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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant will utilize the same abbreviations as those contained in his Initial Brief. Appellee's Answer Brief will be referred to by "Ans. Br.," followed by the appropriate page number(s).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Appellant relies upon the Statement of the Case and Facts as contained in his Initial Brief. Regarding footnote 4 on page 12 of the Answer Brief, appellee erroneously refers to a DSM-IV category. Appellant was referring to the International Classification of Diseases, 9th Revision (ICD-9), Category 310, which reads, in relevant part, as follows:

> **310 Specific nonpsychotic mental disorders due to organic brain damage**
>
> **EXCLUDES neuroses, personality disorders, or other nonpsychotic conditions occurring in a form similar to that seen with functional disorders but in association with a physical condition (300.0-300.9, 301.0-301.9)**
>
> **310.0 Frontal lobe syndrome**
> **310.1 Organic personality syndrome**
> **310.2 Postconcussion syndrome**

Clearly, each category relates to nonpsychotic mental disorders due to organic brain damage which exclude personality disorders, and Dr. Crown referred to appellant's condition as Frontal Lobe Syndrome (PC-Tr. 113).

Regarding the government's assertion that appellant is an antisocial personality, Dr. Crown testified that diagnosing such in the face of organic brain damage would be like "saying that someone can't read and then recognizing they are blind" (PC-Tr. 87) and that such a "diagnostic label is inappropriate when someone has been found to have organic brain damage" (PC-Tr. 90). Beyond relying upon the ICD-9 (which excludes personality disorders if organic brain damage is found to exist), Dr. Crown

also grounded his opinions on the "full body of neuropsychological literature [which] indicates that a person develops neuropsychological consequences as a result of their history, something has happened to them that creates those differences" (PC-Tr. 91). Dr. Crown was accepted by the government, without objection, as an expert in clinical psychology, forensic psychology, and neuropsychology (PC-Tr. 57).

Mr. Miller's testimony contained no reference to introducing the psychiatric report to avoid cross examination of Dr. Barnard by the prosecutor. This conclusion was fashioned by the trial court despite Mr. Miller's inability to recall admitting the report (PC-Tr. 34), his belief that it did not contain nonstatutory mitigators (PC-Tr. 36), and the fact that the report was never mentioned in trial counsel's penalty phase closing argument.

SUMMARY OF ARGUMENTS IN REPLY

Mr. Cherry proved his postconviction claims. Mr. Cherry's inexperienced and unqualified trial counsel did not investigate and prepare for penalty phase of the trial. Trial counsel, void of strategy, presented a patently ineffective penalty phase. None of the excuses offered by the government overcome the conclusion that there is a reasonable probability that but for Mr. Cherry's trial attorney's unprofessional errors, the result of the capital sentencing proceeding would have been different.

Mr. Cherry was deprived of a competent mental health expert despite the government placing his mental state at issue for purposes of penalty phase. Trial counsel neither requested a penalty phase mental health expert nor developed the competency expert into a mitigation witness. Trial counsel did not understand statutory and nonstatutory mitigation, particularly mental health mitigation. Trial counsel should have known Mr. Cherry was of borderline intelligence.

Mr. Cherry is entitled to resentencing before a jury with the effective assistance of a qualified capital trial attorney. This Court can have no confidence in the outcome of the prior sentencing proceeding.

ARGUMENT I

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

Appellee fixates upon the precise allegations in Mr. Cherry's postconviction motion and ignores both this Court's opinion remanding this case and the mitigation evidence presented during the evidentiary hearing. As specified on pages 2 and 3 of appellant's Initial Brief, this Court fully understood and specified Mr. Cherry's mitigation claims in the prior opinion. These claims were proved during the postconviction hearing.

Mr. Cherry claimed 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." Cherry v. State, 659 So. 2d 1069, 1074 (Fla. 1995). This allegation is proved. Despite trial counsel's inability to recall the penalty phase in Mr. Cherry's case, he ultimately admitted he called no penalty phase witnesses (PC-Tr. 20,22). Trial counsel had no memory of introducing the psychiatric report (PC-Tr. 34), but the penalty phase transcript proves that Dr. Barnard's report was the only evidence presented. However, the record also establishes that the report was not argued to the jury by anyone other than the prosecutor, that it was not linked to mitigating circumstances, statutory or otherwise, and that no mitigating circumstances were argued as applicable by trial counsel. Trial counsel never offered a

strategic explanation for introducing, but not arguing, the psychiatric report.

The extensive mitigation discussed in this Court's opinion has been proved as well:

(a) Abject poverty: Mr. Cherry wore clothes given to him by neighbors and they were often dirty, the Cherry family never had any food and Roger would steal food or get it from neighbors, he often slept under his house, Roger was ridiculed for obtaining food from dumpsters, he was smashed in the mouth by a classmate for eating out of the trash, and was generally raised in poverty (PC-Tr. 165-167, 170, 199, 204-214, 239-240, 353-354, 361, 374, Exh. 3, Depo. at 6-7, Exh. 4, Depo. at 8-9). This mitigating factor was proved and has been found mitigating in other cases (Initial Brief at 53-54).

(b) Severe abuse and neglect: Mr. Cherry's father was a brutal and abusive man; his mother was a neglectful alcoholic. Every lay witness testifying below established this in glaring detail. This mitigation was overwhelmingly established[1] and has been declared mitigating in other cases (Initial Brief at 52,

[1] The government, consistent with both the prosecutor and trial court below, urges this Court to ignore or assign only minimal weight to the uncontested egregious abuse suffered by Mr. Cherry in his childhood on the basis that the primary abuser had died years before the crimes. If it is, in fact, scientifically acceptable to consider the adverse impact of child abuse to be diluted by the passage of time, it is surely appropriate to consider the severity of the abuse in making this determination. Mr. Cherry was severely abused and this should have been considered.

54). Further, Dr. Barnard opined that Mr. Cherry's history of severe mental and physical abuse was mitigating (PC-R2. 2128).

(c) Witnessing extreme violence as a child: Roger's father beat Roger's mother and shot both her and a man in front of Roger. This incident "seemed to mess with his mind" (Exh. 3, Depo. at 6). Roger saw "Shorty" die from having his throat cut (Exh. 3, Depo. at 28). As virtually every witness established, Mr. Cherry's mother was severely and regularly beaten by his father and he was exposed to this throughout his childhood. This mitigating factor was proved.

(d) Institutionalization as a child: Mr. Cherry was sent to Dozier School for Boys and Lenox Williams, a retired psychologist, specifically remembered Roger and testified to the conditions at the school. Dozier was a segregated and brutal institution (PC-Tr. 143-154). This mitigating circumstance was established.

(e) Mental health mitigation: (i) organic brain damage; (ii) history supports both statutory and nonstatutory mitigating circumstances; (iii) mental retardation; (iv) incompetency at time of trial; and (v) intoxication at the time of the offense. Of these five factors, it is submitted that Dr. Crown provided unrebutted competent, substantial evidence in support of organic brain damage and of statutory and nonstatutory mental health mitigators. Both Dr. Crown and Dr. Barnard agree that Mr. Cherry is of borderline intelligence or borderline retarded, with an I.Q. between 72 and 78 (PC-R2. 2129). There was some evidence of

cocaine and alcohol use during the relevant time period and a history of abuse of such substances (PC-R2. 2128). There was lay witness testimony establishing that Mr. Cherry huffed gasoline as a child (PC-Tr. 169-170, 196-197). Dr. Crown opined that three statutory mental health mitigators were applicable and the trial jury should have been allowed to consider such testimony. It is submitted that mental health mitigation was proved consistent with this Court's summary of the claims.

Trial counsel committed errors of commission and omission during the penalty phase: he hired no mental health mitigation expert; he conducted no independent mitigation investigation despite having an investigator; he presented no penalty phase witnesses; he admitted a competency report; he failed to give the jury a context for the report or link it with any statutory or nonstatutory mitigating factors; and he engaged in a brief Biblical closing argument which was contrary to law.

The government makes four unsupported assertions regarding this claim: (a) Mr. Cherry was uncooperative with trial counsel, so this excuses the deficient penalty phase; (b) all evidence admitted during the evidentiary hearing was cumulative to the contents of the four page psychiatric report admitted during penalty phase trial; (c) Dr. Crown is a biased, "hand-picked" expert and therefore his testimony must be summarily rejected; and (d) the mitigation testimony was "not particularly compelling" (Ans. Br. at 20-21, 30). While there is a tame attempt to ascribe strategy to the deficient penalty

presentation, this argument fails precisely because trial counsel was so befuddled regarding what he did during Mr. Cherry's trial.

The government's claim that the mitigation presented below was "not particularly compelling" (Ans. Br. 20-21, 30) is rebutted by the evidence. Appellant relies upon the Statement of Case and Facts in his Initial Brief as more than adequate to rebut this remarkable assertion. The government hopes to have this Court conclude on the front end that there is no prejudice because it knows trial counsel's penalty phase performance was deficient. Since the postconviction evidence establishes that trial counsel could have presented, through investigation and a confidential expert, evidence in support of three statutory mitigating factors, evidence which would have diluted aggravating circumstances, and evidence of numerous nonstatutory mitigating circumstances, prejudice is proved; particularly where the jury was but three votes away from recommending life sentences.

The government claims Mr. Miller was rendered ineffective by his client. This convenient claim of lack of cooperation is untrustworthy. Mr. Miller remembered virtually nothing about Roger Cherry's trial and was either wrong or had no recall about most factual matters, including whether he introduced Dr. Barnard's report and whether he called any witnesses. He resisted returning to Florida as a witness and didn't bother to review anything in preparation for his testimony. The "testimony" relied upon is based upon leading, suggestive questioning by the prosecutor. Mr. Miller self-generated very

little and simply agreed with the prosecutor's leading questions when it suited him. Mr. Miller was appointed to represent Mr. Cherry and this trial was his one and only capital case (PC-Tr. 8). He has not been doing criminal cases since (PC-Tr. 16).

Mr. Miller frequently contradicted himself. Initially, his discussions with Mr. Cherry were "adequate in terms of communication going back and forth between us" and he viewed Mr. Cherry "as an intelligent man" (PC-Tr. 30). Then, he was "unable to obtain information from Mr. Cherry" (PC-Tr. 31). What cannot be contested is that Mr. Miller contacted no one other than Mr. Cherry; no family members, no neighbors, no people who knew him during his formative years, no teachers (PC-Tr. 12). He acquired no records on his client. This occurred despite Mr. Miller's belief that "it was [his] obligation to mitigate Mr. Cherry's sentence any way [he] could" (PC-Tr. 17). What cannot be contested is Mr. Miller had at least six months to prepare the case (PC-Tr. 27), but he did not investigate, discover or present a single witness in mitigation for his client (PC-Tr. 20-22). He did not hire a penalty phase mental health expert, because he didn't know how and opted to play expert himself by deciding Mr. Cherry was "an intelligent man" despite an I.Q. now known to be between 72 and 78 (PC-Tr. 10, 13). It's clear that Mr. Miller didn't know how to prepare and communicate with a competency expert. Despite Dr. Barnard's request, he got nothing from Mr. Cherry's lawyer other than discovery materials and there was never any discussion between lawyer and psychiatrist regarding

the exam (PC-R2. 2105-2106; PC-Tr. 36). All Mr. Miller gleaned from the written psychiatric report was that "Barnard passed him" (PC-Tr. 34) and that it did not contain any nonstatutory mitigators (PC-Tr. 36)(emphasis supplied). The government cannot have it both ways. It cannot be argued that Miller was competent, but Mr. Cherry obstructed him, when the lawyer doesn't understand mitigating factors. The government cannot rely on a psychiatric report as constituting all-encompassing mitigation when the trial attorney considered it to contain no nonstatutory mitigators. This also precludes the government from arguing that the mitigation presented during the evidentiary hearing is merely cumulative to the report. Mr. Miller had deficient knowledge of nonstatutory or statutory factors in Florida, chose to ignore them, and cornered himself into presenting an incomprehensible argument, lacking in facts to support legally recognized mitigating circumstances.

Appellant submits the record contains no competent, substantial evidence establishing Mr. Cherry was uncooperative. He cooperated with Dr. Barnard and revealed mitigating information (PC-R2. 2116-2118). Dr. Barnard's report was available to trial counsel pre-trial and he did absolutely nothing to investigate the contents of, expand upon, give life to, or link the report with established mitigating circumstances.

Alternatively, assuming some inability to communicate between Mr. Cherry and Mr. Miller, the record fails to establish that Mr. Cherry gave "counsel reason to believe that pursuing

certain investigations would be fruitless or even harmful" such that Mr. Miller's failure to investigate is insulated from challenge. Strickland v. Washington, 104 S.Ct. 2052, 2066 (1984). Lawyers have an independent duty to investigate and may not "blindly follow" the commands or suggestions of their clients. Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986). The lawyer first must evaluate potential avenues of investigation and defense and advise the client of those offering possible merit. Id., at 1451. Mr. Miller never investigated, so he could not advise Mr. Cherry of his options. As in Thompson, Mr. Miller's decision not to investigate, purportedly due to Mr. Cherry's failure or inability to disclose mitigation information, cannot excuse his failure to conduct any investigation of Mr. Cherry's background for possible mitigating evidence. Id.

Appellant's trial counsel was deficient in that he failed to recognize his client's borderline intelligence and concluded that he was "an intelligent man" (PC-Tr. 30). He compounded the error by failing to develop information regarding his client and providing it to Dr. Barnard. Doing so would have opened the door to the truth. Dr. Barnard testified below that having sufficient collateral data regarding Mr. Cherry convinced him he was wrong in his evaluation of Mr. Cherry's intelligence pre-trial and that he is of "limited intelligence, in my opinion probably borderline intelligence" (PC-Tr. 341), and qualifies for numerous nonstatutory mitigating circumstances. "An attorney has expanded duties when representing a client whose condition prevents him

from exercising proper judgment." Thompson, 787 F.2d at 1451; see, Blanco v. Singletary, 943 F.2d 1477, 1502 (11th Cir. 1991). For an inexperienced attorney preparing for his first and only capital case to blindly rely upon the purported utterances of a borderline retarded client and conduct no penalty phase investigation falls outside the scope of reasonably professional assistance. A simple follow-up, with an available investigator (PC-Tr. 11), of Dr. Barnard's psychiatric report (during which Mr. Cherry was candid and open regarding his history) would have led counsel to all or most of the evidence discovered in postconviction; evidence that Mr. Miller claimed he wanted to know all about (PC-Tr. 49-50).

The government delights in castigating Dr. Barry Crown and dismissing his opinions on the basis that he is a biased, "hand-picked" expert witness. When Dr. Crown's education, training, and qualifications were established and he was offered as an expert in the fields of clinical psychology, forensic psychology, and neuropsychology, the prosecutor's only response was "No problem." (PC-Tr. 57). Dr. Crown's qualifications, including being a certified forensic evaluator pursuant to Florida law, are detailed in the record and his curriculum vitae was admitted into evidence. He was no more "hand-picked" or biased than any confidential expert hired by any party to a legal controversy to offer scientifically substantiated opinions. The government's lack of understanding of the use of ICD-9 and the conclusions based thereon does not establish any deficiency in Dr. Crown's

science. In fact, after reviewing formal psychological test results and other collateral data, Dr. Barnard agreed with Dr. Crown regarding a number of nonstatutory mitigating factors, including Mr. Cherry's borderline intelligence (PC-Tr. 321, 326-327). Dr. Barnard was not offered by Mr. Cherry as an expert to corroborate Dr. Crown, but simply to establish that Mr. Miller did not adequately prepare him, talk to him, or request that he be involved in mitigating Mr. Cherry's sentence. Dr. Barnard never reevaluated Mr. Cherry and was never asked to serve as a mitigation expert. His role was that of the competency evaluator who made the wrong call at the time of trial regarding Mr. Cherry's level of intelligence. Dr. Barnard's lack of testimony that statutory mitigating factors applied is likely due to inability to diagnose organic brain damage (it is outside his field) inability to administer formal mental health testing (this is also outside of his field) and his limited access to collateral data (PC-Tr. 319-320)(he relied upon dated materials from VLRC).

Dr. Crown's testimony, in conjunction with Dr. Barnard's revised opinions, establish that trial counsel should have been on notice of mitigating mental health issues in Mr. Cherry's case. Under such circumstances, reasonably effective representation required counsel to investigate and present independent mental health mitigation through an expert witness during the penalty phase of Mr. Cherry's trial. See, Rose v.

State, 675 So.2d 567, 572-573 (Fla. 1996); Baxter v. Thomas, 45 F.3d 1501, 1513 (11th Cir. 1995).

Conspicuously absent from the government's brief is any rebuttal of Mr. Cherry's argument that the instant case is similar to Rose v. State, 675 So.2d 567 (Fla. 1996), as asserted on pages 55 through 58 of appellant's Initial Brief. Appellant assumes the government possesses no credible answer. Mr. Miller's assistance was deficient and Mr. Cherry has been severely prejudiced.

Unfortunately, the instant case is yet another example of an unqualified, inexperienced, and ineffective attorney being court-appointed to represent a capital defendant and the result is an unreliable death sentence. See, In Re: Amendment to Florida Rules of Judicial Administration--Minimum Standards for Appointed Counsel in Capital Cases, 711 So.2d 1148 (Fla. 1998)(Kogan, C.J., dissenting)("...disproportionately large number of errors caused by inexperienced attorneys appointed when public defenders are unable to take the case"). Mr. Cherry submits that it has been shown by reasonable probability that but for Mr. Miller's unprofessional errors during Mr. Cherry's capital sentencing, the result of the proceedings would have been different. Strickland v. Washington, 104 S.Ct. at 2068.

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.

As this Court acknowledged in Ragsdale v. State, Case No. 89,657, Slip Op., October 15, 1998, deprivation of an effective mental health expert "necessarily overlaps" with a claim of ineffective assistance of counsel due to failure to investigate and introduce evidence in mitigation and such a claim is a proper basis for an evidentiary hearing in postconviction. Slip Op., at 8. Thus, the trial court and government's application of a procedural bar to this claim is contrary to law.

Dr. Crown's testimony was for the most part unrebutted and, in important respects, corroborated by Dr. Barnard. Dr. Barnard's pre-hearing deposition, in addition to his testimony at the hearing, establishes that he believed that Mr. Cherry qualified for powerful nonstatutory mitigating factors: intoxication at the time of the offenses, crack and alcohol abuse by history, severe mental and physical abuse, and borderline intelligence (PC-R2. 2128-2129). Further, although appellant disputes the government's insinuation that he must prove that the specific mental health expert testifying in postconviction was available for trial testimony, the record establishes that Dr. Crown was practicing in Miami in 1986-1987 and available as a confidential mental health mitigation expert had appellant's

trial counsel contacted him (PC-Tr. 108) and Dr. Barnard was obviously available and would have been of substantial value as a mitigation witness if properly informed of Mr. Cherry's history and asked to review formal psychological and/or neuropsychological testing. Nevertheless, the issue is not whether a particular expert was available at the time of trial, but whether the collateral information upon which he relied and the opinions he expressed in postconviction would support the conclusion that a similarly qualified expert could have relied upon the same data and provided similar opinions in support of statutory and nonstatutory mitigating circumstances during appellant's penalty phase trial. Appellant submits that such conclusion is warranted. Further, trial counsel was deficient in failing to develop this data and provide it to a confidential mental health mitigation expert. The record conclusively establishes that no such data was provided to Dr. Barnard for his competency evaluation (PC-R2. 2105-2106) and that trial counsel never requested that a mental health expert be appointed for mitigation purposes. Mr. Cherry's mental state was at issue during the penalty phase and he was denied the expert psychiatric assistance to which he was entitled. Ake v. Oklahoma, 105 S.Ct. 1087 (1985). Due process requires provision of competent mental health assistance as a matter of fundamental fairness and to assure reliability. Id.

The government's simplistic approach to this case is best demonstrated by the following:

> The theory advanced by present counsel fails to take into account the reality of the situation -- Cherry was charged with the brutal murder of two elderly persons, a crime which, under the best of circumstances, presents a difficult case for mitigation. It would not be in Cherry's best interest to change to an intoxication theory of defense at the penalty phase after unsuccessfully attempting to convince the jury that he was innocent. Such a strategy would not have been successful, and it certainly cannot be said that no reasonable lawyer would have decided not to use such a theory [cite deleted]. The fact is that there are certain cases that simply cannot be won, and this is one of those cases [cite deleted].

(Ans. Br. at 38).

Thus, regarding prejudice, the government asserts that appellant's was a "difficult case for mitigation," that presenting substance abuse and intoxication in penalty phase "would not have been successful," and that the case absolutely could not have been won. The government's assertion erroneously assumes that the nature of the crime charged magically elevates bad lawyering to the status of trial strategy. The facts confronted by trial counsel in a capital case are always difficult, but they never justify unconditional surrender to the government.

Caruso v. State, 645 So.2d 389 (Fla. 1994), demonstrates the folly of the government's argument. Caruso brutally murdered his elderly next door neighbors, a husband and wife, during a burglary. The female victim had been stabbed in the upper back, stabbed in the forehead above her eye, and beaten about her face. The male victim had been stabbed ten times and had blunt trauma

and lacerations to the head. Caruso denied involvement and, in fact, got his mother to report the murders and attempted to cast suspicion upon an unidentified black male. Caruso was charged with the crimes after substantial evidence was developed implicating him. Id. at 392. Caruso did not testify during the guilt phase; the defense being that he did not commit the crimes. Id. at 393. During the penalty phase, the medical examiner testified the victims were alive when attacked and experienced pain lasting as long as five minutes for one victim and fifteen minutes for the other victim. Id. at 396. Again, Caruso did not testify during the penalty phase.

What distinguishes Caruso's case from appellant's is what happened next: Caruso's attorney presented mitigation, undoubtedly developed over months of preparation, in the form of family and other lay witnesses who testified that Caruso was a decent fellow except when on cocaine, witnesses who testified to Caruso's substance abuse and at least implied he was under the influence of narcotics during the relevant time period, and, importantly, a clinical forensic psychologist (who did not personally examine Caruso, but reviewed his records and spoke with those who knew him) who testified that the murders in question were committed by either a sociopath or one in a drug-induced rage. Id. The expert testified that Caruso had no apparent history of sociopathy, but did have a substance abuse history. The jury recommended life for both murders by votes of 11-1. Although the trial court overrode one of the life

recommendations and sentenced Caruso to death, this Court reversed the override. The trial court found four aggravating circumstances[2], but this Court determined the mitigation presented by trial counsel provided a reasonable basis for the jury's life recommendations. Id. at 397. One must assume that the mental health expert's testimony influenced both the trial jury and this Court in sparing Mr. Caruso's life.

Was not Mr. Caruso's case a "difficult one for mitigation?" Did not Mr. Caruso's lawyer utilize an intoxication/substance abuse theory in penalty phase despite claiming innocence during guilt phase? Didn't the expert witness rely upon the history of cocaine dependency in providing critical mitigating testimony? Despite the government's opinion, was not Mr. Caruso's lawyer "successful" in obtaining life recommendations and relief from the override death sentence? Was not Mr. Caruso's case so similar to appellant's that the government would consider it one that "cannot be won"? Caruso aptly demonstrates the difficulty of a case requires the lawyer to anticipate a guilty verdict and prepare with all due diligence for penalty phase. Life recommendations can and should be "won" where the mitigation is strong, as in Mr. Cherry's case. It is submitted that had Mr. Caruso's lawyer surrendered to the government in penalty phase, as did appellant's lawyer, Mr. Caruso would likely find himself on death row.

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[2] Prior capital felony, in the course of a burglary, cold, calculated and premeditated, and heinous, atrocious and cruel.

A brief review of cases with atrocious facts, but substantial mitigation such as that established during Mr. Cherry's evidentiary hearing, demonstrates that competent lawyering will result in recommendations of life sentences. Scott v. State, 603 So.2d 1275 (Fla. 1992)(victim bludgeoned with bottle and strangled with phone cord; five aggravating factors and one statutory mitigating factor found by trial court; override death sentence reversed due to age, difficult childhood, borderline intelligence and brain damage, immaturity and impulsivity, and ability to form caring relationships); Reilly v. State, 601 So.2d 222 (Fla. 1992)(sexual battery and murder of a four year old boy, involving multiple lacerations, cut throat, and forced oral sex; trial court overrode jury upon finding of prior violent felony, in the course of sexual battery/aggravated child abuse, and heinous, atrocious and cruel, with no mitigation; reversed by this Court upon determination that I.Q. of 80, borderline retardation, brain impairment, ridicule due to eye problem, and stuttering problem formed reasonable basis for life recommendation); Hegwood v. State, 575 So.2d 170 (Fla. 1991)(triple homicide and robbery; override death sentences reversed based upon age, childhood history, mental health testimony regarding emotional and/or mental impairments); Buford v. State, 570 So.2d 923 (Fla. 1990)(rape and murder of a seven year old girl; aggravating factors of in the course of a sexual battery and heinous, atrocious and cruel outweighed by age, lack of significant prior history, and abused, neglected, and

impoverished childhood, drug and alcohol abuse, intoxication; life recommendation was reasonable and should have been followed by trial court).

Appellant's trial counsel, for no strategic reason, failed to request a confidential mental health mitigation expert, failed to investigate, discover, and provide mitigation data to the competency expert who was appointed for pre-trial purposes, and consequently Mr. Cherry was deprived of a competent mental health expert during the penalty phase of his trial. The outcome of the penalty phase is therefore wholly unreliable.

ARGUMENTS III & IV

Appellant relies upon the arguments contained in his Initial Brief.

CONCLUSION

Based upon Appellant's Initial Brief, the foregoing arguments, and the entire record on appeal in this cause, Roger Lee Cherry respectfully urges this Court to grant him a resentencing before a jury with the assistance of an effective and qualified capital trial attorney.

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

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