IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,511

ROGER LEE CHERRY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal is from the denial of Mr. Cherry's motion for post-conviction relief by former Circuit Court Judge Gayle S. Graziano, Seventh Judicial Circuit, Volusia County, Florida, following an evidentiary hearing, required by this Court in Cherry v. State, 659 So. 2d 1069, 1074 (Fla. 1995), regarding ineffective assistance of penalty phase counsel.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation:

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

"PC-R1." -- record on appeal from initial summary denial of postconviction relief;

"PC-R2." -- record on appeal in the instant proceeding;

"PC-Tr." -- transcript of the evidentiary conducted December 16-18, 1996;

"Supp. R." -- supplemental record on appeal materials;

"Supp. PC-Tr." -- transcript pages 479 through 516, filed as part of the supplemental record on appeal and containing closing arguments [this turns out to be the same text as PC-Tr. 520-555];

"Exh.___Depo." -- transcript of one of the three depositions taken to perpetuate testimony; said testimony was admitted during the hearing, but not made part of the hearing transcript (admitted as Defense Exhibits 3, 4, and 5 and concerning witnesses Daisy Mae Gandy, Bertie Fludd, and Inell Gandy).

REQUEST FOR ORAL ARGUMENT

Mr. Cherry has been sentenced to death and is, therefore, at risk of electrocution by the State of Florida. If this Court grants relief, it may very well save his life. Denial of relief may very well hasten his death. This Court generally grants oral arguments in capital cases in the current procedural posture. Mr. Cherry, therefore, moves this Court, pursuant to Florida Rule of Appellate Procedure 9.320 (and caselaw interpreting the rule) to grant him oral argument in this case and to set aside adequate time for the substantial issues presented to be fully aired, discussed, and for undersigned counsel to answer any questions this Court may have regarding the instant appeal.

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STATEMENT OF THE CASE AND FACTS

Roger Lee Cherry was indicted for two counts of first degree murder, one count of burglary with assault, and one count of grand theft on September 9, 1986, in Volusia County, Florida. (R. 1070-1071.) The government's case is summarized in this Court's direct appeal opinion. Cherry v. State, 544 So. 2d 184 (Fla. 1989). Trial followed and the jury convicted Mr. Cherry as charged on September 25, 1987. (R. 1029-1031; 1235-1238.) Penalty phase was conducted the following day, during which the government presented no additional evidence and Mr. Cherry's appointed counsel presented no testimony and introduced but a single psychiatric evaluation, performed by Dr. Barnard, of Mr. Cherry. (R. 1166-1169.) Following instructions and deliberations, the jury recommended, by votes of 7-5 and 9-3, that sentences of death be imposed for the first degree felony murders of Leonard and Esther Wayne. (R. 1061-1063; 1239-1240.) The trial court sentenced Mr. Cherry to death on both counts, finding four aggravating circumstances and no mitigating circumstances. (R. 1241-1244.)[1]

On direct appeal this Court affirmed the convictions, vacated the death sentence imposed for the death of Leonard Wayne, and, finding the trial court failed to follow mandatory sentencing guidelines, vacated the sentences imposed for the non-

[1]In the sentencing order, the trial judge stated that he did not rely on any psychiatric reports in making his sentencing decision (R. 1244), which, of course, was the only "evidence" introduced by Mr. Cherry's counsel during penalty phase (R. 1037).

capital offenses. Cherry, 544 So. 2d at 188. Although this Court found an improper doubling of aggravating circumstances, the death sentence imposed for the death of Esther Wayne was nevertheless affirmed based upon the remaining aggravating factors and the "the absence of any mitigating factors." Id.

Mr. Cherry, then represented by pro bono counsel, sought postconviction relief by filing a Florida Rule of Criminal Procedure 3.850 motion on April 16, 1992, which contained twenty (20) claims for relief. (PC-R1. 46-426.) The State was ordered to respond, (PC-R1. 1805), and did so on June 30, 1992. (PC-R1. 1809-1928.) On March 12, 1993, without affording Mr. Cherry any opportunity to present legal argument regarding his asserted claims, the trial court summarily denied the motion. (PC-R1. 2205-2224.) Motion for rehearing was denied April 25, 1994. (PC-R1. 2287.) Notice of appeal was timely filed. (PC-R1. 2288-2290.) Thereafter, briefs were filed with this Court and oral argument heard.

On August 31, 1995, this Court rendered it's opinion in Cherry v. State, 659 So. 2d 1069 (Fla. 1995). The relevant portion of this Court's opinion for the instant appeal is as follows:

> Cherry claims that trial counsel presented practically no mitigating evidence at the penalty phase other than a single four-page psychiatric report which was introduced without further argument or comment. Counsel made virtually no attempt to present evidence or to argue mitigating circumstances. Cherry claimed in his 3.850 motion and detailed supporting material attached that the following information was available had counsel conducted an adequate investigation

> of mitigating circumstances: (1) Cherry grew up in conditions of abject poverty; (2) Cherry was severely physically and emotionally abused and neglected from the time he was an infant; (3) Cherry's mother was an alcoholic who drank during her pregnancy and throughout his life and repeatedly neglected, rejected, and abandoned him; (4) Cherry witnessed extreme violence as a child; (5) Cherry was institutionalized at a young age in a brutal and segregated juvenile institution. Cherry also specifically identifies three mental health experts in his petition who indicate that: (1) Cherry is now, and was at the time of trial, mentally retarded; (2) Cherry suffers from organic brain damage; (3) Cherry was incompetent to stand trial and testify; (4) Cherry's history supports both statutory and nonstatutory mitigating evidence; and (5) Cherry was intoxicated at the time of the offense.
>
> Based on the volume and detail of evidence of mitigation alleged to exist compared to the sparseness of the evidence actually presented, we agree that Cherry is entitled to an evidentiary hearing on his claims that counsel was ineffective at the penalty phase.

Cherry v. State, 659 So. 2d at 1074.

This Court unanimously reversed the summary denial of the ineffective assistance of penalty phase counsel claim and remanded to the trial court for an evidentiary hearing. Id.

On October 27, 1995, Mr. Cherry's volunteer counsel moved to withdraw, (PC-R2. 14-20), and this request was granted on December 21, 1995. (PC-R2. 24-25.) Thereafter, it became necessary for counsel with the former Office of Capital Collateral Representative to assume Mr. Cherry's representation, continue the investigation of the case, and prepare for the evidentiary hearing ordered by this Court. (See, CCR's Motion

for Continuance and/or Motion to Hold Proceedings in Abeyance Pending Resolution of Designation of Counsel and attachments, filed January 11, 1996---PC-R2. 28-47.) Ultimately, an evidentiary hearing was conducted on December 16, 17, and 18, 1996. The record on appeal contains extensive background materials pertaining to Mr. Cherry. (PC-R2. 209-1586.)

Despite the substantial number of witnesses called to testify at the evidentiary hearing, difficulty arose in obtaining the attendance of all material witnesses.[2]

At the evidentiary hearing, appellant's trial counsel, David Miller, testified that he was court appointed, had no capital murder legal experience, and only "very limited" experience dealing with mental health issues, with none of that being in litigation. (PC-Tr. 8.) Miller recalled requesting a mental health evaluation "[t]o determine if there was an insanity

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[2]Motions to Perpetuate Testimony were filed as early as August, 1996, (PC-R2. 106-111; 121-126.), denied (PC-R2. 136-138.), and the motions were renewed regarding certain witnesses, of particular importance being Drs. Glen Caddy, Kris Sperry, and Diane Lavete. (PC-Tr. 449-462.) The renewed motions were also denied. (PC-Tr. 475-477.) All of the doctors were outside the jurisdiction. (PC-Tr. 449-462.) Further, a number of affiants were unavailable and the affidavits proffered as exceptions to hearsay based upon Florida State 921.141 and caselaw allowing introduction of relevant hearsay evidence during sentencing in a capital case. (PC-Tr. 283-316.) The court excluded all witnesses pertaining to guilt/innocence, despite the State's statement that it had no objection to the entire record, including guilt/innocence being considered by the court. (PC-Tr. 285, 287, 290-293.) The court admitted affidavits concerning mitigation, but, although unclear in her rulings at times, apparently limited the use of them to materials utilized by Dr. Crown in reaching his opinions. (PC-Tr. 303-307.) This allowed the State to later argue in closing that the defendant had not presented witnesses referred to in his original 3.850 motion.

defense" and to determine competency to proceed. (PC-Tr. 9.) He did not request a penalty phase expert at any point in the proceedings and could not recall if he asked anyone to do a penalty phase investigation. (PC-Tr. 10.) Miller did not contact any of Mr. Cherry's family members and when questioned about neighbors, claimed he "wasn't aware he had any". He also failed to contact anyone who knew his client during his formative years, talked with none of Mr. Cherry's teachers, and requested no school records. (PC-Tr. 12.)

Specifically regarding mental health issues, Miller stated that he "was not qualified to determine whether or not there was a mental health issue." (PC-Tr. 13.) He thought the State had some mental health history on appellant, so he asked for the competency evaluation. He couldn't recall if Dr. Barnard (the psychiatrist appointed to evaluate Mr. Cherry for competency) requested that he provide background materials for review during the competency exam. Id. When Miller's memory was refreshed with the letter Dr. Barnard sent requesting such materials, the witness still couldn't recall if he ever sent anything, (PC-Tr. 14), and he believed the letter regarded "the defense of liability" and did not pertain to penalty phase/mitigation. (PC-Tr. 15.)

Miller claimed to have surveyed capital murder caselaw to prepare because he had a poor memory and frequently had to look things up to comply with law. (PC-Tr. 16.) He also claimed to have had "little regard for what the limitations of the law were

in the sense that [he] felt like it was [his] obligation to mitigate Mr. Cherry's sentence in any way [he] could." (PC-Tr. 17.) Further, he opined that his understanding was that "anything was fair game" during the penalty phase. Id. On proffer, Miller admitted he considered the jury a co-sentencer in Florida. (PC-Tr. 19.)

Miller had no recall of whether he presented any penalty phase witnesses during Mr. Cherry's trial, but upon review of the transcript of sentencing had to admit that he didn't see "any reference, if that's what you're asking me, to witnesses." (PC-Tr. 20, 22.) When counsel for Mr. Cherry requested the court take judicial notice of the penalty phase transcript, the State did not object and further stated: "...I would assume the Court would be considering the entire record in this case, including the trial transcript, as well as the evidence submitted at trial." (PC-Tr. 22.)[3] Miller "thought it was unavoidable" that the case would go up on appeal and claimed to be very interested in protecting the record for appeal. Id. When Mr. Cherry sought to point out 35 instances of unrecorded bench conferences which were not reported, the State objected with: "...the only thing we're here for today is the penalty phase and ineffectiveness of assistance. All of the other issues have been litigated." When counsel for Mr. Cherry was asked to limit inquiry to penalty

[3]Thereafter, the State routinely sought to limit Mr. Cherry from presenting or arguing any evidence from the guilt/innocence phase of the trial and the trial court frequently sustained the State's objections.

phase, it was pointed out by counsel that there was no penalty phase and the State argued the guilt phase in penalty. (PC-Tr. 22, 23.) The court allowed proffer of the testimony, with reference to the record of the trial. (PC-Tr. 24.) Miller had no specific recall of specific objections or any strategic reason for failing to object to improper argument or vague jury instructions. (PC-Tr. 24-27.)

During cross-examination by the State, Miller confirmed he was primarily concerned with the guilt phase, that appellant claimed innocence, and the theory at trial was that Mr. Cherry was in the vicinity of the crimes but did not commit them. (PC-Tr. 28, 29.) Miller stated his meetings with his client "were not great in number," he considered them "adequate in terms of communication," and he purported to discuss penalty phase with Mr. Cherry, but was "unable to obtain" helpful penalty phase information despite the "adequate" communication. (PC-Tr. 30, 31.) Miller claimed to have asked about "people who could have helped" Mr. Cherry, but he knew "little or nothing" about his client's background. (PC-Tr. 33.) Miller had no recall of introducing Dr. Barnard's report during penalty phase and, upon review during the hearing, stated the report contained "good and bad" and he just couldn't recall if he used the report or not. (PC-Tr. 34.) Miller claimed he used a Biblical closing during penalty "[l]ikely because there was little else" and he "had no one step forward and elicit the testimony" he would have liked to have had. Despite this, he acknowledged he somehow knew that Mr.

Cherry had claimed a history of abuse and he had notice that his client's family and social history might be mitigating. (PC-Tr. 35.) He could not recall discussing the case with Dr. Barnard or whether Barnard's testimony would have been helpful during penalty and further testified:

> Q. Certainly in Dr. Barnard's report he did not detail any specific nonstatutory mitigators.
>
> A. No, sir.
>
> Q. Although, the report itself does contain much of the self-reporting from the defendant as to his history.
>
> A. But as I indicated to Mr. Mills, I really was not concerned with statutory mitigators. I was concerned with getting in front of the jury what I could conceivably get in front of the jury to give them a reason not to put this man in the electric chair.

(PC-Tr. 36.)

Miller reiterated his belief that the history of abuse was "the only credible way in which to keep this man out of the electric chair" and that appellant didn't give him names, yet, when led by the State, reversed his position and states that a mitigation case based on child abuse and alcoholism "did not make any sense." (PC-Tr. 39-41.)

On redirect, Miller testified that he "absolutely" would have presented evidence of brain damage, evidence of a long history of drug abuse, evidence of poverty and "anything that I could have used." (PC-Tr. 45.) However, when confronted with a laundry list of mitigating circumstances applicable to Mr. Cherry (poverty as child, alcoholic and violent parents, fetal alcohol

syndrome, child torture by father, mental illness, public humiliation of child, drug use on day of offense, alcohol use on day of offense, history of huffing gasoline, hunger and neglect as a child, witness to extreme violence and his father killing a man as a child, mental retardation, depression, institutionalization), Miller retreated from his previous testimony and testified he wouldn't have used "all of it." (PC-Tr. 46, 47.)

During re-cross, Miller stated he'd want to know all about the mitigation and the witnesses supporting it before he decided to use it or not. (PC-Tr. 49.)

Dr. Barry W. Crown was accepted, without objection or voir dire by the State, as an expert in clinical and forensic psychology and testified that he "administered to Mr. Cherry a battery of neuropsychological tests specifically to assess the relationship between the brain function and behavior." These tests included "problem solving, concentration, attention, memory, verbal and visual processing and reasoning and judgment, representing the primary areas in the cortex, which is the main part of the brain, and also the subcortical areas in terms of emotional responsiveness." (PC-Tr. 57.) The results revealed that Mr. Cherry is "brain damaged", "has impairments and deficits in multiple functional areas", "functions at a low level", and "that he is significantly impaired." (PC-Tr. 58.) His impairments involve: "his ability to engage in problem solving skills", "his ability to recognize the long term consequences of

his immediate behavior", and "when it comes to paying attention to something when there are distractions in the environment or in the area". Id. Mr. Cherry is more distractable than 97 out of 100 people. He is not an anti-social personality, because that requires both ruling out organic factors and a positive history of such behavior in adolescence (such as fire settings and animal abuse). (PC-Tr. 59.)

Mr. Cherry's organic brain damage is the backdrop for understanding why his behavior appears impulsive or spontaneous and it also rules out a finding of anti-social personality. (PC-Tr. 60.) Full scale IQ of 78 resulted from administration of the Wechsler Adult Intelligence Scale, Revised, but the "scatter of the sub scales", which are "[m]ore important to neuropsychologists", were not homogenous and the testing translated into Mr. Cherry possessing an "age equivalency for abstract problem solving...at [the] level of 8 years 9 months." (PC-Tr. 60, 61.) Low IQ is an additional indicator that precludes a diagnosis of anti-social personality. Further, the background materials led Dr. Crown to find a long history of drug and alcohol abuse going back to childhood, when appellant would huff gasoline ("particularly neurotoxic and particularly at a young age"). He also drank moonshine. He was exposed to agricultural chemicals and lead during childhood. A history of significant physical and emotional abuse is revealed and the long history of brain damage suggests prenatal problems. (PC-Tr. 61.)

Mr. Cherry's mother was a chronic alcoholic and drank during her pregnancy with Roger Cherry. Dr. Crown's opinion, "based on test scores and observations of Mr. Cherry", is that he "does suffer from fetal alcohol syndrome." (PC-Tr. 62.) Additionally, use of cocaine and alcohol, as suggested by appellant's history, worsens the impairments of a brain damaged person. Cocaine in a brain damaged person like Roger Cherry produces "sensory limbrick hyper connection syndrome", which effects impulsivity, the ability to control emotional responses, and the "frontal lobe where our primary reasoning and judgment capacities are." Id.

Adding a stressful situation to a substance abusing, brain damaged person "will create a response that lacks intent without understanding of the consequences" and a "random experience." (PC-Tr. 63.) Dr. Crown found that Mr. Cherry suffered from an extreme mental or emotional disturbance at the time of the offense based upon borderline mental retardation or actual mental retardation (if the scatter is taken into account), organic brain damage, and substance abuse. (PC-Tr. 63, 64.) Dr. Crown also found that the statutory mitigating factor of extreme duress or substantial domination of another based upon his testing, findings as detailed above, and his understanding that other people possessing superior abilities were involved in the crimes. (PC-Tr. 64.) Roger Cherry's ability to appreciate the criminality of his conduct and conform his conduct to the requirements of the law was substantially impaired based on

"frontal lobe syndrome...and further aggravation of substance use and abuse." (PC-Tr. 64, 65.)

Dr. Crown also offered opinions, based upon his expertise, the test results, and review of background materials, that the following nonstatutory mitigating circumstances applied to Roger Cherry: (a) fetal alcohol syndrome; (b) brain damage; (c) "long history of alcohol and substance abuse, including huffing"; (d) "has a deprived childhood." (PC-Tr. 65.); (e) "victim of significant child abuse on the high end of the scale"; and (f) exposure to environmental toxins. (PC-Tr. 69.)

Additionally, given that appellant functions on a third grade level, "Mr. Cherry lacks the capacity to understand the long term consequences of his immediate behavior" and "[t]hat is as close as a neuropsychologist can get and it really is equivalent of having the inability to form intent, so it would be [Dr. Crown's] opinion that [Mr. Cherry] is unable to" form the specific intent to torture or cause great pain to a victim. (PC-Tr. 71, 72.) In reaching his conclusions, Dr. Crown relied upon his examination and testing and collateral information (which is more valuable than the subject's self-reporting). He reviewed Dr. Barnard's report, which appeared to contain no testing, and while the report suggested problems, it did not go beyond a superficial level. (PC-Tr. 73.)

During cross-examination, Dr. Crown testified that he spent the major portion of his 4 1/2 hours with appellant "testing him". Tests were administered personally and in an interactive

manner. (PC-Tr. 74.) Dr. Crown specified the tests he performed: Wechsler Intelligence Scale, Shipley Institute of Living Scale, Trail Making Test, Parts A & B, GFW Auditory Selective Attention Test, Rorschach Complex Figure Test, Reitan-Indiana Aphasia Screening Test, Kaufman Neuropsychological Assessment Procedure, Simple Digit Modalities Test, Finger Oscillation Test, word fluency tests, Wide Range Achievement Test Three, Gloria Memory Scale, Draw a Person Test, and Category Test. (PC-Tr. 75.) MMPI was not used due to requiring a 6th grade reading level and word recognition level. Mr. Cherry tested at a 4th grade reading and word recognition level. Id. Dr. Crown determined that a CAT scan or MRI were unsuitable tests for corroborating brain damage, but did suggest a functional brain imaging study. To his knowledge, this test was not performed. (PC-Tr. 76, 77.)

Dr. Crown found it unnecessary to discuss the case with Dr. Barnard since he had his report, no testing was referenced in the report, and the examination was superficial. (PC-Tr. 77, 78.) Dr. Crown disagrees with the conclusions reached by Dr. Barnard regarding appellant's intelligence level and the magnitude of the mental/neurological deficits, but understands how the superficial nature of a clinical interview would miss the deficits he found. (PC-Tr. 78, 79.)

When the State sought to impeach Dr. Crown with purported evidence of planning regarding the criminal episode, Dr. Crown responded that "you can ascribe planning to it, but I believe it's a random act. It's no different than my dog setting out on

a mission." (PC-Tr. 81.) Dr. Crown maintained his position that the low IQ and brain damage mitigate against a finding of anti-social personality and, despite the prosecutor's attempt to "testify" that most mental health professionals use the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) to make diagnoses, Dr. Crown stated that his use of the International Classification of Disease System, Number Nine (ICDS-9), was appropriate and that Medicare and major insurance companies did not utilize DSM-IV and most psychologists and psychiatrists utilized it only as descriptive information. (PC-Tr. 86.)

Referring to anti-social personality as a "gross diagnosis label" and "a catch-all description for people who tend to assume things that aren't necessarily true", Dr. Crown reiterated that low IQ and the history of substance abuse, even in the absence of brain damage, would preclude an anti-social personality diagnosis in Mr. Cherry's case and to conclude otherwise would be "like saying someone can't read and then recognizing they are blind." (PC-Tr. 87.) In explaining his examination, testing and conclusions, Dr. Crown stated that "[t]he full body of neuropsychological literature indicates that a person develops neuropsychological consequences as a result of their history, something has happened to them that creates those differences" and, as such, he can reliably extrapolate back to 1986. (PC-Tr. 91.)

Dr. Crown testified hypothetically that if Mr. Cherry's trial attorney and Dr. Barnard believed he was of average intelligence and competent to stand trial, those opinions would in no way dilute his opinion that appellant is incapable of long term planning because he did not "think the lawyers are in the position to make the assumption and the research literature shows that psychiatrist (sic) and clinical psychologists, based on clinical review, have misdiagnosed retardation and brain damage." (PC-Tr. 104.)

Dr. Crown again testified that Mr. Cherry is borderline retarded and stated he utilized "the leading work on mental retardation the standards of the American Association of Mental Deficiency--" (AAMD) before he was cut off by the prosecutor. (PC-Tr. 109.) Dr. Crown stated that neuropsychologists do not recognize DSM-IV as authoritative for diagnosing mental retardation and that he utilized the authoritative text in reaching his diagnosis. (PC-Tr. 111.) Dr. Crown stated that the fact that appellant was considered retarded in school and placed in classes for the mentally retarded and in special education was indicative of retardation prior to age eighteen (18). (PC-Tr. 112.)

Further, Dr. Crown specified that category 310.2[4] of the ICD-9 applied to Mr. Cherry's brain damage: frontal lobe syndrome, which is "[e]videnced by damage in function to the

[4]This is believed to be a transcript error, as the category described by Dr. Crown is, in fact, 310.1. Alternatively, the witness may have made a minor misstatement here.

frontal lobe portion of the brain exemplified by impulsivity, concentration, attention, reasoning, judgment." (PC-Tr. 113.) When asked if DSM-IV had an identical classification, Dr. Crown responded in the negative and stated that "DSM4 is negligent and does not provide diagnosis categories for organic disorders. It subsumes them in a broad category for psychological conditions not related to the condition." Id. According to ICD-9, experiential background of child abuse is a factor in ruling out anti-social personality and Dr. Crown found that in this case. (PC-Tr. 113, 114.)

Dr. Crown specified the following diagnostic criteria for concluding appellant suffers from Fetal Alcohol Syndrome: "borderline IQ, difficulty in information processing, history of mother's alcohol use during pregnancy, her seizure disorder." (PC-Tr. 115.) He learned that Mr. Cherry's mother "drank on a daily and regular basis, primarily moonshine" from affidavits contained in Mr. Cherry's background materials. Id. Dr. Crown explained that Fetal Alcohol Syndrome is not a mental disorder, but a medical disorder which cannot be overcome and appellant continues to suffer from its effects. Further, mental retardation is also a condition that cannot be overcome with training or education. (PC-Tr. 115, 116.)

In ruling out exposure to Death Row as a contributing factor to appellant's deficits, Dr. Crown stated that since Death Row is "structured with a regular schedule, his nutritional level has increased on a regular basis and in addition he is being kept

free of substances" and, therefore, prison has been "therapeutic" for Mr. Cherry. (PC-Tr. 117.) Therefore, Dr. Crown suspected that Mr. Cherry was in a worse state when seen by Dr. Barnard in 1986. Id.

Regarding exposure to neuro-toxic substances, these included huffing gasoline, exposure to agricultural chemicals while growing up in Mississippi, and exposure to lead. Background materials and affidavits assisted in his analysis and conclusions. (PC-Tr. 117, 118.)

On re-direct, Dr. Crown reaffirmed that the tests he gave Mr. Cherry are generally relied upon by neuropsychologists and neurosurgeons. (PC-Tr. 123.) The physical tests referred to by the prosecution (such as CAT scan, MRI, fatty tissue) were unnecessary because "[n]europsychological assessment as to brain damage is actually more sensitive than all those tests that may appear to be very fancy." (PC-Tr. 124.) In support of his assertion, Dr. Crown stated that studies revealed that EEG testing only identifies an existing problem 30% of the time; MRI and CAT scans do so 70% of the time; but neuropsychological testing identifies existing problems 90% of the time. (PC-Tr. 124, 125.)

Dr. Crown was asked what borderline mental retardation meant and responded: "Borderline retardation is a diagnostic category for those that fall below one standard deviation of the mean on a standard test of intelligence, but do not fall to the level set by the American Association of Mental Deficiency, which is an IQ

of 74." (PC-Tr. 125.) After repeating that Mr. Cherry is not technically "retarded", but "borderline retarded", Dr. Crown clarified that every absolute IQ score is "plus or minus 15 points." (PC-Tr. 129, 139.) Despite the State's effort to reduce the variable to 5 points utilizing DSM-IV, Dr. Crown reasserted that the statistical variation of 15 points is "reflected in every manual of every standardized test of intelligence that's available except for the International Performance Scale, it has a standard deviation of 16." (PC-Tr. 141.)

George W. Barnard, the psychiatrist who originally performed a "mental status exam only" on Mr. Cherry, testified for the limited purposes of establishing that: (a) his exam was basically limited to competency, sanity, and the issue of whether Mr. Cherry met the criteria for involuntary hospitalization; (b) he has no training in neurology or neuropsychological testing and he did not perform "formal psychological testing" on Mr. Cherry; (c) he was not asked to perform a penalty phase investigation; (d) he requested records from trial counsel and received only pretrial discovery materials; and (e) he did not have any school records or affidavits from family and friends at the time of trial. (PC-Tr. 317-319.)

Despite the limited nature of his testimony, the State was allowed to extensively cross-examine Dr. Barnard and the following testimony resulted: (a) he reviewed supplemental materials contained in four (4) volumes received in 1992 (apparently from VLRC and/or prior volunteer counsel, since they

did not withdraw until 1995) (PC-Tr. 319, 320.); (b) that he believed, based upon review of the materials and his prior exam, that Mr. Cherry was of "borderline mental intelligence", had a history of substance abuse, including alcohol and crack, and "would be a person who would be classified as an anti-social personality disability" (PC-Tr. 321.); (c) that his opinion was that Mr. Cherry, while not qualifying for statutory mitigation, may qualify for nonstatutory mitigation in that he had a "very, very strong history" of child abuse which is a "strong indication for mitigating circumstances" (PC-Tr. 322.); (d) that Mr. Cherry was "very" candid in providing him with information and there was no communication problem (PC-Tr. 322, 323.); (e) that he knew about appellant's father beating him and using a chain on one occasion and about the mother being alcoholic (PC-Tr. 323-325.); (f) that he determined Mr. Cherry had a history of alcohol and crack cocaine substance abuse, (PC-Tr. 326), and, although Mr. Cherry denied use on the day of the offenses, affidavits he reviewed tended to indicate that Mr. Cherry was, in fact, under the influence at the time (PC-Tr. 326, 327.); (g) that, according to testing later performed, Mr. Cherry has a full scale IQ of 72 and "was, at a later date than when I saw him, found to be a person of lower intelligence than I saw clinically" (PC-Tr. 327, 328.); (h) that when asked if Mr. Cherry was retarded using the DSM-IV, Dr. Barnard responded "not according to that" (PC-Tr. 328.); and (i) that affidavits he reviewed confirmed and elaborated on factors constituting nonstatutory mitigation and

"maybe made it more severe", as well as relating that appellant was exposed, as a child, to "several, different, very violent incidents", including a person being killed in front of him. (PC-Tr. 330, 331.)

On re-direct, Dr. Barnard specified the following nonstatutory mitigating factors as applying in Mr. Cherry's case: (a) "severe child abuse"; (b) "limited intelligence, in my opinion probably borderline intelligence"; (c) "history of substance abuse, both alcohol and crack" (d) "he probably was under the influence of some of these substances during the time prior to the alleged crime"; and (e) according to the affidavits reviewed, he witnessed extreme violence as a youth. (PC-Tr. 341.)

Following his testimony, the State was allowed to introduce, during appellant's case in chief, the materials relied upon by Dr. Barnard. (PC-Tr. 343-351.)[5] It is believed that these materials constitute the four (4) volume background materials prepared by VLRC prior to their withdrawal as counsel and similar, but not identical, to the four (4) volume background materials utilized by Mr. Cherry's lawyers during the evidentiary hearing. It is clear from Dr. Barnard's comments that he <u>never</u> saw or reviewed a number of affidavits, (PC-Tr. 346, 347), and a substantial number of records, including Dozier and pesticide data. <u>Id.</u>

[5]The trial court pointed out to the prosecutor that he was moving virtually the same materials into evidence as those to which he objected during Dr. Crown's testimony. (PC-Tr. 344).

Lenox Williams, a retired psychologist who worked at the Dozier School for Boys in Marianna, Florida, between 1960 and 1986, testified that he was employed in the guidance clinic and he recalled Roger Cherry from when he was "moved to the colored department as director of training." (PC-Tr. 143, 144.) The "colored" boys were segregated from the "white" boys and the witness recalled Roger Cherry as being both a management problem and "he was a little slow." (PC-Tr. 144, 145.) The facilities for the children were "separate and most unequal," (PC-Tr. 145), and the housing conditions were generally worse for the black children. (PC-Tr. 146,147.) The "colored" boys had no psychological services, no testing, no IQ tests, no special education, no social workers, and insufficient textbooks for learning. (PC-Tr. 148-150.) Further, there were no guidelines for why the boys ended up at Dozier; it wasn't just for crimes, but for "just about anything" since there were no other programs in the State. (PC-Tr. 150.) Corporal punishment was used in 1962 at Dozier, (PC-Tr. 151), and the "colored" boys did farm work while the "white" boys had vocational programs. (PC-Tr. 154.)

Sylvester Hill met appellant in the 60's and grew up with him in DeLand, Florida. (PC-Tr. 161.) Mr. Hill recalled Mr. Cherry's father "kind of beat him up all the time" and "one time he left and he run away from him, and his father [Tommy Lee Cherry] went and got him and put a chain around his neck and drug him home like he was a dog" and all the while was "[k]icking and beating him." (PC-Tr. 162.) Roger's mother, Ceola Cherry, "drunk

a lot" and his father would beat her, too. Id. The father "didn't chastise until he started drinking and then he would chastise them"; unfortunately, the father drank moonshine and liquor "every day." (PC-Tr. 163.) Mr. Hill also related the following:

> Q. Did you every (sic) see the end result of any of the punishment that Tommy Lee issued to Roger?
>
> A. Yes, sir.
>
> Q. And what would you see?
>
> A. Well, he take a gasoline rope out to tie him up. He put it on his wrists and they stay bloody all the time where he had tied him up.
>
> Q. And what would he do when he was tied up?
>
> A. Tie him up and beat him.
>
> *****
>
> Q. Would Mr. Cherry beat Roger in public?
>
> A. Yes.
>
> Q. And what would he use?
>
> A. A water hose, a shovel handle, anything, it didn't matter.
>
> Q. Where would he hit Roger?
>
> A. Wherever he hit him at, his head, anywhere he hit him.
>
> Q. How hard would you say?
>
> A. Like he was trying to kill him.

(PC-Tr. 163, 164.)(emphasis supplied)

Further, Mr. Hill once saw Roger hit in the face with a hammer so hard "it knocked his teeth out." (PC-Tr. 165.) Mr.

Cherry wore clothes given to him by the witness's mother (his father did not provide for Roger) and Roger referred to her as his mother, Roger was called "Chop Chop" and "Monkey Man", and was ridiculed by other children because of the way his daddy beat him all the time. (PC-Tr. 165, 166.) Police would rarely respond to the witness's mother's calls when Tommy Lee would come after Roger and beat him. (PC-Tr. 166.)

Roger Cherry was often dared to do things and he would, like jump off the roof into a kiddie pool and mess up his neck and land on his head. He also slept under the house a lot to avoid home. (PC-Tr. 167.) Roger rarely went to school; his father kept him out to work and do chores. The witness saw Roger crying many times because of the mistreatment. (PC-Tr. 168.) Roger Cherry was not violent. The two of them huffed gasoline by breathing the vapors off a boat engine gas tank. While the witness tried it once, Roger just kept on doing it and would come over to the house all spaced out and weird. (PC-Tr. 169, 170.) Roger was not fed at his house, so Mr. Hill's mother would feed him. Mr. Hill was emphatic that Roger Cherry "was beaten"; "[h]e was not punished." (PC-Tr. 170.) Mr. Hill had heard that Roger later got into using crack cocaine, marijuana, and alcohol. Roger Cherry seemed slow to the witness. (PC-Tr. 171.)

During cross-examination the witness acknowledged his own problems with the law and drugs (PC-Tr. 172, 173.); stated that he never saw appellant's father beat Leo (a small, younger brother of Roger Cherry) (PC-Tr. 177.); never saw Roger being

disrespectful to his father (PC-Tr. 178.); that Roger's mother didn't cook when she was drunk (PC-Tr. 183.); and that others had seen multiple incidents with the chain, although he witnessed it once. (PC-Tr. 187.) On re-direct the witness indicated he was available and would have testified, if asked, at Cherry's trial in 1986. (PC-Tr. 190.)

Levester Hill corroborated Sylvester's testimony: he met Roger in 1960 when they were children; Tommy Lee was "nasty" and mean to his kids (PC-Tr. 194.); Roger's father would drag him with a chain through the streets and beat him with objects; Roger was beaten 3 to 5 times a week; Roger would be tied to a sofa or a tree or whatever and be beaten while tied; he'd be beaten "with anything [Tommy Lee] could get in his hands" (PC-Tr. 195.); Roger's father hit him in the head and on the back many times; Roger showed the witness how to huff gasoline with the old boat motor gas tank; he watched Roger huff gasoline in the backyard "all the time" (PC-Tr. 196.); Roger would run in circles and laugh after huffing gasoline; around 1978 or 1979, the witness used crack cocaine with Roger; Ceola Cherry was a "drinking lady" and "[s]he stayed drunk all the time" (PC-Tr. 197.); he saw her stumbling home drunk every day; Roger was okay except when his father beat him; he'd sleep under the house next door and then get dragged home and beaten; and this would happen 2 or 3 times a week. (PC-Tr. 198.)

Additionally, Mr. Hill confirmed the kids called Roger "Monkey Man" and that he seemed a little stupid, slow, and

"seemed to be a lot off balance". Roger was picked on because he got clothes from neighbors, was slow, and the kids said he "acted like a monkey." (PC-Tr. 199.) The witness knows James Terry ("Woody"), Roger was friends with him, as was the witness, and Terry laughed about Roger being charged with murder. Counsel was prohibited from exploring this further. (PC-Tr. 200-203.) No one contacted him in 1986 or 1987 about testifying for Mr. Cherry, but he would have testified if asked. (PC-Tr. 203.) Mr. Hill confirmed that the previous witness, Sylvester, is his brother.

The following came out on cross-examination: he regularly observed gas huffing; over a 9 year period, Roger was constantly being abused by his father (he never saw the mother abuse Roger); Roger was sent to Dozier for running away from home and not for criminal activity; Leo wasn't beaten because he was "their kid" and they liked him better; the beatings did more harm than anything and sure didn't help keep Roger out of trouble; Tommy Lee worked and made money, but the family never had any food (PC-Tr. 204-214.); James Terry ("Woody") told the witness he was present at the time of the murders and never said Roger committed the murders; and Terry also gave him information about shoes, jalousie windows, and a car that his niece was driving. (PC-Tr. 217-220.)(emphasis supplied).

Ann Marie Luke also grew up with appellant in DeLand and first met him when she was fifteen (15) years old. (PC-Tr. 236, 237.) She observed Ceola Cherry drinking "[p]retty often", Tommy "would beat [appellant], you could hear him hollering", and this

occurred "[p]retty often." (PC-Tr. 238.) Roger didn't do anything bad to prompt the beatings, as far as she knew. (PC-Tr. 238, 239.) She had heard her brothers talking about when Tommy "would soak a rope in kerosene and hang him on the porch and whoop him." (PC-Tr. 239.) She observed appellant's bloody wrists after this happened. Id. Mr. Cherry "would steal food and stuff and my mom would give him food." (PC-Tr. 239, 240.) Leo was a "mama's baby" and she never saw him get too many "whoopings from his daddy". Roger would "come over and hide in the house" when "his daddy be behind him." (PC-Tr. 240.)

The witness is the sister of the previous two witnesses and "[t]he Cherry family I knew, but his daddy I stayed away from." (PC-Tr. 241, 242.) Roger's mom seemed nice and cared for him as best she could. (PC-Tr. 244.) Her brothers were "chastised" with a switch and still got in trouble. (PC-Tr. 245.)[6] She lived in DeLand in 1987 and would have testified for Roger Cherry at trial. Her brothers were never punished like Roger; she had never seen anyone punished the way he was. (PC-Tr. 246, 247.)

Legertha Henry also knew appellant as a child; she was older, about fifteen (15) or sixteen (16) years old; and she knew

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[6]After the witness finished her testimony, the following exchange took place:

> THE COURT: Mr. Daly, I don't know how big the switch taken to the Hill boys was but I had a few switches taken to me in my day.
>
> MR. DALY: Well, whatever it was, it wasn't big enough.

(PC-Tr. 248).

Tommy Lee for his "alcoholic mean behavior." (PC-Tr. 265.) Ceola told the witness about the beatings and "mean things" Tommy Lee would do to Roger. (PC-Tr. 266.) Roger's parents both drank as often as they could get it, Ceola was "kind of Down's Syndrome, but she could work, you know, do housework." (PC-Tr. 267.) Roger "was a slow learner, and just, you know, like to himself all the time" and was "so quiet and withdrawn". Id. Roger was not a leader, but a follower. (PC-Tr. 269.) She lived five (5) blocks away from the Cherrys, but she saw the family because Tommy Lee worked for her father. (PC-Tr. 269, 270.)

The witness is a retired social worker and was "trained to work with disadvantaged people of low income, handicapped, mentally retarded and homes that were not up to what they should be." (PC-Tr. 271, 272.) Although not qualified as an expert despite her training and experience, (PC-Tr. 272-274), the witness opined that in comparison to other children Roger Cherry was "stupid" and slower than other children. (PC-Tr. 274.) The witness made home visits to the Cherry home once or twice a month as part of her job (PC-Tr. 275, 276.); appellant's father used a lot of his money for liquor (PC-Tr. 279.), but the Cherry family was considered indigent for social services (PC-Tr. 281.); and had she been contacted at the time of appellant's trial, which she was not, she would have testified. (PC-Tr. 280.)

Pauline Powell knew Roger Cherry from elementary school, knew him to be a follower, knew that he was treated mean in school, and that he didn't get along with other kids. (PC-Tr.

352.) He stank and his clothes were dirty. He used to jump off the school roof to get attention and would sometimes land on his head. She would have testified if called at the time of trial. (PC-Tr. 353, 354.) Kids picked at Roger and he would retaliate, getting into fights, but he never started them. (PC-Tr. 355, 356.) Roger was referred to as "Monkey Man" by the kids. (PC-Tr. 357.)

John Hill grew up with appellant and lived close by. Roger was a "very rejected child" who was never accepted by other kids and he had a "brutal" father who would put chains around his neck and beat him like a dog, who would take ropes and soak them in kerosene so they would cut Roger when he pulled him through the dirt, and who would beat his son with sticks, water hoses, or anything available. He personally witnessed these incidents. (PC-Tr. 358.) Roger's father routinely came home drunk on Friday nights and would beat Roger and Ceola, but leave Leo alone. Roger was called "Monkey Man". His mother was an alcoholic and the witness had never seen her sober. Ceola talked to his mother, but she only came out of the house when Tommy Lee was gone to work. (PC-Tr. 360.) Roger was ridiculed by others, partly because he never had food and would go through dumpsters at school looking for food. The witness's mother would feed him sometimes when he'd come over while his father was gone. Regarding Tommy Lee Cherry, the witness said: "He's dead now and I don't think anybody's sad about that." (PC-Tr. 361.)

Particularly horrible was the incident where Roger was hung with a rope over a rail, up on his tip toes, where if he moved down off his toes the rope would choke him. The witness regularly observed welts and other injuries on Mr. Cherry, head to toe, meaning on the side of his face, on his back, legs, neck, chest, "all over." (PC-Tr. 362.) Appellant would go into the woods and cry alone. (PC-Tr. 363.) He wanted to run away from home to get away from his father. He was not an average student who could comprehend things and was in exceptional education classes for kids needing help. When asked if Roger seemed slow, the witness responded: "Oh, yes, he was." (PC-Tr. 364.) The witness knows Roger was hit in the mouth with a hammer and lost teeth. (PC-Tr. 365.)

After acknowledging his own problems with the law, (PC-Tr. 365, 366), the witness answered the State's questions with revealing statements such as: "I saw him with a dog chain around his neck more than once" (PC-Tr. 370.); "I knew Roger's father was always drunk" (PC-Tr. 372.); and "My parents don't believe in putting welts on you." (PC-Tr. 373.) He also explained that Frank Williamson hit Roger in the mouth with a hammer because he saw him eating out of the trash, (PC-Tr. 374), and that the other kids "had this in depth knowledge that his mother and father were not as good as their mother and father so that made him even less." (PC-Tr. 376.) He was available and would have testified for appellant if asked back at the time of trial. (PC-Tr. 377.)

Hettie Mabry Cherry, who is crippled, met appellant in the early 70's and became his wife, in part because he was a "good man" who made her stop feeling ashamed about her disability. He was always helpful, but distracted. (PC-Tr. 379, 380.) Roger confided in her about his childhood; she recalls him saying he thought his father tried to sexually assault him and that his mother drank a lot. Roger was accepted in her family; they had never met someone "nobody didn't care for" like Roger. (PC-Tr. 382, 383.) Roger wasn't good at fulfilling even simple tasks: "I can send him to the store to get five things and he's not going to come back with those five things." (PC-Tr. 384.) "He never had his head up." (PC-Tr. 385.) She left him over jealousy of another woman and he threatened to kill himself and then later tried by jumping off a two story building and cutting himself with razor blades. Id. She would have testified. (PC-Tr. 395.) She stayed with appellant for years. (PC-Tr. 398.) She was 51 years old at the time of the hearing and had been convicted of several felonies, apparently for drug violations. (PC-Tr. 401.)

Reatha Mae Henry's daughter used to be appellant's girlfriend and she knew his mother to suffer from epilepsy and have seizures. She died of tuberculosis. (PC-Tr. 408.) She knew little else, other than she often saw Ceola with bruises and injuries. (PC-Tr. 409.) She would have testified. (PC-Tr. 411.)

Sandra Henry knew appellant, as he dated a cousin of hers for two (2) years, and she heard his mom was alcoholic. (PC-Tr. 412.) She had also heard that Roger's father was brutal to him

and also an alcoholic. Tommy Lee worked for her father and she knew Roger in 1985 and 1986. (PC-Tr. 413.) She mostly saw Roger with his head down; he never harmed her; she heard from a girlfriend that he did crack and drank. (PC-Tr. 414.) Roger would call her from jail while awaiting trial "really upset and crying". The witness would have testified. (PC-Tr. 415.)

The court thereafter admitted the depositions of Daisy Mae Gandy, Gertie Fludd, and Inez (sic) Gandy based on their unavailability. (PC-Tr. 418-432.) These depositions were not read into the record, but the trial court agreed to read and consider them along with the other evidence.

Admitted as Defendant's Exhibit 3 was the deposition of Daisy Mae Gandy. (Exh. 3, Depo. at 1.) Ms. Gandy is appellant's aunt, her sister was Ceola Cherry, and she lives in Waynesboro, Mississippi. They grew up as sharecroppers. (Exh. 3, Depo. at 3.) She, as with other witnesses, confirmed that Roger had a "rough" home life, with Tommy Lee, termed a "mean man" who "just done violent things" to Roger, Ceola, and the witness, beating Roger "all the time" and "with anything." (Exh. 3, Depo. at 4.) Tommy Lee used a "gin belt" (a leather belt that came off a cotton gin, had wire in it, and was much heavier than a regular belt), switches, belts, sticks, and pieces of wood. She saw him beating Roger's head two (2) or three (3) times. (Exh. 3, depo. at 5.) Tommy Lee beat his wife and shot both her and a man in front of Roger. These events "seemed to mess with [Roger's] mind." (Exh. 3, Depo. at 6.) Roger's family lived in poor conditions, he was

slow and couldn't understand things too good, he worked in the fields picking cotton or whatever was being picked, and, at times, he would vomit after the planes sprayed the crops. (Exh. 3, Depo. at 6, 7.) Ceola had "some kind of spells" and would be violent in the midst of them; she stabbed the witness once and tried to stab Roger, but she couldn't catch him. Ceola tried to run away from her husband due to the beatings, but he would catch her. (Exh. 3, Depo. at 8.) Tommy Lee beat, shot, and cut his wife. He drank a lot and Ceola did, too, and "[h]e's to blame for that, mostly." (Exh. 3, Depo. at 9.) Tommy Lee Cherry was "the meanest man" she ever met; she "ain't never met nobody like that." (Exh. 3, Depo. at 10.) The witness personally observed the beatings a "heap of times" and sometimes the beatings would be because Roger did something wrong, but other times "he would beat him when he got drunk" and "sometimes he wouldn't be done nothing." (Exh. 3, Depo. at 21, 22.) Each time she saw the beatings, Roger would be hit over the head with some object. (Exh. 3, Depo. at 23.) Tommy Lee was tall and weighed over 250 pounds. (Exh. 3, Depo. at 24, 25.) She also seemed to indicate that Roger was traumatized by seeing a man he knew ("Shorty") have his throat cut and die. (Exh. 3, Depo. at 28.) Tommy Lee would "beat the blood out of [Roger] sometimes" and this happened whenever Tommy Lee "came home from work and got drunk." (Exh. 3, Depo. at 29.) The witness heard about appellant's arrest, but no one talked to her back then. If they had, she would have told them the same things. (Exh. 3, Depo. at 30.)

Admitted as Defendant's Exhibit 4 was the deposition of Bertie Fludd. (Exh. 4, Depo. at 1.) She was around 70 years old at the time of the deposition and had been a next door neighbor of the Cherry family in Florida. Roger's home life was "[v]ery terrible. He had a drinking father and a drinking mother; real bad." (Exh. 4, Depo. at 4.) Tommy Lee beat Ceola and Roger "just like dogs." (Exh. 4, Depo. at 4, 5.) Roger was beaten with a chain or rope ("soaked this rope in some kind of oil") and she "saw them many a time", in fact "[a]ll the week", because "as an average, a violent person go the weekend, but this went on all the week. Every time [Tommy Lee] come home from work, well, somebody got a whipping." (Exh. 4, Depo. at 5.) Ceola was beaten with a rope across her shoulders and her "mouth would look just like a piece of raw meat"; even so, this witness "never even seen him beat Leo." Id. Roger would be beaten "[a]ll over and I have seen him kick him with his feet. He used to wear those long boots and he just kicked him down and just acted like he was an animal." (Exh. 4, Depo. at 6.) When asked if Roger was beaten about the head, the witness responded affirmatively and opined: "I don't see how he got good sense", referring to Roger. She felt the same about Ceola. Tommy Lee used to buy moonshine from a house on a back street and then "[y]ou'd hear lamentation in the house and Roger running around, running around the house or she was running out the door and you knew something was going on." Id. Ceola drank as much as her husband and would go buy

moonshine just as soon as her husband left for work. She smelled the liquor on both of them. (Exh.4, Depo. at 7.)

The Cherrys were a "very low income family", they lived in very poor conditions, Roger acted silly and hung his head, stole food, and had very ragged clothes. (Exh. 4, Depo. at 8, 9.) She felt that Roger's problem "had to be something up here" (indicating her head apparently), because he acted strange and would stand off and hold his head down, not playing with the other kids. (Exh. 4, Depo. at 9, 10.) She knew the Cherrys for "over 20 years, I know." (Exh. 4, Depo. at 11.) Roger frequently ran to her house in a panic, trying to get away from his father. (Exh. 4, Depo. at 16.) She acknowledged that Roger got in more trouble than his brother Leo, but neither she nor anyone in the neighborhood could reason out why the father was so brutal to Roger and she didn't think it was because of behavior. (Exh. 4, Depo. at 19, 20.) In response to the prosecutor's question about whether the witness thought the poor living conditions caused appellant to kill, the witness responded: "I don't think the water had nothing to do with it. I think the environment -- what he was living in and the treatment of his father, that's what I'm referring to." (Exh. 4, Depo. at 26.) She was aware of appellant's arrest, but no one contacted her; she would have testified to the same things then. (Exh. 4, Depo. at 36, 37.)

Admitted as Defendant's Exhibit 5 was the deposition of Inell Gandy. (Exh. 5, Depo. at 1.) Ms. Gandy is Mr. Cherry's first cousin and they were raised together [in Mississippi];

Roger was sweet as a child there. (Exh. 5, Depo. at 3.) Roger's daddy worked, but he'd come home and beat on Roger for no reason. She'd leave because she didn't want to watch. (Exh. 5, Depo. at 4.) Tommy Lee wasn't violent to others outside the family, but he "acted like he didn't like [Roger]" and he beat him with "a switch or with a gin belt or whatever he could get to." (Exh. 5, depo. at 5.) Tommy Lee beat Ceola in front of everyone and she would have spells, "if you get in her way she would hurt you", but then it would "wear off, and she didn't remember any of it." (Exh. 5, Depo. at 6, 7.) In reaction to the beatings, Roger used to say when he got older he was going to kill his father. (Exh. 5, Depo. at 7.) Her memories are from the 1960's, before the Cherrys left Mississippi and moved to Florida. (Exh. 5, Depo. at 19.) Daisy Mae Gandy is her mother. (Exh. 5, Depo. at 21.) The witness would have shared the same information in 1986, if contacted. (Exh. 5, Depo. at 24.)

Bernice Shipman met Roger in DeLand in 1967 and she witnessed Roger's father punish him with whips and chains and make him go around like a dog. Tommy Lee hit Roger anywhere he could and with anything he could, including broom handles and boards. (PC-Tr. 433, 434.) She saw Roger hit in the head and punished "to the max" with chains several times. Roger would run away from home and do what was necessary to eat and survive on the street. (PC-Tr. 435.) Roger's mom would get beat and have epileptic seizures when Tommy Lee beat Roger and she tried to defend him; nothing phased Tommy Lee and he kept beating. (PC-Tr.

436.) Roger loved his mother and acted nervous when she was beat in front of him, which happened a lot. The witness was available and would have testified at time of trial. (PC-Tr. 437.) Ceola and Roger were beaten outside where everyone could see. (PC-Tr. 438, 439.)

Joseph Fludd lived next door to the Cherry family and knew all of them. Roger's father beat him and his mother. He beat Roger in "[s]everal ways", including with a "regular leather whip that you beat horses with" and "kick at him." (PC-Tr. 463.) He had also seen Tommy Lee use his fist and strike Roger across his back and hit his head. He noticed Ceola's drinking increase over time. Roger "was pretty much a loner" and "kind of shy." (PC-Tr. 464.) The witness was available and would have testified at Mr. Cherry's penalty proceeding. Id. The witness knew Ceola bought liquor at a "shine house", where "everybody went over there and when they come out they was ripped." (PC-Tr. 464, 465.)

During closing argument, Mr. Cherry's counsel pointed out that the recommendation for death was 9-3 and only three (3) jurors were needed to obtain a life sentence. He asserted that trial counsel was deficient for failing to investigate and present mitigating evidence which would have changed the result. He asserted that trial counsel ignored his duty to his client based upon his fear of the judge and jury and that "he just stopped with Mr. Cherry." (Supp. PC-Tr. 479-483.) The resulting prejudice to Mr. Cherry was that three (3) potential statutory mitigating factors (supported by Dr. Crown's testimony), along

with substantial nonstatutory mitigation (supported by Dr. Crown, Dr. Barnard, and the numerous lay witnesses) that was never presented or considered by the jury and judge. (Supp. PC-Tr. 484-489.)

The prosecution concentrated on the following in closing: the same doctors mentioned in the VLRC 3.850 motion were not presented and he wonders why (despite contesting use of their depositions or allowing telephonic testimony during the hearing itself), attacking Dr. Crown as a "psychologist from Miami,"

(Supp. PC-Tr. 489-491.), who "is worthless as an expert" and whose testimony regarding "mental health mitigation evidence is worthless," (Supp. PC-Tr. 496.), ignoring Dr. Barnard's testimony regarding nonstatutory mitigation and claiming appellant is anti-social, (Supp. PC-Tr. 492, 493), arguing Dr. Crown is unbelievable because he didn't utilize DSM-III or DSM-IV, (Supp. PC-Tr. 491, 493.), arguing that Mr. Cherry was just a "bad kid" and, although "he did get beaten, admittedly, some of them rather cruel", the court should "remember this is the 60's when parents still disciplined their children and tried to put them on the road to do the right thing," (Supp. PC-Tr. 493.), and wondering how long Mr. Cherry would get "to milk the, my old man beat when I was young?" (Supp. PC-Tr. 494.), generally concentrating on the evidence introduced in the guilt/innocence phase of the trial, (Supp. PC-Tr. 496.), and arguing no mitigation could be presented because it was inconsistent with the defense of guilt and appellant is anti-social. (Supp. PC-Tr. 497-511.)

In rebuttal, counsel for Mr. Cherry implored the court to look to the evidence to decide the case and pointed out how Dr. Barnard, even without complete information, had now changed his opinion and believed Mr. Cherry was of borderline intelligence. (Supp. PC-Tr. 512.) Counsel pointed out that mitigation was readily available, not pursued, and a decision not to present mitigation can only be made after one knows what facts comprise the evidence. (Supp. PC-Tr. 512-516.)

The trial court entered its Order Denying Defendant's Motion to Vacate Judgment and Sentence Pursuant to Rule 3.850 on January 17, 1997. (PC-R2. 1724-1736.) Specific references to the order will be contained in arguments to follow; in short, the trial court adopted all arguments asserted by the State and made numerous factual and legal errors in characterizing the evidence presented during the evidentiary hearing. Motion for rehearing was filed February 12, 1997, (PC-R2. 1897-1901.), and denied on April 11, 1997. (PC-R2. 1952.) Notice of appeal was timely filed. (PC-R2. 1966.) This appeal follows.

SUMMARY OF ARGUMENT

This Court remanded Mr. Cherry's case for a full and fair evidentiary hearing regarding the performance of his penalty phase counsel. The trial court deprived Mr. Cherry of that full and fair hearing by denying well-founded Motions to Perpetuate Testimony.

Despite the limitation placed upon him by the court below, Mr. Cherry presented overwhelming evidence of deficient attorney performance and resulting prejudice regarding the penalty phase of his trial. Trial counsel had never represented a client in a capital murder case, was in over his head, and failed to provide Mr. Cherry with a true adversarial testing. Trial counsel did absolutely nothing which can be considered consistent with the role of advocate in a death penalty case.

Trial counsel failed to object to improper instructions and improper and prejudicial penalty phase closing arguments by the prosecutor. Worse, counsel engaged in no investigation, preparation, consideration of various strategies, presentation of lay or expert testimony, or argument in hopes of saving Mr. Cherry's life. The record establishes that trial counsel was at least rudimentarily on notice of Mr. Cherry's family and personal history that dictated both procurement of professional mental health mitigation testimony and a full investigation into the potential mitigating evidence available regarding Mr. Cherry.

Trial counsel did no more than procure a competency examination (which is actually preparation for the guilt/innocence phase of a capital trial) and talk to his client a few times. During the "mental status exam" conducted by Dr. Barnard for competency purposes, Mr. Cherry candidly revealed the tip of the iceberg of his personal and family history, which is replete with events so startling that court personnel wept during the evidentiary hearing. Trial counsel found none of it because

he never looked. The evidence below establishes that had trial counsel investigated a case in mitigation, he could have procured, with relative ease, expert testimony in support of three (3) statutory mitigating circumstances and numerous nonstatutory mitigating circumstances. Further, the expert testimony would have cancelled or greatly diminished the weight accorded the aggravating circumstance of especially heinous, atrocious, or cruel.

Trial counsel's testimony was both revealing and internally inconsistent at the evidentiary hearing. Any attempt to blame Roger Cherry for Mr. Miller's ineffectiveness is unsupported by the record. Mr. Miller had no theory of his case in 1986 and 1987 and had only contradictory and unclear thoughts in that regard in 1996.

Trial counsel conducted no investigation, presented no testimony in mitigation, presented Dr. Barnard's report without comment or argument, and engaged in incomprehensible closing argument. His own lack of strategy and preparation is aggravated by what he allowed the prosecution to argue without objection.

Mr. Cherry suffered great prejudice: he was sentenced to death by a jury who had no idea that he was of borderline mental intelligence or borderline retarded; that he was mentally incapable of understanding the consequences of his actions, while under emotional or mental disturbance, or intending pain and suffering to another; that he had been severely tortured as a child; that he ate from trash cans and wore clothes provided by

neighbors, because his abusive, drunken father had no concern for anything other than liquor and abusing his wife and Roger; that his peers would call him "Monkey Man" and smash him in the mouth with a hammer for daring to be so pitiful; that he was a longtime abuser of crack cocaine and alcohol, he likely consumed substances the day of the offenses, and he huffed gasoline regularly as a child; and the additional, extensive mitigating evidence detailed in this brief.

Only three jurors' votes were needed for Mr. Cherry to obtain a life sentence. Even in the absence of any mitigation being presented by trial counsel, three voted to spare his life. It is reasonably probable that had Mr. Cherry been afforded effective counsel during the penalty phase of his trial, the outcome would have been different.

The trial court below utilized an erroneous legal standard in evaluating Mr. Cherry's claims. She ignored the facts proved by evidence and found "facts" rebutted by the record and clearly erroneous. The trial court failed to fulfill the purpose of this Court's remand of Mr. Cherry's case and failed to find unrebutted and proven mitigating circumstances.

Mr. Cherry is entitled to a life sentence. At a minimum, he should be afforded a resentencing.

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL.

A. DEFICIENT PERFORMANCE OF COUNSEL

Appellant's trial counsel had no capital murder experience prior to being appointed to represent Mr. Cherry. Further, he had only "very limited" experience dealing with mental health issues. (PC-Tr. 8.) Counsel did not present any witnesses in mitigation. He merely introduced a four-page psychiatric report which, according to Dr. Barnard was a "mental status exam only" and basically limited to competency, sanity, and involuntary hospitalization issues. (PC-Tr. 317-319.) Mr. Cherry's trial counsel made no reference to the report and certainly made no attempt to argue that it contained mitigation, either statutory or nonstatutory. The prosecutor made the only comments about the report; comments that trial counsel ignored. (R. 1037, 1050-1055; 1044, 1045.) In fact, Mr. Miller's closing argument, being less than five (5) transcript pages in length, was no more than Biblical rambling. It is devoid of reference to any statutory or nonstatutory mitigating circumstance. (PC-Tr. 1050-1055). As best undersigned can determine, the argument was contrary to Florida law. Although Florida law permits a death sentence for first degree felony murder, Mr. Miller's argument was that such law should be ignored because "that is something that was not recognized in biblical times and was not recognized until fairly recently in our history." (R. 1054.) Surely, any competent

capital trial attorney would recognize that this argument would be contradicted, and that counsel would be seen as lacking in credibility, once the jury instructions were read.

A careful review of the penalty phase transcript in conjunction with Mr. Miller's testimony at the evidentiary hearing helps explain such a perplexing argument: he conducted no penalty phase investigation beyond speaking with his client, (PC-Tr. 10, 30-33.); he never requested a mental health expert despite having possession of Dr. Barnard's report (which would have set off red flags to a competent capital attorney) and realizing that he "was not qualified to determine whether or not there was a mental health issue" (PC-Tr. 13); because he had no understanding of capital sentencing law and no strategy for penalty phase. The latter assertions are supported by counsel's statements that he was consumed with the issue of guilt/innocence or, as he termed it, "the defense of liability" (PC-Tr. 15, 28, 29.)[7]; that "he had little regard for what the limitations of the law were" and he felt like "anything was fair game" in the penalty phase, (PC-Tr. 17); and his admissions that he had no strategic reason for failing to object to improper argument by the prosecutor[8] or improper jury instructions. (PC-Tr. 24-27.)

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[7]This is, as this Court is fully aware, an expression more appropriate to civil law and typically uttered by practitioners of civil law.

[8]For example, the prosecutor made the following arguments, none of which are fair comment on the evidence or relevant to aggravation or mitigation, in his penalty closing:

> You can bet one thing, that if any state in

Particularly disturbing is the "anything was fair game"

> the United States of America attempted to put a murderer to death in the same fashion in which Esther Wayne died, there would be an outcry over the land as being cruel and unusual punishment because you certainly couldn't put a murderer to death in the same way that Esther Wayne died by stomping their brains out.

(R. 1043.)

> That is a good commandment. There is nothing wrong with that commandment, thou shalt not kill. As a matter of fact, if Roger Cherry followed that commandment, we wouldn't be here today. But at the same time God gave Moses that commandment, he knew that commandment would be broken and in doing so, he told Moses what to do in the event that it was. In the 35th Chapter of Numbers, Verse 33: God told Moses, murder defiles the land and except by the death of the murderer, there is no way to perform the ritual of purification for the land in which a man has been murdered.

(R. 1047.)

> The criminal justice system in this country is a frustrating thing. People feel that they have no control over it. They have no voice in it. That it just happens, that all the rights are the Defendant's rights or whatever. It doesn't work, it's slow, it's whatever. And they really have no voice in the criminal justice system, they're frustrated. And on the few occasions when they do have a voice, it seems like nobody cares, nobody listens, nobody pays attention.
>
> Today, ladies and gentlemen, each one of you individually and collectively have a unique opportunity in a situation. You have a voice in the criminal justice system. Not only do each of you have a voice, but that voice will be heard today.

(R. 1048.)

comment, because this further explains why no objections were lodged during the prosecutor's closing penalty argument. Mr. Miller did not understand that the State was limited to what it could present in aggravation, while the Constitution requires that all mitigation be weighed and considered. Lockett v. Ohio, 438 U.S. 586, 604 (1978). Further, counsel reiterated his ignorance while being cross-examined by the prosecutor. When Mr. Daly attempted to lead Mr. Miller into saying that he didn't get a mental health expert because Dr. Barnard's report wasn't helpful or was sufficient in and of itself, the witness responded that he "really was not concerned with statutory mitigators." (PC-Tr. 36).

Mr. Miller's testimony during the evidentiary hearing was internally inconsistent and revealed an attorney who was in over his head and didn't know how to argue for Mr. Cherry's life: he used his Biblical closing "[l]ikely because there was little else" and he "had no one step forward and elicit the testimony" for him, (PC-Tr. 35.), despite having notice of child abuse and other mitigation and realizing the abuse was "the only credible way in which to keep this man out of the electric chair", he later said a mitigation case focusing on child abuse and alcoholism "did not make any sense", (PC-Tr. 39-41), and later, again, initially states he "absolutely" would have presented and argued evidence of brain damage, a long history of drug abuse, evidence of poverty and "anything that [he] could have used", (PC-Tr. 45), then retreats and maintains that he wouldn't have

used "all of it", (PC-Tr. 46, 47), but that he'd have liked to have known all the evidence before he decided. (PC-Tr. 49).

The only record evidence of why trial counsel did not have the information to evaluate before making a decision about what to present in mitigation, as distinct from presenting nothing, are his own deficiencies as a capital attorney. Mr. Miller, for whatever reason, be it caseload, inexperience, or simple lack of interest, expected the mitigation case to "step forward" on its own, with no effort on his part. When that did not happen, he abdicated his role as advocate and was simply "a person who [happened] to be a lawyer...alongside [Mr. Cherry]", but that "is not enough to satisfy the constitutional command" of the Sixth Amendment. Strickland v. Washington, 466 U.S. 668, 685 (1984).

Mr. Miller attempted, through inconsistent testimony, to blame his client for his own deficient performance as a lawyer. Miller testified that although his visits with Mr. Cherry "were not great in number", he considered them "adequate in terms of communication", yet claimed he "was unable to obtain" mitigation evidence from Mr. Cherry and knew "little or nothing" about his client. (PC-Tr. 30-33.) Dr. Barnard and his report belie this convenient memory by trial counsel. Dr. Barnard's report contained enough red flags to trigger a full mitigation investigation, even assuming no client cooperation. But the record shows that Mr. Cherry was cooperative.

Dr. Barnard testified that appellant was "very" candid with him during the competency evaluation, provided him with

information, and no communication problem arose. (PC-Tr. 322, 323.) It was through this two (2) hour exam that Dr. Barnard obtained the skeletal facts which later result, with actual psychological testing and a family history investigation, in his opinions that appellant had a "very, very strong history" of child abuse which is a "strong indication for mitigating circumstances", (PC-Tr. 322.), and qualified for numerous nonstatutory mitigating circumstances. (PC-Tr. 341.) While it is convenient for Mr. Miller to blame his constitutionally deficient performance on his client, the record facts indicate otherwise. Mr. Miller was on notice that mitigating evidence was available and could be developed.

While the record refutes any claim that Mr. Cherry failed to cooperate with his appointed counsel, even if this were partially true, such does not excuse Miller's deficiencies. Even a defendant's desire not to present mitigation evidence does not terminate the lawyer's constitutional duties during the sentencing phase of a death penalty trial. See, Blanco v.Singletary, 943 F.2d 1477, 1502 (11th Cir. 1991); Deaton v. Dugger, 635 So. 2d 4, 7-9 (Fla. 1994). Further, a lawyer may not blindly follow where his client might lead, but has a duty to independently investigate and present to his client the results of his investigation and his view of the merits of alternative courses of action. Tafero v. Wainwright, 796 F.2d 1314, 1320 (11th Cir. 1986); Eutzy v. Dugger, 746 F. Supp. 1492, 1499 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. 1990); Koon v. Dugger,

619 So. 2d 246 (Fla. 1993). Although a client's wishes or directions may limit the scope of an attorney's investigation, they will not excuse the failure to conduct any investigation of a defendant's background for potential mitigating evidence. See, Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986); 1986); Thomas v. Kemp, 796 F.2d 1322 (11th Cir.), cert. denied, 479 U.S. 996 (1986); Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), cert. denied, 461 U.S. 910 (1983).

It is unrefuted, as the State presented no evidence to the contrary, that substantial statutory and nonstatutory mitigating evidence was available to trial counsel at the time of trial. Extensively presented in the Statement of Case and Facts, these factors may be summarized as follows:

Statutory Mitigation: Dr. Barry Crown, accepted by the Court without objection from the State as an expert in clinical and forensic psychology and neuropsychology, (PC-Tr. 56, 57.), gave Mr. Cherry no less than fourteen (14) standard psychological and neuropsychological tests (PC-Tr. 76, 77.), reviewed background materials and affidavits from family members, teachers, friends and associates, and, based upon his findings of retardation (if subscatter tests are considered, along with the numerical variation implicit in IQ tests) or borderline retardation (looking at the numerical values alone), (PC-Tr. 60, 61, 109 129, 139, 141.), organic brain damage, (PC-Tr. 59, 60, 113, 114.), and contributing factors of fetal alcohol syndrome, a long history of substance and alcohol abuse, including huffing of

gasoline (which is extremely neuro-toxic in children), severe child abuse (which included blows to the head), and exposure to environmental toxins, (PC-Tr. 65-69.), concluded that Mr. Cherry qualified for three (3) statutory mitigating factors: (a) he suffered from an extreme mental or emotional disturbance at the time of the offense;[9] (b) he acted under extreme duress or under the substantial domination of another person;[10] and (c) his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.[11] (PC-Tr. 63-65.) These test results and opinion testimony are totally unrebutted.

Lay Witness Nonstatutory Mitigation: numerous lay witnesses testified that Roger Cherry was brutalized by his father in the most inhumane ways: attempted sexual assault, chained, tied, hung, and beaten like an animal with objects which should never touch a child, including blows to the head; that both of his parents were alcoholics and his mother was both beaten by his father and suffered epileptic seizures; that he was impoverished; that he was deprived of food; that he was shy, ashamed, cried to himself, and followed rather than lead; that he was ridiculed for eating trash and stealing food from dumpsters, called names ("Monkey Man" being most prevalent), and considered "stupid" and slow by adults and classmates alike; that he witnessed extreme

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[9]Section 921.141 (6)(b), Florida Statutes (1987).

[10]Section 921.141 (6)(e), Florida Statutes (1987).

[11]Section 921.141 (6)(f), Florida Statutes (1987).

violence as a child, including his mother and a man being shot by his father, his father stabbing his mother, his mother chasing him with a knife while in a seizure, and a man named "Shorty" having his throat cut and dying in his presence; that he was housed in a brutal segregated facility where he was denied testing and remedial help; and having to work in the fields as a sharecropper's child early in life and vomiting after the planes sprayed the crops.

Expert Witness Nonstatutory Mitigation: not only did Dr. Crown testify to nonstatutory mitigation, (PC-Tr. 65-69.), but so did Dr. Barnard. After acknowledging the limited nature of his competency exam of Mr. Cherry at the time of trial, dramatically altered his previous opinion that Mr. Cherry was of average intelligence and stated that he was of "borderline mental intelligence", (PC-Tr. 321), and qualified for the following nonstatutory mitigators: (a) "severe child abuse"; (b) "limited intelligence, in my opinion probably borderline intelligence"; (c) "history of substance abuse, both alcohol and crack"; (d) "he probably was under the influence of some of the substances during the time prior to the alleged crime"; and (e) witnessed extreme violence as a youth. (PC-Tr. 341.) Dr. Barnard relied on Dr. Fisher's IQ testing (full scale IQ 72, i.e., 6 points less than Dr. Crown's findings and corroborative of the fact that IQ tests vary more than 5 points regardless of the prosecutor's assertions---PC-Tr. 139.), and background materials.

The nonstatutory mitigating circumstances available to penalty phase counsel, but neither discovered through investigation nor presented to the sentencing jury and court, have been accepted as mitigating in other cases:

Low intelligence is an accepted mitigating circumstance. See, Henyard v. State, 689 So. 2d 239, 244 (Fla. 1997)(trial court found low intelligence and emotional deficits to be mitigating); Sinclair v. State, 657 So. 2d 1138, 1142 (Fla. 1995)(trial court found "dull normal intelligence" in mitigation); Larkins v. State, 655 So. 2d 95, 100-101 (Fla. 1995)(this Court recognized "poor reader"; "difficulty in school"; "dropped out of school at the fifth or sixth grade"; and "functions at the lower 20% of the population in intelligence" mitigating; remand for resentencing by trial court upon finding that mitigation in record was inconsistent with trial court's finding of no nonstatutory mitigation); Thompson v. State, 648 So. 2d 692, 697 (this Court, in explaining its approach to Penry v. Lynaugh, 492 U.S. 302 (1989), stated that it has "elected to follow the approach of the United States Supreme Court and treat low intelligence as a significant mitigating factor with the lower scores indicating the greater mitigating influence.")(emphasis supplied); Brown v. State, 526 So. 2d 903, 907-908 (Fla.), cert. denied, 488 U.S. 944 (1988)(defendant's IQ of 70-75, classified as borderline defective or "just above the level for mild mental retardation" was part of the "ample evidence mitigating against death").

Child abuse is an accepted mitigating circumstance. See, Jackson v. State, 704 So. 2d 500, 506-507 (Fla. 1998)(trial court failed to adequately address nonstatutory mitigating circumstances, including defendant's difficult childhood that included sexual assault); Chandler v. State, 702 So. 2d 186, 200 (Fla. 1997)(trial court found that it is a mitigating factor that defendant had a deprived childhood or suffered abuse as a child); Boyett v. State, 688 So. 2d 308, 310 (Fla. 1997)(traumatic family life and history of sexual abuse among nonstatutory mitigating circumstances supporting life sentence recommendation); Strausser v. State, 682 So. 2d 539, 540 at n. 3, 542 (Fla. 1996)(trial court found nonstatutory mitigation in that defendant was severely abused as a child; jury override reversed where substantial mitigation, including expert testimony that Stausser had been physically and sexually abused by his stepfather as a young child, supported jury recommendation); Campbell v. State, 571 So. 2d 415 (Fla. 1990)(abused or deprived childhood).

History of alcohol and substance abuse is an accepted mitigating circumstance. See, Mahn v. State, ___So. 2d___ (23 FLW S219, April 16, 1998)(extensive history of alcohol and substance abuse); Morgan v. State, 639 So. 2d 6, 14 (Fla. 1994)(defendant sniffing gasoline for many years and on the day of the offense established as nonstatutory mitigating circumstances); Knowles v. State, 632 So. 2d 62 (Fla. 1994)(neurologically impaired substance and solvent abuser established statutory mitigation on facts of case); Clark v.

State, 609 So. 2d 513, 516 (Fla. 1992)(extensive history of substance abuse constituted strong nonstatutory mitigation).

Fetal alcohol syndrome is an accepted mitigating circumstance. See, Hunter v. State, supra, at 254 (trial court found fetal alcohol syndrome as a nonstatutory mitigating circumstance).

Head injury is an accepted mitigating circumstance. See, Johnson v. Singletary, 612 So. 2d 575, 577-581 (Fla. 1993)(J. Kogan specially concurring)(chronic and long standing brain damage, along with other substantial mitigation, procedurally barred from consideration); Foster V. State, 679 So. 2d 747 (Fla. 1996)(organic brain damage); Hall v. State, 541 So. 2d 1125 (Fla. 1989)(same); Waterhouse v. State, 522 So. 2d 341 (Fla. 1988)(same).

Growing up impoverished is an accepted mitigating circumstance. See, Foster v. State, 614 So. 2d 455, 461 (Fla. 1993)(trial court gave special instruction to jury allowing the consideration of any factor in mitigation and specifically including poverty); Maxwell v. State, 603 So. 2d 490, 492 (Fla. 1992)("disadvantaged youth" found mitigating); Meeks v. Dugger, 576 So. 2d 713, 716 (Fla. 1991)(this court included "background of poverty and depravation" and "severe emotional problems as a result of his deprived childhood" in the category of "substantial nonstatutory mitigating evidence"); Brown v. State, supra (this Court specifically held the trial court erred in rejecting

"disadvantaged childhood, his abusive parents, and his lack of education and training" as mitigating).

Hunger, deprivation, and malnutrition are accepted mitigating circumstances. See, Hall v. State, 614 So. 2d 473, 478 (Fla. 1993)(deprived childhood); Jones v. State, 580 So. 2d 143, 146 (Fla. 1991)("cultural deprivation and poor home environment may be mitigating factors"); Stevens v. State, 552 So. 2d 1082, 1085, 1085 at n. 8 (Fla. 1989)(childhood in poverty and neglect, with a sibling dying of malnutrition, deemed mitigating).

Emotional abuse is an accepted mitigating circumstance. See, Pomeranz v. State, 703 So. 2d 465, 472 (Fla. 1997)(emotional abuse as a child one of a number of factors supporting a life sentence recommendation); Hunter v. State, 660 So. 2d 244, 254 (Fla. 1995)(trial court considered emotional abuse and neglect as a nonstatutory mitigator); Turner v. State, 645 So. 2d 444, 448 (Fla. 1994)(defendant raised in an emotionally and mentally unstable home).

It is well established that when trial counsel is on notice that his or her client may have a mitigating mental health problem, reasonably effective representation requires counsel to investigate and present independent medical mental health mitigation during the penalty phase of a capital trial. See,e.g., Rose v. State, 675 So. 2d 567, 572-573 (Fla. 1996); State v. Lara, 581 So. 2d 1288, 1290 (Fla. 1991); State v. Michael, 530 So. 2d 929, 930 (Fla. 1988); O'Callaghan v. State,

461 So. 2d 1354, 1355-1356 (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, 1450-1451 (11th Cir. 1986); Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981); United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974).

Additionally, counsel is under a duty to independently investigate, evaluate, and present all statutory and nonstatutory mitigation in a capital case. Rose v. State, supra; Heiny v. State, 620 So. 2d 171, 173 (Fla. 1993); Stevens v. State, 552 So. 2d 1082, 1087-1088 (Fla. 1989); State v. Michael, supra; Porter v. Singletary, 14 F.3d 554, 557 (11th Cir), cert. denied, ___ U.S. ___, 115 S.Ct. 589 (1994). Failure to investigate available mitigation constitutes deficient performance. Rose v. State, supra; Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Deaton v. Dugger, supra; Heiny v. State, supra; Phillips v. State, 608 So. 2d 778 (Fla. 1992); Mitchell v. State, 595 So. 2d 938 (Fla. 1992); State v. Lara, supra; Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Bassett v. State, 541 So. 2d 596 (Fla. 1989).

The instant case is factually similar to several cases where either this Court or a trial court, later affirmed by this Court, have granted postconviction relief for deficient performance of penalty phase counsel. In Rose, the trial court denied relief after an evidentiary hearing, but this Court remanded for a new sentencing proceeding upon a finding that Mr. Rose received

ineffective assistance of penalty phase counsel. Remarkably, the mitigation presented during the evidentiary hearing in Rose mirrors the instant case. Mr. Rose grew up in poverty[12]; was emotionally abused, neglected throughout childhood, and his mother confined him and attempted to abandon him[13]; was a slow learner and had an IQ of 84[14]; had suffered head trauma[15]; and had previously been diagnosed by a physician as schizoid.[16] Rose, 675

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[12]Compare the testimony in Mr. Cherry's case: he lived in poverty, obtained clothes and food from neighbors, stole food, and ate from trash cans and dumpsters. (PC-Tr. 165, 199, 204-214, 239, 240, 279-281, 353, 354, 361, 374; Exh. 3, Depo. at 3, 6, 7; Exh. 4, Depo. 8,9.)

[13]Compare the testimony in Mr. Cherry's case: he was neglected by a drunken mother, attacked by her during seizures, publicly ridiculed and humiliated in public by classmates, tortured and assaulted by his drunken father, hit in the mouth with a hammer for eating trash, called "Monkey Man" by everyone. (PC-Tr. 162-166, 170, 194-196-199, 238-240, 246, 247, 266, 352, 355-357, 358-363, 365, 370, 372-374, 382, 383, 412, 413, 433-437, 463-465; Exh. 3, Depo. at 4, 5, 8-10, 21-25, 29; Exh. 4, Depo. at 4-7, 16, 19, 20, 26; Exh. 5, Depo. at 4-7.)

[14]Compare the testimony in Mr. Cherry's case: his full scale IQ is between 72 and 78, according to Drs. Crown, Fisher, and Barnard; he is, at a minimum, borderline retarded and of borderline mental intelligence; he was considered slow or stupid by all who knew him. (PC-Tr. 58, 60, 61, 71, 72, 81, 109, 112, 125, 129, 139, 321, 327, 328, 341, 144, 145, 199, 267, 274, 364, 384; Exh. 4, Depo. at 9, 10.)

[15]Compare with the testimony in Mr. Cherry's case: he was often struck in the head during his father's beatings, he had his teeth knocked out by a hammer blow, and he jumped off of roofs, injuring his neck and head. (PC-Tr. 164, 165, 167, 195, 196, 353, 354, 362, 365, 374, 385, 433-435, 464,; Exh. 3, Depo. at 5, 23; Exh. 4, Depo. at 6.)

[16]This is inapplicable to Mr. Cherry, but a large amount of nonstatutory mitigation applies to Mr. Cherry that is not mentioned in Rose.

So. 2d at 571. This Court summarized the expert testimony presented at the Rose evidentiary hearing as follows:

> In addition, Dr. Jethro Toomer, a clinical and forensic psychologist,[17] testified that: (1) Rose suffers from organic brain damage;[18] (2) Rose has a longtime personality disorder; (3) Rose is a chronic alcoholic;[19] (4) Rose meets the criteria for the statutory mitigator of being under the influence of an extreme emotional or mental disturbance at the time of the offense, see Sec. 921.141(6)(b) Fla.Stat. (1993);[20] and (5) Rose's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired at the time of the offense, see id. Sec. 921.141(6)(f).[21] Dr. Toomer's opinion was based on a psychosocial evaluation of Rose in which he administered a battery of psychological tests and reviewed Rose's school, hospital, medical and prison records.[22] His testimony was essentially

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[17]Compare Dr. Barry Crown's credentials in clinical and forensic psychology and neuropsychology. (PC-Tr. 55-57.)

[18]Compare Dr. Crown's testimony that Mr. Cherry suffers from organic brain damage. (PC-Tr. 58, 63, 69, 86, 113, 117, 118, 124.)

[19]Compare expert testimony that Mr. Cherry has a long history of substance (crack cocaine) and alcohol abuse; Mr. Cherry "huffed" gasoline on a regular basis as a child. (PC-Tr. 61, 62, 65, 117, 118, 321, 326, 327, 341.) Please note that both Dr. Crown, a clinical and forensic psychologist and neuropsychologist, and Dr. Barnard, a psychiatrist, opined that this nonstatutory mitigating factor was established in this case.

[20]As previously noted, Dr. Crown also found this statutory mitigator in Mr. Cherry's case. (PC-Tr. 63, 64.)

[21]Again, Dr. Crown found this statutory mitigator. (PC-Tr. 64, 65). It should be noted that Dr. Barnard's conclusion that Mr. Cherry was under the influence of substances just prior to the offenses also supports this finding. (PC-Tr. 326, 327.)

[22]Dr. Crown engaged in a similar, if not identical, methodology in reaching his opinions regarding Mr. Cherry. (PC-Tr. 57, 60-62, 73-77, 86, 91, 109, 111, 113, 123-125, 129, 139,

> uncontested.[23] In addition to the evidence outlined above, Rose presented substantial lay testimony regarding mitigation at the postconviction hearing which had not been investigated or was not presented by counsel during the penalty phase proceedings.

Rose, 675 So. 2d at 571 (footnotes added)

This Court evaluated the reasons asserted by trial counsel for failing to investigate mitigation in Rose and noted, among other factors specific to that case, that: "counsel had never handled a capital case before being appointed to represent Rose"; "counsel was totally unfamiliar with the concept of aggravating and mitigating factors"; and he "failed to investigate Rose's background and obtain the school, hospital, prison, and other records and materials that contained the information outlined above as to Rose's extensive mental problems, etc." Rose, 675 So. 2d at 572. Likewise, Mr. Cherry's counsel had never handled a capital case, (PC-Tr. 8.); as argued above, seemed totally perplexed by the concept of aggravators and mitigators to the point of not being concerned with statutory mitigation and formed no strategy in regard to penalty phase; and did absolutely no penalty phase investigation.

The deficiency of penalty phase counsel in the instant case actually surpasses that which appears on the face of this Court's opinion in Rose. Numerous nonstatutory mitigators, previously detailed, apply in the instant case which did not apply in Rose.

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[23]The State presented no evidence below to rebut Dr. Crown's opinions.

These mitigators were but an investigation away from saving Mr. Cherry's life. Further, Dr. Crown's testimony established that trial counsel, had he been inclined to conduct a proper mental health investigation and ensure that Mr. Cherry received adequate mental health assistance, could have obtained expert mental health testimony to undermine and defeat the aggravating factor of especially heinous, atrocious, or cruel: Mr. Cherry functions on a third grade level, is borderline retarded and brain damaged, and his condition is "the equivalent of having the inability to form intent" to torture or cause great pain to a victim. (PC-Tr. 71, 72.) Florida law requires specific intent to torture before this aggravator can be found to exist. Kearse v. State, 662 So. 2d 677 (Fla. 1995); Stein v. State, 632 So. 2d 1361 (Fla. 1994); Bonifay v. State, 626 So. 2d 1310 (Fla. 1993); Lewis v. State, 377 So. 2d 640 (Fla. 1979). Dr. Crown's expert testimony establishes, without any contradiction by the State, that Mr. Cherry could not form the requisite specific intent to torture. Even assuming the aggravating circumstance could still be applied under these circumstances, Mr. Cherry's diminished capacity to form the intent to inflict pain and suffering would have dramatically diminished the weight given to it. Michael v. State, 437 So. 2d 138, 141-142 (Fla. 1983); Huckaby v. State, 343 So. 2d 29 (Fla.), cert. denied, 434 U.S. 920 (1977); Jones v. State, 332 So. 2d 615 (Fla. 1976).

State v. Lara, supra, is also instructive. In unanimously affirming the lower court's grant of sentencing relief, this

Court reviewed a case remarkably similar to the case at bar. Again, the attorney representing Mr. Lara was handling his very first capital case and devoted 90% of his time to the guilt phase. State v. Lara, 581 So. 2d at 1289. The attorney did not investigate any detail of the defendant's background and did not properly utilize expert witnesses regarding Lara's psychological state. Id. The only witness presented during penalty phase was the defendant's aunt and her testimony comprised seven transcript pages (one witness more and two pages longer than Miller's entire penalty phase presentation for Mr. Cherry). The aunt briefly testified that the defendant's father treated him "very bad" and beat him a lot. Id. This was more than Roger Cherry's sentencing jury knew, even assuming they read Dr. Barnard's competency report after trial court failed to even to mention it.

The trial court found, and this Court agreed, that the testimony of eight (8) background witnesses and mental health expert testimony as presented during the postconviction evidentiary hearing established compelling mitigation that was never presented to the jury, but should have been, due to counsel's deficient performance. Such is the case here.

In Phillips v. State, supra, the State conceded deficient performance on the part of penalty phase counsel under remarkably similar circumstances: trial counsel did virtually no preparation for penalty phase and the only testimony presented was the defendant's mother, who testified he was a good son and helped her when he wasn't in prison. Phillips v. State, 608 So. 2d at

782. Further, postconviction testimony revealed that Phillips grew up in poverty, was left unsupervised by his migrant worker parents, was physically abused by his father, witnessed his mother being beaten by his father, was a withdrawn, quiet child, with no friends, and suffered a head injury in adolescence. Id. Aside from the similar mitigation, which is less compelling than in Mr. Cherry's case, Phillips is relevant to the current inquiry because it refutes the prosecutor's assertion that because Mr. Cherry was thirty-six years old at the time of the offenses, childhood abuse was unimportant. This Court confronted the identical claim in Phillips and held that while time factor may make the evidence "less compelling", it "does not change the fact that it was relevant, admissible evidence that should have been presented to the jury" and "[i]t cannot be seriously argued that the admission of the evidence could have in any way affirmatively damaged Phillips' case." Id.

Further, Phillips involved very similar expert testimony regarding borderline intelligence and deficits in adaptive functioning, supported two (2) of the same statutory mitigators involved in Mr. Cherry's case (extreme emotional or mental disturbance and inability to conform his conduct to the requirements of the law), and opinion testimony that Phillips did not have the mental capacity to form the necessary intent to qualify for the especially heinous, atrocious, or cruel aggravator. Phillips, 608 So. 2d at 783. As here, the mental mitigation was "essentially unrebutted." Id. The State should

concede deficient performance in the instant case, as it is more compelling than Phillips.

In summary, the deficiency analysis reveals that penalty phase counsel conducted no investigation, presented no penalty phase witnesses, made no comprehensible closing argument to the jury, and totally ignored any argument regarding the applicability of mitigators or the inapplicability of aggravators. In contrast, during the postconviction evidentiary hearing appellant presented evidence of readily available mental health expert testimony that would have supported the finding of three (3) statutory mitigating factors and aided in defeating the most emotional of statutory aggravating factors. Further, documentary and lay witness testimony was readily available to establish double-digit nonstatutory mitigating factors.

Deficient performance under Strickland v. Washington, supra, and this Court's precedent has been established: the above identified acts or omissions of penalty phase counsel were deficient; they were outside the wide range of professionally competent assistance. See, Baxter v. Thomas, supra.

B. THE DEFICIENT PERFORMANCE OF PENALTY PHASE COUNSEL PREJUDICED MR. CHERRY.

Even without any mitigation presented to the jury, they voted 9-3 for death. Only three (3) additional jurors were needed to save Mr. Cherry's life.

Mr. Miller's deficient performance as an attorney prejudiced Mr. Cherry under Strickland v. Washington, which requires showing "a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694 (1984).[24] 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 at 930. Prejudice is established when trial counsel's deficient performance deprives the defendant of a "reliable penalty phase proceeding." Deaton v. Dugger, supra. Mr. Cherry was not provided with a reliable penalty phase proceeding due to his trial counsel's inexperience, misunderstanding of capital sentencing law, failure to perform background investigation, failure to engage a mental health expert to explore statutory mental health mitigation, omissions regarding improper prosecutorial comments and improper jury instructions, and incomprehensible theological argument, more appropriate in a church than a courtroom, during closing.

The overwhelming mitigation developed and presented by postconviction counsel could not and would not have been ignored had it been presented to the sentencing judge and jury. Prejudice is established under such circumstances. See, Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995)(prejudice established by presenting of "substantial mitigating evidence" in postconviction); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992)(prejudice established by "strong mental mitigation" which

[24]A defendant is not required to show counsel's deficient performance "[m]ore likely than not altered the outcome in the case." Strickland, 466 U.S. at 693.

was "essentially unrebutted" in postconviction); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991)(prejudice established by evidence of statutory mitigating factors and abusive childhood); Bassett v. State, 541 So. 2d 596, 597 (Fla. 1989)("this additional mitigating evidence does raise a reasonable probability that the jury recommendation would have been different").[25]

C. THE TRIAL COURT'S ORDER REVEALS SHE DID NOT UTILIZE THE APPROPRIATE LEGAL STANDARD, RELIED UPON FACTS NOT PROVED AND IGNORED THOSE WHICH WERE PROVED, AND FAILED TO FIND UNREBUTTED MITIGATION ESTABLISHED DURING THE HEARING

As stated above, Strickland v. Washington does not require Mr. Cherry to prove that but for counsel's deficient performance it is "more likely than not" that he would have received a life sentence. Strickland v. Washington, 466 U.S. at 693. Rather, the standard is "a reasonable probability" that the outcome of the proceedings would have been different; a reasonable probability is a "probability sufficient to undermine confidence in the outcome". Strickland v. Washington, 466 U.S. at 694. The trial court below applied an erroneous legal standard by requiring Mr. Cherry to prove that he "would have probably received a life sentence" but for counsel's errors, (PC-R2. 1726), or, alternatively, that but for the errors "it is highly likely that the jury would have recommended a life sentence", (PC-R2. 1730), or, alternatively, requiring Mr. Cherry to

[25]Prejudice was found in these cases despite the existence of numerous aggravating circumstances. See, Hildwin (four aggravating circumstances); Phillips (same); Mitchell (three aggravating circumstances); Lara (same); Bassett (same).

"demonstrate that the outcome of the proceedings would have resulted in a life sentence but for counsel's errors at penalty phase". (PC-R2. 1736.) In short, Judge Graziano utilized "probably"; "highly likely"; and "demonstrate that the outcome of the proceedings would have resulted in a life sentence" in the sense of "more likely than not" and failed to follow the law.

Further, the trial court made blatant misrepresentations of the evidence presented below in her order. Dr. Crown's opinions, rendered after conducting no less than fourteen (14) standard psychological and neuropsychological tests,[26] and the State stipulating to his expertise in clinical and forensic psychology and neuropsychology, are characterized by the trial court as no more than speculation, (PC-R2. 1726), and based solely on background materials and lay witness testimony. (PC-R2. 1727.) This finding completely ignores Dr. Crown's testimony that his testing, when considered in conjunction with collateral material, supported his opinions and conclusions. (PC-Tr. 59-61, 65-69, 76, 77, 109, 129, 139, 141.)

Additionally, Dr. Crown is accused of diagnosing mental retardation and brain damage without conducting "any physical tests". (PC-R2. 1727.) This conclusion is contrary to the evidence that neuropsychological testing is more sensitive than any other form of testing for brain damage, that there exists no

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[26]Please see previous discussion of Dr. Crown's testing and credentials and the comparison to Dr. Toomer's credentials and testimony in the Rose case, at page 54 of this brief and footnotes thereto.

physical test to diagnose mental retardation, and ignores the fact that neuropsychological tests are physical tests performed by a patient, with a trained professional evaluating the results and basing opinions thereon.

Additionally, the trial court mischaracterized a perceived disagreement between Dr. Crown and Dr. Barnard regarding Mr. Cherry's level of retardation and then rejects it altogether as a mitigating circumstance. (PC-R2. 1727.) The court attempts to discredit Dr. Crown by concluding that Dr. Crown found Mr. Cherry to be mentally retarded, while Dr. Barnard finds him to be borderline retarded. This is not what the testimony revealed. Dr. Crown found retardation if the subscatter scales and the deviation implicit in IQ testing are considered, but freely admitted that Mr. Cherry is borderline retarded if the numerical score is the only thing considered. (PC-Tr. 60, 61, 109, 129, 139, 141.) Further, Dr. Barnard, relying on even lower IQ test results (which seem to corroborate Dr. Crown's testimony that there is a 15 to 16 point deviation in all IQ testing), testified that Mr. Cherry was borderline retarded and when asked if he met the definition of retardation under DSM-IV, simply stated that he did not according to that. Thus, the conflict does not exist: both Dr. Crown and Dr. Barnard agree that Mr. Cherry is at least borderline retarded and of borderline mental intelligence. However, only Dr. Crown was qualified to do testing and evaluate the subscatter scales.

It must be noted at this juncture that the trial court apparently made a finding that Dr. Barnard and Dr. Crown were similarly situated to render their opinions, but that Dr. Barnard's opinion was less "speculative" than Dr. Crown's. In so doing, the court totally ignored the fact that Dr. Barnard admitted that his initial and superficial clinical impression during the competency evaluation was that Mr. Cherry was of average intelligence, but he was wrong. At the hearing below, he admitted as much and found Mr. Cherry to be of borderline mental intelligence. Further, Dr. Barnard did not review the case, at any time, as a mitigation expert for penalty phase and he never reviewed all that is known and available regarding Mr. Cherry.

The trial court mischaracterized Dr. Barnard's competency report as well: (a) the report, a mental status exam limited to competency and sanity, was not supplemented by background materials from trial counsel, but merely pretrial discovery materials; (b) the report is skeletal in its reference to nonstatutory mitigation and certainly did not provide the jury with the wealth of nonstatutory circumstances presented at hearing below and did not contain any detail regarding "family history, educational history, employment history, marital history, medical history, psychiatric history and alcohol and drug history" as stated by the lower court. (PC-R2. 1727.) The trial court's comment that the report went to the jury without State objection, precluding cross-examination of the facts presented in the report, is an obvious attempt to make

utilization of the report a strategic decision by trial counsel. However, Mr. Miller never testified to having any strategy in penalty phase, let alone one regarding this report.

Even more misleading is the trial court's finding that "Dr. Barnard testified that he relied on affidavits of background witnesses for his 1996 re-evaluation of the Defendant, and even considering these new affidavits, Dr. Barnard found the Defendant to be clinically of average mental capacity..." (PC-R2. 1728.) This finding is erroneous in two (2) important respects: Dr. Barnard has never re-evaluated Mr. Cherry since the time of trial (PC-R2. 1759); and Dr. Barnard never agreed with his original competency exam conclusion that Mr. Cherry was of average intelligence. He specifically testified that Mr. Cherry was of "borderline mental intelligence". (PC-Tr. 321.)

Additionally, the trial court's conclusions regarding Mr. Cherry's alleged refusal to communicate with counsel as an excuse for trial counsel's deficient performance are simply unsupported and rebutted by the record. (PC-R2. 1729.) As previously asserted, the record demonstrates that Mr. Miller believed he had adequate communication with Mr. Cherry and Mr. Cherry had no communication problems with Dr. Barnard and, given the limited purpose of the competency exam, did forthrightly reveal, in skeletal fashion, his personal and family history. Even after having Dr. Barnard's report in hand, which the trial court deems to be the equivalent of true mitigation, Mr. Miller did nothing

with it and presented no lay witnesses or mental health experts to corroborate and give life to its contents.

Perhaps most disturbing is the trial court's characterization of the extensive mitigation presented in the postconviction hearing as being "merely cumulative" to Dr. Barnard's report on competency. (PC-R2. 1730.) In remanding this case for evidentiary hearing and ruling that Mr. Cherry had stated a "prima facie basis for relief" notwithstanding the introduction of the report, this Court rejected such a simplistic and erroneous conclusion. In fact this Court noted that the report was introduced "without further argument or comment". Cherry v. State, 659 So. 2d at 1074. In remanding this case, this Court directed that trial counsel's performance and the resulting prejudice was to be scrutinized because the allegations (which were proven at the postconviction hearing) demonstrated that mitigation was available which was not cumulative and which was not investigated or presented. For example: nowhere in Dr. Barnard's report are oiled ropes meant to burn a child's skin; evidence of a child subjected to torture, not just abuse; a child subjected to violence and death at every turn; a child who is chased by a knife wielding mother in the fit of an epileptic seizure; a child who watches a friend bleed to death from having his throat cut; a child who jumps off the roof to get attention or, as an adult, in an attempt to commit suicide; a child who huffs gasoline and twirls around in a toxic haze to avoid his pitiful existence; a child hammered in the mouth for eating out

of the trash and running to neighbors for protection, food, and clothing; a child vomiting after planes spray the crops he picks in Mississippi as a child; a child who is "Monkey Man' to his peers and always considered stupid and slow? The trial court's erred in denying relief and Quite simply, the trial court heard what she wanted to hear, parroted the "testimony" of the prosecutor, and totally ignored the mitigation supported by the record.

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIMS THAT HE WAS DENIED A COMPETENT MENTAL HEALTH EVALUATION AND THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PROVIDE THE MENTAL HEALTH EVALUATOR WITH BACKGROUND INFORMATION AND FOR FAILING TO OBTAIN ANY EVALUATION OF APPELLANT'S ORGANIC BRAIN FUNCTIONING.

Psychiatric examination to evaluate Appellant's competency, sanity and criteria for involuntary hospitalization was ordered by Judge Blount at trial counsel's request. Dr. George W. Barnard performed the evaluation and rendered a four page report.[27] At the postconviction hearing, Miller recalled requesting a mental health evaluation "[t]o determine if there was an insanity defense" and to determine competency to proceed, (PC-Tr. 9.), and not requesting a penalty phase expert at any

[27]The four page report contained Dr. Barnard's findings, based only on Appellant's self-report, that his mother had alcohol problems, his father beat him severely and walked him around with a chain around his neck, he was deprived of food and water, as an adult he had cut himself to get his wife's attention, and at age 13 he was hit in the mouth with a hammer, became unconscious and was hospitalized. The report itself contained "red flags" that investigation was warranted.

point in the proceedings. Miller could not recall if he asked anyone to do a penalty phase investigation. (PC-Tr. 10.)

At the postconviction hearing, Miller purported to discuss penalty phase with Mr. Cherry, but was "unable to obtain" helpful penalty phase information despite the "adequate" communication. (PC-Tr. 30, 31.) Miller claimed to have asked about "people who could have helped" Mr. Cherry, but he knew "little or nothing" about his client's background. (PC-Tr. 33.)

Miller claimed he used a Biblical closing during penalty "[l]ikely because there was little else" and he "had no one step forward and elicit the testimony" he would have liked to have had. Despite this, he acknowledged he somehow knew that Mr. Cherry had claimed a history of abuse and he had notice that his client's family and social history might be mitigating. (PC-Tr. 35.) He could not recall discussing the case with Dr. Barnard or whether Barnard's testimony would have been helpful during penalty. Miller testified to his belief that the history of abuse was "the only credible way in which to keep this man out of the electric chair" but that appellant didn't give him names, and that he "absolutely" would have presented evidence of brain damage, evidence of a long history of drug abuse, evidence of poverty and "anything that I could have used", (PC-Tr. 45.), and would have wanted to know all about the mitigation and the witnesses supporting it before he decided to use it or not. (PC-Tr. 49.)

Miller did not contact any of Mr. Cherry's family members and when questioned about neighbors, claimed he "wasn't aware he had any". He also failed to contact anyone who knew his client during his formative years, talked with none of Mr. Cherry's teachers, and requested no school records. (PC-Tr. 12.) Moreover, Miller failed to direct anyone to contact anyone who knew his client during his formative years and therefore was unable to provide Dr. Barnard with the information about Mr. Cherry's childhood.

Specifically regarding mental health issues, Miller stated that he "was not qualified to determine whether or not there was a mental health issue." (PC-Tr. 13.) He thought the State had some mental health history on appellant, so he asked for the competency evaluation. He couldn't recall if Dr. Barnard (the psychiatrist appointed to evaluate Mr. Cherry for competency) requested that he provide background materials for review during the competency exam. Id. When Miller's memory was refreshed with the letter Dr. Barnard sent requesting such materials, the witness still couldn't recall if he ever sent anything, (PC-Tr. 14), and he believed the letter regarded "the defense of liability" and did not pertain to penalty phase/mitigation. (PC-Tr. 15.)

At the postconviction hearing Dr. Barnard testified that: (a) he has no training in neurology or neuropsychological testing and did not perform "formal psychological testing" on Mr. Cherry; (b) he was not asked to perform a penalty phase investigation;

(c) he requested records from trial counsel and received only pretrial discovery materials; and (d) he did not have any school records or affidavits from family and friends at trial. (PC-Tr. 317-319.) Dr. Barnard further testified that Mr. Cherry was "very" candid in providing him with information and there was no communication problem (PC-Tr. 322, 323.); that he knew about appellant's father beating him and using a chain on one occasion and about the mother being alcoholic (PC-Tr. 323-325.); and that he determined Mr. Cherry had a history of alcohol and crack cocaine substance abuse. (PC-Tr. 326.)

Dr. Barnard further testified however that based upon his review of supplemental materials contained in four (4) volumes received by postconviction counsel in 1992 (PC-Tr. 319, 320.): (a) he believed Mr. Cherry was of "borderline mental intelligence", had a history of substance abuse, including alcohol and crack (PC-Tr. 321.); (b) that he had a "very, very strong history" of child abuse which is a "strong indication for mitigating circumstances" (PC-Tr. 322.); (c) that affidavits he reviewed tended to indicate that Mr. Cherry was, in fact, under the influence at the time (PC-Tr. 326, 327.); (d) that, according to testing he reviewed, Mr. Cherry has a full scale IQ of 72 and "was, at a later date than when I saw him, found to be a person of lower intelligence than I saw clinically" (PC-Tr. 327, 328.); (e) that when asked if Mr. Cherry was retarded using the DSM-IV, Dr. Barnard responded "not according to that" (PC-Tr. 328.); and (f) that affidavits he reviewed confirmed and elaborated on

factors constituting nonstatutory mitigation and "maybe made it more severe", as well as relating that appellant was exposed, as a child, to "several, different, very violent incidents", including a person being killed in front of him. (PC-Tr. 330, 331.) Dr. Barnard specified the following nonstatutory mitigating factors applied in Mr. Cherry's case: (a) "severe child abuse"; (b) "limited intelligence, in my opinion probably borderline intelligence"; (c) "history of substance abuse, both alcohol and crack" (d) "he probably was under the influence of some of these substances during the time prior to the alleged crime"; and (e) according to the affidavits reviewed, he witnessed extreme violence as a youth. (PC-Tr. 341.) It is clear from Dr. Barnard's comments that despite his request for information, he was not provided and did not see or review any of the information contained in the affidavits, (PC-Tr. 346, 347.), or records from the Dozier School for Boys and regarding pesticides. Id.

Because the process failed Mr. Cherry, virtually none of the information which was presented in the postconviction hearing through the testimony of expert witnesses was revealed during the penalty phase. The evaluation which was conducted was grossly inadequate, largely because of trial counsel's failure to investigate mitigation. No relevant and crucial statutory criteria were addressed. No adequate testing was performed. A cursory interview and pro forma presentation of opinions based solely on what little was gleaned from the single interview is

all the mental health "assistance" that Mr. Cherry received. This is by no means enough, Mason v. State, 489 So. 2d at 735-37. See State v. Sireci, 536 So. 2d 231 (Fla. 1988).

A criminal defendant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see, e.g., O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Mason v. State, 489 So. 2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984). If the defendant shows a reasonable probability that an expert would aid in his defense, and that denial of expert assistance would result in an unfair trial, then due process is violated if the defendant is denied his request for that expert assistance. This due process right extends to penalty phase. Due process requires provision of competent mental health assistance as a matter of fundamental fairness and to assure reliability. Ake v. Oklahoma, 470 U.S. 68 (1985). The provision of competent psychiatric expertise to a defendant assures the defendant "a fair opportunity to present his defense," and also "enable[s] the jury to make its most accurate

determination of the truth on the issues before them." Ake, 470 U.S. at 77. See also Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991). Here, trial counsel failed to advance Mr. Cherry's due process rights. Trial counsel's failure was unreasonable under the circumstances and was prejudicial. Had counsel advanced Mr. Cherry's right to an appropriate penalty phase mental health evaluation and conducted an investigation of the available mitigation information, and made reasonable decisions about the presentation of mitigation, there is a reasonable probability that the outcome of the proceeding would have been different. Baxter v. Thomas, 45 F. 3d 1501 (11th Cir. 1995); Loyd v. Whitley, 977 F.2d 149 (5th Cir. 1992); Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Magill v. Dugger, 824 F.2d 879, 889-90 (11th Cir. 1987); Elledge v. Dugger, 823 F.2d 1439, 1444-45 (11th Cir. 1987); Blake v. Kemp, 758 F. 2d 523, 531 (11th Cir. 1985). Based on an adequate investigation and appropriate evaluation, three (3) statutory mitigating factors were presented at the postconviction hearing through the testimony of Dr. Barry Crown. (PC-Tr. 63-65.)

The importance of an appropriate evaluation is well stated in Starr v. Lockhart, 23 F. 3d 1280 (8th Cir. 1994):

> As Ake explains, due process requires access to an expert who will conduct, not just any, but an appropriate examination. Id. at 83, 105 S.Ct. at 1096. We find that Starr's exam was inappropriate because it did not delve

into the mitigating questions essential to Starr.

* * *

We agree with the Arkansas Supreme Court that a report on the four statutorily mandated items [footnote omitted] does not suffice to cover everything a defendant might raise as a "mental defect" in mitigation and for which an Ake expert is required. In Starr's case, the examination merely found Starr to be:

> aware of the nature of the charges and the proceedings taken against him. He is capable of cooperating effectively with an attorney in the preparation of his defense. At the time of the commission of the alleged offense, the defendant did not lack the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

State Trial Transcript at 54. These conclusions can only establish that Starr is criminally responsible for his acts, not the degree of such responsibility. The difference between Starr's perceptions of the probable results of the acts he committed and those of a person of normal mental capabilities, a crucial issue for Starr, was not addressed either by the report or the underlying examination. The issue was crucial because in our system of criminal justice acts committed by a morally mature person with full appreciation of all their ramifications and eventualities are considered more culpable than those committed by a person without that appreciation. See Penry, 492 U.S. at 322-23, 109 S.Ct. at 2948-49; Ford v. Wainwright, 477 U.S. 399, 406-10, 106 S.Ct. 2595, 2600-02, 91 L.Ed.2d 335 (1986); Kerrin M. McCormick, The Constitutional Right to Psychiatric Assistance: Cause for Reexamination of Ake, 30 Amer.Crim.L.J. 1329, 1336 (1993). For this reason, Starr needed an expert to make an appropriate examination and to explain the effects of his retardation on his relative

> culpability at the sentencing phase of the proceedings. [footnote omitted]
>
> The inadequacy of the examination is illustrated by the testimony of the examining psychologist. The psychologist testified that Starr was mildly retarded, but was unable to explain to the jury the level of Starr's social and intellectual functioning because his tests had not dealt with that. Nor was he able to interpret or explain the results of previous mental health tests, which assigned Starr the mental age of a six or seven year old, because he was not familiar with the methodology of those tests. Nor could he explain what it meant, in either psychological or lay terms, for an adult male to have the mental age of seven.

Id. at 1289-90.

It is the duty of the mental health expert also to protect the client's rights, and the expert violates those rights when he or she fails to provide professionally adequate assistance. Mason v. State. The expert also has the responsibility to properly evaluate and consider the client's mental health background. Mason, 489 So. 2d at 736-37.

Mr. Cherry was denied his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. The evaluation conducted in his case was not professionally adequate. Counsel failed to assure that the evaluation would be, and the expert failed in his task. Consequently, Mr. Cherry was tried and sentenced to death in violation of his due process and equal protection rights and confidence in the reliability of the outcome of the proceedings is undermined.

ARGUMENT III

TRIAL COUNSEL'S FAILURES AT PENALTY PHASE TO OBJECT TO CONSTITUTIONALLY IMPERMISSIBLE INSTRUCTIONS BY THE COURT AND ARGUMENT BY THE PROSECUTOR, AND TO ARGUE THAT THE EVIDENCE SUPPORTED A LIFE SENTENCE, DEPRIVED ROGER CHERRY OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF ARTICLE I, §§ 9, 16, 17 AND 21 OF THE FLORIDA CONSTITUTION, AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that 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. Strickland, which itself involved in part a claim of ineffective assistance of counsel at penalty phase, obviously applies to the penalty and sentencing phases of a capital case just as it does to the guilt phase. See, e.g., Stevens v. State, 552 So. 2d 1082, 1085-88 (Fla. 1989).

Courts have recognized that in order to render reasonably effective assistance, an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Thus, an attorney is charged with the responsibility of presenting legal objections and argument in accord with the applicable principles of law. See, e.g., Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); Beach v. Blackburn, 631 F.2d 1168 (5th Cir. 1980); Herring v. Estelle, 491 F.2d 125, 129 (5th Cir. 1974); Rummel, 590 F.2d at 104; Lovett v. Florida, 627 F.2d 706, 709 (5th Cir. 1980). Where

counsel fails in this duty and, for example, fails to object to erroneous instructions or to improper prosecutorial argument, counsel has been found to be ineffective. Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983).

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in other portions of the trial. See Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982); see also Kimmelman v. Morrison, 477 U.S. 365 (1986). Even a single error by counsel may be sufficient to warrant relief where the error is of constitutional dimension. Nero, 597 F.2d at 994 ("Sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the sixth amendment standard").

The jury rendered its verdicts finding Roger Cherry guilty on all four counts of the indictment on the afternoon or evening of September 25, 1987. (R. 1030, 1033.) The penalty and sentencing proceedings, including the penalty phase jury charge conference, were conducted on the morning of September 26, 1987. (R. 1033-68.)[28] The entire proceedings, including the jury charge conference, the presentation of evidence, closing arguments, the instructions to the jury, the jury's return of its penalty verdicts, the defendant's allocution to the judge at

[28]Defense counsel never filed a motion for additional time to prepare for penalty phase and did not request additional time after the jury verdict. (R. 1032.)

sentencing, and the judge's imposition of sentence, consumed a grand total of thirty-five transcript pages.

In a limited number of cases, the deficiencies in counsel's performance are so great that counsel's ineffectiveness literally "cries out from a reading of the transcript." Douglas v. Strickland, 714 F.2d 1532, 1557 (11th Cir. 1983), vacated, 468 U.S. 1206 (1984), adhered to on remand, 739 F.2d 531 (11th Cir. 1984, cert. denied, 469 U.S. 1208 (1985). This is one of those cases.

The penalty phase charge conference began at 9:30 a.m. on September 26, 1987. (R. 1033.) Counsel for the defense did not request any special jury instructions. Counsel for the defense objected to the proposed instruction on only one of the aggravating factors sought by the prosecution, the aggravating factor of a prior conviction of a violent felony. The basis for counsel's objection was that in the absence of additional facts concerning Mr. Cherry's prior robbery convictions, there was no basis for a finding that they were violent felonies. (R. 1034-5.) The objection was promptly overruled. (R. 1035.)[29]

The jury was then brought in and the court gave them preliminary instructions. Counsel for the defense did not object to any of these instructions. (R. 1036-37.)

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[29]There is longstanding Florida law, of which counsel was apparently unaware, that a robbery conviction automatically meets the definition of a violent felony, so that no evidence beyond the fact of a judgment and conviction of robbery is necessary to support the aggravating factor. Simmons v. State, 419 So. 2d 316 (Fla. 1982).

The prosecutor then made his closing argument. The argument is littered with grossly improper comments and arguments that are impermissible both under the constitutions of the United States and the State of Florida, and under Florida law with respect to the imposition of the death penalty. (R. 1043-48.) Defense counsel made no objection during this entire argument, nor did he make any objection, motion for mistrial, or motion for curative instruction at its close.

The court then gave the jury the final penalty phase instructions. (R. 1055-60) Defense counsel did not object to any of the instructions. After the jury returned with its death verdicts, the court discharged the jury and moved immediately to impose sentence. Neither at that time, (R. 1064), nor previously, did defense counsel request any time between penalty phase and sentencing in order to develop additional mitigating evidence or prepare an argument for life to the judge. Defense counsel also did not request a pre-sentence investigation at any time.

Throughout the entire proceedings, with the limited exception of his brief and ineffectual, if not affirmatively harmful, closing argument, defense counsel was a passive participant, a virtual spectator to the drama in which his client was sentenced to death. In almost any capital case that is deficient performance, since the failure of the defense to do anything at penalty phase virtually guarantees that a sentence of death will result. See Stevens v. State, 552 So. 2d 1082, 1087

(Fla. 1989) ("when counsel fails to develop a case in mitigation, the weighing process is necessarily skewed in favor of the aggravating factors argued by the state"). In Roger Cherry's case, the performance is particularly lamentable, because there was so much for reasonably competent counsel to do. On the record alone, it is clear that competent counsel, knowledgeable in the law, would have objected to many of the instructions and most of the prosecutor's argument.

Defense counsel made only a single objection during the entire penalty phase and sentencing proceedings. (R. 1034.) There was no valid legal basis for that objection. See supra. There were numerous valid objections that competent counsel would have made in order to protect his client from the erroneous application of aggravating circumstances and from the prejudicial effects of the prosecutor's closing arguments.

First, there were valid objections that should have been made to all of the aggravating factors sought by the State. The State requested instructions on the following aggravating circumstances: prior conviction of violent felonies; murder committed during the commission of a felony (burglary); murder committed for the purpose of pecuniary gain; and especially heinous, atrocious or cruel. (R. 1033-34)

The State's evidence in support of the prior violent felony conviction aggravating factor consisted of the two robbery convictions that the State had already introduced into evidence at the guilt phase of Mr. Cherry's trial. (R. 922, 1213, 1217.)

Competent counsel would have realized that under the governing law, those judgments of conviction, standing alone, were sufficient to establish the prior violent felony aggravating circumstance, Simmons v. State, 419 So. 2d 316 (Fla. 1982), in the absence of any challenge to the convictions themselves. Such counsel would then have investigated the convictions themselves in order to determine whether there was a basis for a challenge to them.

Second, the prosecution asked for and received instructions on both the aggravating factors of murder committed during a burglary and murder committed for pecuniary gain. Since the jury had already found Mr. Cherry guilty of burglary and felony murder, (R. 1029), it was a foregone conclusion that they would also find that aggravating factor. At the time of trial, however, the law was clear that where the aggravating factors of felony murder and murder for pecuniary gain are based on the same facts, they cannot both be applied against the defendant. See, e.g., Mills v. State, 476 So. 2d 172 (Fla. 1985), cert. denied, 475 U.S. 1031 (1986)(burglary and pecuniary gain); Palmes v. State, 337 So. 2d 783 (Fla. 1976)(same). Therefore, counsel should have sought to force the State to make an election between the two aggravating circumstances, or at least sought an instruction to the jury that they could consider one or the other but not both.

Even if it would not have been reversible error to deny such an instruction, see Suarez v. State, 481 So. 2d 1201 (Fla. 1985),

cert. denied, 476 U.S. 1178 (1986), Mr. Cherry clearly was entitled to a limiting instruction informing the jury that "should it find both aggravating factors present, it must consider the two factors as one ...." Castro v. State, 597 So. 2d 259 (Fla. 1992). Counsel, however, did not request such an instruction. Moreover, at closing argument the prosecutor attempted to differentiate between the two aggravating factors, suggesting that the felony murder aggravating factor applied simply on the basis of the fact that the murder was committed during a burglary, while the pecuniary gain aggravating factor focused on the defendant's motive. (R. 1041-42) The prosecutor's argument misstated the law on this issue, but counsel made no objection. Nor did counsel make any attempt to educate the jury in his own argument that the jury should only weigh one, not both, aggravating factors.

Since counsel could have no strategic or tactical reason for wanting the jury to consider and weigh both aggravating factors, the implication is clear that the reason counsel did not do any of this is that he was ignorant of this aspect of Florida's death penalty law, which has been well established since the 1976 decision in Provence. Here again, counsel's performance was clearly deficient. It is also reasonably likely that his performance on this issue influenced the outcome. There is no way to know how the jury conducted its weighing process, but given the prosecutor's argument, it is altogether likely that the

jury found and gave independent weight to both aggravating factors, and that added weight affected its death verdict.

Third, the court instructed the jury that it could find the especially heinous, atrocious or cruel aggravating factor if the crime was "especially wicked, evil, atrocious or cruel." (R. 1056.) That instruction gave the jury absolutely no guidance as to what types of murder the aggravating factor properly applies to, and did not in any way limit its discretion to find the aggravating factor and to render a death verdict based on it. At the time of trial, the United States Supreme Court had already condemned, as unduly vague, a Georgia jury instruction on the "outrageously or wantonly vile, horrible or inhuman" aggravating factor, which instruction gave at least as much information concerning that factor as the instruction given in Mr. Cherry's case. Godfrey v. Georgia, 446 U.S. 420 (1980).

Also prior to Mr. Cherry's trial, the Court of Appeals for the Tenth Circuit, en banc, had found a more detailed Oklahoma instruction on the especially heinous, atrocious or cruel aggravating circumstance to be unduly vague. Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987)(en banc). That holding was affirmed by a unanimous United States Supreme Court. Maynard v. Cartwright, 486 U.S. 356 (1988). Recently, in Stringer v. Black, 1992 U.S. Lexis 1533 (1992), the Supreme Court held that Maynard was "controlled by Godfrey," id., for purposes of the Court's analysis under Teague v. Lane, 489 U.S. 288 (1989). In other words, Maynard was "dictated" by the precedent of Godfrey,

id. at 301, and thus was not "susceptible to debate among reasonable minds." Butler v. McKellar, 494 U.S. 407, 415 (1990).

Thus, a competent attorney at the time of Mr. Cherry's trial would have been aware that there was governing authority from the United States Supreme Court that dictated the conclusion that the court's instruction was impermissibly vague. A reasonably competent attorney would have objected to an instruction that was vague under controlling United States Supreme Court precedent.

Fourth, counsel failed to object to instructions that improperly and prejudicially placed the burden on Mr. Cherry to prove that the mitigating circumstances outweighed the aggravating circumstances, and precluded the jury from considering sympathy or mercy for Roger Cherry in determining what his sentence should be. Nor did counsel object to instructions from the court and arguments by the State that misinformed the jury concerning its role in the sentencing process.

Fifth, counsel failed to object to a blatantly incorrect instruction that permitted the jury to find as an aggravating factor that Mr. Cherry had a significant history of prior criminal activity. Any reasonably competent attorney would have realized that this instruction misstated the law and that it was never intended to be used as an instruction concerning aggravating factors, but only as an instruction concerning rebuttal evidence offered by the prosecution when the defendant seeks to establish the mitigating factor of no significant

history of criminal activity. Since counsel had decided to waive that mitigating factor, he certainly should have been sufficiently aware of the issues surrounding the factor to object to the court's instruction. Failure to object to the non-statutory aggravation evidence and instruction standing alone may constitute ineffective assistance of counsel. See Fitzpatrick v. Wainwright, 490 So. 2d 938 (Fla. 1986)(appellate counsel was ineffective for failing to raise Maggard error on appeal, although counsel was otherwise effective).

Finally, counsel failed to object to a host of improper comments made by the prosecutor in closing argument.

Individually and cumulatively, the failures by defense counsel to make objections that a reasonably competent attorney would have raised create serious doubts regarding the reliability of the outcome. Under the standard of Tedder v. State, 322 So. 2d 908 (Fla. 1975), a jury life verdict would have virtually guaranteed a life sentence for Roger Cherry. The jury voted for death, but it did so after being erroneously instructed that (1) it would consider Mr. Cherry's entire criminal record as an aggravating factor; (2) it could consider murder committed during a burglary and murder committed for pecuniary gain as independent aggravating factors; (3) in effect (because the jury was given no guidance or limiting instruction), it could consider anything at all in deciding whether the aggravating factor of especially heinous, atrocious or cruel applied; and (4) its role in the sentencing process was merely advisory. Moreover, the jury voted

for death after being urged by the prosecutor to do so (a) on the basis of the victims' characteristics and the impact of the crime on their family and friends; (b) based on misstatements concerning the evidence; (c) because Mosaic law, derived directly from God, required the death penalty in order to purify the community; and (d) as a way of expressing jurors' frustrations regarding the criminal justice system. It is much more than reasonably likely that these erroneous instructions and impermissible, prejudicial and inflammatory arguments affected the jury's death votes. Mr. Cherry has shown both deficient performance and prejudice, and is entitled to relief. Mr. Cherry was abandoned at and even before sentencing. He was sentenced to death, for all practical purposes, without counsel. His death sentence cannot be allowed to stand if the guarantees of the right to counsel embodied in the Florida and United States Constitutions are to have any meaning.

ARGUMENT IV

MR. CHERRY WAS DENIED A FULL AND FAIR HEARING AND THEREBY DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE TRIAL COURT REFUSED TO ALLOW MOTIONS TO PERPETUATE TESTIMONY FOR CRITICAL OUT-OF-STATE EXPERT WITNESSES WHO WERE UNAVAILABLE.

Mr. Cherry is entitled to Due Process of law in postconviction, including full and fair proceedings before the postconviction court. See, Tefftteller v. Dugger, 676 So. 2d 369 (Fla. 1996); Easter v. State, 37 F.3d 1343 (8th Cir. 1994); Huff v. State, 622 So. 2d 982 (Fla. 1993); Holland v. State, 503 So.

2d 125 (Fla. 1987); Evitts v. Lucey, 469 U.S. 387 (1985). In the postconviction evidentiary hearing below, Mr. Cherry was deprived of his right to present the perpetuated testimony of critical expert witnesses to the trial court and this Court on review. Further, by depriving Mr. Cherry of these witnesses, the trial court gave advantage to the prosecutor and permitted him to argue, apparently successfully, that experts referenced in the Fla. R. Crim. P. 3.850 motion did not testify and that diluted the evidentiary weight of the expert testimony presented.

Motions to Perpetuate Testimony, filed pursuant to Fla. R. Crim. P. 3.190 (j), were filed as early as August, 1996, (PC-R2. 106-111; 121-126.), denied (PC-R2. 136-138.), and the motions were renewed regarding certain key expert witnesses, specifically Drs. Glen Caddy, Kris Sperry, and Diane Lavate, (PC-R2. 449-462), during the evidentiary hearing. The renewed motions were also denied. (PC-Tr. 475-477.) All of the experts were outside the jurisdiction of the State of Florida and unavailable at the time of hearing. (PC-Tr. 449-462.)

The trial court, by virtue of her rulings denying the motions, deprived Mr. Cherry of the full and fair hearing to which he was entitled. The granting of the motions would in no manner have prejudiced the State and this Court would now be reviewing a completely developed record, with corroborating evidence of Dr. Crown's opinions. Since such a full and fair hearing was denied, and now full review as a consequence, Mr. Cherry's constitutional rights have been violated. This Court

should relinquish jurisdiction for the limited purpose of allowing Mr. Cherry to present the testimony of the witnesses excluded by the trial court's rulings, supplement the record on appeal with same (assuming no change in the ruling below results from the additional testimony), and render opinion only after having a complete record for review.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record on appeal, appellant, ROGER LEE CHERRY, urges this Court to relinquish jurisdiction for supplementation of the record; for imposition of a life sentence; and/or for reversal of the postconviction court's order denying postconviction relief and remand for full resentencing before a jury.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on May 13, 1998.

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