went to Marianna as an adolescent. Being beaten and jailed at a young age is a mitigator. Marshall v. State, 604 So. 2d 799 (Fla. 1992). He went to Marianna when physical abuse was a daily event.

Prejudice occurs where there is some nonstatutory mitigation and "the aggravating circumstances cannot be characterized as overwhelming. All the aggravating circumstances were directly related to the murder itself except one which referred to the fact that Mikenas was on parole when he committed the crime." Mikenas v. Dugger, 519 So. 2d 601, 602 (Fla. 1988). Appellant has shown such prejudice at bar.

C. The lower court erred in finding that this Court's decision in White v. Dugger is a procedural bar.

Ignoring all of the foregoing, the court rejected the Hitchcock claim solely on the ground that this Court's denial of appellant's habeas petition in White v. Dugger bars relief. R 1075-76.

This ruling is contrary to Hall v. State, 541 So. 2d 1125 (Fla. 1989). As appellant did in White v. Dugger, Hall filed a habeas petition alleging Hitchcock error and pointing to in-the-record mitigation which had not been considered at sentencing, which this Court denied Hall v. Dugger, 531 So. 2d 76 (Fla. 1988).[31] Then, like appellant, he filed a rule 3.850 motion alleging a Hitchcock violation based on out-of-the-record mitigation which had not been presented at sentencing. The trial court denied Hall's motion, reasoning that Hall v. Dugger barred relief. This Court reversed, writing in part:

> We do not agree with the trial court's ruling that our denial of relief in Hall VI constitutes a procedural bar under the law of the case and res judicata. This case involves significant additional non-record facts which were not considered in Hall VI because that was a habeas corpus proceeding with no further development of evidence beyond the record. In this case, however, we are aided by the trial court's findings of fact at the rule 3.850 hearing. Moreover, as we have stated on several occasions, Hitchcock is a significant change in law, permitting defendants to raise a claim under that case in postconviction proceedings. [Cit.]

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[31] In both Hall v. Dugger and White v. Dugger, 523 So. 2d at 141, this Court found the Hitchcock error harmless in view of the trial record only.

541 So. 2d at 1126. See also Alvord v. State, 694 So. 2d 704 (Fla. 1997) (distinguishing Hall where 3.850 claim did not present substantially different evidence or mitigators not found at the original trial).

Thus, the question is whether the 3.850 record shows substantially different mitigating evidence, or mitigators absent at the original trial. Nearly any testimony presented in this Rule 3.850 proceeding would be "substantially different" than that presented at trial, since "No testimony was presented of any mitigating circumstances, statutory or nonstatutory, but the trial judge found the mitigating circumstance of no previous felony convictions." White v. State, 415 So. 2d 719, 720 (Fla. 1982). On habeas, appellant could only draw three mitigators from the scant trial court record:

> White now asserts that three areas of nonstatutory mitigating evidence should have been presented and considered: (1) alleged residual doubt as to his guilt; (2) the complicity of his co-defendant, Richard DiMarino; and (3) White's use and consumption of alcohol.

White v. Dugger, 523 So. 2d 140.

In contrast to the original sentencing, the postconviction record contains substantial lay and expert mitigating testimony, as well as previously unknown facts about DiMarino's culpability. The court erred in rejecting appellant's Hitchcock claim. This Court should reverse and order new jury sentencing proceedings. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const., and Constitution Amendments V, VI, VIII, and XIV, U.S. Const.

II. WHETHER THE COURT ERRED IN REJECTING THE CLAIM THAT COUNSEL WAS INEFFECTIVE AT PENALTY.

To show ineffectiveness of counsel, one must show deficient performance and prejudice under Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). The court's order did not decide if the sentencing performance was deficient, limiting itself to ruling that there was no prejudice. R 1071-72.[32] Hence, appellant addresses prejudice first, and then deficient performance.

A. Counsel's performance prejudiced appellant.

Appellant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693-694 (e.s.). Rather, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. 694. "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." Id. 695. "[A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." Id. 696. See also Cunningham v. Zant, 928 F.2d 1006, 1016 (11th Cir. 1991) ("To satisfy the prejudice prong, the defendant must show 'a reasonable probability that, but for counsel's unprofessional errors,

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[32] The court also rejected some sub-points on the ground of procedural bar, as is discussed below.

the result would have been different. A reasonable probability is probability sufficient to undermine confidence in the outcome.' [Strickland, 466 U.S.] at 694, 104 S.Ct. at 2068. A proceeding may be unreliable 'even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.' Id.") (e.s.), and Smith v. Dugger, 911 F.2d 494, 497 (11th Cir. 1990) (same).

The court did not use this standard at bar. After reviewing the aggravators, it wrote: "Additional evidence concerning White's alcoholism, memory lapses and abusive childhood would not have outweighed the aggravating circumstances especially in light of the brutality and indifference demonstrated by Defendant in the commission of this murder." R 1072 (e.s.). It also relied on this Court's ruling of no prejudice in White v. Dugger. Thus, the court required that appellant show that the result would actually have been different -- a higher standard than set out in Strickland, Cunningham and Smith. Further, as noted at Point I above, White v. Dugger is not dispositive of prejudice in light of the record developed on the rule 3.850 motion.

Appellant suffered Strickland prejudice. Dr. Caddy showed that reasonable investigation would have developed the statutory mitigating circumstance that appellant's ability to conform his conduct to the requirements of law was substantially impaired (section 921.141 (6) (f)). R 360. Appellant's poor education, subservient character and mental defects would have given much greater weight to the statutory mitigating factor of his age. Insofar as failure to develop and

present nonstatutory mitigation came from ignorance and inaction, rather than (as unrebutted evidence showed) belief that the law barred such evidence, the absence of the powerful nonstatutory mitigation from the sentencing hearing also constitutes Strickland prejudice.

Rose v. State, 675 So. 2d 567, 573 (Fla. 1996) states:

> We still must determine the prejudicial effect, if any, of counsel's performance. In evaluating the harmfulness of resentencing counsel's performance, we have consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order, Hildwin, 654 So. 2d at 110; Santos v. State, 629 So. 2d 838, 840 (Fla. 1994), and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness. Hildwin, 654 So. 2d at 110. For example, in Baxter the court held:
>
> > We hold that Baxter suffered prejudice from his attorneys' failure to conduct a reasonable investigation into his background. Psychiatric mitigating evidence "has the potential to totally change the evidentiary picture." Middleton [v. Dugger], 849 F.2d [491] at 495 [(1988)]. We have held petitioners to be prejudiced in other cases where defense counsel was deficient in failing to investigate and present psychiatric mitigating evidence. See Stephens v. Kemp, 846 F.2d 642, 653 (11th Cir.) ("prejudice is clear" where attorney failed to present evidence that defendant spent time in mental hospital), cert. denied, 488 U.S. 872, 109 S.Ct. 189, 102 L.Ed.2d 158 (1988); Blanco [v. Singletary], 943 F.2d [1477] at 1503; Middleton, 849 F.2d at 495; Armstrong v. Dugger, 833 F.2d 1430, 1432-34 (11th Cir.1987) (defendant prejudiced by counsel's failure to uncover mitigating evidence showing that defendant was "mentally retarded and had organic brain damage").

> 45 F.3d at 1515. Indeed, the substantial mitigation that has been demonstrated on this record is similar to the mitigation found in Hildwin and Baxter to require a resentencing proceeding where such evidence may be properly presented. Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992) (prejudice established by "strong mental mitigation" which was "essentially unrebutted"), cert. denied, 509 U.S. 908, 113 S.Ct. 3005, 125 L.Ed.2d 697 (1993); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992) (prejudice established by expert testimony identifying statutory and nonstatutory mitigation and evidence of brain damage, drug and alcohol abuse, and child abuse); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991) (prejudice established by evidence of statutory mitigating factors and abusive childhood).

Further, failure to object to improper instructions, comments and arguments turned the jury sentencing phase into a nullity. The jury thought its penalty verdict was of little importance. [33] It knew its decision was subject to appeal. TR 796-98 (court explains appellate rights in jury's presence). It did know of the 25 year mandatory minimum and (as shown by Dr. Radelet's testimony), likely assumed that,

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[33] The judge told the jury that he was "not required to follow the advice of the jury," and "it is my responsibility and mine alone to decide" the sentence. TT 11. The state emphasized this on voir dire, TT 16, so that one juror opined that the jury was "just an advisor, like if they wanted the death penalty, it is up to the judge himself to uphold it or make his own opinion." TT 32-33. After Kaplan urged the jury to take its job seriously at the end of the guilt phase, the state told the jury: "During that second phase you are not sentencing anyone in the case, it is the judge's responsibility and his alone to determine the sentence of the case." It said that the penalty verdict "is merely that, a recommendation," continuing that "the ultimate decision, of course, is solely upon the shoulders of the judge". TT 747-48. The judge again instructed the jury on this matter. TT 820. Thus, even before the penalty phase began, the jury thought it had no significant role at sentencing.

if sentenced to life, appellant would be free in a few years. It did not consider nonstatutory mitigation as shown at Point I above.

The state argument minimizing the jury's role in sentencing was like comments found unconstitutional in Mann v. Dugger, 844 F.2d 1446, 1457 (11th Cir.1988). Similar prejudice arose from failure to object to the court's comments about appellate rights. See Pait v. State, 112 So. 2d 380, 383-384 (Fla. 1959). Appellant was also prejudiced by the failure to make jurors aware of the mandatory minimum part of a life sentence. As Dr. Radelet showed, jurors would have had an incorrect view that appellant was be released from prison long before expiration of the 25 year minimum. Prejudice also arose from the instructions and argument limiting consideration of mitigation and the minimal defense performance on voir dire of the jury.

B. Counsel's performance was deficient.

Kaplan informed himself on Florida law only to the extent of determining that it barred nonstatutory mitigation. He was ignorant of the importance of the jury's role in sentencing, the 25 year mandatory minimum, the impropriety of the court's commenting on the right of appeal, and other significant sentencing issues. He did not investigate appellant's background, contact family or childhood witnesses, examine school records, examine school records, or conduct similar investigative steps. Minimal investigation of existing law would have revealed that: under Tedder, the jury's role was of vital importance; under the statute, there was a mandatory minimum; under

Pait, comments minimizing the jury's role constitute reversible error. Reasonable factual investigation would have revealed strong mitigation and facts diminishing the impact of the aggravators.

Appellant "must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 686. He must show conduct below "an objective standard of reasonableness". Id. 687-88. "Judicial scrutiny of counsel's performance must be highly deferential." Id. 689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. 689. Hence "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable". Id. 690-91.

Not making a reasonable investigation will generally satisfy the performance prong. Kenley v. Armontrout, 937 F.2d 1298, 1304 (8th Cir. 1991) ("Failing to interview witnesses or discover mitigating evidence relates to trial preparation and not trial strategy."). See Foster v. Lockhart, 9 F.3d 722, 726 (8th Cir. 1993) (extensive discussion of relationship between strategy and failure to investigate). See also Futch v. Dugger, 874 F.2d 1483, 1486 (11th Cir. 1989), Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986), Blanco v. Singletary, 943

F.2d 1477, 1503 (11th Cir. 1991) (decision not to call witnesses "was not a result of investigation and evaluation, but was instead primarily a result of counsels' eagerness to latch onto Blanco's statements that he did not want any witnesses called."). In Kimmelman v. Morrison, 477 U.S. 365, 385, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), the Court wrote:

> The trial record in this case clearly reveals that Morrison's attorney failed to file a timely suppression motion, not due to strategic considerations, but because, until the first day of trial, he was unaware of the search and of the State's intention to introduce the bedsheet into evidence. Counsel was unapprised of the search and seizure because he had conducted no pretrial discovery. Counsel's failure to request discovery, again, was not based on "strategy," but on counsel's mistaken beliefs that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense and that the victim's preferences would determine whether the State proceeded to trial after an indictment had been returned.
>
> Viewing counsel's failure to conduct any discovery from his perspective at the time he decided to forgo that stage of pretrial preparation and applying a "heavy measure of deference," ibid., to his judgment, we find counsel's decision unreasonable, that is, contrary to prevailing professional norms. The justifications Morrison's attorney offered for his omission betray a startling ignorance of the law--or a weak attempt to shift blame for inadequate preparation. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Ibid. Respondent's lawyer neither investigated, nor made a reasonable decision not to investigate, the State's case through discovery. Such a complete lack of pretrial preparation puts at risk both the defendant's right to an "'ample opportunity to meet the case of the prosecution,'" [Strickland], at 685, 104 S.Ct., at 2063 (quoting Adams, supra, 317 U.S., at 275, 63

> S.Ct., at 240), and the reliability of the adversarial testing process. See 466 U.S., at 688, 104 S.Ct., at 2065.

The justifications for Kaplan's omissions likewise "betray a startling ignorance of the law -- or a weak attempt to shift blame for inadequate preparation." He did not perform as counsel under Strickland.

This penalty phase amounted to a breakdown in the adversarial process. Kaplan knew neither the law governing penalty trials, nor facts to be presented. He relied on the state and judge to tell him the law. While he had tried capital cases before, none involved a separate penalty phase. R 99-100. He spent no time on a separate penalty investigation. R 99. He says he spoke with Abrams about penalty evidence between phases but came up with nothing. R 117. Abrams said Kaplan never spoke to him about penalty, either about substantive law, R 72, or factual matters.[34] After Kaplan returned to Kentucky between phases, Abrams never spoke with him again until possibly the evening before the penalty phase; he did not see it as his role to develop witnesses. R 74-5.

Kaplan thought the judge had unfettered discretion at sentencing. He had no idea the penalty verdict received great weight. R 116. He was ignorant of the import of the penalty phase.

Counsel has a duty to investigate sources of information for penalty phase. State v. Lara, 581 So. 2d 1288 (Fla. 1991). While

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[34] Neither did Abrams conduct an independent investigation into evidence which might be used at penalty phase. R 66.

arguing the adversarial breakdown here was so severe that no prejudice need be established, Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987), appellant has presented a wealth of testimony which would reasonably likely have changed the outcome of the penalty, as in other cases granting relief because of penalty phase ineffectiveness. See Bassett v. State, 541 So. 2d 596 (Fla. 1989); Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Michael v. State, 530 So. 2d 929 (Fla. 1989).

This case involves a pervasive failing in counsel's central obligation: "`An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence.' Porter v. Singletary, 14 F.3d 554, 557 (11th Cir.), cert. den., U.S. , 115 S.Ct. 532, 130 L.Ed.2d 435 (1994). The failure to do so `may render counsel's assistance ineffective.' Bolender, 16 F.3d at 1557." Rose, 675 So. 2d at 571.

Abrams sat at the defense table the second day of trial to comply with the Integration Rule. He engaged in no investigation of penalty phase, and did not speak with Kaplan about penalty phase with the exception of a possible phone call the evening before it was to take place. Kaplan did no more. This is like the fractured team in Magill. There, the public defender office designated private attorney Stancil to provide representation, and met weekly with the head of the office (Pierce), to discuss that and other cases. The first day of trial, Pierce showed up and said he was trying the case. At the end of guilt phase Pierce left town and Stancil took back over. The court found the

representation ineffective (though prejudicial only at penalty phase), disagreeing with the lower court's attribution of knowledge of the prepared lawyer to the unprepared one who actually tried the case:

> Magill's allegations that several of Pierce's acts or omissions during trial constituted ineffectiveness must be assessed in light of Pierce's lack of pretrial preparation. The district court erred by considering Stancil and Pierce collectively as `counsel' thereby attributing Stancil's pretrial preparation to Pierce. Although two attorneys can often be considered as co-counsel, to do so in this case would be erroneous. When Stancil and Pierce discussed this case prior to trial, they did not do so with the intent that Stancil was preparing Pierce to present the case in court. They merely discussed this case as they did Stancil's other cases. Stancil was surprised when Pierce showed up on the first day of trial and took over the case. Although Pierce technically had access to Stancil's case file, there is no suggestion he ever studied it. We cannot conclude that Magill's `counsel' interviewed witnesses and interviewed the defendant. Magill's counsel during the guilt phase was Pierce, not Pierce and Stancil. Stancil testified that all decision regarding the guilt phase (i.e., objections, advising Magill to testify, opening and closing arguments) were made by Pierce alone. Thus, in examining Magill's claim of ineffective assistance during guilt phase, we consider Pierce's actions in light of Pierce's failure to prepare for the trial and its possible outcome.

Magill, 624 F.2d at 885-886. This echoes the last-minute placement of Abrams at counsel table here, and the lack of any significant coordination between the two in representing appellant.

Adding two lawyers together subtracted from the quality of representation. Kaplan assumed Abrams was responsible for many matters when Abrams swears he was not. In Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989), two attorneys on a case had an investigator who gathered background information for penalty phase. Each lawyer thought the other was responsible for penalty, and there was no evidence that

either one received or relied on t`he information. Id. 759-760. Thus, while the state contended that the information provided postconviction could have led to introduction of harmful information, the court found no such strategic decision had been made. Counsel can decline to investigate areas of mitigation, but:

> such decisions 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 available to them. Such ignorance precluded [the attorneys] 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.

Harris, 874 F.2d at 763. See Rose, 675 So. 2d at 572 (counsel followed "ill-conceived . . . strategy" of nonappointed appellate counsel).

Kaplan did not know the law. In Garcia v. State, 622 So. 2d 1325, 1329 (Fla. 1993), this Court wrote: "Counsel's failure to comprehend the most fundamental requirement governing the admissibility of evidence in capital sentencing proceedings was clearly unreasonable, particularly where the provision is set out plainly in Florida Statutes." See also Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded, 468 U.S. 1206 (1984), adhered to on remand, 739 F.2d 531 (1984) (ignorance of penalty procedures, in addition to failure to consult with client, no investigation and inappropriate comments to trial judge rendered assistance ineffective);

House v. Balkcom, 725 F.2d 608 (11th Cir. 1984) (unaware of new capital sentencing statue, counsel absented selves from parts of trial, sought no defense witnesses, and failed to move for new trial when victims seen alive after being with defendant); Cave v. Singletary, 971 F.2d 1513, 1518-19 (11th Cir. 1992) (counsel misunderstood felony murder rule, but no prejudice at guilt phase; prejudice at penalty phase where absence of mitigation witnesses resulted from lack of preparation).

There was no independent mitigation investigation. Kaplan spent his time preparing for guilt phase. This is similar to State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991), where the trial court found:

> At the evidentiary hearing, the defendant's trial attorney, Stuart Adelstein, testified -- and the court finds -- that he was overwhelmed and panicked in handling his first capital case, spent ninety percent of his time working on the guilt-innocence phase of trial, did not investigate in any detail the defendant's background, and did not properly utilize expert witnesses regarding defendant's mental state. In short, the court finds that Mr. Adelstein virtually ignored the penalty phase of the trial.

There is no evidence that Kaplan or Abrams "panicked"; however, there is evidence that Kaplan "virtually ignored the penalty phase of trial" because of his ignorance of the importance of the penalty verdict.

Similar cases include: Phillips v. State, 608 So. 2d 778, 782 (Fla. 1992)(state concedes deficient performance where counsel undertook virtually no penalty preparation and presented only defendant's mother in mitigation); Bates v. State, 604 So. 2d 457, 459 (Fla. 1992)(record supported finding that counsel "failed to investigate Bates' background adequately," resulting in prejudice); Mitchell

v. State, 595 So. 2d 938, 941-41 (Fla. 1992) (ineffectiveness finding upheld where counsel "presented no evidence at the penalty phase of the trial. He testified that he thought he was going to obtain a not-guilty verdict, so he had not prepared for the penalty phase"); Deaton v. Dugger, 635 So. 2d 4, 8 (Fla. 1993)(ineffectiveness finding upheld where "clear evidence was presented that defense counsel did not properly investigate and prepare for penalty phase proceedings" even where client waived mitigation; counsel testified he didn't prepare for penalty phase before conclusion at guilt because that might give him a "defeated attitude"); Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993)("Heiney's lawyer in this case did not make decisions regarding mitigation for tactical reasons. Heiney's lawyer did not even know that mitigating evidence existed. This is so because counsel did not attempt to develop a case in mitigation").[35]

Kaplan argued DiMarino's disparate sentence in mitigation, but did not develop evidence of his domination and Bill's subservience. This is a major reason this Court found ineffectiveness in Bassett v. State, 541 So. 2d 596 (Fla. 1989). See also State v. Michael, 530 So. 2d 929 (Fla. 1988)(counsel who admitted he was on notice of client's "disturbed mental condition" ineffective for not pursuing that line of investigation); Middleton v. Dugger, 849 F.2d 491, 495 (11th Cir.

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[35] Accord, Armstrong v. Dugger, 833 F.2d 1430, 1433 (11th Cir. 1987)(attorney's penalty investigation of speaking with defendant's parole officer and parents fell below standard of reasonableness); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Agan v. Singletary, 12 F.3d 1012 (11th Cir. 1994).

1988)(counsel, who was unaware of psychiatric records and had no strategic reason for failing to find them, ineffective as such can "totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior", acting both as mitigation and weakening aggravators).

C. The court erred in applying a procedural bar to some issues.

On the ground that they could have been raised on appeal, the court refused to consider arguments that counsel failed to object to: the court's discussing the defendant's right to appeal in the jury's presence, the court's informing the jury that appellant was in jail before trial, jury instructions mitigators must outweigh the aggravators, jury instructions improperly restricting consideration of mitigation, and argument and instructions denigrating the jury's role in sentencing. R 1070-71. The court erred. These matters involve inaction of trial counsel which must be considered in post-conviction litigation. Appellant could not litigate ineffective assistance of counsel on direct appeal, and the absence of objections rendered these matters not subject to appellate review. The court should have reviewed the merits of these arguments, and granted the motion, as set out in sections II.A and II.B of the argument above. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const., and Constitution Amendments V, VI, VIII, and XIV, U.S. Const.

III. WHETHER APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AS TO GUILT.

Kaplan did nothing when the state mid-trial filed an amended statement of particulars altering its theory of the case, failed to obtain an instruction on the intoxication defense and failed to present evidence of appellant's alcoholic history, failed to obtain a ruling on his objection to collateral bad act testimony, failed to object to bad character evidence and evidence creating sympathy for the victim. Appellant suffered prejudice from Kaplan's deficient performance.

As it did regarding penalty, the court addressed only the issue of prejudice, and did not rule whether counsel's performance at the guilt phase was deficient. R 1066-67. Appellant relies on the recitation of governing legal standards in Point II above.

A. There was prejudice under Strickland.

The finding of lack of prejudice rested on the detailed testimony of DiMarino describing the murder and the "cumulative circumstantial evidence" that appellant participated in beating Crawford, left the clubhouse with her and DiMarino in his girlfriend's car, was seen in the car in a remote location without the victim around the time of death, and the body of the victim had been transported in the car. R 1066-67. The court ruled that "nothing counsel did or did not do would have changed the resulting guilty verdict." R 1067 (e.s.).

The court used an incorrect legal standard -- it required that appellant show that the result actually "would have" been different. In fact, appellant "need not show that counsel's deficient conduct more

likely than not altered the outcome in the case." Strickland, 466 U.S. at 693-694 (e.s.). Rather, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. 694. Under the correct legal standard, the record shows prejudice.

The state's pre-trial statement of particulars said the murder occurred "In Orange County, Florida, in the vicinity of 3209 Surfside Way" [the Outlaw clubhouse]. TR 1520. With this in hand, Kaplan could have held the state to this allegation, pointing out to the jury that the evidence would not show that the murder occurred there. He could have barred DiMarino's entire story that the murder occurred elsewhere and the "cumulative circumstantial evidence" set out above, so that the state would have been left without a case. In Stang v. State, 421 So. 2d 147 (Fla. 1982), this Court held that it was error to let the state amend a statement of particulars mid-trial where the defense has relied on the statement before the jury.

After the testimony of 18 witnesses at appellant's trial, the state amended its statement of particulars to allege that the murder occurred "In Orange County, Florida, in the vicinity of 3209 Surfside Way, Sea World, Land Street Road and various places in route to and from said location a more exact location known only to the Defendant." TR 1536, 453. Kaplan made no objection to this amendment, which let the state materially alter its case. Had he competently objected and

made the state abide by its statement of particulars and limit its evidence, there is a reasonable probability that it would have lead to an acquittal and discharge of appellant and a bar to retrial. Mars v. Mounts, 895 F.2d 1348 (11th Cir.1990). Given the foregoing, appellant has shown prejudice requiring a new trial.

The failure to obtain an instruction on the intoxication defense and to develop evidence of his alcoholic history also prejudiced appellant. Once the state, due to the failure to confine the state's case to the statement of particulars, was able to present DiMarino's testimony that appellant participated in the murder, it became crucial to argue that appellant was too intoxicated to satisfy the mental element of first degree murder. The trial evidence was that appellant was kicked out of a bar that night because of his extreme intoxication before going to sleep at the clubhouse. TT 287-90. According to the state's case, DiMarino awakened him from his drunken slumber to participate in the crime. TT 474. The jury could readily have accepted that DiMarino and the other Orlando Outlaw witnesses were minimizing appellant's intoxication in order to pin the blame on him, an outsider from Kentucky. Due to Kaplan's incompetence, however, the jury did not receive a theory of defense instruction advising them how use this evidence, and did not receive evidence showing his long-term alcoholism and its effect on his thought processes. Under Strickland, it is reasonably probable that the jury would not have found him guilty of first degree murder had it been properly informed.

Also prejudicial was failure to bar admission of improper evidence including Officer Williams' statement that he knew Crawford was in fear based on nine years of dealing with the Outlaws, TT 199 (which constituted guilt-by-association evidence), evidence and argument about Crawford's children, T 491, 693 (creating sympathy for her), and evidence that appellant had been violent to Sami Nestle, T 307-308 (improper collateral crime evidence).

B. Counsel's performance was deficient.

Kaplan's trial preparation trial was minimal. He was ignorant of Florida law. He relied on Abrams "to tell me the procedural aspects and whatever law there was on the subject". R 106. Abrams had filed motions, but "I never seen all of those motions, but he had talked to me and he told me he had made many motions." R 107. He depended on Abrams for jury instructions: "That would have been his forte. He did take an active role in that in the discussion." R 107. Kaplan could give no reason for not seeking an intoxication instruction. R 105.

To perform as counsel under the Sixth Amendment, one must know governing law. United States v. Loughery, 908 F.2d 1014, 1018 (D.C.Cir. 1990), Lewandoski v. Makel, 949 F.2d 884 (6th Cir. 1991). The record reveals the ignorance of the law or attempts to shift blame condemned in Kimmelman. It appears that Kaplan was unaware of the original statement of particulars and the use to be made of it.

A court may not manufacture after-the-fact strategic explanations for counsel's omissions. Harris v. Reed, 894 F.2d 871, 878 (7th Cir.

1990) ("Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer."); Washington v. Murray, 4 F.3d 1285, 1289 (4th Cir. 1983) ("... the district court should not have constructed a tactical decision counsel might have made, but obviously did not. See Griffin v. Warden, Maryland Correc. Adjus. Ctr., 970 F.2d 1355, 1358 (4th Cir. 1992).") Thus, the court erred in finding respecting the waiver of the intoxication defense and instruction that, though Kaplan testified that he "abandoned it for some reason which he reason he could not now remember", "examination of the testimony at trial gives the most likely explanation for abandoning the intoxication defense". R 1066, n.2.

Only ignorance and inaction explain Kaplan's omissions. He did not make "strategic choices made after thorough investigation of law and facts relevant to plausible options [which choices] are virtually unchallengeable". Strickland, 466 U.S. at 690-91. Since he did not engage in reasonable decision-making after thorough investigation or a reasonable decision not to investigate, his omissions do not receive the high deference usually accorded to counsel's actions. His performance was deficient: minimally competent counsel would have used the statement of particulars to limit the state's case, would have obtained a theory of defense instruction and presented evidence supporting it, and would have prevented the jury from receiving improper evidence and argument. This Court should order a new trial.

Art. I, §§ 9, 16, 17, 21, 22, Fla. Const., and Constitution Amendments V, VI, VIII, and XIV, U.S. Const.

IV. WHETHER THE COURT ERRED IN DENYING THE MOTION FOR TRANSCRIPTION AND REVIEW OF GRAND JURY PROCEEDINGS.

In Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), the Court held that one charged with rape of a minor was entitled to in camera review of the minor's welfare file notwithstanding that the file was confidential under state law. He was entitled to this review upon a bare assertion that the file "might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence." 107 S.Ct. at 995. On remand, the state supreme court held in camera review insufficient to safeguard the defendant's rights, so that counsel is entitled to see the records. Commonwealth v. Lloyd, 567 A.2d 1357 (Pa. 1989).

Pennsylvania v. Ritchie applies to grand jury testimony: Under Keen v. State, 639 So. 2d 597, n.4 (Fla. 1994), it is error not to grant in camera review and release of grand jury testimony upon an adequate showing by the defense. See also Miller v. Dugger, 820 F.2d 1135 (11th Cir. 1987), Hopkinson v. Shillinger, 866 F.2d 1185, 1220-21 (10th Cir.), reh. denied 888 F.2d 1286 (10th Cir. 1989) (en banc).

In moving for transcription and review of grand jury testimony, appellant made a stronger showing that did Ritchie or Hopkinson. While Ritchie claimed the records "might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence", and Hopkinson claimed "that evidence tending to exculpate him may have been presented to this grand jury", 886 F.2d at 1220, appellant showed that

the state's case changed totally during the investigation and prosecution stages. The arrest warrant included Frank Marasa, raising the likelihood there was evidence about his role or some other person's, which could be relevant to guilt or sentencing. R 819. At the preliminary hearing and in its statement of particulars (after the indictment), the state maintained the murder occurred at the Outlaw clubhouse, contrary to its theory at trial. Id. Presumably, it presented its original theory (murder at the clubhouse) to the grand jury, so that the grand jury testimony would contract its trial theory. As in Hopkinson, there was a second grand jury, which indicted Guy Ennis Smith. Id. Further, both Richard DiMarino and Sami Nestle made inconsistent statements. R 818-19. Inconsistent statements by a key state witness was relied on in Miller and Keen. Since DiMarino was indicted with appellant, the grand jury record very likely contains material impeaching him, which must be disclosed under Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). The court erred in denying the motion. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const., and Constitution Amendments V, VI, VIII, and XIV, U.S. Const.

V. WHETHER THE COURT ERRED IN DENYING APPELLANT'S CLAIMS THAT THE STATE FAILED TO PROVIDE THE DEFENSE EXCULPATORY OR IMPEACHING EVIDENCE AND PRESENTED FALSE EVIDENCE.

A. DiMarino testified that he became a witness in exchange for the promise to protect him and his wife from the Outlaws and that his five-year sentences on two pending charges would run concurrent with his 15 year sentence for Crawford's murder. TR 168-69, 506-507. No mention was made of a written agreement or additional promises.

The state did not disclose that: DiMarino entered a written memorandum in which the state agreed "not to seek enhanced punishment", def. Ex. 2, par. 5, although he qualified as an habitual offender, and agreed not to file other charges against him.[36] His attorney testified that DiMarino was facing about 40 years of charges. R 160. Asked if there were other charges which the could have filed but did not file in exchange for his testimony, DiMarino's lawyer replied: "Yes. There were to be no other charges filed, as I recall. There would be no other charges filed, and Mr. DiMarino was to be given concurrent time on the charges that were pending." R 162-63. The state agreed before his testimony to give his wife $1000. R 162.

Thus, DiMarino testified falsely about the extent of the deal and the state failed to disclose evidence on this point. It is a violation of due process for the state to present false evidence or let it go

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[36] Thus, the record of co-defendant Smith's trial showed that "the state had dismissed two additional felony charges against" DiMarino. Smith, 403 So. 2d at 934.

uncorrected. Giles v. Maryland, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967) (inconsistent statement of rape victim); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) (false testimony about consideration for testimony); Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957) (false testimony regarding relationship of wife to witness); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (promise of leniency to government witness not disclosed); Craig v. State, 685 So. 2d 1224 (Fla. 1996). Under Napue, there must be a new trial if there is any reasonable likelihood the judgment could have been affected.

The state must disclose exculpatory or impeaching evidence. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Abrams and Kaplan said the state did not notify them of the foregoing matters. R 63-64, 65, 85; 108 110, 111, 113.

The state presented false evidence and did not disclose evidence impeaching its main witness. DiMarino was important for three purposes: establishing appellant's guilt; magnifying his role; and establishing aggravators. There is a reasonable likelihood that appellant would not have been convicted or would not have been sentenced to death if the jury had not been mislead as to the magnitude of DiMarino's agreement with the state. The evidence was material and undermines confidence in the outcome both as to guilt and penalty,

given DiMarino's importance to the state. This Court should order retrial or resentencing.

B. Similarly, the state failed to disclose Ann Hicks' evidence which would have cast doubt on the state's theory concerning the comparative roles of appellant and DiMarino. This constitutional violation was prejudicial both as to guilt and penalty. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const., and Constitution Amendments V, VI, VIII, and XIV, U.S. Const.

VI. WHETHER THE COURT PREJUDGED THE SENTENCE AND COMMUNICATED THAT DECISION TO THE STATE AND HAD THE STATE PREPARE THE ORDER SENTENCING APPELLANT TO DEATH.

A. Immediately upon receiving the penalty recommendation, the judge read and signed an order sentencing appellant to death. TR 830 ff., 1638-39.[37] The judge's oral statements sentencing appellant to death immediately after polling the jury, TR 830 ff., are verbatim the same as the written order, TR 1638-39. For instance:

In short, this was a particularly brutal, atrocious and cruel murder. Gracie Mae Crawford was beaten about the face to the extent that she received, according to Dr. Hegert, a subdural hematoma. Then, highly intoxicated so her will to resist was gone, she was forcibly kidnapped, even though asking to go home to her children. You and your accomplice coldly and coolly looked for a lonely spot, took her over a five-foot fence, and, as she lay on the ground, stabbed her fourteen times, followed by a ceremonial slitting of her throat. The unfeeling, indifferent, cold-blooded ease in which all of this was done could not have been done by one unaccustomed or inexperienced with cruel death.	In short, this was a particularly brutal, atrocious and cruel murder. Gracie Mae Crawford was beaten about the face to the extent that she received, according to Dr. Hegert, a subdural hematoma. Then highly intoxicated so her will to resist was gone, she was forceably kidnapped even though asking to go home to her children. You and your accomplice coldly and cooly looked for a lonly spot, took her over a give foot fence and as she lay on the ground, stabbed her fourteen (14) times followed by a ceremonial slitting of her throat. The unfeeling, indifferent, cold blooded ease in which all of this was done could not have been done by one unaccustomed or inexperienced with cruel death.
TR 830-31.	TR 1638.

[37] The judge's oral statements sentencing appellant to death immediately after polling the jury, TR 830 ff., are verbatim the same as the written order, TR 1638-39. (The order bears the clerk's stamp showing it was filed on December 20, the day of the penalty verdict.) Thus, the judge already had the order in hand when the jury returned its recommendation.

Thus, the judge already had the order in hand when the jury returned its recommendation.

Appellant learned for the first time at the post-conviction hearing that the state prepared this order. Judge Pfeiffer testified: "I'm not the author of this." and "The whole order was done by Mr. Hart [prosecutor], right." R 139. He said he "would be very positive that probably" Hart prepared the order before the jury's recommendation, as evidenced by the fact that it shows an alternative of whether the death sentence was imposed in concurrence with or over the jury's sentencing recommendation. R 137-38; TR 1638. Thus the record shows the judge decided the sentence before the jury penalty proceedings.

"In the Florida sentencing scheme, the sentencing judge serves as the ultimate factfinder. If the judge was not impartial, there would be a violation of due process. The law is well-established that a fundamental tenet of due process is a fair and impartial tribunal. Marshall v. Jerrico, Inc., 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980)." Porter v. Singlegary, 49 F.3d 1483, 1487-88 (11th Cir. 1995). See also Zeigler v. State, 452 So. 2d 537, 540 (Fla. 1984) (trial judge's pretrial statement that, if defendant convicted, "I'll fry the son-of-a-bitch"). Marshall states: "The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. See Mathews v. Eldridge, 424 U.S. 319, 344, 96 S.Ct. 893, 907, 47 L.Ed.2d 18 (1976)." 446 U.S. at 242.

B. Abrams testified that during the guilt phase, Judge Pfeiffer would make "bzzz" sounds in chambers. R 76-7. Another time (he isn't sure if it was during DiMarino's or White's trial), the judge made a locomotive sound. While saying he didn't take it to mean the judge had made up his mind, he took the sounds to refer to the electric chair. R 89, 90. The sounds were not on record and always in chambers.

Marc Lubet, DiMarino's counsel, corroborated Abrams, testifying that Judge Pfeiffer made the same electrical sounds during DiMarino's trial the month before. R 169. He thought they did not necessarily mean his client would not get a fair trial but took them to mean that Judge Pfeiffer meant to sentence DiMarino and Bill White to death if convicted. R 170, 171. Judge Pfeiffer denied making the electric chair buzzing sounds, but the order denying the 3.850 motion does not resolve the conflict in the testimony. R 1069-70. Again, the record shows that the judge was biased requiring a new trial or resentencing.

C. Further, the court's prayers set a biased tone of vengeance. Significantly, the state picked up on this tone in final argument as to guilt. TR 752. The judge's daily invocations of divine vengeance deprived appellant of a fair trial. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const., and Constitution Amendments V, VI, VIII, and XIV, U.S. Const.

VII. WHETHER APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE.

Given the postconviction record, the death sentence in this case is disproportionate. The judge initially made a finding of fact that DiMarino was "Orlando enforcer" and Smith was "Florida regional enforcer for the Outlaws." TR 1647. He further found that both Smith and DiMarino were actively involved in the beating of Crawford, TR 1646, and that Smith said he did not want any witnesses. TR 1647. He found that DiMarino drove the car to the murder site, threw her down, stood by while White stabbed her, and then DiMarino himself slashed her throat. Id. DiMarino was convicted of third degree murder. Smith's death sentence was later reduced to life imprisonment on appeal. The record now contains abundant unrefutted mitigation of the sort which would justify a life verdict and sentence. Given the disparate treatment of the dominant, equally culpable co-defendants who initiated the murderous episode (appellant was asleep when DiMarino awoke him to participate in the beating, TR 298, 474), and the substantial mitigation, this Court should reduce the sentence to one of life imprisonment. See Scott v. Dugger, 604 So. 2d 465 (Fla. 1992) (reducing sentence to life on postconviction appeal because of co-defendant's subsequent life sentence). Art. I, §§ 9, 16, 17, 21, 22, Fla. Const., and Constitution Amendments V, VI, VIII, and XIV, U.S. Const.

VIII. WHETHER THE COURT ERRED STRIKING CLAIMS WITHOUT AN EVIDENTIARY HEARING.

The court erred in striking other claims of constitutional error. Under rule 3.850(d), a court may deny claims only where the court records "conclusively show that the prisoner is entitled to no relief". Unless the pleading is deficient, the court must attach to the order "a copy of that portion of the files and records that conclusively shows that the prisoner is entitled to no relief". Id. At bar, the court erred in denying claims without an evidentiary hearing and without attaching documents conclusively showing that appellant was entitled to no relief. These claims include: Kaplan, a non-attorney under Florida law, represented appellant on the first day of trial without local counsel, so that appellant was not represented by counsel at jury selection, opening statements, and the testimony of the first witnesses -- all crucial stages of the case -- in violation of the Counsel and Due Process Clauses. R 1073-74.

The claims also include that: New evidence showed that the death sentencing procedure was unreliable. R 508, 1074; SR 182-83. The court applied an improper standard in rejecting mental health mitigation and the jury considered only nonstatutory mitigation. R 505, 508, 1074; SR 182. Florida's death penalty, and electrocution in particular are unconstitutional in violation of the Cruel, Unusual Punishment Clauses of the state and federal constitutions. R 1074-75. The sentencing proceeding was unreliable and unconstitutional because the state and judge diminished the jury's sense of responsibility for

sentencing and the court improperly made the jury aware that the case would be reviewed on appeal. R 1075, 1078. The state illegally and unconstitutionally sought sympathy for the deceased at guilt and penalty phases. R 1076-77. The jury was misinformed about the nature of a life sentence. R 1078. It was error to let counsel to waive the intoxication defense without appellant's consent. R 1077. Numerous unplead and unsupported felony murder theories were presented to the jury. R 1077-78. It was error to instruct the jury not to consider sympathy, and that mitigtors must outweigh aggravators. R 1078-79. All of these claims plead constitutional error it was a violation of the Due Process, Jury, Counsel, and Cruel, Unusual Punishment Clauses to deny these claims. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const., and Constitution Amendments V, VI, VIII, and XIV, U.S. Const.

CONCLUSION

Based on the foregoing argument and the authorities cited therein, appellant respectfully requests this Court reverse and remand with instructions to retry appellant or to conduct a new sentencing hearing, or reducing his sentence to life imprisonment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to JOHN W. MOSER, Capital Collateral Regional Counsel -- Middle, 405 North Reo Street, Suite 150, Tampa, FL 33609-1004 and to JUDY TAYLOR RUSH, Assistant Attorney General, Assistant Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, FL 32118 by U.S. Mail this 20 day of February, 1998.

Attorney for William M. White