IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,142

ARTHUR DENNIS RUTHERFORD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Rutherford's Fla. R. Crim. P. 3.850 motion for post-conviction relief. This proceeding challenges both Rutherford's conviction and his death sentence imposed upon resentencing. References in this brief are as follows:

"R. at ___." The record on direct appeal to this Court.

"2nd Supp. R. at ___." The second supplemental record on direct appeal to this Court.

"PC-R1. at ___." The Court Reporter's transcribed notes of the evidentiary hearing held in this case on April 24-26, 1996.

"PC-R2. at ____." The record on appeal in these post-conviction proceedings, excluding the transcribed notes of the evidentiary hearing.

REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE

Rutherford was indicted by a grand jury in the First Judicial Circuit, Santa Rosa County, for first-degree murder and robbery (R. 1). On January 28, 1986, trial commenced before the Honorable George E. Lowrey. The jury found Rutherford guilty (R. 74) and recommended death (R. 75). However, pursuant to a defense motion for mistrial, the court found the State had committed a material, substantial, knowing and willful discovery violation at trial and ordered a retrial (R. 106-11).

Venue was transferred for retrial to Walton County, before the Honorable Clyde B. Wells. Retrial commenced on September 29, 1986. The jury found Rutherford guilty on October 2, 1986 (R. 150). At the penalty phase on October 2, 1986, the jury recommended death by a vote of 7 to 5 (R. 156). Rutherford was sentenced to death on December 9, 1986, and the judge's sentencing order was entered on December 17, 1986 (2nd Supp. R. 3). Rutherford appealed his convictions and sentences, which were affirmed. Rutherford v. State, 545 So. 2d 853 (Fla. 1989), cert. denied, Rutherford v. Florida, 110 S. Ct. 353 (1989).

Rutherford filed a motion under Fla. R. Crim. P. 3.850 on August 1, 1981 (PC-R1. 2). An amended motion was filed on October 16, 1992 (PC-R1. 286). The court entered an order denying relief on some claims and ordering an evidentiary hearing on Rutherford's penalty phase ineffective assistance of counsel claims (PC-R1. 386-94).

At the evidentiary hearing, Rutherford presented testimony and exhibits regarding trial counsel's preparation for the penalty phase and regarding mental health and other mitigation

available at the time of trial. That evidence is summarized in the Argument section of this brief as it relates to the individual claims.

Following the evidentiary hearing, the court denied relief (PC-R1. 675-834). Rutherford's motion for rehearing (PC-R1. 835-41) was denied (PC-R1. 845). Rutherford filed a notice of appeal (PC-R1. 846), and this appeal follows.

SUMMARY OF ARGUMENT

1. Rutherford was denied effective assistance of counsel at the penalty phase due to trial counsel's failure to object to testimony presented by the state which was inadmissible hearsay and was irrelevant to proving aggravating factors. The improper evidence consisted of testimony by three friends of the victim regarding the victim's fear of Rutherford. Despite clear precedent holding such evidence inadmissible, counsel did not object. At the evidentiary hearing, counsel testified that there was no reason for not objecting to this testimony. Rutherford was prejudiced by counsel's failure to object because the State relied upon this testimony in urging the jury to impose death, the judge explicitly relied upon this testimony in imposing death, and the jury voted for death by a narrow 7 to 5 margin. Further, on direct appeal, this Court refused to address the issue regarding the friends' testimony because counsel had failed to object. Thus, a proper objection would have entitled Rutherford to an appellate reversal. Counsel's performance was deficient and Rutherford was prejudiced. Rutherford is entitled to resentencing.

2. Rutherford was denied the effective assistance of counsel at the penalty phase when trial counsel failed to investigate and present available mental health mitigation. Through prior competency reports and other documents, counsel were aware that Rutherford

had mental health problems relevant to two mental health mitigation issues, alcohol dependence and posttraumatic stress disorder. However, counsel did not seek appointment of a mental health expert to develop mental health mitigation. This failure was unreasonable in light of the information available to counsel. Presentation of expert mental health mitigation would have been entirely consistent with counsel's penalty phase strategy. Rutherford was prejudice by counsel's failure. The evidentiary hearing established that statutory and nonstatutory mental health mitigating factors could have been proved at Rutherford's penalty phase. At trial, the court found no mitigating factors other than Rutherford's lack of criminal history because other factors lacked corroboration. This Court affirmed the trial court's findings and specifically noted that Rutherford did not claim to suffer from post-traumatic stress disorder. However, expert testimony at the post-conviction hearing established that at the time of the offense, Rutherford suffered from an extreme emotional disturbance, a statutory mitigator, and suffered from alcohol dependence and post-traumatic stress disorder from his service in Vietnam, both recognized nonstatutory mitigators. Rutherford is entitled to resentencing.

3. Rutherford was denied effective assistance of counsel at the penalty phase due to counsel's failure to investigate Rutherford's background and military service. In addition to the mitigating factors discussed in Argument II, testimony at the evidentiary hearing established that Rutherford was abused as a child, made contributions to society through his military service, suffered from family and domestic problems, contributed to his community by helping his friends and neighbors, and was a good father and provider for his children, all recognized nonstatutory mitigators. In light of the trial court's finding of no mitigators other

than lack of criminal history and the jury's close 7 to 5 vote, Rutherford was prejudiced by counsel's unreasonable omissions. Relief is proper.

4. Double Jeopardy precluded a retrial because the mistrial was caused by the prosecutor's intentional misconduct.

5. Mr. Rutherford was denied effective assistance of counsel at the guilt phase when counsel did not investigate available evidence. State agencies' failures to comply with public records requests hindered the ability to prove this claim.

6. The trial court erroneously summarily denied meritorious claims as procedurally barred.

ARGUMENT I

THE FAILURE TO OBJECT CLAIM.

At the penalty phase of Rutherford's trial, the State presented testimony from three witnesses who were friends of the victim. The purpose of presenting these witnesses was to elicit testimony that the victim was afraid of Rutherford. Although this testimony was inadmissible under well-established state law principles and highly inflammatory and prejudicial, defense counsel did not object to its admission. Counsel had no reason for failing to object (PC-R1. 90-91). Defense counsel's unreasonable failure to object permitted Rutherford's sentencing jury and judge to hear and consider this irrelevant evidence. Given the nature of the testimony and the 7-5 jury death recommendation, this evidence was extraordinarily prejudicial to Rutherford. 3.850 relief is required.

A. DEFICIENT PERFORMANCE

During the penalty phase, the State presented the testimony of three of the victim's friends, Lois LaVaugh, Beverly Elkins, and Richard LaVaugh. Lois LaVaugh had known the victim for several years (R. 805). After describing how she and the victim used to swim, play golf, and have dinner together (id.), Mrs. LaVaugh testified she had been at the victim's home the day before the murder, while Rutherford was there, and the victim related her fear of Rutherford:

> [A.] And **she said, "I am quite nervous right now," she said "A. D. Rutherford is here."**
>
> And I said "Do you want us to come over?" And **she said "Yes, I would sure like you to come over." And she said, "He has been here quite awhile."**
>
> And the four of us jumped in the car and went over and he was on the front porch with no shirt on --
>
> * * *
>
> And we went in and I introduced my friends to Stella because she had not met them. And later on the van drove up and Stella went outside. And she said "Go ahead and show your friends the house." So I showed them the rest of the house.
>
> And when she came back she said **"I sure am nervous, he scared me," you know, she said, "He really has made me nervous" because she said he had come in the house with no shirt and sit on her couch.** And she said "I told him that I had work to do outside" and they went outside and she was working in the yard.
>
> Q. Did you have any further conversation with her about A. D.?
>
> A. That afternoon after she was finished working in the yard and she came back over, she apologized to my friends after we got home, she apologized to the friends and **she told them how scared she was of him that day.**
>
> Q. **Of who?**
>
> A. **A. D. Rutherford.**

(R. 805-08)(emphasis added). On cross, Mrs. LaVaugh testified she had not heard any conversations between the victim and Rutherford (R. 812), and that she did not see Rutherford threaten or attack the victim (R. 813).

The State also called Beverly Elkins, the victim's next door neighbor (R. 820). Mrs. Elkins testified she had talked to the victim about Rutherford installing some sliding glass doors and the victim related:

> THE WITNESS: So **she said, "Do you think that he purposely left the doors where they'll not lock so he can get in the house.?" And she said, "I am afraid to stay here with my doors where they will not lock."**
>
> BY MR. SPENCER:
>
> Q. How long was this before her death?
>
> A. Several months before her death.
>
> MR. GONTAREK: Same objection.
>
> BY MR. SPENCER:
>
> Q. If you would direct yourself to the period -- Did she form any feeling toward Mr. Rutherford, did she express it to you?
>
> A. All right, then the Wednesday before her death on Thursday she and I went walking as I testified previously, and **she told me that Mr. Rutherford came to her house that afternoon and she said, "I just wish that they would just quit coming to the house, I get very upset and they act like they are casing the joint."**
>
> And she said, "They came to the door and I went to the door and he had a screw in his hand. And I said, 'A. D., what are you doing with the screw?' And he said, 'Put it in the sliding glass door.'" And she said, "I told him that I already had the doors taken out because they did not work."
>
> But they she said, **"I just don't want him to come to my house anymore." -- She was frightened of him, she said. And she said, "He just keeps coming around."**

And then when we finished the walk we stopped by the house and she came in my house and she told my husband, she said -- well, she had said that A. D. had sent Attaway to the bank. And he said, "I'll buy the doors back since I sold them to you for seventy-five dollars; I'll buy them back --"

MR. GONTAREK: Same objection, Judge. It is not one of the nine aggravating questions that the statute requires.

MR. SPENCER: Judge, it is if she will answer the question --

THE COURT: Overruled at this time.

BY MR. SPENCER:

Q. Direct your attention best you can to the emotional relationship between A. D. Rutherford as expressed to you by Stella Salamon the day before her death?

A. And that day she told my husband, she said, "If he comes to get the doors the next morning --" because she said Mr. Attaway came back after staying gone about an hour and A. D. said that he could not get a check cashed or get money at the bank or whatever and that he would get the money and come back the next morning, and that would be on Thursday the day that she was killed, to pick up the door.

And she told my husband, she said, she told my husband, "Joe, if he comes in the morning I'll call you to come down," because she was frightened. And she said, "If I call you do not walk through the woods, drive down, I want you down there." And he said, "Just call, Stella, and I'll be right there." And obviously we did not really think that she was in any danger --

MR. GONTAREK: I object she's completely beyond --

THE COURT: Objection overruled.

BY MR. SPENCER:

Q. Can you specifically say as of Wednesday evening what Mrs. Salamon was concerned about with reference to A. D. Rutherford?

A. **She was frightened for him to come around her house and she wanted somebody to be there if he came back again.**

(R. 820-25)(emphasis added). On cross, Mrs. Elkins testified that she had never seen the victim and Rutherford together (R. 826).

Finally, the State called another friend of the victim, Richard l.aVaugh. On direct examination, LaVaugh testified that he and his wife socialized with the victim (R. at 814), and explained how he helped the victim with repairs to her home (R. at 815-16). On cross, defense counsel elicited the following:

> Q. And are you able, Mr. LeVaugh [sic], to say that you ever saw A. D. Rutherford threaten Stella Salamon?
>
> A. I can't say that I know that he threatened her, no.
>
> Q. Or made any aggressive moves toward her?
>
> A. Only what she said.
>
> Q. **And he never communicated any threats to her that came to your knowledge?**
>
> A. **She told my wife that she was scared of him and asked us to come over there because he was on the front porch.**
>
> Q. Right. And I understand you went over there?
>
> A. Yes.
>
> Q. And he was sitting on the front porch?
>
> A. Yes.
>
> Q. And there was no argument or violence or anything in that period?
>
> A. No.

(R. 818-19)(emphasis added).

Although this irrelevant, inadmissible and inflammatory testimony was not elicited by the State on direct exam and thus not technically part of a failure to object claim, counsel's

performance in cross-examination of LaVaugh is arguably even more unreasonable then their lack of objection during the testimony of Lois LaVaugh and Beverly Elkins because it demonstrates that counsel failed to appreciate the nature of the evidence admitted during the testimony of the first two friends. To the extent that allowing the jury to hear the testimony was unreasonable performance, whether by failing to object or by actually eliciting the testimony on cross-examination, all three friends' testimony will be considered together.

To establish deficient performance under Strickland v. Washington, 466 U. S. 668 (1984), Rutherford must prove that "counsel's representation fell below an objective standard of reasonableness," 466 U.S. at 688, such that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. For the following four reasons, counsel's failure to object to the friends' testimony was objectively unreasonable in light of the inadmissible, irrelevant, and inflammatory nature of the evidence. First, precedent at the time of Rutherford's trial established that the testimony highlighted above was inadmissible hearsay at a Florida capital sentencing proceeding, and its presentation deprived Rutherford of his confrontation clause rights. Florida's capital sentencing statute at the time of trial provided:

> Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, **provided the defendant is accorded a fair opportunity to rebut any hearsay statements**.

§ 921.141(1), Fla. Stat. (1985, 1986 Supp.)(emphasis added).

At the time of Rutherford's penalty phase, this Court had clearly held that for hearsay to be admissible against a defendant at a capital sentencing proceeding, the hearsay must be of a character which affords the defendant a fair opportunity for rebuttal. See Dragovich v.

State, 492 So. 2d 350, 355 (Fla. 1986); Perri v. State, 441 So. 2d 606, 608 (Fla. 1983). See also Engle v. State, 438 So. 2d 803, 813-14 (Fla. 1983). The hearsay evidence presented in Rutherford's penalty phase did not provide a fair opportunity for rebuttal, and thus fell outside the scope of § 921.141(1). In stating that Rutherford made her nervous, the victim was expressing her opinion that Rutherford was acting in a suspicious manner. She never stated specific behaviors which prompted her reaction. Indeed, the penalty phase witnesses testified that they observed no threatening or suspicious behavior. Consequently, the substance of the hearsay was nothing more than the victim's opinion without any foundation expressed.

In Dragovich, this Court ordered resentencing because the State had introduced evidence at the penalty phase indicating that the defendant had a reputation as an arsonist. The Court held that allowing the introduction of such improper evidence "compromis[ed] the weighing process," 492 So. 2d at 354, because it allowed "improper considerations [to] enter into the weighing process." Id. at 355. The Court then explained:

> Further, section 921.141(1) provides, in part, that all legally obtained, probative evidence, including hearsay, is admissible during the penalty phase, 'provided the defendant is accorded a fair opportunity to rebut any hearsay statements.'
>
> We find that the hearsay reputational evidence employed here is not susceptible to the fair rebuttal contemplated by the statute. Were we to hold otherwise, penalty phase proceedings could well turn into 'mini-trials' on collateral matters. The only rebuttal possible in this context would be for the defendant to introduce witnesses to testify that he did not have a reputation as an arsonist. Assuming, arguendo, that resolution of this issue could result in ascertaining some apparent truth, it would merely establish the truth of the defendant's reputation in some circles as an arsonist.

Dragovich, 492 So. 2d at 355.[1]

The situation here is analogous to the testimony deemed inadmissible hearsay in Dragovich because it was impossible to fairly rebut. Just as Dragovich could only introduce reputation evidence that he was not known as an arsonist, Rutherford would have been forced to introduce evidence that the victim was not afraid of him. Characterizing behavior as suspicious involves the perception of the person drawing the conclusion. To fairly confront such conclusions, cross-examination of that person is essential. Because the victim made the speculative conclusions here, no amount of cross-examination of the witnesses who related her bare statements would have been helpful in rebutting them. Under Florida law at the time of the penalty phase, the friends' testimony was inadmissible hearsay. Counsel's failure to object to the testimony was unreasonable. See Dragovich, 492 So.2d at 355.

Second, the friends' testimony during the penalty phase was also inadmissible because it was not relevant to prove any of the aggravating circumstances enumerated in § 921.141, Fla. Stat. The victim's state of mind at the time prior to the crime has no place in evaluating the circumstances of the crime for aggravating factors. In his sentencing order, the judge used this evidence as partial support for finding "cold, calculated and premeditated" (CCP) (2nd Supp. R. 5). This reliance was misplaced, however, because this evidence did not shed light on Rutherford's state of mind, which is the only pertinent consideration when assessing this aggravator. See, e.g., Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994). Additionally, the reason for the victim's statements about her anxiety were speculative at best. She was

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[1] Dragovich was decided on May 29, 1986, and rehearing was denied on August 29, 1986. Mr. Rutherford's trial began on September 29, 1986. (R. at 192).

suspicious, but no evidence of Rutherford's behavior provided a foundation for that suspicion. See supra. Consequently, the evidence had no bearing on Rutherford's state of mind.

Assuming that the victim's statements had foundation, they were still irrelevant to prove CCP. Her alleged suspicion was that Rutherford was "casing the joint" (R. 823). Evidence that a perpetrator is planning a theft or robbery is not a proper consideration in determining if CCP applies. See, e.g., Jackson v. State, 498 So. 2d 906 (Fla. 1986); Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984). Thus the jury should not have heard this evidence.

The testimony of the victims' three friends was also irrelevant to the heinous, atrocious or cruel aggravator. Although the victim's state of mind can be relevant to this factor, it must be the mental state immediately prior to or contemporaneous with the homicide. See, e.g., Routly v. State, 440 So. 2d 1257, 1265 (Fla. 1983). The victim's mental anguish as the result of knowledge of impending death is the key consideration. See Id. The testimony in question here tended to show the victim's state of mind at a time well before the commission of the homicide. Additionally, there was no testimony that her anxiety was due to knowledge of impending death. Rather, it was merely the product of her own speculation which was not based upon any evidence of imminent threat of death. As such, under Florida law at the time of trial, the testimony was irrelevant. Again, defense counsel unreasonably failed to object on this basis.

Third, the introduction of the friends' testimony was also contrary to well-established Florida precedent prohibiting the use of testimony which would "evoke the sympathy of the

jury or . . . prejudice the defendant." Welty v. State, 402 So. 2d 1159, 1162 (Fla. 1981). See also Jordan v. State, ___ So. 2d ___ (Fla. April 17, 1997). Here, the friends' descriptions of their social engagements with the victim and their unrebuttable hearsay testimony regarding the victim's fear of Rutherford could only have been intended to "evoke the sympathy of the jury." In Dragovich, this Court noted that "[t]he potential for abuse, and the resulting prejudice to defendants, in using strictly reputational evidence [based on unrebuttable hearsay] is manifest." Dragovich, 492 So.2d at 355. The same concern for abuse and sympathy that was held to be improper in both Welty and Dragovich is equally present in Rutherford's case. Thus defense counsel's lack of objection failed "to assure the defendant as dispassionate a trial as possible and to prevent interjection of matters not germane to the issue." Welty, 402 So. 2d at 1162.

Fourth, counsel had no strategic reason for failing to object to any of the friends' testimony. Counsel failed to object to the testimony of Lois LaVaugh. See supra. On direct appeal of Rutherford's case, the State conceded that counsel failed to object. See Answer Brief of Appellee, at 28, Rutherford v. State, Supreme Court Case No. 69,825 ("With reference to the testimony of friend, Lois LaVaugh, the defense made no objection to her testimony (R. 804-810)."). Additionally, the State did not alter its position in its Response to Rutherford's 3.850 Motion or at the post-conviction evidentiary hearing.

Next, defense counsel did not raise a proper objection to Beverly Elkins' testimony. The objections which defense counsel did make were strictly limited to the witness's descriptions of the repairs needed on the victim's home (R. 820-825), which is clearly how the trial court understood the objections. See, e.g., (R. 822)(court admonishing the

prosecutor to "skip over the issue of home repair as much as possible"). The State argued on direct appeal that, "with reference to the testimony of friend, Beverly Elkins, the defense made no objection to her testimony concerning the victim's fears of Rutherford (R. 823-825)." Answer Brief of Appellee, at 29, Rutherford v. State, Supreme Court Case No. 69,825. Additionally, the State did not alter its position in its Response to Rutherford's 3.850 Motion or at the post-conviction evidentiary hearing. Finally, with respect to the testimony of Richard LaVaugh, on direct appeal the State argued that "defense counsel on cross-examination, solicited the only testimony about the victim's fear of Rutherford. The State cannot be blamed for defense counsel's questions." Answer Brief of Appellee, at 28-29, Rutherford v. State, Florida Supreme Court Case No. 69,825. Additionally, the State did not alter its position in its Response to Rutherford's 3.850 Motion or at the post-conviction evidentiary hearing.

In Rose, this Court indicated that the reasons trial counsel took certain action are important to the ineffectiveness analysis. Rose v. State, 675 So. 2d 567, 572 (Fla. 1996) ("[i]n evaluating the competence of counsel, we must examine the actual performance of counsel . . . during the penalty phase proceedings, as well as the reasons advanced therefor."). Here, defense counsel's failures to object to the State's presentation of the friends' testimony regarding the victim's fear of Rutherford, and defense counsel's elicitation of some of that testimony, were unreasonable, and was not based upon tactic or strategy.

William Treacy, who was the ultimate decision maker during the penalty phase (R. 60-61), conceded at the post-conviction evidentiary hearing that he had no reason for not objecting to the inadmissible, irrelevant, and prejudicial testimony by the victim's friends:

Q: During the penalty phase of Mr. Rutherford's case that state called a number of witnesses or at least some witnesses who testified -- or do you recall the state calling some witnesses that testified that the victim in this case was afraid of Mr. Rutherford?

A: I recall that.

* * *

Q: Did you object to the admission of that testimony?

A: I don't know.

Q: At the present time, well, considering your knowledge of the law at the time of the trial -- if you can recall as a general concept, **do you consider the introduction of that testimony improper?**

A: Her state of fear?

Q: Yes.

A: Yes. I think it would be objectionable because you can't testify to somebody else's mental state; you can testify -- Well, generally you can't.

Q: And would that be the, is that the type of testimony which at that time you would have considered it important to object to?

A: Well, yes. . ..

(R. 90-91)(emphasis added).

Overall, numerous, well-established bases for objecting to the State's presentation of the friends' testimony were available at the time of Rutherford's penalty phase. At the evidentiary hearing, counsel admitted that there was no reason for not objecting. Counsel's failure to object meant that "counsel was not functioning as the 'counsel' guaranteed [Rutherford] by the Sixth Amendment. Strickland, 466 U.S. at 687.

B. PREJUDICE

Strickland's prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.[2] Confidence in the outcome is undermined when the court is unable "to gauge the effect" of counsel's omissions. State v. Michael, 530 So. 2d 929, 930 (Fla. 1988). Prejudice is established when trial counsel's deficient performance deprives the defendant of "a reliable penalty phase proceeding." Deaton v. Dugger, 635 So. 2d 4, 9 (Fla. 1993). For the following five reasons, counsel's failure to object to the friends' testimony deprived Rutherford of a reliable penalty phase proceeding and was thus prejudicial.

First, the State relied upon the friends' testimony in the penalty phase closing argument. In closing argument, the prosecution stated:

> **Also consider the testimony of Ms. Elkins and Ms. [LaVaugh] that said that she, that she was afraid of this man, that she didn't want anything to do with him.**
>
> * * *
>
> **You can consider the other testimony. Harold Attaway said, "I heard her say, 'Take the doors and forget about the money.'" And that's consistent with what Ms. Elkin [sic] said, and Ms. [LaVaugh], that she was afraid of the man, she didn't want anything to do with him, she wanted him out of her life, out of her house, not around. She was afraid he was over there casing the house, as she said. And she had it arranged where she could call and, in fact, did call the neighbors to come over at one point when he was left there alone on the front steps.** He said they went to get a beer and he said they were trying to get a check cashed so he could pay her for the doors. I don't think that was the real reason he was there. **So, consider**

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

> **those factors, and consider the fact that the house was locked up, and that when she knew he was coming over there she wanted this man there with her, or to be on call, the neighbor. Consider the testimony of the other witnesses.**

(R. 901-02)(emphasis added). Because the prosecutor was able to rely on counsel's deficient performance to argue for death, Rutherford was deprived of a reliable penalty phase. Prejudice is established and relief is warranted under these circumstances. See Strickland, 466 U.S. at 694; Deaton, 635 So.2d at 9.

Second, the judge explicitly relied upon the friends' testimony in sentencing Rutherford to death:

> (i) The crime was committed in a cold, calculated, and premeditated manner without any pretence of moral or legal justification. . . . **This was further established by the testimony at the penalty phase of the trial that indicated the victim was deathly afraid of the defendant and had expressed her fear of the defendant and her fear of being alone with him.**

(2nd Supp. R. 4-5)(emphasis added). Because the judge relied on counsel's deficient performance to impose death, Rutherford was deprived of a reliable penalty proceeding. Prejudice is established and relief is warranted under these circumstances. See Strickland, 466 U.S. at 694; Deaton, 635 So.2d at 9.

Third, a prejudice finding is in order because the jury almost voted for a life sentence despite considering inadmissible, irrelevant and inflammatory evidence. In Dragovich, this Court stated that

> **We cannot know the effect this [unrebuttable, inflammatory hearsay] testimony had on the jury. Therefore, we vacate the sentence of death and remand for resentencing before a new jury.**

Dragovich, 492 So.2d at 455 (emphasis added). In Rutherford's case, the same is true. The jury recommended death by 7 to 5 (R. 156). Had counsel properly objected and moved to

prevent the jury from considering the inadmissible, irrelevant and inflammatory testimony, it is impossible to know if one juror's vote would have changed, thus resulting in a life sentence that could not have been overridden. Prejudice is established in such circumstances. See Strickland, 466 U.S. at 694; Michael, 530 So.2d at 930.

Fourth, counsel's failure to object was prejudicial because Rutherford would have been entitled to appellate reversal if the court admitted this evidence after an appropriate objection. See Dragovich, 492 So.2d at 355. See also Jordan v. State, ___ So. 2d ___ (Fla. April 17, 1997). However, when an issue regarding the testimony of the victim's friends was presented on direct appeal, this Court declined to address it:

> [T]here was no objection to these comments at trial. Indeed, one of them was elicited by defense counsel on cross-examination; thus the issue was waived.

Rutherford v. State, 545 So. 2d 853, 857 (Fla. 1989). Counsel's failure to preserve a viable line of appellate attack made trial performance all the more deficient and prejudicial.

Finally, caselaw supports a prejudice finding under circumstances similar to those of Rutherford. Counsel have been found to be prejudicially ineffective for failing to raise objections, to move to strike, or to seek limiting instructions regarding inadmissible, prejudicial testimony, Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983); for failing to object to improper questions, Goodwin v. Balkcom, 684 F.2d 794, 816-17 (11th Cir. 1982); and for failing to object to the admission of evidence which was not admissible under state law. See, e.g., Atkins v. Attorney General, 932 F.2d 1430, 1431-32 (11th Cir. 1991); Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). See also Lewis v. Lane, 832 F.2d 1446, 1457-58 (7th Cir. 1987).

In Vela, counsel during a capital sentencing failed to object to witnesses' testimony about the victim's good character. Vela, 708 F.2d at 962. The court found that the testimony was not relevant to sentencing but was "admitted solely for the purposes of inflaming the jury." Id., at 963. In granting relief on the issue of whether the failure to object constituted ineffective assistance of counsel, the Vela court held that

> Vela was thrice prejudiced. First, defense counsel allowed the prejudicial evidence on [the victim's] good character to be introduced. Second, by failing to object to it and ask for a curative instruction, counsel allowed the jury to consider it as if it had been material, probative evidence, relevant to the issue of Vela's sentence. Third, defense counsel's failure to object waived the issue for consideration on direct appeal. We have no difficulty concluding that counsel's ineffectiveness 'resulted in actual and substantial disadvantage to the cause of [Vela's] defense.' Strickland, 693 F.2d at 1262. Indeed, given the extremely prejudicial effect of this testimony, we fail to see how anyone could conclude otherwise.

Id., at 966. Rutherford was equally prejudiced by his counsel's failure to object to the testimony of the victim's friends. Relief is appropriate.

It is important to note that the failure to object is, on its own, sufficient to warrant relief, regardless of the effectiveness of the remainder of counsel's assistance. See, e.g., Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. Sept. 14, 1981). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even if counsel provided effective assistance at his trial in some areas, defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981); Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979); Strickland; Kimmelman.

Additionally, when the failure of counsel to object is combined with the other errors made by counsel, see Arguments II-IV, prejudice is established because the errors undermine confidence in the fundamental fairness of the sentencing determination. See Gunsby v. State, 670 So. 2d 920, 924 (Fla. 1996); Cherry v. State, 659 So. 2d 1253 (Fla. 1995); Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995). Counsel's errors regarding the admission of the friends' testimony require Rule 3.850 relief.

ARGUMENT II

THE FAILURE TO PRESENT MENTAL HEALTH MITIGATION CLAIM.

At the penalty phase, the only testimony even arguably related to mental health mitigation presented was the cursory description by five witnesses, including Rutherford, of Rutherford's change in behavior since his return from the Vietnam War (R. 837, 844-845, 852, 862, 884-885). Additionally, counsel entered into evidence a Mobile, Alabama Veterans' Center form prepared entirely by Rutherford, indicating emotional problems stemming from his service in the Vietnam War (R. 881).[3] This was the entire extent of

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[3] As was made clear at the post-conviction hearing by Dr. Robert Baker, one of Mr. Rutherford's mental health mitigation experts, the evidence presented contained indicia of posttraumatic stress disorder, a recognized mental impairment in 1986. (PC-R1. at 348)(Dr. Baker discussing how testimony consistent with posttraumatic stress disorder); (PC-R1. at 355) (Dr. Baker testifying that posttraumatic stress disorder was a recognized mental health condition at the time of Mr. Rutherford's trial). See also (PC-R1. at 201-202)(Dr. Larson, Mr. Rutherford's other mental health expert, testifying that posttraumatic stress disorder well-established and researched mental health condition at time of Mr. Rutherford's trial). At Mr. Rutherford's trial, however, counsel made no attempt to either explain the significance of the evidence in terms of Mr. Rutherford's mental health or to connect the testimony to mitigating factors. Instead, counsel simply told the jury that "you are to weigh [the aggravating circumstances] against the mitigating circumstances which came from the witness stand, which comes from the documents, service in the Marine Corp, family life, whatever." (R. 913). See Stephens v. Kemp, 846 F.2d 642, 655 (11th Cir. 1988)(holding that failure to guide jury concerning how to apply evidence into consideration of mitigating

counsel's efforts to introduce mental health mitigation during Rutherford's penalty phase.[4] In fact, counsel made no attempt to either explain the significance of the evidence in terms of Rutherford's mental health or to connect the testimony to mitigating factors.

It is undisputed from the record on appeal, the evidentiary hearing (PC-R1. 109-110, 120-121), and Judge Bell's order denying post-conviction relief (PC-R2. 692), that counsel neither procured[5] nor presented expert mental health mitigation testimony during Rutherford's penalty phase. In contrast to the paltry mental health mitigation evidence presented, counsel could have presented evidence and testimony that, at the time of the offense, Rutherford suffered from posttraumatic stress disorder and alcohol dependence, and was under the influence of an extreme emotional disturbance. All of this information constitutes mitigation under Florida law. Counsel's failure to present mental health mitigation evidence deprived Rutherford of a reliable penalty phase proceeding.

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factors relevant to prejudice finding). See also Hendricks v. Calderon, 70 F.3d 1032, 1045 (9th Cir. 1995)(finding that failure to present mitigation evidence in form that jury could understand "fully satisfies the prejudice requirement under Strickland."). In fact, this Court found on direct appeal that, with respect to the mitigating evidence presented, Mr. Rutherford "did not make a claim of posttraumatic stress disorder." Rutherford v. State, 545 So. 2d 853, 856 n.3 (Fla. 1989).

[4] At the post-conviction hearing, counsel claimed to have presented Mr. Rutherford's court-ordered, pre-trial competency evaluation reports to the sentencing judge during the final sentencing hearing (PC-R1. 420; 437-438). Nothing in the record, however, indicates that these reports were ever placed before the sentencing jury. Failure to place the reports before the jury is quite significant considering that the jury recommended death by a 7-5 vote, the narrowest of margins. See infra Argument II.B.2.

[5] At the post-conviction hearing, Mr. Treacy indicated that he may have had a conversation with the county coroner regarding post-traumatic stress disorder, but because he does not remember doing so, he probably did not (PC-R. 119-120). Even if Mr. Treacy did discuss post-traumatic stress disorder with a coroner, that clearly does not qualify as an attempt to obtain the services of an expert in posttraumatic stress disorder, or even mental health mitigation.

A. DEFICIENT PERFORMANCE

The specific facts of Rutherford's case made the failure to procure and present expert mental health testimony unreasonable, and thus deficient performance. Counsel were clearly aware of Rutherford's mental impairments. Treacy, who made the ultimate decisions during the penalty phase, (PC-R1. 60-61), read the two competency reports prepared for Rutherford's first trial (PC-R1. 80). From those reports, he was on notice that Rutherford had disclosed information relevant to at least two mental health mitigation issues: alcohol dependence and posttraumatic stress disorder. See (PC-R2. 797-804)(competency reports of Drs. Phillips and Medzerian). Indeed, counsel admitted that he knew Rutherford had posttraumatic stress disorder:

> Q: . . . Did any of the prior psychological people who had examined him even if it was just for competency or even if it was an earlier proceeding, did any of them diagnose Mr. Rutherford as suffering from post-traumatic stress disorder?
>
> A: I believe that they did, best of my recollection.

(PC-R1. 80). See also (PC-R1. 109)(Treacy conceding that, based on Dr. Phillips' report, he knew that Rutherford suffered from posttraumatic stress disorder).

In fact, Treacy knew that Rutherford had received psychological counselling for mental problems:

> Q: Okay. Did you learn through mister, the senior Mr. Rutherford that, the younger Mr. Rutherford had received counseling of any sort?
>
> A: I can't remember where I learned that.
>
> **Q: Did you learn that during the course of your investigation?**
>
> **A: Yes. Uh-huh (indicates affirmative).**

Q: Okay. Did you hire a psychological expert witness to examine Mr. Rutherford?

A: No.

(PC-R1. 79)(emphasis added).

Further, during the penalty phase, Treacy introduced the form Rutherford filled out at the Veterans' Administration Center in Mobile, Alabama (R. 881)(Defense Exhibit C). The form indicates that it is designed to determine what, if any, "readjustment counseling services" Rutherford needs, and asks questions about Rutherford's military service and present emotional state. Additionally, this report states that Rutherford had had contact with the Santa Rosa County Mental Health Facility. It also appears to have been highlighted in places, indicating it was read.

The post-conviction court found that both Treacy and Gontarek were aware of Rutherford's mental health problems:

> Despite not reaching the level of statutory mitigation, the collateral proceeding evidence made it clear that Mr. Rutherford's personality disorder and purported alcoholism were available non-statutory mitigators. But so did the pre-trial evidence in the hands of trial counsel. Though not as extensively, **both trial counsel were aware of these same non-statutory mental health mitigators** through the information in the two competency/sanity evaluations as supplemented by the other witnesses and the evidence.

(PC-R2. 696)(emphasis added). All told, it is readily apparent that both Treacy and Gontarek knew, prior to trial, that Rutherford had mental health problems, including alcohol dependence and posttraumatic stress disorder. Despite this knowledge, counsel did not, at the very least, retain an independent expert witness to evaluate Rutherford for penalty phase purposes (PC-R1. 79).

Caselaw holds that when counsel is aware that their client has a mental health problem, reasonably effective representation requires them to investigate and present independent expert mental health mitigation testimony for penalty phase purposes. See, e.g., Rose, 675 So.2d at 572-573; Michael, 530 So.2d at 930; O'Callaghan v. State, 461 So. 2d 1354, 1355-56 (Fla. 1984); Perri v. State, 441 So. 2d 606, 609 (Fla. 1983). See also Baxter v. Thomas, 45 F.3d 1501, 1513 (11th Cir. 1995); Stephens v. Kemp, 846 F.2d 642, 653 (11th Cir. 1988); Thompson v. Wainwright, 787 F.2d 1447, 1450-51 (11th Cir. 1986); Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. February 5, 1981); United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974).[6]

The Stephens decision is especially applicable to Rutherford's present case. In Stephens, trial counsel was familiar with a pre-trial, court-ordered evaluation report finding Stephens competent to stand trial. The report noted that Stephens had previously been hospitalized in a mental institution. The Stephens Court commented that

> [o]n the basis of this written evaluation of [Stephens], trial counsel elected to pursue his investigation into [Stephens'] mental condition no further. . .. In

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[6] Judge Bell seemed to measure trial counsel's performance by the law in effect at the time of Mr. Rutherford's trial. See, e.g., (PC-R2. 697)("There is no indication in any case **contemporaneous with Mr. Rutherford's trial** that competent representation of capital defendants at penalty phases in 1986 required the hiring of a mental health expert to evaluate a defendant solely for purposes of preparing mitigation . . .")(emphasis added). Despite his belief, ineffectiveness is not measured exclusively by the caselaw in existence at the time of the performance in question; rather, because it is of constitutional import, it is measured objectively. See, e.g., Rose, 675 So.2d at 570-571 (using framework from case decided in 1995, Baxter v. Thomas, to analyze claim that counsel ineffective at penalty phase hearing held in 1984). This is especially true of Mr. Rutherford's claim that counsel was deficient for failing to procure and present expert mental health mitigation testimony. See, e.g., Michael, 530 So.2d at 930 (1988 decision indicating that effective representation in 1983 of a client with known mental health problems required the retention of independent mental health expert for mitigation purposes).

> preparation for the penalty phase of the trial, trial counsel thus conducted no inquiry whatsoever into the possibility of presenting evidence of [Stephens'] mental history and condition in mitigation of punishment.

Stephens, 846 F.2d at 653. The Court then held that,

> [a]lthough trial counsel was well aware in advance of trial that [Stephens] had spent at least a brief period of time in a mental hospital before the [crime], . . . he completely ignored the possible ramifications of those facts as regards the sentencing proceeding. **This omission denied [Stephens] reasonably competent representation at the penalty phase.**

Id. (footnote omitted)(emphasis added). Likewise, counsel here was well aware, in advance of trial, that Rutherford had mental health problems. Accordingly, "professionally reasonable representation require[d] more of an investigation into the possibility of introducing evidence of [Rutherford's] mental history and mental capacity in the sentencing phase that was conducted by trial counsel in [Rutherford's] case." Id.

Further, trial counsel had no strategic reason for not procuring and presenting expert mental health mitigation testimony during Rutherford's penalty phase. In fact, at the post-conviction, evidentiary hearing, Treacy made clear that he made an affirmative, strategic decision **to present** mental health evidence:

> Q: Did you submit [the competency reports and the VA report] to the trial judge or the to the trial jury, whatever the record reflects, did you submit these materials during the penalty phase of the case because you believed that they were important to mitigation ?
>
> A: I frankly do not remember submitting them but I guess that I did if they are a part of the record. But yes, I will submit them -- people listen to doctors and there is some pretty good stuff in there.
>
> Q: So -- and I [hate] to use the expression because sometime it is abused -- but **your strategic decision was to present expert testimony regarding Mr. Rutherford's mental health. Is that fair?**
>
> **A: Yes. Uh-huh (indicates affirmative).**

(PC-R1. 89)(emphasis added). See also (PC-R1. 420).

Furthermore, Treacy conceded that mental health mitigation was consistent with his penalty phase strategy:

> THE WITNESS [TREACY]: And granted I knew that he had some physical and perhaps mental, but not significant mental. Not significant to this trial. Whoever has been in combat or a lot of people who have been in combat have troubles; but I didn't see it as a, -- something that would motivate me to say 'Hey, we have to get another doctor here.' Didn't do that.
>
> THE COURT: Would that defense or those elements have been consistent with your theory of mitigation as you've discussed it with Mr. Molchan?
>
> THE WITNESS: Yes, yes, sir.

(PC-R1. 434-435).

Consistent with the above-noted penalty phase strategy, counsel did indeed present evidence of mental health mitigation:

> Q: And you [Treacy] stated there was a difference of opinion between you and Mr. Rutherford regarding the introduction of psychological testimony. And you introduced that testimony anyway, didn't you?
>
> A: Yes.
>
> Q: So you made that decision?
>
> A: Yes. Well, you have to make a decision, for example, as to whether a man is competent or not. And he, you know, and there are some decisions that the lawyer must make.
>
> **Q: And this was one of those decisions?**
>
> **A: To put that evidence in?**
>
> **Q: Yes.**

(PC-R1. 111). See also (PC-R1. 401)(Gontarek admitting that counsel did present mental health evidence during penalty phase). Specifically, mental health expert testimony about posttraumatic stress disorder would have been consistent with counsel's penalty phase strategy (PC-R1. 109). In fact, at the post-conviction hearing, Treacy claimed that:

> A: **[i]n the jury selection, we tried to get, we tried to get people who had been in the military**, and I think, particularly tried to get members, retired members, they would all be retired who had served in Vietnam.
>
> Q: Why did you do that?
>
> A: Because of the defendant's service. **And they will know how traumatic it was**, and it was a plus.

(PC-R1. at 412)(emphasis added).[7]

Additionally, Treacy testified at the post-conviction hearing that expert testimony that Rutherford suffered an extreme emotional disturbance at the time of the crime would have fit within his penalty phase strategy:

> Q: If you had information that Mr. Rutherford not only suffered from a mental illness but suffered from a mental illness that qualified him in the opinion of an expert witness, or which in the opinion of an expert witness met the criteria for the statutory mitigating factor of, that the crime was committed while the defendant was under the influence of extreme emotional distress. **Would you**

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[7] A review of the entire voir proceedings, however, reveals that neither Mr. Treacy nor Mr. Gontarek asked even a single question about military service. See generally (R. 198-328). See also (R. at 218-R.234; 286-295; 302-308; 312-316; 319-320)(Mr. Gontarek's voir dire questions); (R. at 248-277; 295-297)(Mr. Treacy's voir dire questions). Additionally, neither counsel asked any of the potential jurors any questions designed to select a jury sympathetic to Mr. Rutherford such as: their attitudes toward the Vietnam War; their attitudes toward the military; their attitudes toward persons in the military; whether they know people in the military; their level of and belief in patriotism; and/or whether they or someone they knew had experienced a traumatic event, and, if so, how they acted now. Even though counsel conceded the importance of having a jury that could understand Mr. Rutherford's situation, they certainly did not act on this belief during voir dire. This failure is further indicia of deficient performance.

have wanted to present that -- would that be relevant, is that in your mind relevant mitigating evidence?

A: Sure.

Q: If the witness was a credible witness is that the type of evidence that you will want to present?

A: If the witness was credible?

Q: Yes.

A: Certainly. I would want a credible witness to provide any good mitigating circumstances. And that is a mitigating circumstance.

(PC-R1. 421-422)(emphasis added).

The problem, however, with counsel's penalty phase strategy is that, once they decided to put on mental health evidence, they did not reasonably procure and present such evidence. Two courts agreed that counsel presented no information regarding statutory or non-statutory mental health mitigation, specifically posttraumatic stress disorder. The trial court found no mitigating factors other than Rutherford's lack of a criminal history (2nd Supp. R. 5). This Court affirmed and specifically found that Rutherford "did not make a claim of posttraumatic stress disorder." Rutherford, 545 So. 2d at 856 & n.3.[8]

Counsel clearly did not present expert mental health mitigation testimony at the penalty phase. Counsel did not even attempt to retain an expert to evaluate Rutherford for purposes of mitigation. Had counsel procured and presented mental health mitigation

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[8] In light of this Court's finding especially, the post-conviction court's finding that independent mental health expert testimony in the penalty phase was unnecessary with respect to any claim of posttraumatic stress disorder, because "[trial] counsel elicited enough of Mr. Rutherford's wartime experiences to give the jury a good idea of that event," (PC-R2. at 688), rings quite hollow.

testimony, it would have totally changed the penalty phase proceedings. At the post-conviction hearing, counsel offered four reasons why they did not present mental health expert testimony. First, Treacy believed that his personal observations of Rutherford vitiated any need to procure and present independent, expert mental health mitigation testimony at the penalty phase because Rutherford "acted rationally" and "was not insane" (PC-R1. 414-415). He later added: "I knew that he had some physical and perhaps mental, but not significant mental. . . . but **I didn't see it as a, -- something that would motivate me to say 'Hey, we have to get another doctor here.' Didn't do that**" (PC-R1. 434-435)(emphasis added). In denying Rutherford post-conviction relief, Judge Bell noted the importance of Treacy's and Gontarek's personal knowledge to his conclusion that they did not render ineffective assistance of counsel: "Mr. Treacy was **comfortable** with the information he had and **saw** no need to hire an additional expert" (PC-R2. 699)(emphasis added).

However, neither Treacy's "comfort" nor his personal observations satisfy his constitutional requirement to provide effective assistance. First, there is no indication in the record that Treacy has any training in the detection of mental health problems. Second, it is not uncommon for a person to have mental health problems that are not perceptible by a layperson. See, e.g., Bruce v. Estelle, 536 F.2d 1051, 1059 (5th Cir. 1976). Third, it was unreasonable for Treacy to substitute his own judgment for that of a trained mental health expert. See, e.g., Mauldin v. Wainwright, 723 F.2d 799, 800 (11th Cir. 1984). Finally, the fact that Treacy was on notice that Rutherford had mental health problems, made it unreasonable for him to then rely on his personal observations in rejecting expert assistance. See, e.g., Bouchillon v. Collins, 907 F.2d 589, 597 (5th Cir. 1990). Thus a reasonable

performance required procuring and presenting expert mental health assistance, not simply relying on untrained, lay observations to dismiss the need for mental health mitigation.

The second reason that counsel did not present expert psychiatric testimony during the penalty phase is that they thought the pre-trial competency evaluations were sufficient for mitigation purposes (PC-R1. 107; 109-110; See also PC-R1. 414-415).[9] Treacy's belief evinces a fundamental misunderstanding of the crucial distinction between a competency evaluation and a mental health evaluation for penalty phase mitigation. The focus of a competency evaluation is much different from the focus of a mental health mitigation evaluation. As Dr. Larson explained at Rutherford's evidentiary hearing, a competency evaluation is limited to whether a person is competent to stand trial (PC-R1. 181, 197), whereas a mitigation evaluation is a diagnostic evaluation focused on whether the defendant has mental disabilities sufficient to qualify as statutory and non-statutory mitigation (PC-R1. 181-82; 197). In fact, it would be inappropriate to conduct mitigation-type diagnoses and address mental health mitigation in a competency report (PC-R1. 197). However, Treacy believed that competency and mitigation evaluations involved the same issues (PC-R1. 82, 84). Additionally, a competency evaluation is generally limited to information provided by the defendant, while a critical part of evaluating for mental health mitigation is to review collateral information about the defendant (PC-R1. 183; 198). This information is crucial in making a diagnosis regarding statutory and non-statutory mental health mitigation (PC-R1. at

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[9] The competency evaluations which Mr. Treacy relied upon were done at the behest of Mr. Rutherford's counsel at his first trial, and not by motion of Mr. Treacy or Mr. Gontarek, who only worked on Mr. Rutherford's retrial (R. 35-36). Mr. Treacy admitted that the reports upon which he relied were prepared in conjunction with a previous trial (PC-R1. 81).

180). Further, the allegiance of the competency evaluator is quite different from that of a mental health mitigation expert. A competency examiner is appointed by the court, examines the defendant, and then reports back to the court, and both parties; he or she is expected to be neutral and detached. See, e.g., United States v. Theriault, 440 F.2d 713, 715 (5th Cir. 1971). See also (PC-R2. 800-801)(indicating that competency reports delivered to state and defense counsel and court). On the contrary, an expert appointed to assist the defendant in developing mitigation is a confidential expert whose responsibility is to assist the defense only. See generally Ake v. Oklahoma, 470 U.S. 68 (1985).

An examination of the two competency reports further reveals the deficient performance an attorney renders by relying solely on these reports to the exclusion of pursuing independent mental health mitigation. Dr. Larson examined both reports and stated that, generally, he would not consider either of them sufficient in scope to constitute an adequate mental health mitigation evaluation (PC-R1. 197). Specifically, Dr. Larson noted that neither competency evaluation "address[es] either the two statutory mental health mitigators nor d[o] they address the so called non-statutory mitigation except perhaps some of it inadvertently. But those issues were not addressed" (PC-R1. 197-198). A review of both reports confirms Dr. Larson's findings (PC-R2. 797-804).

In fact, at the evidentiary hearing, Treacy admitted that both reports on which he relied were inadequate for mental health mitigation purposes. Treacy conceded that Dr. Phillips' report did not adequately evaluate Rutherford's posttraumatic stress disorder (PC-R1. 116-117) and conceded that Dr. Medzerian's report was likewise deficient (PC-R1. 118). Treacy's admissions thus directly refute his prior claims that independent, expert evaluation

of Rutherford for mental health mitigation was unnecessary because he had two competency reports (PC-R1. 107; 109-110; 414-415). In fact, reliance on the competency reports was entirely misplaced and constituted deficient performance. See Strickland, 466 U.S. at 687.

Treacy's belief that the competency reports were adequate for mitigation purposes also demonstrates a patent misunderstanding between competence to stand trial and a mental state sufficient to mitigate punishment. An individual can be competent to stand trial and still have mental health problems worthy of presentation as mitigation. In State v. Dixon, 283 So. 2d 1 (Fla. 1973), this Court made clear that two statutory mental health mitigating factors, § 921.141(6)(b) and (f), Fla. Stat., should still be considered under Florida's capital sentencing scheme despite a competency finding because these statutory mitigating circumstances are "provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state." Dixon, 283 So.2d at 10. See also Perri, 441 So.2d at 609. Accord Blanco v. Singletary, 943 F.2d 1477, 1503 (11th Cir. 1991). The same is true in Rutherford's case. Being found competent at his first trial does not mean he was not entitled to mental health mitigation at his second trial. Counsel was deficient for failing to pursue this mitigation.

The third reason counsel offered at the post-conviction hearing for not presenting expert mental health mitigation testimony is their belief that it was not standard practice to put on expert mental health mitigation testimony during the penalty phase of a capital trial (PC-R1. 35-37). The court below relied on this position to reject Rutherford's claim of ineffective assistance, stating, "There is no indication in any case contemporaneous with Rutherford's trial that competent representation of capital defendants at penalty phases in

1986 **required** the hiring of a mental health expert to evaluate a defendant solely for purposes of preparing mitigation . . . As Mr. Gontarek testified, though it is now a given that such additional evaluations are performed, the standard at the time of trial did not so **dictate**" (PC-R2. 697)(emphasis added). See also (PC-R2. 698). However, in assessing ineffective assistance of counsel purposes, it is irrelevant whether Gontarek's practice is subjectively acceptable, or whether counsel did not take action because it was not "required" or "dictate[d]." Rather, under Strickland, this Court needs simply to determine whether trial counsel's performance "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688.

Caselaw clearly indicates that the failure to procure and present expert mental health testimony during Rutherford's penalty phase was objectively unreasonable. In February 1985, the United States Supreme Court decided Ake v. Oklahoma, 470 U.S. 68 (1985), a watershed capital case involving mental health mitigation issues. Ake established a right to the assistance of an independent mental health expert during the penalty phase if the defendant's mental health is an issue. Id. at 84. The Ake Court made clear that the need for an independent defense mental health expert is especially acute in the sentencing phase of a capital trial. Id. Given the monumental import of Ake and the proximity in time between the decision and Rutherford's trial, counsel's statement that "we really did not do [mental health mitigation] back in those days," (PC-R1. 35), smacks of ignorance of the law and thus constitutes unreasonable performance.[10] Rutherford's mental health condition was certainly

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[10] Besides Ake's specific reference to the need for independent, expert mental health mitigation assistance, trial counsel reasonably skilled to handle a capital sentencing should have been familiar with another United States Supreme Court decision, Lockett v. Ohio, 438

an issue relevant to his case. See infra. Thus, under Ake alone, both Treacy and Gontarek failed to protect Rutherford's right to due process, and thus performed deficiently, because they did not enlist the assistance of mental health experts.

Additionally, reasonable counsel in 1986 would have enlisted the assistance of an independent psychiatrist for mitigation purposes once they knew, as did Treacy and Gontarek, of their client's mental health problems. For instance, this Court decided in 1988 that effective representation in 1983 of a capital defendant with a known mental health problems required the retention of an independent mental health expert for mitigation purposes. See Michael, 530 So.2d at 930. If it was unreasonable to not retain mental health experts once on notice in 1983, then counsel's excuse for not pursuing mitigation on behalf of Rutherford in 1986 is equally unreasonable. Id. See also Baxter, 45 F.3d at 1514 (finding that counsel rendered deficient performance for failing to conduct a reasonable investigation into psychiatric mitigating evidence and then present that evidence at trial held in 1983); Rose, 675 So.2d at 572-73 (finding deficient performance for failing to investigate and present client's mental health background for use at sentencing phase held in 1984).

The fourth reason that counsel did not present expert mental health mitigation testimony is because Treacy "traveled very heavily on what the judge feels relevant" (PC-R1. 420). Limiting presentation of mental health mitigation because the trial judge would not find it relevant is blatantly unreasonable. First, this "strategy" ignores the effect that the

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U.S. 586 (1978). In Lockett, the Supreme Court held that capital sentencers must allow consideration of, "as a mitigation factor, **any** aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604 (emphasis added).

expert mental health testimony would have had on the jury, which is a co-sentencer whose decision is entitled to great weight. See Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992); Tedder v. State, 322 So. 2d 908, 910 (1975). Additionally, the sentencing judge would have been required to at least consider credible mitigating evidence. See, e.g., Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993). Finally, the "strategy" ignores the responsibility of counsel to make a record for review by this Court. See, e.g., Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993). In fact, members of this Court have specifically suggested that counsel's failure to put on mitigation based on prior knowledge of the sentencing judge's predispositions is a measure of ineffective assistance of counsel. See Hildwin v. Dugger, 654 So. 2d 107, 111 (Fla. 1995)(Anstead, Shaw and Kogan, JJ., specially concurring).

Counsel's unreasonable excuses for not presenting expert mental health mitigation testimony are compounded by Treacy's conceding "cold, calculated and premeditated" during his penalty phase closing argument:

> 'The crime was committed in a cold, calculated and premeditated manner.' **That you have found. That's essentially a part of your verdict. So, I'm not here to nit-pick over that.**

(R. 909)(emphasis added).[11] Once counsel conceded this aggravator, he then had a concurrent duty to put on mental health mitigation testimony to rebut the aggravator's mens

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[11] Although at the time of Mr. Rutherford's penalty phase, this Court required more in this aggravating circumstance than simply premeditation, see Jent v. State, 408 So. 2d 1024, 1032 (Fla. 1982); McCray v. State, 416 So. 2d 804, 807 (Fla. 1982); Combs v. State, 403 So. 2d 418 (Fla. 1981), defense counsel informed the jury that this aggravator applied automatically as a result of the jury's guilty verdict. This was additional indicia of deficient performance, which was prejudicial to Mr. Rutherford, whose jury recommended death by only 7 to 5. See infra.

rea requirement. See, e.g., Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992); Huckaby v. State, 343 So. 2d 29, 33-34 (Fla. 1977).

Essentially, counsel believed that they had enough information--through two competency reports, a Veterans Administration background form prepared by Rutherford himself, his personal observations of Rutherford's demeanor, and Rutherford's penalty phase testimony--regarding Rutherford's mental health condition that they did not have to procure or present expert mental health mitigation testimony. Nonetheless, counsel's belief that there was no need to retain expert mental health services was completely misplaced. Instead of relying on competency reports and some limited, non-credible lay testimony,[12] at a minimum, counsel should have consulted with a confidential mental health mitigation expert to determine if Rutherford's indicia of mental health problems had any legal significance. This action would have been consistent with their belief that mental health mitigation was an issue in Rutherford's case. Counsel's failure to procure and present expert mental health mitigation testimony during Rutherford's penalty phase was professionally unreasonable and therefore constituted deficient performance. See Strickland, 466 U.S. at 687.

B. PREJUDICE

At the evidentiary hearing, Rutherford presented the testimony of two mental health experts, Dr. James Larson (PC-R1. 176-235) and Dr. Robert Baker (PC-R1. 328-387). Dr. Larson, who the State stipulated was an expert in clinical and forensic psychology (PC-R1. 176), testified that he first evaluated Rutherford in 1991 (PC-R1. 177). In forming his

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[12] For example, the sentencing judge found all of Mr. Rutherford's penalty phase testimony to be incredible and uncorroborated. (2nd Supp. R. 5).

opinions, Dr. Larson relied on (1) a series of diagnostic tests examining Rutherford's cognitive abilities and personality functions (PC-R1. 227); (2) extrinsic records detailing Rutherford's life, including his military records, records from a drug and alcohol treatment center, Santa Rosa County mental health facility records, jail records, school records, marital records, and Veterans Center records (PC-R1. 177-179); and (3) what other persons reported of Rutherford's behavior, feelings, and actions (PC-R1. 177-179).

Dr. Larson testified that the collateral records were especially important to making a full evaluation. For instance, Dr. Larson stated that the records shed light on the problems Rutherford experienced during his developmental years:

> [W]hat became significant to my thinking is that he grew up in what one calls a dysfunctional family. And there is considerable documentation by other people that his father was abusive of alcohol and also physically abusive of other members of the family. The siblings saw their mother struck on numerous occasions.
>
> The siblings were beaten sometimes and verbally and physically abused according to a variety of sources.

(PC-R1. 185).

Additionally, the records were significant to Dr. Larson's analysis because they document problems Rutherford was experiencing prior to the time of the crime. For instance, Dr. Larson testified to the importance of Rutherford's records from the Avalon Center, a drug and alcohol treatment facility:

> One of the best sources of information is the Avalon records. And he was in therapy for approximately 6 months or so there, almost on the average of once a week. And my recollection is I counted 20 to 23 sessions or so on a 6 month period. And those records were unusually good . . . based on my review of a lot of other records. And they put a lot of detailed information in there.

* * *

At any rate those records indicate or document a number of important issues such as the kind of family that [Rutherford] came from, the alcohol background, abusiveness of the family.

They document the difficulty, marital difficulty -- I should say the extreme marital conflict with his wife. They document her leaving the family and leaving him with the children.

They document variable functioning on his part when his wife returns and when she leaves begin [sic].

* * *

The Avalon Center records then document also alcohol dependence. They document the kind of stress that he seemed to be under because of his family and heightened stress in terms of observable agitation even though he may not verbally agree with it. They document increased agitation when they talked about his wife. . . And they document issues about the extra burden that he carried because of having to parent the children on his own at times without her assistance.

* * *

They also described him as in denial. And not always admitting or ready to admit his alcohol dependence. And I should explain it is a common characteristic of an alcoholic. . ..

But basically he was responsive and came to his appointment -- according to the records. He made progress according to their statements in the records. He discussed critical issues in his life. He would call them up and ask for additional appointments when things were bad.

(PC-R1. 186-187, 189-190). Regarding Rutherford's alcohol dependence, Dr. Larson testified that the records established that this impairment existed before the crime occurred (PC-R1. 191).

Additionally, Dr. Larson testified that the Santa Rosa County Mental Health Center records document well that Rutherford suffered from posttraumatic stress disorder prior to the crime (PC-R1. 188). Further, according to Dr. Larson's testimony, the records

> indicate [Rutherford's] concern about agent orange and some of his emotional problems. And Dr. Thames, for example, medicated him with numerous medication to help him sleep without real good success.

(PC-R1. 189).

Dr. Larson's testing of Rutherford reinforced his findings from the collateral records. For example, regarding posttraumatic stress disorder, Dr. Larson testified that Rutherford met all of the criteria:

> The criteria basically had to do with first of all was he exposed to a traumatic event outside of the range of normal human experience. And of course he was involved in the Vietnam war [sic], and on a number of occasions experienced apparently very traumatic events; the death of comrades, death of babies, and being under fire all of that period of time.
>
> The criteria also included various things like exaggerated arousal. And he meet [sic] the criteria for exaggerated arousal such as startled response or numbing having to do with blocking out things.

(PC-R1. 192).

Based on all of the information at his disposal, Dr. Larson made the following diagnosis of Rutherford's personality functioning: (1) that he suffers from posttraumatic stress disorder (PC-R1. 184); (2) that he suffers from alcohol dependence (PC-R1. 184); and (3) that he has a personality disorder not otherwise specified (PC-R1. 184).

Importantly, Dr. Larson testified to a reasonable degree of psychological certainty that, at the time of the crime, Rutherford suffered both from posttraumatic stress disorder

directly related to his Vietnam War experience, and alcohol dependence (PC-R1. 192-193).[13] He stated that posttraumatic stress disorder was a well-accepted and researched mental disorder in 1986 (PC-R1. 201), and that he would have been able to explain the symptoms to Rutherford's jury had he been called at the penalty phase (PC-R1. 222).

Additionally, Dr. Larson testified that, at the time of the offense, Rutherford likely was under the influence of an extreme emotional disturbance (PC-R1. 194), brought about by a confluence of factors:

> I think at the time of the incident, during that time frame he was alcohol dependent. I thing that he suffered from post traumatic [sic] stress disorder.
>
> In addition to that I think that he was under a lot of stress and those stressors included such things as his wife just returning and pregnant with another man's child. Stressors included that he was about to sign, I think on the very day of the incident, papers that he would take paternal responsibility for the child.
>
> Stressors included his on-going alcoholism even though he was in alcoholic treatment for six months or so he never maintained sobriety for a short period of time.
>
> * * *
>
> Another factor was his children getting ready to start school so he was parenting the children basically on his own and trying to get school clothing and school supplies and so forth. He had custody of his children for some period of time. And he had undergone a divorce which is a very major stressor.

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[13] Dr. Larson testified that his opinion that Mr. Rutherford's posttraumatic stress disorder and alcohol dependence existed at the time of the offense was documented in the mental health center records (PC-R1. 188-89), and the drug and alcohol treatment records (PC-R1. 189), both of which were made prior to the crime. See, e.g. (PC-R1. at 190)(alcohol center records diagnosing alcohol dependence made one year to one year four months prior to offense).

> And he also had health problems and concerns about agent orange. And he had skin problems that are well documented in the medical records prior to the incident.
>
> He had concern that his children suffered some kinds of genetic affect of agent orange. And two of his children I understand had defects; one physical abnormality and another a blood disease. And those weighed heavily upon him. And he took his parenting responsibilities very seriously based on the information that I reviewed.
>
> * * *
>
> And he probably did a lot of drinking in part to self-medicate the post-traumatic stress disorder. And I'll assume because he was alcohol dependent that he was abusive of alcohol.
>
> And right on the date of the incident there is information, for example, that he was drinking on the day of the incident. . ..
>
> And another major stressor is his wife's return.
>
> He, he was sort of in a love-hate relationship with her. And he had been hurt very badly by her but he loved her and strongly attached to her. And became attached to her shortly after a return from Vietnam; after a very short romance. And there is documentation that whenever she was around or they were having conflict that his substance abuse increased.

(PC-R1. 193-195). The stress from Rutherford's attachment to his wife was particularly problematic, and stemmed from early developmental problems. As Dr. Larson explained

> [h]e failed two grades in school according to the school records. And that is important in terms of forming negative concept, a sense of inadequacy and failure. That may be a reason that he attached to his wife so strongly although a strong attachment to a spouse is a normal event. But his attachment was exceedingly strong. So strong that in therapy other therapists were trying to get him to detach because she appeared to be an unhealthy influence in his life.

(PC-R1. 196). This stress only contributed to Dr. Larson's findings that Rutherford was under the influence of extreme emotional distress at the time of the crime.[14]

Finally, Dr. Larson stated that all his conclusions would have been the same if he had been retained to assist Rutherford in 1986 (PC-R1. 202). He also noted that many psychiatrists in the First Judicial Circuit could have made the same evaluation of Rutherford in 1986 (PC-R1. 203).

Dr. Robert Baker, a psychologist specializing in the treatment of post-traumatic stress disorder (PC-R1. 329), also testified. Himself a Vietnam veteran (PC-R1. 330), Dr. Baker had spent the past 15 years working with and evaluating veterans of all wars, and working with victims of trauma (PC-R1. 329). Dr. Baker described his particularized training and experience in the area of posttraumatic stress disorder (PC-R1. 336-337). During his doctoral work, Dr. Baker determined that, during the Vietnam War,

> the people who were exposed mostly to combat, the heavier the combat the higher likelihood, and the more difficult type of P T S D [posttraumatic stress disorder] that developed. And the closer that you were to the action, and the longer you were in the action the more likely that you would develop P T S D and that it would be chronic and severe.

(PC-R1. 337-338).

In forming his opinions, Dr. Baker relied on (1) a series of diagnostic tests examining Rutherford's cognitive abilities and personality functions (PC-R1. 336, 339); and (2) extrinsic records detailing Rutherford's life, including his military records, records from a drug and alcohol treatment center, Santa Rosa County mental health facility records, jail records,

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[14] This Court has recognized that marital problems like those experienced by Mr. Rutherford are relevant to establishing extreme emotional distress. See Klocok v. State, 589 So. 2d 219, 222 (Fla. 1991).

school records, marital records, and Veterans Center records (PC-R1. 332). According to Dr. Baker, the records he examined detailing the units to which Rutherford was attached during his military service are "very good in basically setting the stage to show that there was actually traumatic events that took place in both the basic sub-unit that he was with, and that he was attached to the unit when these things happened" (PC-R1. 333).

Based upon the background materials and tests, Dr. Baker concluded that Rutherford "had post traumatic [sic] stress disorder, chronic, and severe" (PC-R1. at 338). Rutherford's posttraumatic stress disorder existed prior to the crime (PC-R. at 376).[15] According to Dr. Baker, posttraumatic stress disorder is:

> a very pervasive disorder that is a debilitating disorder and a very painful disorder. And it comes from, in this particular case it comes from a very young boy going to war. And that, he gave what he could. And he did well in the war zone. He wasn't someone in his performance evaluations were [sic], that they saw that he sluffed off. And that is not in there at all. And while in the war zone he was a good soldier, . . . and developed a disorder that affected his life in a profound way.

(PC-R1. 385).

The background materials indicated that Rutherford's unit in Vietnam was exposed to much direct fire from the enemy and suffered many casualties (PC-R. 338). The background material also informed Dr. Baker that Rutherford had the following symptoms of posttraumatic stress disorder prior to the crime: unexpected thoughts about the war zone, exaggerated startled response, trouble sleeping, feeling guilty about Vietnam, worries about losing his temper, reluctance to talk about events, loss of interest in one or more activities,

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[15] In fact, Dr. Baker testified that a report in the background material diagnosed Mr. Rutherford with posttraumatic stress disorder in 1983 (PC-R1. 378).

and highly stressful Vietnam experience (PC-R. 376-377). The competency reports, which Dr. Baker reviewed (PC-R1. 343), bolstered his conclusion that Rutherford suffered from posttraumatic stress disorder at the time of the offense (PC-R1. 343).

Further, the background materials revealed that Rutherford was reluctant to discuss his Vietnam War experiences prior to the time of the crime. This reluctance was consistent with Dr. Baker's diagnosis because

> someone that has been to war or maybe did not do much in the war or, and wants to build on whatever it is that happened to them, they talk about it a lot. But usually people that have a lot of experience in the war zone with death and dying do not want to talk about it because it is too painful and it brings back the death of people that you were not able to help. And brings back things that maybe you had to do and you did not want to do and things that you had to do and you regret later.

(PC-R1. 348).

The psychological tests confirmed this and supported that Rutherford suffered from posttraumatic stress disorder at the time of offense (PC-R. 339). The Mississippi Scale test, developed to measure specifically for posttraumatic stress disorder, was particularly relevant. As Dr. Baker explained, "[c]ombat veterans with heavy combat usually come out with a score very similar to the score that Rutherford came out with. On the combat exposure scale that he did he came out as other men would with heavy combat, that had heavy combat with units that were involved in heavy combat" (PC-R1. 339). The Minnesota Multiphasic Personality Inventory (MMPI) done by Dr. Larson also confirmed Dr. Baker's findings. As Dr. Baker explained,

> [w]hen I looked at the old M M P I his configuration was the same as what we predict; that 82% of the time that people with that configuration would have P T S D.

(PC-R1. 342). See also (PC-R1. 372). Dr. Baker also testified that Rutherford's drinking problem, which was clear to Dr. Baker from both the records and his testing (PC-R1. 350), is quite consistent with his finding of posttraumatic stress disorder:

> [I]n relation to P T S D the purpose of it is that they oftentimes drink a lot over a period of time.
>
> * * *
>
> Alcohol works well to suppress dreams. And if you go to bed drunk you do not dream most of the time. And you go through a stouper [sic] and you go to bed and you do not dream.
>
> And it also helps to calm someone down, makes them feel that they are calming down. And sometimes people drink for a long period of time and then they have a double problem. But it does work well in the beginning.
>
> And when they stop drinking then usually what happens is they have a flood of pictures comes back in the daytime or nightmares.

(PC-R1. 349-350).

Overall, Dr. Baker's conclusion that Rutherford suffered from posttraumatic stress disorder, extreme at the time of the crime is based on

> [l]ooking at the type of symptoms, the number of symptoms, and severity of the symptoms and how often they come and how long they last. And how disfunctional [sic] they are to concentration and attention. And the different kinds of things that happen, and you are trying to concentrate and you have a flash. And it is very painful and you lose your abilities to remember what you are doing.
>
> * * *
>
> That the, part of the test that I gave is called mini mental status exam, and that he had difficulty with remembering names of objects that I asked him to remember. And he had difficulty recalling numbers and giving them to me again in a backward way, 1, 2, 3. 3, 2, 1. And difficulties just looking at his ability to really function in a day to day environment his memory was not good.

(PC-R1. 370-371).

Finally, Dr. Baker testified that posttraumatic stress disorder was a recognized mental health problem (PC-R1. 355), he would have been able to explain Rutherford's posttraumatic stress disorder to Rutherford's jury and would have been able to provide corroboration (PC-R1. 386).

The evidence presented by Dr. Baker and Dr. Larson at the post-conviction hearing established numerous mental health mitigating circumstances. The evidence established that, at the time of the offense, Rutherford was suffering from an extreme emotional disturbance. See § 921.141(6)(b), Fla. Stat. The evidence also established that, at the time of the crime, Rutherford suffered from severe alcohol abuse, another recognized nonstatutory mental health mitigating factor. See, e.g., Parker v. State, 643 So. 2d 1032, 1035 (Fla. 1994); Carter v. State, 560 So. 2d 1166, 1168 (Fla. 1990). Finally, the evidence established that, at the time of the crime, Rutherford suffered from posttraumatic stress disorder, which is recognized as nonstatutory mental health mitigation in Florida. See Masterson v. State, 516 So. 2d 256, 258 (Fla. 1987).[16]

In contrast, at trial, the court first found that Rutherford had no prior significant history of criminal activity, but then ruled that because of a "lack of corroboration," no other mitigating factors were established (2nd Supp. R. at 5). Of course, the testimony of Dr. Larson and Dr. Baker provides the necessary corroboration of Rutherford's mental condition.

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[16]Judge Bell's attempt to distinguish Mr. Rutherford's case from Masterson by stating that Mr. Rutherford's posttraumatic stress disorder did not exist at the time of the crime (PC-R2. 695-696), is clearly refuted by the post-conviction testimony of both Dr. Larson and Dr. Baker. See supra.

On direct appeal, this Court specifically found that Rutherford "did not make a claim of posttraumatic stress disorder." Rutherford, 545 So.2d at 856 n.3. Of course, both Dr. Larson and Dr. Baker, after thorough evaluation, found that Rutherford indeed suffered from posttraumatic stress disorder at the time of the crime.

These mitigating factors were unrebutted and could not have been ignored by the jury and judge.[17] Prejudice is established under such circumstances. See Rose, 675 So.2d at 573-74; Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992); Michael, 530 So.2d at 930.[18] See also Baxter v. Thomas, 45 F.3d 1501, 1515 (11th Cir. 1995); Middleton v. Dugger, 849 F.2d 491, 495 (11th Cir. 1988); Stephens v. Kemp, 846 F.2d 642, 653 (11th Cir. 1988); Armstrong v. Dugger, 833 F.2d 1430, 1432-34 (11th Cir. 1987); United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974). The evidence presented at Rutherford's hearing is identical to that which established prejudice in these cases, and Rutherford is similarly entitled to relief.

Rutherford's situation is strikingly similar to that of Michael v. State. In both cases, the trial courts found, and this court affirmed, three aggravating circumstances. Compare Michael, 437 So.2d at 141, with Rutherford, 545 So.2d at 856. Both sentencing courts also

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[17] See, e.g., Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993); Santos v. State, 591 So. 2d 160, 164 (Fla. 1991); Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987).

[18] Prejudice was found in these cases despite the existence of numerous aggravating factors. See Rose v. State, 461 So. 2d 84, 85 (Fla. 1984)(three aggravating factors); Mitchell v. State, 527 So. 2d 179, 182 (three aggravating factors); Phillips v. State, 476 So. 2d 194, 196 (Fla. 1985)(four aggravating factors); Michael v. State, 437 So. 2d 138, 141-42 (Fla. 1983)(three aggravators). The courts found three aggravating factors in Mr. Rutherford's case. (2nd Supp. R. at 4-5); Rutherford v. State, 545 So. 2d 853 (Fla. 1989).

found, and this court affirmed, that the only applicable mitigating circumstance was lack of a significant history of prior criminal activity. § 921.141(6)(a), Fla. Stat. Id.[19]

In post-conviction, the Michael trial court found that Michael's trial counsel's penalty phase representation was constitutionally deficient because counsel failed to present mental health mitigation despite knowing about Michael's mental health problems. Michael, 530 So.2d at 930. Similarly, counsel here knew of Rutherford's mental health problems as well. See supra. Counsel also failed to procure and present expert mental health mitigation testimony during the penalty phase. See supra. Prejudice is established. Michael, 530 So.2d at 930.

The prejudicial effect of counsel's failure to procure and present expert mental health mitigation testimony is compounded by the 7-5 death recommendation (R. 156). In Phillips, this Court found that strong mental health mitigation that was essentially unrebutted would have made a major difference if presented to the jury because

> **[t]he jury vote was seven to five in favor of a death recommendation. The swaying of the vote of only one juror would have made a critical difference here.** Accordingly, we find that there is a reasonable probability that but for counsel's deficient performance in failing to present mitigating evidence the vote of one juror would have been different, thereby changing the jury's vote to six and six and resulting in a recommendation of life reasonably supported by mitigating evidence.

Phillips, 608 So.2d at 783 (emphasis added). Likewise, in Rutherford's case, had expert mental health mitigation testimony like that presented at the post-conviction hearing been

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[19] In Michael, this Court on direct appeal specifically found that the two mental health mitigating factors did not apply. Michael, 437 So. 2d at 141. In Rutherford, this Court on direct appeal found that no claim of posttraumatic stress disorder was made. Rutherford, 545 So.2d at 856 n.3.

heard by the sentencing jury, there is a reasonable probability that one juror would have voted for life. Given the expert mental health mitigation evidence Rutherford would have presented, the life recommendation would not have been subject to a judicial override. See, e.g., Parker, 643 So.2d at 1035; Stevens v. State, 613 So. 2d 402, 403 (Fla. 1992). Accord Scott v. State, 657 So. 2d 1129, 1132 (Fla. 1995).

Additionally, the mitigation established at the evidentiary hearing would have totally changed the picture of Rutherford presented at the penalty phase. There, the State argued for both of the cold, calculated and premeditated aggravating factor and the heinous, atrocious or cruel aggravator, while the defense presented nothing to explain or reduce these aggravating circumstances. In contrast, the unrebutted mental health evidence presented at the post-conviction hearing clearly established that Rutherford has suffered from serious mental disturbances since before the crime occurred, and that these mental health impairments result from factors over which Rutherford had no control. Thus the mental health evidence would have substantially diminished the weight of the aggravating circumstances. See Phillips, 608 So.2d at 783.

As noted above, the failure to procure and present independent expert mental health mitigation testimony is, on its own, sufficient to warrant relief, regardless of the effectiveness of the remainder of counsel's assistance. See Washington, Kimmelman, Nelson; Nero; Strickland, supra. Additionally, when the failure of counsel to procure and present expert mental health mitigation testimony is combined with the other errors made by counsel, see supra Argument I; infra Arguments III-IV, prejudice is established because the errors undermine confidence in the fundamental fairness of the sentencing determination.

See Gunsby; Cherry; Harvey, supra. The error committed by Rutherford's counsel in not procuring and presenting mental health expert testimony during the penalty phase is sufficient to warrant Rule 3.850 relief.

ARGUMENT III

THE FAILURE TO PRESENT STATUTORY AND NON-STATUTORY MITIGATION CLAIM.

Trial counsel failed to conduct a reasonable statutory and non-statutory mitigation investigation. Counsel thus provided ineffective assistance, and Rutherford is entitled to relief. Rose, 675 So. 2d at 571; Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993); Stevens v. State, 552 So. 2d 1082, 1087-1088 (Fla. 1989); Michael, 530 So.2d at 930.[20]

A. MITIGATION DISCOVERABLE BY A REASONABLE INVESTIGATION

At the post-conviction hearing, extensive mitigation testimony, including the mental health mitigation evidence presented above, see Argument II, was presented. Post-conviction counsel also presented expert testimony about the dreaded conditions Rutherford faced in Vietnam. See infra (testimony of Dr. Guilmartin). In addition to the expert testimony of Drs. Larson, Baker, and Guilmartin, post-conviction counsel presented the testimony of seven lay witnesses, including six of Rutherford's family members, who testified about Rutherford's life history. Combined, the testimony comprised a wealth of information about Rutherford's childhood and young adulthood, available at the time of trial, which compellingly demonstrates why the death sentence is not appropriate in this case. Evidence regarding Rutherford's character and background, his early life marked by abandonment,

[20]To avoid repetition, Mr. Rutherford incorporates the discussion in Argument II herein.

economic hardship, and emotional deprivation, and his military service in some of the most horrendous campaigns of the Vietnam War was not considered by his sentencers because it was either not made available for their review or was inadequately presented. The evidence, discussed in detail below, establishes on its own, and in conjunction with an adequate mental health evaluation, both statutory and nonstatutory mitigating circumstances about which the judge and jury knew nothing. The presentation of such evidence would have persuaded the sentencers to spare Rutherford's life.

Rutherford's mother was only nineteen years old when she gave birth to Rutherford; she had only been fourteen when her first son was born (PC-R1. 236). From a very young age (PC-R1. 265), the Rutherford children were called upon to work to keep the family afloat. They chopped and hauled wood, fed and tended horses, pigs, mules, chickens, dogs, cows and other animals, planted and reaped crops, raised sugar cane and made sorghum and cleared entire fields with hoes and axes (PC-R1. 238, 259, 269, 284). The Rutherfords used a wood stove for cooking (PC-R1. 269). The Rutherfords were not farmers, but they grew their own food in a garden that took up an entire field and when the sugar cane came in, it was a full-time job cutting and processing it into syrup (PC-R1. 237, 265).

In addition to their chores, the children attended school, were required to do their homework and worked for nearby farmers bailing hay, milking cows, picking cotton, pecans, and beans on weekends and in their spare time to bring in the money needed to support their large family (PC-R1. 273). On top of all this, the children endured a volatile father, A.E. Rutherford, who continuously abandoned them for months on end (PC-R1. 247, 266, 286). As a result, the children had to work very hard. However, A.E. Rutherford did not work

much when he was at home either. Additionally, A.E. Rutherford bullied and physically abused his wife in front of the children (PC-R1. 287-288). He also drank a lot (PC-R1. 264).

A.D. Rutherford and his brothers dropped out of school between fifteen and seventeen years old so they could get full-time jobs and support the family their father would not support (PC-R1. 240, 288). If the children failed to do their chores or did not do one exactly right, the parents whipped them with leather belts, their hands or peach tree switches (PC-R1. 239, 266). If the father was home, he would do the whipping and sometimes left marks on the children. He never let anything pass without a whipping. One child described the frequency of the whippings by saying, "the peach tree stayed trimmed pretty high" (PC-R1. 286). A.E. Rutherford stated that "a good peach tree switch" is "the best medicine in the world" (PC-R1. 266).

In early 1968 (PC-R1. 288), when A.D. Rutherford was nineteen years old, he enlisted in the Marine Corps. Drafted by the Army, he sensed that he was going to Vietnam; wanting to get the best training available, he joined the Marines (PC-R1. 289). Rutherford's service in the Marines during the Vietnam conflict was one of the most important phases of his life in terms of shaping his behavior, personality and character.

Dr. John Guilmartin, a former helicopter combat rescue pilot during the Vietnam War and current military historian specializing in combat stress and how groups and individuals respond to that stress (PC-R1. 42), testified at the hearing. Dr. Guilmartin had reviewed Rutherford's unit command chronologies, battalion command chronologies, and education

and service records (PC-R1. 44). The unit command chronologies are especially important because they are "really the staple, particularly of modern military history" (PC-R1. 44).

Dr. Guilmartin stated that Rutherford was not well equipped to handle the miserable conditions of the Vietnam conflict. Rutherford's scores on "the initial battery of mental tests that one takes on entering the service placed him well below average; I would say marginally qualified both in terms of formal education having left school in the 10th grade, and in terms of scores" (PC-R1. 46).

Nonetheless, Rutherford did serve in an American uniform in Vietnam. Based upon the records, Dr. Guilmartin testified that Rutherford "saw approximately five and a half months of combat service in South Vietnam, Northern I Corps, attached to the first battalion, third marine [sic] regiment" (PC-R1. 46). The nearly six month period refers "to that period of time in which [Rutherford] was assigned to a line infantry regiment engaged in combat" (PC-R1. 46).

By reading the command chronologies of Rutherford's unit, Dr. Guilmartin determined that the combat experiences Rutherford faced while in Vietnam were

> **[p]retty miserable in a nutshell**. Constant patrolling, constant search and destroy missions, relatively few large scale assaults.
>
> Now the flip side of that is that there was never the sense of achievement in capturing a notable objective. And his unit was subjected to constant snipping and harassment by artillery, ambushes, boobie traps, mines, rocket attacks -- probably one of the most insidious tactics used by the enemy against the marines [sic] at that time in that theater involved mortar attack; the use of light, smooth bore artillery. . ..
>
> And I should also add that the communist forces, . . . these are first rate troops who knew the terrain very well, better than the American troops I would submit -- they become very adept at as they called it hugging the enemy; that is, engaging the Americans and staying close to them to maximize

> the chance that Americans supporting artillery fires and artillery fire in support if the American troops in combat would endanger our own troops. So friendly fire as it was called was also a real danger.

(PC-R1. 47-48)(emphasis added).

Because Rutherford experienced this miserable combat situation, he was subject to an inordinate amount of stress and strain, including

> [c]onstant fear of enemy action, constant uncertainty, the inability to very completely disengage; they are always exposed.
>
> And I should add to that to those who have not been in the field which I expect is the majority of us, you are not eating well, field sanitation is non-existent. And you go for weeks or perhaps months without a shower. You are tired, you are subject to blisters, cramps. It is a pretty miserable environment all the way around. And overlay on that the constant, the ever present threat of enemy action.

(PC-R1. 49).

Additionally, the troops in Vietnam were "well aware of the opposition to them, and well aware that a very vocal segment of public opinion viewed our commitment as morally wrong and viewed them as in effect accomplices in war crimes" (PC-R1. 50). Combined with the stress and strain of combat, this knowledge of dissenting public opinion

> obviously placed a great deal of pressure on [the American soldiers in Vietnam]. And it varies depending on the individuals. For the professional soldier who is armored by education, by conscious commitment it can be a, I submit shrugged off to a degree. But **for the individual who is not terrible well educated or not terribly well led -- and bear in mind that both the Marine Corp. and the army were getting very close to the bottom of the manpower barrel at this time, such an individual is very vulnerable indeed.**
>
> * * *
>
> This was not a good time to serve in Uncle Sam's combat ground forces.
>
> * * *

> You don't have the feeling of doing something great and glorious for which you will be rewarded by recognition by the country at large. It is a very thankless type of combat; constant pressure, constant unremitting exposure to ambush, mortar fire, artillery fire, and all the rest.

(PC-R1. 50, 52)(emphasis added).

In fact, based upon the confluence of the harsh combat style, the lack of support back home, and Rutherford's ill-preparedness to mentally cope with the situation, his service in uniform was unbelievably difficult. Dr. Guilmartin testified:

> **I think if I had to pick one of the most difficult times and places to serve in American uniform in Vietnam in Northern I Corps. during the period, the year following the 1968 offensive right on up to the withdrawal of the American troops that would be it.** Take your pick Army or Marine Corp, but that surely has got to have been form the standpoint of the young enlisted rifleman, it has got to have been one of the most difficult times ever.
>
> And again the individual will react to that based on his own individual make-up. And I submit that a relative lack of education and surely the lack of clear objectives and leadership, our national leadership, left it very unclear what we were doing in Vietnam.
>
> **By the time that Mr. Rutherford got to Vietnam it was clear that we were drawing down. And very reasonable soldiers would ask: Why are we here? What are we doing? And if the colonels and the captains could not come up with an answer I submit the lance corporals certainly couldn't. And that has to be a major exacerbating factor.**

(PC-R1. 52-53)(emphasis added).

Despite everything, Rutherford "was a fire team leader and promoted to lance corporal. And that suggests to me that he gave it his all. He tried. . . So the picture that I formed is a marginally qualified marine that in my judgement should never have been in uniform, and having volunteered for a service which combat duty in Vietnam was a near certainty gave it his best shot" (PC-R1. 54). Essentially, according to Dr. Guilmartin, Rutherford "did his best" (PC-R1. 56). Years later, Rutherford found out that he **and** his

children were still suffering the effects of his Vietnam service. Rutherford knew he had a rash that would not go away; he testified about the defoliated trees he saw in Vietnam (R. 880-4). Dr. Guilmartin testified that Rutherford was exposed to the defoliator commonly known as Agent Orange during his service in Vietnam (PC-R1. 54). Based on studies documenting the Agent Orange spray paths of U.S. Air Force planes during the period in which Rutherford was in Vietnam, "[i]t is a certainty that Mr. Rutherford was indeed exposed heavily if not to direct spray from above certainly to the residual effects on the environment" (PC-R1. 55). By residual exposure, Dr. Guilmartin was referring to "brushing up against leaves that were treated with [Agent Orange]. And I'm talking about drinking water that has the stuff in it. He could not, he could not have avoided that if he wanted to" (PC-R1. 57). Rutherford's eldest son, Paul, testified that

> I was born handicapped on my right side. And--and I've had a colon operation when I was 20 years old. My right hand is swelled up real big . . ..
>
> * * *
>
> I only got one breast on one side and . . . the shoulder muscle, I don't have a shoulder muscle up here. And I can't turn my hand over as far as I can turn my hand. My thumb is messed up.
>
> Also, I got a, a knot on my back and problems with my feet too.

(PC-R1. 306-307).[21]

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[21] At the evidentiary hearing, Mr. Rutherford would have wanted to present an expert in toxicology to testify to the effect his exposure to Agent Orange has had on his health and the health of his children. Due to lack of adequate funding, however, the Capital Collateral Representative denied Mr. Rutherford's request. As a result, Mr. Rutherford was not even evaluated to determine his exposure to Agent Orange and the effects of that exposure for both him and his children.

After leaving Vietnam, Rutherford arrived in California (PC-R1. 262). He married the former Martha Sue Bender within a few weeks, and they moved to Rutherford's Florida hometown area (PC-R1. 242, 262). A.D. and Martha Sue lived with A.D.'s parents about a week; they then bought and moved into a trailer on his parents' property, close to his parents' house (PC-R1. 262).

Rutherford attempted to make a good life for himself in Florida. For instance, he was especially considerate of elderly people, and was known to do odd jobs for them, fixing things or running errands (PC-R1. 318) As his best friend Edilow "Buddy" Morrell testified:

> it was a few old people around him that couldn't get around good, and I know the times he went and worked their house or went and got groceries for them. And first one thing and another. But he, but he was a real good friend and neighbor.

(PC-R1. 318). In fact, Rutherford once spent three to four nights putting in a pump on Morrell's well (PC-R1. 318).

A.D.'s friends and family noticed a change in A.D. after he returned from Vietnam. He was nervous and jittery (PC-R1. 261-62, 276); he could not sit still and had to keep himself occupied (PC-R1. 241, 261-62, 274-76, 289). He was easily startled and would jump at the slightest movement or noise (PC-R1. at 277). If a helicopter or an airplane flew by when he was outside, he would dive to the ground as if diving for cover (PC-R1. 275).

When Rutherford went to sleep, he would convulse like an epileptic until he woke up, bathed in sweat, screaming, shaking and crying (PC-R1. 314). His nightmares occurred repeatedly, haunting his sleep and waking hours (PC-R1. 279, 290, 306). His brother Earl, who lived with A.D. for a while, testified:

> a lot of times at night we would hear him and he will wake me up and screaming and hollering and shaking. And I would go knock on the door and ask them what it was and, you know, go check on him. And he will be like in a cold sweat. And then he would, he would go back to sleep and there wasn't no more that night or it would never happen again the same night.

(PC-R1. 279).

Rutherford's oldest daughter, Regina, also observed her father's torment:

> I remember one nightmare, and I don't know if it was from Vietnam or not. But I remember because I was sleeping in his bedroom that night. And my mom had left us and so he made a pallet for me and [my younger sister] Crystal on the floor to sleep. And so we was sleeping on the floor and I remember waking up that night because I kept hearing him making noises and stuff and it woke me up. And I sit on the bedside and watched him because he was throwing his hands and sweating all over. And when he started throwing his hands, it scared me and so I, I woke him up. And he got up like real hurriedly and told me to go back to bed it was okay and it was just a bad dream.

(PC-R1. 314). Rutherford also experienced frequent, severe headaches (PC-R1. 276, 305). The headaches extended across his forehead and throbbed so badly his eyes would water (PC-R1. 276)("[his] head hurt him so bad that he couldn't hardly see"). His feet were cracked and had rashes as well (PC-R1. 306).

Rutherford also had quiet moods (PC-R1. 275). He would sit on his front porch swing for hours, staring into space. Sometimes he would stare at a spot on the wall for one to two hours at a time on end (PC-R1. at 277). People who knew him said he would drift away from a conversation and be a million miles away with an unfocused gaze, then fade back into the conversation after a while and ask where they were. His brother Earl explained:

> [a]nd then you know, like you were talking and I will go by and he would be sitting in the swing, and, you know, he would just be staring off into the wild

blue. And sometimes he will talk to you and sometimes he would not. And I just always leave.

(PC-R1. 278).

Rutherford did not like to talk about Vietnam and what happened to him over there (PC-R1. 242, 279). When he did talk about his experiences, the horror and effect on him was evident, as his brother Earl testified:

> Q: Did he ever tell you, ask you -- did he ever tell you about a story about a kids [sic] in a baby carriage from Vietnam?
>
> A: Yes, ma'am.
>
> Q: What was that story about?
>
> A: **He said that they was in some kind of little town over there or something, patrolling or what not, whatever they were doing. And he said that these little kids just pushed a baby stroller out there in amongst all of them and blowed up themselves and some of the American troops.**
>
> Q: And he saw that?
>
> A: Yes, ma'am.
>
> Q: What was he doing when he told you that story?
>
> A: **Well, he was about crying.**

(PC-R1. 278)(emphasis added).

Additionally, A.D. Rutherford developed a drinking problem when he returned from Vietnam (PC-R1. 249, 276, 291). He drank frequently, and voluminously. On his way home from work in the evenings, he would stop by a convenience store and drink a six-pack with the boys (PC-R1. 277, 281). When he drank, Rutherford's personality changed. He would snap from a hardworking, caring man into a crazy man, like flipping on a light

switch, and the least thing would set him off. His best friend, Buddy Morrell, testified that he tried to stay away from A.D. when he was drinking (PC-R1. 320).

Rutherford's marriage was also quite rocky. Sue left A.D. and their children many times, sometimes for other men, and would stay gone for months on end, much like his father had done to him as a child (PC-R1. 279-280, 293, 302, 305, 309, 319). Sue's leaving tore A.D. apart (PC-R1. 280, 293, 310). He and the children would beg her to stay (PC-R1. 312), and when she'd leave, A.D. would start drinking heavily (PC-R1. 280, 293, 319). He couldn't concentrate on his work and would take off to look for her (PC-R1. 280). Despite his marital problems, Rutherford kept his household together as best as he could whenever his wife left (PC-R1. 309, 319). He cared deeply about his children (PC-R1. 243), and when he went to work during the day, he would have a babysitter stay with them or would take the children to stay with his mother. A.D. fretted about how he was going to be able to keep them all together and support them. The welfare of his children weighed heavily on A.D.'s mind (PC-R1. 263, 293, 311).

A year or so before the murder, Sue Rutherford went to California. Rutherford had to take care of all four children (PC-R1. 244), as well as cope with the pain of losing Sue (PC-R1. 302). He was so distraught over her leaving that he flew to California to beg her to come back (PC-R1. 246, 280, 303). His efforts ultimately proved unsuccessful. After A.D. and Sue Rutherford divorced in April 1984, A.D. received custody of their then-four children (PC-R1. 294-295, 315). Sue, however, came back to A.D. Rutherford in the summer of 1985, three days before the crime (PC-R1. 313, 316). She was pregnant with another man's child (PC-R1. 294, 312).

This evidence presented at the post-conviction hearing established numerous mitigating factors. As discussed above in greater detail, see Argument IIB, the evidence established mental health mitigation in the following areas: (1) at the time of the offense, Rutherford was suffering from an extreme emotional disturbance; (2) at the time of the offense, Rutherford suffered from severe alcohol abuse, a recognized nonstatutory mitigating factor, see, e.g., Parker v. State, 643 So.2d 1032, 1035 (Fla. 1994); Carter v. State, 560 So. 2d 1166, 1168 (Fla. 1990); and (3) at the time of the offense, Rutherford suffered from posttraumatic stress disorder, which is recognized as nonstatutory mitigation in Florida. See Masterson v. State, 516 So. 2d 256, 258 (Fla. 1987).

Additionally, the evidence at the post-conviction hearing established recognized non-statutory mitigation, including: (1) that Rutherford was abused as a child, see Campbell v. State, 571 So. 2d 415, 419 n.4 (Fla. 1990); (2) that Rutherford made a contribution to society through his military service, see DeAngelo v. State, 616 So. 2d 440, 443 (Fla. 1993); Campbell, 571 So.2d at 419 n.4; Masterson, 516 So.2d at 258 (Fla. 1987); (3) that Rutherford suffered from family and domestic problems, see Smalley v. State, 546 So.2d 720, 723 (Fla. 1989); (4) that Rutherford made a contribution to his community by helping his friends and neighbors, see Campbell, 571 So.2d at 419 n.4; and (5) that Rutherford was a good father and provider to his children. See, e.g., Dolinsky v. State, 576 So.2d 271, 275 (Fla. 1991).

In contrast, at trial, the court first found that Rutherford had no prior significant history of criminal activity, but rejected any other mitigation due to "lack of corroboration"

(2nd Supp. R. 5).[22] With specific respect to Rutherford's military service, Dr. Guilmartin could have provided the much-needed corroboration of Rutherford's experiences. Dr. Guilmartin explained that Rutherford's trial testimony was consistent with his conclusions about the nature of Rutherford's military service:

> A: His descriptions of his exposure to combat struck me as accurate and honest, it strikes me in particular as a very accurate reflection of the sorts of things that would stick in a young rifleman's mind.
>
> It was clear that he viewed that as an unpleasant experience, and it would be rather surprising if he didn't.
>
> * * *
>
> Q: Doctor, if Mr. Rutherford had been asked a question -- and this is from his trial testimony -- asked a question, 'Tell me about the D M Z.' And his response to that question, 'It is hell.' That would have been really an accurate description of what he went through?
>
> A: It is certainly an accurate depiction indeed.

(PC-R1. 56, 58).

Additionally, on direct appeal, this Court ruled that the trial court properly found no mitigation, Rutherford, 545 So.2d at 856, and stated, "He did not make a claim of posttraumatic stress disorder." Id. at 856 n.3. Of course, Rutherford presented ample mental health mitigation testimony, including testimony that he suffered from posttraumatic stress disorder at the time of the crime, at the evidentiary hearing. See Argument IIB. Additionally, he presented non-statutory mitigating evidence regarding his military service,

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[22] Judge Bell's finding that "[trial] [c]ounsel elicited enough of Mr. Rutherford's wartime experiences to give the jury a good idea of that event," (PC-R2. 689), is completely belied by the trial court's finding that Mr. Rutherford's testimony about his military experience was completely unbelievable.

his abused childhood, his caring for his children, and his troubled domestic relationship. Neither the sentencing jury nor the sentencing judge heard any of this evidence.

Significantly, all of the mitigating testimony presented at the evidentiary hearing would have been uncovered if counsel had simply undertaken a reasonable investigation. Proper investigation and preparation would have resulted in evidence establishing an overwhelming case for life on behalf of Rutherford. Counsel also failed to obtain mental health assistance in preparation for the penalty phase, and failed to provide available mental health experts with critical historical information and evidence of Rutherford's background. Although counsel has a general duty to conduct a reasonable investigation of a client's background for possible mitigating evidence, Porter v. Singletary, 14 F.3d 553, 557 (11th Cir. 1994), counsel here failed to investigate substantial mitigating evidence that was reasonably discoverable.

In Rutherford's case, the failure to investigate mitigating evidence was especially unreasonable because counsel was on notice of Rutherford's mental health problems. See Argument IIA. As such, they had a heightened responsibility to conduct an adequate mitigation investigation. See, e.g., Blanco, 943 F.2d at 1502; Thompson, 787 F.2d at 1451. As discussed above, counsel was well aware of Rutherford's mental health problems yet took no steps to investigate his mental health background or procure an evaluation by an independent expert for mitigation purposes. But for this failure, substantial mitigating evidence could have been presented to Rutherford's jury and judge.

Additionally, the testimony presented at the evidentiary hearing from Rutherford's family and friends was readily available. His brother Earl was both available and willing to

testify (PC-R1. 281). His brother William was also available and willing to testify on Rutherford's behalf (PC-R1. 300). His oldest daughter Regina was available and willing to testify about life with her father (PC-R1. 316).[23] His oldest child Paul was also available and willing to testify about his father (PC-R1. 308).[24] His best friend, Buddy Morrell, was available and willing to testify (PC-R1. 321). Sadly, despite the important mitigating testimony they had to offer, not one of these persons was ever contacted by trial counsel (PC-R1. 281, 296, 308, 316, 321).

Finally, corroborating testimony about Rutherford's military service was readily available. Counsel admitted that Rutherford's military records were obtainable by court order without a release (PC-R1. 399); yet, they never took the steps necessary to obtain the records. If they had, a military historian such as Dr. Guilmartin could have provided the crucial corroborating testimony so desperately needed to establish a case for life.

B. DEFICIENT PERFORMANCE

Trial counsel had no strategic reason for not investigating statutory and non-statutory mitigation for use during Rutherford's penalty phase. In fact, at the post-conviction hearing, both Treacy and Gontarek made clear that they made an affirmative, strategic decision **to present any and all** mitigation evidence, including evidence of Rutherford's Vietnam experiences and evidence that he was a good father and good worker (PC-R1. 421). See also (PC-R1. at 401-402)(Gontarek testimony).

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[23] Regina testified that she was 11 at the time of the crime (PC-R1. 315).

[24] Paul was 13 at the time of Mr. Rutherford's trial (PC-R1. 307).

Specifically, the mitigation testimony presented at the post-conviction hearing was quite consistent with counsel's penalty phase strategy. The mental health mitigation discussed above fit within counsel's strategy. See supra Argument IIB. See also (PC-R1. 421-422)(testimony about extreme emotional disturbance consistent with trial strategy). Additionally, the non-statutory mitigation presented at the evidentiary hearing comported with counsel's tactics. For example, Treacy testified that expert testimony about Rutherford's service in the military would have been consistent with counsel's penalty phase strategy:

> A: . . . [T]he Vietnam experience in general, yes, I think that is good for the type of jury that I tried to assemble.

(PC-R1. 422-423). Additionally, testimony about Rutherford's willingness to help others would have been consistent with counsel's penalty phase strategy: "I thought I did put on witnesses like that" (PC-R1. 425-426).

Further, Treacy testified that the family mitigation testimony presented at the post-conviction hearing was consistent with his penalty phase strategy:

> Q: If you had been able to obtain the testimony of other family members and that testimony contained mitigating evidence or evidence which could have been used in mitigation would that have been evidence that you would have liked to present to the jury?
>
> A: Yes. **Any evidence that was mitigating I would be delighted to present to the jury.**

(PC-R1. 92)(emphasis added).

Essentially, counsel decided to put on as much mitigating evidence as possible during the penalty phase of Rutherford's trial. Thus counsel had no reason for failing to place before the jury credible evidence of Rutherford's mental health problems and life history. The problem, however, with counsel's penalty phase strategy is that, once they decided to

put on mitigation evidence, they did not reasonably procure and present such evidence. The wealth of significant mitigating evidence which was reasonably available and should have been presented to the sentencing jury was inadequately presented. Two courts, including this Court, agreed that counsel presented no information regarding statutory or non-statutory mitigation. See (2nd Supp. R. at 5); Rutherford, 545 So.2d at 856 and n.3.

Critically, the evidence which would have resulted in a life recommendation at the penalty phase of Rutherford's trial was not known to the sentencers for one reason -- trial counsel failed to seek it out. Trial counsel's failure to adequately investigate Rutherford's life history and seek a professionally adequate mental health evaluation is conduct which falls well below the standard for reasonably competent counsel in a capital case. Basically, Rutherford's counsel operated through neglect. In fact, counsel conceded that there was no reasonable strategy for his failure to interview the family and friends presented:

> Q: Okay, so -- so you can not, you can not say now that 'I would make a strategic decision to exclude a witness' that you never even knew existed?
>
> A: Of course not.
>
> Q: Of course not. You have to go out and find the witnesses before you make a strategic decision whether to present him or not?
>
> A: If you don't know a witness exists obviously you can not be interviewing him.

(PC-R1. 426-427).

By failing to investigate the substantial statutory and non-statutory mitigation reasonably available in Rutherford's case, counsel abdicated their responsibility to Rutherford's cause. This failure was entirely unreasonable because no tactical motive can be ascribed to a lawyer whose omissions are based on the failure to properly investigate and

prepare. Rose, 675 So.2d at 572-573. See also Baxter, 45 F.3d at 1514; Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991); Nealy, 764 F.2d at 1178.

At the post-conviction hearing, counsel offered two reasons why they generally did not present mitigation testimony.[25] First, counsel claimed that Rutherford obstructed their investigation. See, e.g., (PC-R1. at 67). This allegation, however, is refuted by Rutherford's actions, counsel's limited investigative efforts, and counsel's penalty phase presentation. Despite a claim that Rutherford somehow hindered the penalty phase investigation, he assisted counsel when requested. For example, he gave both trial counsel and counsel's investigator specific directions to his parents' house (PC-R1. 67, 77). Counsel and the investigator did in fact interview Rutherford's parents (PC-R1. 77-78). As was made clear at the evidentiary hearing, Rutherford's alleged obstruction did not prevent counsel from conducting an extensive interview:

> Q: . . . I am correct that you eventually did get to speak to [Rutherford's parents] regarding Mr. Rutherford's case?
>
> A: Yes, yes.
>
> **Q: So you were not prevented from speaking to those people, is that fair?**
>
> **A: Nobody could prevent us, I don't suppose.** Mr. Rutherford was very -- senior, was very defensive and you got, you got the impression that he did not want to talk to you. And you got the impression that he was still under A D Rutherford's directions not to talk to us. **He eventually opened up and talked because we were there a couple much [sic] hours, I guess.**

(PC-R1. 77-78)(emphasis added).

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[25] This is in addition to the four reasons discussed above, see supra Argument II.A.2., why counsel did not procure and present mental health mitigation specifically.

Further, Rutherford discussed with Treacy the health problems he felt that he was suffering as a result of exposure to Agent Orange (PC-R1. 98). Despite the importance of this testimony to presenting a credible picture of Rutherford's military experience, see supra, counsel unreasonably declined to put on this evidence. See infra. Thus Rutherford's own actions tend to refute a claim of obstruction.

Rather, it is counsel's limited investigation, not any interference by Rutherford, that resulted in a deficient penalty phase presentation. Regarding his penalty investigation, Treacy testified at the evidentiary hearing that

> [W]e did not miss a witness that we were aware of from the intake, the initial conference with Mr. Rutherford or subsequent follow up conferences or with those of his friends that may give you the name of somebody else that could help. No. We did them all. But if we did not know that they existed we did not do them.

(PC-R1. 427-428). However, he also admitted that he did not contact any members of Rutherford's family other than his parents:

> Q: Were you aware of whether Mr. Rutherford had any brothers and sisters?
>
> A: I was aware that he had a brother.
>
> Q: Did you make any effort to determine whether or not he had any brothers and sisters other than the one brother?
>
> A: I don't recall, I don't really remember.

(PC-R1. 92).

In reality, counsel did not attempt to contact any other member of Rutherford's family or any of his friends. Treacy stopped his mitigation investigation after talking to Rutherford's parents not because Rutherford somehow obstructed the investigation, but merely because he neglected to continue. In fact, the investigator on the case, William

Graham, a former Investigator of the Year for the Florida Public Defenders' Association (PC-R1. 63), confirmed that counsel simply stopped investigating mitigating evidence after talking to Rutherford's parents (PC-R1. 129-130, 139-140).

Trial counsel should have known better than to limit penalty phase investigation. Treacy represented criminal defendants for 36 years (PC-R1. 94). During that time, as he explained at the evidentiary hearing, he had his share of clients with whom he did not have an ideal relationship:

> Q: . . . Did you have any clients that were uncooperative?
>
> A: I can remember one that would not even come down out of the jail to see me. He never met me.
>
> Q: Did the fact that the, that the fact that he came, would not come down and see you, did that in any way -- let me ask: **Were you of the opinion that because he would not come down and see you that you did not have to investigate his case or that you should not investigate his case --**
>
> A: **No.**
>
> Q: Even if you could not get information from him?
>
> A: No, no, as a matter of fact I had that jury out a long time.
>
> Q: And were you able to get that, keep that jury out a long time by going to other sources other than your client to develop your case?
>
> A: I may have misled you a little bit. He would not talk to me for about a month that I had his case or two months before it came to trial. And just before trial, hours before trial, he told me what his version of the story was and I went with it.
>
> Q: Now, you had prepared for trial prior to just a few hours before trial?
>
> A: Uh-huh. (indicates affirmative)
>
> **Q: And in preparing for that trial did you have to rely upon sources -- obviously you had to rely upon sources other than your client?**

A: Yes.

Q: And you were still able to prepare for trial and keep that jury out quite a long time, is that right?

A: Well, yes. Uh-huh (indicates affirmative).

(PC-R1. 94)(emphasis added). Additionally, Treacy served in the military during Vietnam (PC-R1. 97), and thus was aware of the horrors Rutherford faced (PC-R1. 114-115). Based on this knowledge, he even attempted to use Rutherford's military record as mitigation (PC-R1. 97).

Finally, counsel's claim of interference is belied by the penalty phase presentation at Rutherford's trial. Rutherford did not prevent counsel from presenting mitigation evidence. In the penalty phase, as discussed above, counsel did in fact present mental health mitigating evidence despite the claim that Rutherford obstructed such investigation.

Q: **And you [Treacy] stated there was a difference of opinion between you and Mr. Rutherford regarding the introduction of psychological testimony. And you introduced that testimony anyway, didn't you?**

A: **Yes.**

(PC-R1. 111).

Regarding non-statutory mitigation, counsel also presented some limited testimony in that area. For example, counsel did present some evidence about Rutherford's Vietnam experience and that he was a good person (PC-R1. 420). Again, the failure to present adequate mitigation testimony was not the result of Rutherford's actions but rather counsel's inactions in failing to properly investigate and present mitigating evidence.

The other reason that counsel did not present mitigation evidence in general is because Treacy "traveled very heavily on that that the judge feels relevant" (PC-R1. 420).

Based on this, Treacy specifically rejected introducing information he knew to be mitigating. For instance, Treacy admitted at the post-conviction hearing that Rutherford's exposure to the defoliant commonly known as Agent Orange, during his service in the Vietnam War "could be used as a mitigating factor." (PC-R1. at 100). However, he declined to present this evidence precisely because he felt that the trial judge would reject its mitigating value:

> **I remember having a discussion with Judge Wells in a recess or something like that,** I don't remember. And I was in the middle of asking about agent orange and **the judge told me kind of in an aside, "Bill, did you see the article in --" I don't remember if it was Time Magazine or what** it was, but it was an article at that time by some national agency like DOD or NIH or something like that -- which worked to counter purposes to my thesis that agent orange was, was deleterious to your health.

(PC-R1. at 101). As discussed above, it was unreasonable for counsel to limit his presentation of mitigation because of a belief that the trial judge would not find it relevant.

Essentially, trial counsel had no strategic reason for not investigating statutory and non-statutory mitigation for use during Rutherford's penalty phase. Additionally, there was a wealth of non-statutory and statutory mitigating evidence reasonably available. See supra Argument III.A. Thus counsel's performance at Rutherford's penalty phase was objectively unreasonable, constituting deficient performance under Strickland. Strickland, 466 U.S. at 688.

C. PREJUDICE

A strong case for Rutherford's life could have been made at the penalty phase of this trial. As established above, however, counsel failed to discover and use the wealth of mitigation available in Rutherford's background -- mitigating evidence which establishes compelling reasons for sympathy -- without which no individualized consideration could

occur. Had counsel adequately prepared and discharged their Sixth Amendment duties, overwhelming mitigating evidence which would have precluded a sentence of death in this case would have been uncovered. As it was, Rutherford's jury recommended death by only 7 to 5 (R. 156). **One single vote would have swung the balance.** Presentation of any of the available material and relevant evidence discussed herein, and in Argument II, would have made a difference. Yet, although ample mitigating evidence was easily accessible, trial counsel failed to present critical mitigating evidence in the penalty phase of Rutherford's trial.

Counsel's failure in this regard was not based on "tactics"; rather, it was based on the failure to adequately investigate and prepare. The evidence was not hard to find; it cried out for presentation. Essentially, counsel failed to present the jury with a complete picture of Rutherford. Thus, the jury did not learn about significant mitigation evidence involving Rutherford's childhood and development, and about his experiences during the Vietnam War, and about the difficulties he experienced after returning from Vietnam. Rutherford's jury heard very little of this compelling evidence about his character and background. This evidence alone would have presented a strong case for life. Nevertheless, the significance of this evidence is even more apparent when viewed in the context of Rutherford's significant mental health problems.

The expert and lay witness evidence presented by Rutherford at the evidentiary hearing and discussed above and in Argument II was significant to recognized mitigating factors which the sentencers could not legally ignore, see, e.g., Farr, 621 So. 2d at 1369, and which would have entirely altered the balance of aggravation and mitigation at the

penalty phase. The prejudicial effect of counsel's failure to procure and present expert mental health mitigation testimony is compounded by the jury's 7-5 vote. In Phillips, this Court found that strong mental health mitigation that was essentially unrebutted would have made a major difference if presented to the jury because

> **[t]he jury vote was seven to five in favor of a death recommendation. The swaying of the vote of only one juror would have made a critical difference here.** Accordingly, we find that there is a reasonable probability that but for counsel's deficient performance in failing to present mitigating evidence the vote of one juror would have been different, thereby changing the jury's vote to six and six and resulting in a recommendation of life reasonably supported by mitigating evidence.

Phillips, 608 So.2d at 783 (emphasis added).

Likewise, here, had expert and family testimony like that presented at the post-conviction hearing been heard by the sentencing jury, there is a reasonable probability that one juror would have voted for life. Based upon the mitigation Rutherford would have presented, the jury could quite reasonably have returned a life recommendation, which would not have been subject to a judicial override. See, e.g., Parker, 643 So.2d at 1035; Stevens v. State, 613 So.2d 402, 403 (Fla. 1992). Confidence in the outcome of the sentencing is undermined, and Rutherford is entitled to relief.

Additionally, caselaw holds that prejudice is established in situations similar to Rutherford's. See, e.g., Rose, 675 So.2d at 573 (finding prejudice for failing to investigate and present evidence of mental health problems); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992)(prejudice established by expert testimony identifying statutory and nonstatutory mitigation evidence of brain damage, and drug and alcohol abuse); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991) (finding prejudice established by evidence of statutory mitigating

factors and abusive childhood); Bassett v. State, 541 So. 2d 596, 597 (Fla, 1989)(holding that "this additional mitigating evidence does raise a reasonable probability that the jury recommendation would have been different").[26] See also supra Argument II.B.2. (discussing cases finding prejudice for failure to investigate and present expert mental health mitigation evidence).

Further, it is not dispositive that some evidence was presented at Rutherford's penalty phase. See Hildwin, 654 So.2d at 110 n.7 (finding prejudice despite "recogniz[ing] that Hildwin's trial counsel did present some evidence in mitigation at sentencing"). Compare State v. Lara, 581 So. 2d at 1289 (prejudice established by evidence of statutory mitigating factors and childhood abuse) with Lara v. State, 464 So. 2d at 1175 (at penalty phase, defense presented evidence regarding childhood abuse). See also Cunningham v. Zant, 928 F.2d 1006, 1017-19 (11th Cir. 1991). The important consideration is that the evidence presented at Rutherford's penalty phase does not even scratch the surface of the available mitigation. For instance, none of the voluminous and unrebuttable evidence available in Rutherford's military records was presented. Additionally, none of the available evidence regarding mental health mitigating factors was presented.

Rutherford's sentencing judge found that, besides Rutherford's lack of significant prior criminal activity, no mitigation had been established. In such circumstances, evidence

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[26] Prejudice was found in these cases despite the existence of numerous aggravating factors. See Rose v. State, 461 So. 2d 84, 85 (Fla. 1984)(three aggravating factors); Mitchell v. State, 527 So. 2d 179 (Fla. 1988)(three aggravating factors); Lara v. State, 464 So. 2d 1173 (Fla. 1985)(same); Bassett v. State, 449 So. 2d 803 (Fla. 1984)(same). Courts found three aggravating factors in Mr. Rutherford's case. See (2nd Supp. R. at 5); Rutherford, 545 So.2d at 856-857.

establishing unrebutted mitigating factors cannot be considered cumulative to what was presented. The defense has a burden of proof at the penalty phase. Under Florida law, a mitigating factor should be found if it "has been reasonably established by the greater weight of the evidence: 'A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.'" Campbell, 571 So.2d at 419-20 (Fla. 1990)(quoting Fla. Std. Jury Instr. (Crim.) at 81). Establishing a fact "by the greater weight of the evidence" requires presenting evidence of a certain weight--evidence which adds weight in not cumulative by is necessary to meet the burden of proof. Further, once established, the weight of a mitigating factor matters in the ultimate decision between life and death because Florida's capital sentencing scheme requires the sentencers to weigh mitigation against aggravation. See Stringer v. Black, 112 S. Ct. 1130 (1992).

As above, the failure to investigate and present statutory and non-statutory mitigation testimony is, on its own, sufficient to warrant relief, regardless of the effectiveness of the remainder of counsel's assistance. See Washington, Kimmelman, Nelson; Nero; Strickland, supra. Additionally, when the failure of counsel to investigate and present statutory and non-statutory mitigation testimony is combined with the other errors made by counsel, see Arguments I,II &IV, prejudice is established because the errors undermine confidence in the fundamental fairness of the sentencing determination. See Gunsby, Cherry, Harvey supra.

ARGUMENT IV

THE MISTRIAL/DOUBLE JEOPARDY CLAIM.

The Double Jeopardy Clause does not preclude retrial after a defense requested mistrial, McLendon v. State, 74 So. 2d 656 (Fla. 1954), unless intentional prosecutorial misconduct provokes the mistrial. Oregon v. Kennedy, 456 U.S. 667 (1982); State v. Dixon, 478 So. 2d 473 (Fla. 2d DCA 1979); State v. Kirk, 362 So. 2d 352 (Fla. 1st DCA 1978). This exception applies here. The trial court lacked jurisdiction to conduct a retrial.

The trial court summarily denied this claim. However, at the evidentiary hearing, counsel attempted to question Gontarek regarding his failure to object or file a motion to prevent the retrial of Rutherford based on double jeopardy. The court disallowed this questioning because it was not presented in the claims before the court. This ruling was erroneous and an abuse of discretion (PC-R1. 29-31).

The trial court permitted an evidentiary hearing on the issues surrounding penalty phase ineffective assistance of counsel. Failure to object to a trial that is barred by the Double Jeopardy Clause is a constitutional issue that infects the entire proceeding. Defense counsel had a duty to raise objections to the proceeding as a whole, not just to separate parts of the trial. Kimmelman v. Morrison. Had the Florida Supreme Court remanded this case for a resentencing, counsel would have had the duty to raise an objection to the proceeding as double jeopardy because he had notice of the mistrial at the first trial. When counsel objects to the constitutionality of a trial, he objects to the trial as a whole. To attempt to separate this issue from an ineffective assistance of counsel claim is both intellectually dishonest and error.

Under Oregon v. Kennedy, a prosecutor's misconduct prompting a mistrial is sufficient to constitute a double jeopardy bar to retrial if it "was intended to provoke the

defendant into moving for a mistrial." 456 U.S. at 679. The trial court granted a mistrial because the prosecutor knowingly and intentionally violated his discovery obligations (R. 106-111). Two prosecution witnesses, Sherman Pittman and Kenneth Cook, testified about statements Rutherford allegedly made that had not been disclosed on the State's discovery answer (R. 106-111)(Supp. R. 321-45, 390-98). Defense counsel objected and moved for a mistrial, advising the court that he had no notice that the witnesses would testify to incriminating statements (Supp. R. at 384-400). The State had listed the witnesses' names but had not indicated that they would testify to statements Rutherford allegedly made to them (R. 107)(Supp. R. at 386-391).[27] Granting the motion for mistrial, the court found: (1) the prosecutor knowingly and willfully violated the discovery rules (R. 109); (2) the impact of the violation was substantial since the witnesses' testimony was significant and the defense was deprived of the opportunity to prepare for it (R. 110); and (3) that the State failed to demonstrate that no prejudice accrued to the defense (R. 109).

The prosecutor's intentional misconduct benefited the prosecution because the second trial cured the discovery problem and insured the admissibility of the critical testimony.

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[27]Defense counsel did not depose the witnesses because his investigation did not reveal they would testify to material information (Supp. R. 390-98). None of the police reports given to counsel contained references to these statements, even though Pittman and Cook testified that they told police about the statements (Supp. R. 327, 340-42). Pittman spoke to Sheriff Coffman, and Cook spoke to Deputy Pridgen (Supp. R. 327, 341). Pridgen did reveal during a defense deposition taken a few days before trial that Cook spoke to him about Mr. Rutherford once asking him to "pull a job on an elderly lady" (Supp. R. 391-92). The prosecutor admitted that this brief reference was the only possible notice counsel had of the statements (Supp. R. 395). The prosecutor stated that he was not aware of the complete details of the statement Pittman related at trial until the day before he testified (Supp. R. 397-98). The prosecutor failed to honor his continuing duty to disclose such information and presented the testimony without prior notice to defense counsel or the court (Supp. R. 321-45, 397-98).

Pittman's and Cook's testimony was important evidence of premeditation since it related admissions about a plan to rob and kill one to two weeks before the homicide (Supp. R. 321-45). The prosecutor's knowing and intentional violation of his duty to disclose information was aimed at prompting a mistrial that would cure his pretrial discovery violation and avoid the sanction of exclusion of important evidence. As a result, the mistrial acts as a double jeopardy bar to the second trial.

Rutherford's fundamental right to be free from double jeopardy was violated. This was fundamental error depriving the trial court of jurisdiction. Thus, this claim is not subject to waiver or procedural bar. See, Sawyer v. State, 113 So. 2d 736 (Fla. 1927). A new trial is required.

ARGUMENT V

THE GUILT-INNOCENCE INEFFECTIVENESS CLAIM.

Counsel made numerous other errors during the guilt-innocence phase. Rutherford's Rule 3.850 motion alleged that trial counsel did not adequately investigate and prepare for the guilt phase and that Rutherford was prejudiced by counsel's omissions. Strickland v. Washington, 468 U.S. 668 (1984). The trial court denied an evidentiary hearing on this issue. Even when counsel attempted to ask questions concerning strategies that were equally applicable to both phases of trial, the state objected to entering such an issue and the trial court sustained the objection (PC-R1,163-164).

The trial court erroneously ruled that if the Rule 3.850 motion did not mention the witness's name or his factual testimony then Rutherford was prevented from inquiring of that witness. This was error. Rule 3.850 states that the movant should provide a "brief" statement

of the facts. The rule does not say that all facts that could be presented at an evidentiary hearing must be pled in the motion. Applying such a standard violated due process, deprived Rutherford of notice of the standard and was a clear abuse of discretion.

Further, the testimony of Jan Johnson, Winston Perritt, and Jennie Hill revealed that Florida Department of Law Enforcement (FDLE) and Santa Rosa County Sheriff's Department (SRCSD) had not disclosed requested public records. In the case of SRCSD, fingerprint cards, which included palm prints from the crime scene, were not made available to trial counsel. The cards were destroyed despite the required 75-year retention period and before counsel was assigned to this case (PC-R1, 163-165).

The destruction of these cards is particularly disturbing because the only physical evidence supposedly linking Rutherford to the crime scene was the presence of two palm prints. Otis Garrett, testified to his comparison of two latent palm prints from the crime scene to Rutherford's prints (R. 532-552). He testified that six points of comparison matched (R. 547-548). The court refused to allow Rutherford to call Garrett at the evidentiary hearing even though he had been subpoenaed for the hearing. If counsel had consulted an expert he would have learned that there are two techniques for examining prints and that experts consider one of those methods unreliable. Counsel did not consult or hire a forensic expert to examine the prints or help defense counsel prepare to impeach Garrett on cross.

The SRCSD also failed to disclose the original check written to Rutherford for services he performed for Winston Perritt shortly before the crime. Evidence that Rutherford had money that he legitimately earned was crucial to the defense in that it corroborated their

theory that Rutherford had money from another source, not the victim's house. The failure to disclose this information either to defense counsel or postconviction counsel is a violation of Chapter 119 and should be litigated at a full and fair evidentiary hearing.

Also, Jan Johnson, a purported blood spatter expert from FDLE, referred to pictures that she brought to court to substantiate her opinions (PC-R1, 158-159). These pictures were not previously provided to Rutherford despite requests for public records. The FDLE's violation of Chapter 119 effectively prevented counsel from challenging the blood spatter evidence and testimony at trial.

The State suggested during the testimony of Jeannie Hill and other witnesses that if postconviction counsel wanted to get into the area of public records inquiries that he could raise it in a new 3.850. However, the State knew that a subsequent Rule 3.850 motion would be treated as a successor motion and subject to strict limitations as to what issues could be raised. By not allowing this questioning, the trial court prevented Rutherford from inquiring as to why the public records requests done on this 3.850 motion were not complied with by FDLE and SRCSD. A remand is required.

Trial counsel failed to discover that Ms. Johnson's qualifications as a blood spatter expert at the time of trial were suspect.[28] The qualifications of a so-called "expert" are

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[28]Ms. Johnson testified at trial in 1985 that her entire training consisted of attendance at Judith Bunker's blood stain pattern interpretation school in Orlando, conducting experiments from the Herbert MacDonnel blood stain interpretation book, and writing a research paper (R. 789). During Ms. Johnson's testimony at the evidentiary hearing, she attempted to explain her qualifications, but admitted that the instructor conducting her training was LeRoy Parker, an FDLE employee. Ms. Johnson testified that Parker was also a student in the class and had no more training in blood-spatter analysis than the other participants in the class (PC-R1. 148-149).

dubious when that person has been trained by someone who knows no more than the trainee did at the time the training took place. This type of qualification is suspect and should have been explored by trial counsel.

Judith Bunker, Ms. Johnson's mentor, also has fabricated her credentials. Not only has Ms. Bunker lied about her educational experience (she lacks a high school diploma), she also lied about the nature and level of experience she allegedly accrued in the field of blood-spatter work.[29] In Correll v. State, slip op. No. 88,474 (April 10, 1997), this Court acknowledged that Ms. Bunker had lied about her qualifications as a blood stain expert, but did not grant relief "in light of the overwhelming evidence presented at trial in support of Correll's guilt." Id., slip op. at 2-3. Unlike Correll, the case against Rutherford was purely circumstantial. Ms. Johnson's testimony was crucial to the State's case in establishing

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[29] Ms. Bunker's status as a bloodstain pattern was a direct result of her employment, support, and endorsement by the State. Through State employment which lasted from 1970 until 1982, Ms. Bunker established her credentials and reputation as a bloodstain pattern expert through the sponsorship and endorsement from the Medical Examiner and the State Attorney for the Ninth Judicial Circuit.

In 1974, the Medical Examiner's (ME) office paid for Ms. Bunker to attend a 4 credit hour workshop on bloodstain pattern analysis given by Mr. Herbert MacDonnel in Birmingham, Alabama. Ms. Bunker was then promoted to ME's Assistant and immediately began instructing local law enforcement on interpretating bloodstain pattern evidence. This instruction was sponsored by the ME and within the scope of Ms. Bunker's employment. With the imprimatur of the ME, Ms. Bunker transformed herself from a secretary into the ME's leading authority and expert on bloodstain pattern evidence. From this time forward the ME held Ms. Bunker out to the public as a bloodstain expert.

The Ninth Circuit State Attorney's Office (SAO) was responsible for introducing and establishing Ms. Bunker as a court qualified bloodstain pattern expert. As early as 1977, the SAO began vouching for Ms. Bunker's credentials and qualifications as a bloodstain pattern expert in court. Ms. Bunker first qualified as an expert by testifying for the prosecution in the Ninth Judicial Circuit. With the SAO's continued vouching for her expertise she was repeatedly qualified as an expert in the Ninth Circuit. During this time, Ms. Bunker was also an employee for the District Nine ME. Only after four years of testifying for the State did Ms. Bunker qualify as an expert in another judicial circuit.

the mode of death and how the crime occurred. However, she was not qualified to testify as a blood-spatter expert because she did not have sufficient training from qualified experts. Trial counsel should have researched Ms. Johnson's training and impeached her critical testimony.

Defense counsel also failed to interview witnesses who could corroborate Rutherford's testimony at guilt phase. Rutherford testified that the money he spent on the day of the victim's death was money he had been keeping to buy school supplies for his children (R. 618, 632-633). Trial counsel could have easily established that Rutherford had obtained the money legitimately. For example, at the evidentiary hearing, Arron Winston Perritt testified that Rutherford had been working for and was being paid by him at the time the crime was committed. Had trial counsel called Perritt to testify, he would have given the jury corroborating evidence for its case.

Counsel also failed to present an available mental health defense by calling mental health experts to explain the effects of alcohol on the ability to form specific intent. See Gurganus v. State, 451 So. 2d 817 (Fla. 1984). Evidence readily available to counsel supported this defense.

Statements of witnesses established that Rutherford was a heavy drinker. In her deposition, Elizabeth Ward testified Rutherford was drunk every time he came to her house (Deposition of Elizabeth Ward, 12/30/85) (PC-R1. 288-89). Other witnesses saw Rutherford purchasing beer on the day of the offense. One SRCSD report stated Rutherford purchased beer the morning of the offense (PC-R1. 289). Another police report indicated Rutherford purchased more beer in the evening of the same day (PC-R. 289). Witnesses also

told police they saw Rutherford drinking on the day of the offense (Statement of Mary Francis Heaton, 8/23/85; Statement of Elizabeth Ward, 8/23/85) (PC-R1. 290-91). In her deposition, Elizabeth Ward said that on the day of the offense Rutherford was drinking beer, had beer in his cooler, which he always kept full, and had liquor on his breath (Deposition of Elizabeth Ward, 12/30/85). This evidence indicated the need to pursue the availability of an intoxication defense and the substance of such a defense. Rutherford was prejudiced by counsel's omissions.

Counsel also failed to investigate evidence indicating that Rutherford suffered from post-traumatic stress disorder and its effect on his ability to form specific intent. At the evidentiary hearing, Dr. Baker and Dr. Larson testified about the significant impact that Rutherford's service in Vietnam had on his mental abilities. See Argument II.B.1. This testimony could have been used during guilt phase to refute specific intent.

The files and records do not conclusively show Rutherford is entitled to no relief on this claim. Rutherford was entitled to a full and fair evidentiary hearing. Rule 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986). The lower court erred in excluding relevant evidence.

To the extent that Rutherford did present evidence of counsel's guilt-phase ineffectiveness, 3.850 relief is merited. Additionally, when counsel's guilt phase failures are combined with the other errors made by counsel, see Arguments I-IV, prejudice is established because the errors undermine confidence in the fundamental fairness of the guilt and sentencing determinations. Gunsby v. State, 670 So. 2d 920, 924 (Fla. 1996).

ARGUMENT VI

ERRONEOUS SUMMARY DENIAL OF MERITORIOUS CLAIMS

Although the lower court granted an evidentiary hearing on some claims, the court summarily denied the others. The court erred. A Rule 3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986).

A trial court may not summarily deny without "attach[ing] to its order the portion or portions of the record conclusively showing that relief is not required." Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990). The files and records in this case do not conclusively rebut Rutherford's allegations. The court attached nothing from the record or files to its order to conclusively show that Rutherford is not entitled to relief.

The court below summarily denied Rutherford relief on Claims IV, V, VI, VII, VIII, IX, X, XI, XII, XIV and XV. Although these claims alleged ineffective assistance of counsel, the court below ruled they were procedurally barred or meritless (PC-R. 675, 706-711). As to some of these claims, the court held that Rutherford could not use the forum of 3.850 to relitigate issues on new and different grounds. (PC-R. 708). These rulings are erroneous.

Rutherford's trial counsel failed to effectively function at nearly every stage of his representation. Ineffective assistance of counsel claims are properly raised in 3.850. Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987). The Sixth Amendment requires that criminal defendants be provided effective assistance of counsel. See Strickland, 466 U.S. 668. Counsel "has a duty to bring to bear such skill and knowledge as will render the trial a

reliable adversarial testing process." Id. at 688. Since the only way a criminal defendant can assert his rights is through counsel, counsel has the duty, inter alia, to know the law, to make proper objections, to assure that jury instructions are correct, to examine witnesses adequately, to present evidence, and to file motions raising relevant issues.

Considering ineffectiveness claims due to failure to object does not frustrate the preservation of error rule because a defendant claiming ineffective assistance has the additional burden of satisfying Strickland. Kimmelman, 477 U.S. at 373-75. Hardman v. State, 584 So. 2d 649 (Fla. 1st DCA 1991); Menendez v. State, 562 So. 2d 858 (Fla. 1st DCA 1990). A defendant raising an ineffectiveness claim based upon counsel's failure to timely raise an issue is asserting a distinct Sixth Amendment claim with a "separate identit[y]" and "reflect[ing] different constitutional values" from the underlying claim that the defendant asserts counsel ineffectively failed to preserve. Kimmelman, 477 U.S. at 375.

Rutherford's claims are not procedurally barred. They are ineffective assistance of counsel claims properly brought under Rule 3.850. The court below erred in summarily denying relief to Rutherford on these claims.

A. IMPROPER INSTRUCTIONS ON AND APPLICATION OF AGGRAVATORS

Rutherford's jury was not properly instructed on aggravating factors. The judge simply read the list of aggravating factors from the statute (R. 920-21), and provided no limiting constructions. Maynard v. Cartwright, 108 S. Ct. 1853 (1988); Richmond v. Lewis, 113 S. Ct. 528 (1992). The jury received no instructions on the elements of "cold, calculated and premeditated" and "heinous, atrocious or cruel." The vagueness and overbreadth of the statute was not channeled and limited.

The errors cannot be found to be harmless. The jury recommended death by only 7-5 (R. at 156). One different vote could have resulted in a life recommendation. Trial counsel was ineffective in failing to object to the vague instructions. Case law at the time of trial established that "heightened premeditation" is required to establish CCP. See e.g., Jent v. State, 408 So. 2d 1024, 1032 (Fla. 1982). Case law also established the definition of HAC. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). Rutherford was prejudiced in light of the jury's close vote. A new sentencing is proper.

B. IMPROPER NONSTATUTORY AGGRAVATING FACTORS

During the penalty phase, the State introduced evidence that was not relevant to any statutory aggravating factors and argued this evidence and other impermissible matters as a basis for imposing death. Further, the trial court relied upon several impermissible factors in sentencing Rutherford to death.

The State presented the testimony of three friends of the victim. None of this testimony was relevant to any aggravating factor, and much of it was inadmissible hearsay. See Argument I. The prosecutor also argued that the crime affected the defendant's family (R. 900); that the defendant should die because he solicited the aid of two women in writing a check on the victim's account (R. 903); that the victim died undressed (R. 901); and that the crime was aggravated because it was done to procure a small sum of money (R. 903). In light of the jury's close 7-5 vote (R. at 156), the erroneous admission of this evidence and argument cannot be considered harmless.

The court improperly relied on nonstatutory aggravators. The court specifically found that Rutherford had a "lack of remorse"--a fact neither argued nor proved by the state--and

weighed this nonstatutory aggravator against the mitigation (2nd Supp. R. at 4), found the victim's fear of Rutherford to be an aggravator (Id. at 5), and relied upon the first trial's jury recommendation in addition to the second (Id. at 5-6).

The consideration of improper and unconstitutional non-statutory aggravating factors violated the Eighth Amendment, and prevented the constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S. Ct. 1130 (1992); Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). Counsel ineffectively failed to object, although the statute clearly delineates the permitted aggravators. In light of the jury's close vote, Rutherford was prejudiced.

C. NO TIMELY WRITTEN SENTENCE OF DEATH

At sentencing, the trial court imposed death and stated written findings would be filed later (R. 948). The written order was not filed until 8 days later. Written findings of fact in support of a death sentence are required. Fla. Stat. section 921.141(3); Van Royal v. State, 497 So. 2d 625 (Fla. 1986); Grossman v. State, 525 So. 2d 833 (1988); Patterson v. State, 513 So. 2d 1257 (Fla. 1987); State v. Dixon, 283 So. 2d 1 (Fla. 1973). The requirement of specific written findings provides for meaningful review of the death sentence and fulfills the eighth amendment requirement that a death sentence not be imposed in an arbitrary and capricious manner. See Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). Although the contemporaneous findings requirement is clearly set forth in the statute, counsel failed to object, to Rutherford's prejudice.

D. NO WRITTEN REASON FOR DEPARTURE SENTENCE

The court sentenced Rutherford to 30 years imprisonment for robbery to run concurrently with the death sentence (R. 161-62, 949). Contrary to Fla. R. Crim. P. 3.701(d)(1), no sentencing guidelines score sheet was prepared. While Rutherford's direct appeal was pending, this Court relinquished jurisdiction for preparation of a guidelines scoresheet. The court then provided a written reason for the departure, and this Court affirmed. Rutherford, 545 So. 2d at 857. This procedure is contrary to Pope v. State, 561 So. 2d 554, 556 (Fla. 1990).

The robbery sentence must be reversed. See Uptagrafft v. State, 499 So. 2d 33 (Fla. 1st DCA 1986); Barr v. State, 474 So. 2d 417 (Fla. 2d DCA 1985); Newsome v. State, 473 So. 2d 709 (Fla. 2d DCA 1985); Sanchez v. State, 480 So. 2d 704 (Fla. 3d DCA 1985). Trial counsel's failure to object to this error was deficient performance which prejudiced Rutherford.

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on September 8, 1997.

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