IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,540

PAUL ALFRED BROWN, JR.

Appellant

v.

STATE OF FLORIDA

Appellee

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT FOR HILLSBOROUGH COUNTY,
STATE OF FLORIDA

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Brown's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied some claims and granted an evidentiary hearing on limited claims. The following symbols will be used to designate references to the record in the instant case:

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

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

"PC-R. Vol., Pg."–3.850 circuit court hearing transcripts.

REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE AND FACTS

i. Course of Proceedings and Disposition in Court Below

The Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, entered the Judgment and Sentence at issue on March 3, 1987. Mr. Brown was charged by indictment with murder in the first degree, armed burglary, attempted first degree murder, violations of §782.04(1)(a), §810.02, and §777.04 and §782.04 Fla. Stat.

Trial began on February 16, 1987 and the jury returned a verdict of guilty on February 19, 1987. On the same day, the penalty phase before the jury was held. The jury returned a death sentence recommendation by a 7-5 vote.

On March 2, 1987, sentencing before the Judge was held. The Court, accepting the jury recommendation, imposed a sentence of death. Mr. Brown unsuccessfully took a direct appeal from the judgment of conviction and imposition of the death sentence. Brown v. State, 565 So. 2d 304 (Fla. 1990). Rehearing was denied on June 11, 1990. On November 26, 1990, a petition for writ of certiorari was denied by the United State Supreme Court. See, Brown v. Florida, 111 S. Ct. 537 (1990).

Mr. Brown's pleadings pursuant to Fla. R. Crim. P. 3.850 were due to be filed November 26, 1992. However, to avoid the signing of a warrant, Mr. Brown agreed to initiate his

postconviction motion six months early to comply with schedules established by the Governor. Mr. Brown timely filed his initial 3.850 motion in the circuit court on May 8, 1992 (PC-R. 17-29). At a status hearing on June 5, 1992, the court dismissed Mr. Brown's initial 3.850 motion without prejudice. An amended 3.850 motion was filed on September 16, 1992 with special request for leave to amend when and if 119 compliance did occur (PC-R. 30-81).

A second amended 3.850 was filed on November 24, 1992 (the two-year date) with special request for leave to amend based on the receipt of some of the requested materials pursuant to 119 requests. Chapter 119 litigation was ongoing.

On August 31, 1994, Mr. Brown learned that his trial defense counsel, Wayne Chalu, was employed by the Hillsborough County State Attorney's Office, the same office which prosecuted Mr. Brown's Rule 3.850 motion. Mr. Brown filed a motion to disqualify the Hillsborough County State Attorney's Office (PC-R. 107-112). The conflict of interest inherent in this situation caused Mr. Brown to fear that his former defense counsel would testify consistent with his goals of maintaining employment with the Hillsborough County State Attorney's Office. On October 12, 1994, Judge Sexton agreed and granted Mr. Brown's Motion to Disqualify the State Attorney (PC-R. 120).

The state appealed Judge Sexton's order in a writ of

certiorari to the Florida Supreme Court. Without opinion, this Court quashed Judge Sexton's order with one dissenting vote on January 31, 1995.

On October 24, 1995, Mr. Brown filed a motion to compel disclosure of public records and sought permission to inspect the physical evidence in the case pursuant to Chapter 119.01 Et. Seq., Fla. Stat (PC-R. 125-130). After depositions and repeated requests for disclosure, Mr. Brown learned that physical evidence in the custody of the circuit clerk’s office had been admitted into evidence at trial was either lost or destroyed (PC-R.34-38). In addition, the original unedited version of Mr. Brown’s “confession” had been either lost or destroyed by the Hillsborough County State Attorney’s Office (PC-R.Vol IV,43). Because the unedited version of the tape had not been admitted at trial but a transcript of a portion of the tape had been admitted, Judge Tharpe ruled that Chapter 119 compliance had occurred (PC-R. 298-355). After this ruling, Mr. Brown was granted leave to file his third amended motion to vacate judgment of conviction and sentence on July 8, 1996 (PC-R. 135-266). A Huff hearing was held before Judge Tharpe. He summarily denied all claims except four claims on which he granted an evidentiary hearing. Those four issues were the Chapter 119 claim regarding the lost evidence; prosecutorial misconduct; ineffective assistance of counsel at guilt phase and the ineffective

assistance of counsel at penalty phase (PC-R. 298-355). An evidentiary hearing was set for March 3-5, 1997.

On February 20, 1997, Mr. Brown filed his notice to ensure compliance with Rule 2.050(b)(10), which required that judges hearing postconviction matters in death penalty cases should have attended a judicial course as a requirement or obtain a waiver from the Florida Supreme Court(PC-R. 361-363). Judge Tharpe had not attended the required course at the time, however, a waiver was pending(PC-R.Vol.IV,27-28). Judge Tharpe recused himself the week before the evidentiary hearing was to begin.

The Friday before the evidentiary hearing was to begin on Monday, counsel learned that Judge Diana Allen had been assigned to take the case. Judge Allen had no prior familiarity with Mr. Brown's case or the extensive and lengthy five year procedural history in circuit court(PC-R.6).

During the week before the evidentiary hearing, Mr. Brown filed a second motion to disqualify the State Attorney's office based on new facts which had arisen during preparation for the evidentiary hearing[1](PC-R.364-414). Mr. Brown filed this motion when he learned that the Hillsborough County Public Defender's office which had represented him at trial, had allowed

[1]The motion had been filed on February 26, 1997. Both counsel and the state had attempted to get the motion heard before the evidentiary hearing began, however no judge had been assigned to take over the case. The motion was not addressed until the first day of the evidentiary hearing.

Assistant State Attorney George Bedell to review a micro-fiche copy of Mr. Brown's confidential trial attorney file without postconviction counsel's knowledge nor Mr. Brown's consent (PC-R. 364). This event was particularly disturbing because postconviction counsel had agreed to allow Mr. Bedell to review her copy of the trial attorney files subject to the taking of exemptions on matters contained in the file which were not relevant to the postconviction proceeding. Mr. Bedell did not request to see the trial attorney's file in counsel's possession until after his secret review of the micro-fiche copy at the public defender's office. [2]

It was not until the first day of the evidentiary hearing that Mr. Brown learned the truth about the disclosure of his confidential files. The state had not only reviewed the public defender's micro-fiche copy of his defense attorney's files prior to the hearing, but it had obtained a copy of the defense files, two years prior to the granting of an evidentiary hearing from the public defender's office (PC-R.Vol.IV,22-27).

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[2]During the evidentiary hearing, Mr. Brown learned that the reason Mr. Bedell had asked the public defender to review the micro-fiche copy of the defense attorney's files was because of a conversation he had with Mr. Chalu. Mr. Chalu disclosed that he had not seen some notes which he thought were a part of the file while undersigned counsel was preparing him to testify at the evidentiary hearing. This is the same Mr. Chalu who had testified in the first motion to disqualify hearing before Judge Sexton that he had no conversations with Mr. Bedell regarding the substance of Mr. Brown's case (PC-R. 380).

> MR. BEDELL: Right. And what had happened in this case from my perspective was that a couple of years ago, I had asked Mr. Lopez, who was then the Chief Assistant at the Public Defender's Office, if they had the file so that Mr. Chalu and Mr. Alldredge could look at it. And I did that knowing that this day was going to come sometime, and he told me that they couldn't find the file. And so I didn't do anything for quite awhile.
>
> And I called back after he was elected judge and spoke with him before he left office one more time, and he turned over to me some microfiche, which I never looked at. I suspect they are duplicates of the microfiche that they have at the Public Defender's Office. However, what's on the microfiche is not even the case where Mr. Brown is charged with first-degree murder.
>
> What I finally figured out was that it is the case where he was charged with attempted first-degree murder and armed robbery, an entirely separate case. But I looked through that looking for notes because, again, Mr. Chalu had told me that they had not been able to find or see the handwritten notes they said should have been in Mr. Brown's file.
>
> * * *
>
> ...it was the attempted murder case that was prosecuted simultaneously with the capital case and which Mr. Brown ultimately pled guilty to.
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> However, what I saw in that file and what I made copies of and what I have right here that the Court can look at if you want to is virtually identical to what Ms. Backus [sic] turned over to me. And the purpose of making these copies again was to get Mr. Chalu and Mr. Alldredge to look at them so they could be prepared to answer questions that they were going to have to answer in this hearing. It wasn't to go snooping around to try to find out secrets of Mr. Brown. I wanted to know simply what he had disclosed to his lawyers and whether they had diligently pursued the information that he had given to them and that's what happened.

(PC-R. Vol. IV, 22-24). Judge Allen failed to recognize the significance of these events because she had not been on the case long enough to be familiar with the prior disqualification

hearing and refused to grant the motion to disqualify. Mr. Brown now had two strikes against him before the evidentiary hearing started.[3]

Despite the state's misconduct and the hearing court's lack of knowledge of the case, the evidentiary hearing began on March 3, 1998(PC-R.Vol.IV,15.19,35,41). The hearing court found certain documents which counsel had exempted from her copy of the defense attorney's files as being irrelevant to the post-conviction proceedings. Instead of finding that they were exempt, the court turned the documents over to the state even though the court acknowledged that the documents were irrelevant to the proceedings(PC-R.Vol.IV,16-18). The hearing court also erroneously believed that the state had the burden of proof in Rule 3.850 hearings(PC-R.Vol.IV,29-30).

At the conclusion of the evidentiary hearing, counsel was allowed closing argument before the hearing court ruled. On April 9, 1997, Judge Allen denied relief on the four issues which had been addressed at the evidentiary hearing. Then, the court addressed the issues previously summarily denied by Judge Tharpe and stated that "Counsel was given the opportunity to present

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[3]Similar conflicts between Mr. Chalu's involvement as Chief Assistant Public Defender in representing death sentenced clients and his current employment with the Hillsborough County State Attorney's office have arisen since Mr. Brown's case . See, Henry (John) v. State and numerous other cases. Mr. Chalu no longer prosecutes postconviction cases because of the numerous conflicts of interest.

evidence on any claim." Judge Allen states that no evidence was presented as to claims which were not addressed at the evidentiary hearing(PC-R.450). However, counsel was not given an opportunity to visit these issues with Judge Allen. As a result, the hearing court simply adopted Judge Tharpe's order even though she was not the judge who heard the argument during the Huff hearing. The portion of the order that the hearing court did write failed to adequately address the merits of the issues and the court failed to attached the portions of the record on which it relied in summarily denying the claims which were not addressed at the evidentiary hearing.

Timely notice of appeal was filed on May 5, 1997 (PC-R. 454-455). This appeal is properly before this Court.

ii. Statement of Facts

a. Facts introduced at Trial and Sentencing

Mr. Brown was sentenced to death by a 7 to 5 jury vote. On direct appeal, this Court had two dissenting opinions as to the sentence in this case. At trial, no defense evidence was presented at guilt phase in this case. The only defense evidence presented was at penalty phase. It consisted of the testimony of three lay witnesses: Mr. Brown's father, a video tape of his stepmother, his brother, Jimmy and the expert mental health testimony of Dr. Berland, a psychologist and Dr. Afield, a psychiatrist. See Argument VIII, infra. The mental health

testimony was highly impeached by the State's attorneys for its lack of independent corroboration and the lack of time spent during the examination of Mr. Brown. The lay witnesses were uncontroverted. No other evidence was presented to the jury. This was Mr. Brown's defense counsel's first penalty phase.

During closing argument, assistant state attorney, Michael Benito, was allowed to argue, without defense objection, his famous "day in the life" argument which had been continually condemned by this Court as improper argument. See, Argument II, infra.

The final blow came when the trial court erroneously instructed the jury on the aggravating factor of "cold, calculated and premeditated." See, Argument I infra. Mr. Brown was sentenced to death by the vote of one juror.

b. Facts introduced at Evidentiary Hearing

Mr. Brown was granted an evidentiary hearing by Judge Tharpe on four issues-- ineffective assistance of counsel at guilt and penalty phases, prosecutorial misconduct and the missing evidence from the Circuit Clerk's office for Hillsborough County. The court summarily denied the other claims.

Mr. Brown presented the testimony of Mr. Don Buchanan from the Hillsborough County Circuit Clerk's office to memorialize for the record that the bolt-cutters entered into evidence at trial that were in the custody of his office had been lost or destroyed

(PC-R. Vol. IV, 33-44). Previous testimony regarding the missing original “confession” of the defendant was memorialized before Judge Tharpe at a previous hearing . Mr. Brown could not have these items analyzed because they have been destroyed (PC-R. Vol. IV, 39-43).

The remaining issues were addressed together through the testimony of the trial defense attorneys, mental health experts and lay witnesses. Mr. Brown presented the testimony of Wayne Chalu, his guilt-phase defense attorney. Mr. Chalu testified that he was the attorney responsible for the guilt phase even though he had done the initial work up of the case (PC-R. Vol. IV, 51). He testified that he was responsible for hiring the experts initially and directing the investigation of the case (PC-R., Vol. IV, 51-54). He testified that the theory of the defense case was to concentrate on penalty phase and the get a lesser charge at guilt phase(PC-R.Vol.IV,57,75,76-77).

Mr. Alldredge was called into the case as penalty phase attorney(PC-R.Vol.IV,49-50,78). Mr. Brown’s case was the first penalty phase Mr. Alldredge had ever conducted(PC-R.Vol.IV,70, Vol.V,126). He testified that he was dissatisfied with the performance of the investigator who conducted the mitigation investigation in the case(PC-R.Vol.IV,63,Vol.V,153). He was dissatisfied because certain tasks had been requested by Mr. Chalu at the inception of the case but where not followed up on

by the investigator such as obtaining all of the background materials necessary for the mental health experts(PC-R.Vol.V, 154-155). After being presented with the materials that the investigator did not get, Mr. Alldredge testified that he would have used those materials during penalty phase and in his opinion these materials would have been information that was important for the jury to hear(PC-R.Vol.V,135,150,169). Mr. Alldredge testified that he would have presented the testimony of any witnesses to the jury that could have possibly testified to mitigating information had he known of their existence(PC-R., Vol.V,150,169).

Mr. Brown presented evidence regarding the mental health information that was available at the time of trial. Dr. Steven Szabo, the jail psychologist, evaluated Mr. Brown during his incarceration in county jail before and after trial. He diagnosed Mr. Brown at the county jail as being schizophrenic and possibly anti-social(PC-R.Vol.V,192). He administered increasing doses of Mellaril from 50 to 200 milligrams to Mr. Brown after the crime and during the trial. Dr. Szabo, who was available to testify at the time of trial, would have testified that Mr. Brown was not malingering or faking his mental illness(PC-R.Vol.V,197, 200-206). Dr. Szabo testified from county jail records that were in the defense attorney's file but never used at trial. Mr. Chalu testified that Dr. Szabo had spoken with Dr. Afield, but

this is not reflected in Dr. Szabo's testimony(PC-R.Vol.IV,85).

Mr. Brown presented the testimony of Dr. Jerry Fleischaker, a psychiatrist who had treated Mr. Brown for mental disorders as an adolescent(PC-R.Vol.V,209). Because his files had been destroyed through the passage of time and he had no independent recollection of the findings purported to him in the pre-sentence investigation, Judge Allen erroneously refused to consider his testimony(PC-R.Vol.V,208), even though he could have offered his opinion based on the documents that he had reviewed.

On the second day of the evidentiary hearing, Mr. Brown presented the neuropsychological testimony of Dr. Henry Dee (PC-R.Vol.V,134). Neuropsychological testing to confirm organic brain damage was not done at trial even though Dr. Berland had indicated in his report that this type of testing needed to be done. Dr. Dee testified as to the evidence of organic brain damage that he found and how it affected Mr. Brown's ability to form specific intent(PC-R.Vol.VII,230-310). He also found that Mr. Brown was borderline retarded with multiple learning deficiencies and an inability to cope in stressful situations. Mr. Alldredge had already testified that he would have used this information from Dr. Dee if he had it available(PC-R.Vol.V,135, 150).

Dr. Faye Sultan testified from a plethora of independent corroborative evidence which was not given to the trial defense

experts(PC-R.,Vol.VII,315-360). Upon her review, she found the presence of statutory and non-statutory mitigating factors. Her testimony was of the type that Mr. Alldredge said he would have shown to the jury and had no reason for not presenting this type of evidence(PC-R.Vol.V,135). It was obvious that the hearing court was not considering Dr. Sultan's testimony. In fact, her testimony is not addressed at all in the court's order(PC-R.449-453). The hearing court repeatedly interfered with counsel's direct examination and openly cross-examined the witness for the state(PC-R.Vol.VII,330-331,334,338,345-346,356,366-368,377,386-387)[4]. The court did such an effective cross-examination for the state that the state's attorneys did not find it necessary to conduct any cross-examination of the witness(PC-R.Vol.VII,359).

Mr. Brown presented additional mitigation witnesses, who had information which Mr. Alldredge said he would have presented had he had the additional information(PC-R.Vol.V,135). Bessie Conway testified to the beating that she saw Paul Brown Sr., inflict on his son with a belt. The beating was so vicious that Ms. Conway picked up a chair and threatened to hit Paul, Sr. with it unless he let the boy go(PC-R.Vol.VII,360-365). Daniel

[4]In total, the judge interrupted and criticized counsel or the witness twenty-six times during Mr. Brown's case (PC-R. Vol. IV, 80, Vol. V, 126, 139, 141, 148-149, 150, 152, 156-157, 168, 173, 175-183, 202-204, 217-219, Vol. VII, 330-331, 334, 338, 345-346, 356, 366-368, 377, 386-387). Mr. Brown could not receive a full and fair hearing under these circumstances.

Russell Jackson testified to the brutal bloody beatings that he and Paul, Jr. were subjected to at the hands of Paul's father (PC-R.Vol.VII,368-383).

Jimmy Lee Brown, Paul's brother, testified at trial. He had information that was never brought out by defense attorneys at trial regarding the magnitude of the physical abuse Mr. Brown suffered during his childhood(PC-R.Vol.VII,387-412). These same witnesses gave testimony that Mr. Alldredge said he would have presented at penalty phase had he known of the information they possessed(PC-R.Vol.V,135).

The state presented two rebuttal witnesses, the state called Wayne Chalu to testify as to both phases of the trial even though he was responsible for only one(PC-R.Vol.VII,450-458). The state also called Dr. Robert Berland, the psychologist who testified for the defense at trial(PC-R.Vol.VII,412-450). Dr. Berland in essence testified that the additional background materials presented by counsel would have "reinforced the believability" of his testimony(PC-R,Vol.VII,431). Even though the additional neuropsychological testing did not change his mind regarding whether Mr. Brown was malingering on the four MMPI tests that he gave Mr. Brown, it did corroborate his findings of organic brain damage(PC-R.Vol.VII,420).

He testified that he thought Mr. Brown was "gilding the lily" and not malingering(PC-R.Vol.VII,425). A distinction which escaped

the judge, jury and the state. Dr. Berland testified that the additional materials made his results "more believable" and could have showed that Mr. Brown had no reason to fake his mental illness(PC-R.Vol.VII,441,446).

After the presentation of all of these facts, the hearing court denied Mr. Brown's claims in a five-page order which did not address the merits of the claims and without citing to the record.

SUMMARY OF ARGUMENT

1. Mr. Brown's jury was not given the limiting jury instruction on the "cold, calculated and premeditated" aggravating circumstance at trial contrary to Espinosa v.Florida. This Court addressed this issues on the merits at direct appeal, holding specifically that Maynard v. Cartwright,108 S.Ct. 1853 (1988)did not apply to Mr. Brown's case. The jury instructions were not properly given in this case.

2. Mr. Brown was denied a full and fair hearing in the lower court regarding the prosecutor's misconduct during trial and at the evidentiary hearing. During trial, the state improperly argued to the jury it should consider that Mr. Brown would be able to have a "life" in prison that he would be able to read, write, eat and sleep unlike the victims in the case. This argument was improper at the time and eventually held to be error in Taylor v. State, 583 So.2d 323 (Fla. 1991) and Jackson v.

State, 522 So.2d 802 (Fla. 1988). This was error at the time of trial, which was obviously recognized by the defense attorneys in Taylor and Jackson. Defense counsel's testimony at evidentiary hearing that he did not know the argument was improper is deficient performance. Particularly, where both the Jackson and Taylor cases were tried by the same public defender's office and both trials occurred around the same time period as Mr. Brown's trial in Hillsborough County.

The pattern of misconduct continued into the evidentiary hearing where counsel learned that the assistant state attorney had, years prior to the determination of whether Mr. Brown was entitled to an evidentiary hearing, obtained a micro-fiche copy of trial defense attorney's files on a companion case which was not the subject of the collateral attack. This was done without collateral counsel's knowledge or Mr. Brown's permission. The state's improper taking of the trial attorney defense files from the Hillsborough County Public Defender's Office was outrageous conduct. Mr. Brown's second motion to disqualify the state's attorney's office was erroneously denied.[5] Mr. Brown is entitled to a new trial. Finally, the prosecution lost or destroyed the

[5]Mr. Brown's first motion to disqualify the state's attorney's office was based on the fact that his trial defense counsel, Mr. Chalu, is now employed at the Hillsborough County State Attorney's Office and was prosecuting death penalty postconviction cases. The circuit court granted the motion but this Court subsequently quashed the court's order without opinion.

only original taped confession of Mr. Brown taken by the Sheriff's Department. The lower court erroneously ruled that because the tape was not admitted into evidence at trial there was no violation. However, portions of the tape were transcribed and admitted.

3. Mr. Brown was denied a full and fair hearing on the issue of ineffective assistance of counsel at guilt phase where the lower court failed to address the merits of the claim in its order denying relief. Trial counsel was deficient in failing to introduce any evidence in the guilt phase at trial. Counsel testified at evidentiary hearing that he was not sure whether Mr. Brown understood the implications conceding guilt as a trial strategy; counsel failed to recognize that the jury was tainted by a prejudicial newspaper article which was circulating in the jury room during Mr. Brown's trial; that he knew Mr. Brown was under the influence of a powerful drug Mellaril during trial but failed to apprize the judge or jury that this medication affected his demeanor in court and that counsel failed to recognize that there was evidence available to rebut specific intent and Mr. Brown's ability to premeditate but did not properly investigate or present this evidence in order to preserve his closing argument which the jury was instructed was not evidence. Mr. Brown was denied a full and fair hearing by the court's continual interference with counsel's examination of the witnesses and

acted as a “second” prosecutor in cross-examining the witnesses for the state. Mr. Brown is entitled to a new evidentiary hearing or in the alternative a new trial.

4. Trial counsel was ineffective at penalty phase for not investigation and presenting a wealth of mitigating evidence that was only alluded to at trial. Trial counsel had no tactical or strategic reason for not presenting this evidence. He testified at evidentiary hearing that had he known of the evidence he would have presented it to the jury and felt that all of the evidence would have been mitigating. Counsel testified that he was dissatisfied with the performance of his investigator for not following through on requests. As consequence, Mr. Brown’s mental health experts were subject to brutal cross-examination by the state for their failure to have independent corroborative background information and having done only a cursory examination of the defendant. The trial court found these experts incredible and failed to find any evidence in mitigation. Likewise, trial counsel failed to present the compelling testimony of neighbors who witnesses the beatings Mr. Brown suffered at the hands of his father. Trial counsel testified that he would have used this evidence at trial had he known of its existence. Mr. Brown was denied a full and fair hearing by the trial court’s interference with the presentation of his case and the open disdain for his witnesses. The hearing court failed to address the merits of

this claim. A new trial or sentencing is proper.

5. Mr. Brown received ineffective assistance of counsel during voir dire when he was not allowed additional peremptory challenges to jurors Moser and Montoya. Trial counsel was rendered ineffective by the interference of the trial court. Mr. Brown was prejudiced by the inability to strike these two jurors. Particularly, in a case where the jury vote was 7 to 5 for death. Mr. Brown is entitled to a new trial.

6. The death sentence in Mr. Brown's case rests upon an unconstitutional automatic aggravating factor of the murder was committed while the defendant was engaged in the commission of a burglary. When Mr. Brown was convicted of felony murder, he then automatically faced statutory aggravation for felony murder without the state having to prove a single fact. This aggravator does not distinguish between those who should live and those who should die. A new trial is proper.

7. Mr. Brown was denied a reliable sentencing proceeding when the trial judge failed to find the existence of mitigation established by the record. During penalty phase, the defense presented a number of witnesses who testified unrebutted to statutory and non-statutory mitigation. The state presented no evidence. Mr. Brown was denied an individualized sentencing proceeding. A new sentencing proceeding should be granted.

8. The penalty phase jury instructions improperly

shifted the burden of proving that death was inappropriate to Mr. Brown and the trial court improperly employed a presumption of death in sentencing Mr. Brown. To the extent that trial counsel failed to object or argue this claim, he was ineffective. Mr. Brown is entitled to a new trial.

9. Contrary to Caldwell v. Mississippi, Mr. Brown's sentencing jury was misled by the state's argument and the court's instruction that unconstitutionally diluted the jury's sense of responsibility for the sentence. This was a constitutional violation which denied Mr. Brown due process. A new trial is proper.

10. Mr. Brown's jury was tainted by a prejudicial newspaper article which was circulating the jury room during trial. Counsel was ineffective for failing to object and move for mistrial when informed of the jury's misconduct. Counsel's testimony at evidentiary hearing that he did not feel the jury had been prejudiced was an unreasonable decision not based on any tactic or strategy. A new trial is proper.

11. The combination of procedural and substantive errors in Mr. Brown's trial cannot be harmless in the context of the jury's 7 to 5 vote for death. It cannot be said the prejudice of the jury reading newspaper accounts of the trial in which it recalls evidence of other crimes, the improper argument of the state at closing, the ineffectiveness of counsel at guilt and

penalty phases in failing to investigate the case fully or presenting evidence in guilt phase, and the influence of improper jury instructions did not affect the outcome of this trial.

12. The Florida Rules of Professional Responsibility which prevent attorneys from interviewing jurors to evaluate whether juror misconduct has occurred is contrary to the equal protection clause of the United States Constitution and the Florida Constitution. The prejudice is that Mr. Brown cannot prove the extent to which the taint of the prejudicial information and improper jury instructions affected the sentence.

13. The trial court erroneously instructed the jury on the standard to use in evaluating the testimony of Mr. Brown's expert witnesses. Dr. Berland and Dr. Afield testified at trial in penalty phase and were highly impeached by the state's cross-examination. The jury was then instructed that decisions of law regarding whether the experts were considered such was left to the jury when it is exclusively the province of the court. Mr. Brown's sentence of death is unreliable.

14. Mr. Brown's IQ establishes that he is borderline mentally retarded. To execute Mr. Brown, a mentally retarded and brain damaged defendant would constitute cruel and unusual punishment.

ARGUMENT I

MR. BROWN'S DEATH SENTENCE WAS THE PRODUCT OF CONSTITUTIONALLY INVALID JURY INSTRUCTIONS.

a. The erroneous ruling by the lower court

In her five-page order, the hearing court failed to properly address this claim in the court below. Judge Allen merely adopted the findings of Judge Tharpe without independent consideration of the claim nor knowledge of the facts (PC-R. 449-453). Under Rule 3.850(d), when summarily denying a claim, the court is to "...a copy of that portions of the files and records that conclusively shows that the prisoner is entitled to no relief shall be attached to the order.." See, Fla. R. Crim. P. 3.850(d). Under Rule 3.850, unless the files and records show that the defendant is entitled to no relief he should be granted a hearing on those claims. Judge Allen indicated in her order that she give counsel an opportunity to present evidence on the claims other than the four on which she conducted an evidentiary hearing. However, counsel was not aware of this opportunity nor does the record bear this assertion.

Mr. Brown's jury failed to receive complete and accurate instructions defining aggravating circumstances in a constitutionally narrow fashion. The penalty phase jury was instructed, over defense objection, on the aggravating circumstances as follows:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence. The Defendant has been previously convicted of a felony involving the use of violence to some person. The crime of attempted murder of Tammy Bird is a felony involving the use of violence to

> another person. The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of burglary. The crime for which the Defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(R.658-59). The jury recommended death by a 7 to 5 vote. In imposing the death sentence, the trial court found three aggravating circumstances (R. 912-16). Even though the court found that mitigation existed, the court rejected it as not outweighing any one of the aggravating circumstances (R. 912-16).

On direct appeal, this Court addressed this issue on its merits. This Court affirmed the conviction, however, two justices dissented as to sentence. Brown v. State, 565 So. 2d 304 (Fla. 1990). Significantly, the court specifically relied exclusively on the Maynard v. Cartwright[6] standard to affirm the trial court's finding of aggravating circumstances. Brown at 308, and refused to apply Maynard to the cold, calculated and premeditated aggravator. The court refused to consider what effect the vague instructions had on the jury's decision.

In his initial Motion to Vacate Judgment, Mr. Brown raised this issue, arguing that the instructions regarding these aggravating circumstances were in violation of Maynard v. Cartwright.[7] That motion was dismissed without prejudice on June

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[6]Maynard v. Cartwright, 108 S.Ct. 1853 (1988).

[7]In Maynard, the United States Supreme Court was faced with Oklahoma's capital sentencing statute, which provided as an

5, 1992 because it was incomplete and prematurely filed.

On June 8, 1992, the United States Supreme Court reversed longstanding Florida jurisprudence and held that, contrary to the Florida Supreme Court's holding in Mr. Brown's case, Maynard v. Cartwright is applicable in Florida. Sochor v. Florida, 112 S. Ct. 2114 (1992). This decision is significant in that Eighth Amendment Maynard error before either of the sentencers[8] requires remand or application of a harmless beyond a reasonable doubt standard.

On June 29, 1992, the United States Supreme Court expanded on the application of Maynard principles to Florida in Espinosa v. Florida, 112 S. Ct. 2926 (1992). In Espinosa, the Supreme Court again reversed the Florida Supreme Court, holding that Maynard had been incorrectly applied in Florida, and that the standard jury instruction regarding the "especially wicked, evil, atrocious, or cruel" aggravating factor violated the Eighth Amendment. In Espinosa, the jury had been instructed on the "especially wicked, evil, atrocious, or cruel" aggravating

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aggravating circumstance the "especially heinous, atrocious, and cruel" language. The United States Supreme Court affirmed the Tenth Circuit's grant of relief, explaining that Oklahoma's instructions did not comply with the fundamental Eighth Amendment principle requiring the limitation of capital sentencers' discretion. For years, however, the Florida Supreme Court has consistently held that Maynard did not affect Florida's capital jury instructions regarding aggravating circumstances.

[8]In Florida, the constituent sentencers are the judge and jury.

circumstance. The jury recommended a death sentence and the court followed the jury's recommendation. On appeal to the Florida Supreme Court, Mr. Espinosa argued that the instruction on "especially wicked, evil, atrocious, or cruel" was vague and left the jury with insufficient guidance on when to find the existence of the aggravating factor. The Florida Supreme Court rejected the argument.

The United States Supreme Court reversed, explaining that in a state where the judge and jury weigh aggravating and mitigating circumstances, as in Florida, weighing of an invalid aggravating factor violates the Eighth Amendment. Id. (citing Sochor v. Florida; Stringer v. Black, 112 S. Ct. 1130 (1992); Parker v. Dugger, 111 S. Ct. 731 (1991); Clemons v. Mississippi, 494 U.S. 738, 752 (1990)). An aggravating factor is invalid if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor. Espinosa, 112 S. Ct. at 2929. See Stringer v. Black. The Supreme Court also noted that it had previously held instructions more specific and elaborate than the one given unconstitutionally vague. See Espinosa, 112 S. Ct. at 2928.

The Espinosa Court explained that "a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give 'great weight' to the jury's recommendation, whether that recommendation be life...or death."

Espinosa, 112 S. Ct. at 2928 (citations omitted). In Florida, "the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances." Id.

In Mr. Brown's case, the jury was not given a limiting instruction on the "cold, calculated, and premeditated" aggravating factor. The Florida Supreme Court had already held that it violated constitutional principles to find the "cold, calculated and premeditated" factor unless there was "heightened premeditation" defined as a form of premeditation which is greater than the premeditation required to establish first-degree murder. Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988). The Florida Supreme Court has attempted to limit this aggravator by holding that it is reserved for murders characterized as "execution or contract murders or those involving elimination of witnesses." Green v. State, 583 So. 2d 647, 652 (Fla. 1991). Over defense counsel's objection, the court refused to give the jury this limiting construction, thus violating Maynard requirements that jury instructions must be adequately defined. This issue was raised on direct appeal and the Supreme Court said, "We find Brown's attempt to transfer Maynard to a different state and to a different aggravating factor misplaced. ...we therefore find no error regarding the penalty instructions."

Brown, 565 So. 2d at 308. This finding has since been reversed by the United States Supreme Court. Sochor; Espinosa.

Espinosa controls Mr. Brown's case. The death sentence must be set aside because the jury weighed an invalid aggravating factor, thus placing a thumb on "death's side of the scale." Stringer v. Black, 112 S. Ct. 1130, 1137 (1992). In Stringer v. Black, the United States Supreme Court held that relying on an invalid aggravating factor, especially in a weighing state like Florida, invalidates a death sentence. Espinosa v. Florida constitutes a substantial change in Florida law, and claims based on Espinosa are cognizable in Fla. R. Crim. P. 3.850 proceedings.

The Florida Supreme Court recognized Hitchcock was a change in law because it declared the standard jury instruction given prior to Lockett to be in violation of the Eighth Amendment.[9] In addition, it rejected the notion that mere presentation of the nonstatutory mitigation cured the instructional defect. After Hitchcock, the Florida Supreme Court recognized the significance of this change, Thompson v. Dugger, and declared, "[w]e thus can think of no clearer rejection of the 'mere presentation' standard reflected in the prior opinions of this Court, and conclude that this standard can no longer be considered controlling law." Downs v. Dugger, 514 So. 2d 1069, 1071 (1987). So too here, Espinosa

[9]Hitchcock v. Dugger, 481 U.S. 393 (1987), held that it was error to fail to instruct the jury that nonstatutory mitigating factors are sufficient to support a life sentence.

is clear in its rejection of the standard jury instruction and its rejection of the notion that the judge sentencing insulated the jury instructions regarding aggravating factors from compliance with the Eighth Amendment jurisprudence.

In Delap v. Dugger, 513 So. 2d 659 (Fla. 1987), the Florida Supreme Court held that the change brought by Hitchcock was so significant that the failure to raise a timely challenge to the jury instruction would not preclude consideration of a Hitchcock claim in post-conviction proceedings. Again, the instruction rejected in Hitchcock was, as it is here, a standard jury instruction repeatedly approved. See Demps v. State, 395 So. 2d 501,505(Fla.1981). This Court must treat Espinosa's reversal of the Florida Supreme Court's jurisprudence as a substantial change in law.

Under Espinosa, Mr. Brown's capital sentencing was tainted with Eighth Amendment error based upon the jury 's improper consideration of the invalid aggravating circumstance, "cold, calculated, and premeditated"(R.658-59). The standard jury instruction did not contain any of the Florida Supreme Court's limiting constructions regarding this aggravator, and therefore was "so vague as to leave the sentencer without sufficient guidance for determining the presence or the absence of the factor. Espinosa, 112 S.Ct.2926.

The Florida Supreme Court has held that "calculated"

consists "of a careful plan or prearranged design," Rogers v. State, 511 So.2d 526,533(Fla. 1987), and that "premeditated" refers to a "heightened" form of premeditation which is greater than the premeditation required to establish first-degree murder. Hamblen v. State, 527 So.2d 800,805 (Fla. 1988); Holton v. State, 573 So. 2d 284, 292 (Fla. 1991). By any standards, the "heinous, atrocious, and cruel" or "cold, calculated and premeditated" aggravating circumstances are of the "most serious order." Maxwell v. State, 603 So.2d 490(Fla. 1992)(citing O'Callaghan v. State, 542 So.2d 1324(Fla. 1989)). This has been recently recognized by the Supreme Court of the United States when it remanded Hodges v. Florida, 113 S.Ct. 33(1992) for reconsideration by the Supreme Court of Florida in light of Espinosa. Plainly, aggravating circumstance (5)(i) of Section 921.141, Florida Statutes is unconstitutionally vague, overbroad, arbitrary, and capricious on its face. Stringer v. Black, 112 S. Ct. at 1139 ("[o]ur precedents[] have not permitted a state in which aggravating factors are decisive to use factors of vague or imprecise content"). This circumstance is statutorily defined:

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

Section 921.141(5)(i), Fla. Stat. The Florida Supreme Court has attempted to limit this overbroad aggravator by holding that it is reserved for murders "characterized as execution or contract

murders or those involving the elimination of witnesses." Green v. State, 583 So. 2d 647,652 (Fla. 1991); Bates v. State, 465 So. 2d 490,493(Fla. 1985).

Mr. Brown's jury was not told about any limiting instructions regarding the "cold, calculated, or premeditated" aggravator, but presumably found this factor present. Id. at 3097. Elsewhere in this pleading, collateral counsel has detailed evidence of Mr. Brown's severe brain damage, intoxication and extreme mental illness. Any of these factors make heightened premeditation beyond a reasonable doubt an impossibility. Mr. Brown could not have performed the cool reflection, rational thought and careful calculation that is required for the cold, calculated and premeditated aggravating factor. Rogers v. State, 511 So. 2d 526(Fla. 1987); Santos v. State, 591 So.2d 160(Fla. 1991). The only instruction the jury ever received regarding the definition of "premeditated" was at guilt phase, in reference to the degree of premeditation necessary to establish guilt of first-degree murder. As the Florida Supreme Court has held, this definition does not establish the "cold, calculated, and premeditated," aggravating factor. Under these circumstances, it must be presumed that the erroneous instruction tainted the jury's recommendation, and in turn, the judge's death sentence, with Eighth Amendment error. Id. This error is magnified by the state’s focus on the "cold,

calculated, and premeditated" aggravator in closing argument at penalty phase when the state argued that the murders were nothing more than an execution See, Argument II.

The limitations designed to narrow and limit the scope of this otherwise open-ended aggravator were not provided to Mr. Brown's jury. The jury in Mr. Brown's case had unbridled and uncontrolled discretion to apply the death penalty. The necessary limitations and definitions were not applied. This violated Maynard v. Cartwright, Shell v. Mississippi, and Stringer v. Black. The Florida Supreme Court was in error when it held that Maynard does not apply to Florida. Mr. Brown was denied his Eighth and Fourteenth amendment rights to have aggravating circumstances properly limited for the jury's consideration.

Given the dispositive nature of Espinosa, Mr. Brown should be granted a resentencing.. Under Espinosa, Mr. Brown is entitled to a new sentencing based upon Eighth Amendment error at his penalty phase.

ARGUMENT II

MR. BROWN WAS DENIED A FULL AND FAIR HEARING REGARDING HIS PROSECUTORIAL MISCONDUCT CLAIM.

a. The erroneous ruling in the lower court:

During closing argument, Prosecutor Benito urged the jurors to sentence Mr. Brown to death on the basis of numerous impermissible and improper factors. Benito made the following

argument:

> What about life imprisonment, ladies and gentlemen? What about life imprisonment? Now I am not saying that I would like to spend one day in jail, all right, don't get me wrong, but t (sic) what about life imprisonment? What can one do in prison? You can laugh; you can cry; you can eat; you can sleep; you can participate in sports; you can make friends; you can watch TV; you can read; in short, you live to learn -- you live to learn about the wonders that the future holds. In short, it's life.
>
> People want to live. Life imprisonment is life. If Pauline Cowell, if she had it, she would have given Paul Brown the world if he would have just let her live. People want to live.
>
> Life imprisonment if (sic) life, but Pauline Cowell is dead, and she is dead for one reason. She is dead because Paul Alfred Brown decided, decided for himself, that she should die. That man, right there, made that decision, and for making that decision -- for making that decision he also deserves to die.
>
> The punishment must fit the crime.
>
> If it wasn't for Paul Alfred Brown, ladies and gentlemen, Pauline Cowell, 17 years old, would have almost her entire life ahead of her. She was 17, but Pauline Cowell is no more. On this earth for 17 years and now she is gone.

(R. 636-637)(emphasis added).

Prosecutor Benito also improperly told the jurors that Mr. Brown should be shown "the same mercy" that he had allegedly shown the victim. Florida recognizes that a shot to the head is not "heinous, atrocious, and cruel" and that a killing triggered by the victim's sudden screaming is not an execution style slaying. Yet Prosecutor Benito said:

> Pauline Cowell was not simply killed, all right. She wasn't simply killed, Pauline Cowell was executed. She was

> executed. "I shook her, she hollered, so I shot her, and I shot her in the head to make it quick." She was not simply killed, she was executed.

(R. 634-635). To frighten the jurors, Benito argued that the system of justice would not "function properly" unless Mr. Brown received a death sentence(R.635). These comments went without objection by defense counsel. Failure to object to this impermissible argument is ineffective assistance of counsel. Prejudice is when Mr. Brown's jury considered impermissible factors in deliberating whether Mr. Brown should live for die. See, Campbell v. State, 670 So.2d 720(Fla. 1996).

At the evidentiary hearing on this claim, Mr. Alldredge, the attorney responsible for penalty phase, testified that he did not know this argument was improper and did not object(PC-R.Vol.V, 151).

The hearing court held that:

> It is undisputed that counsel for the defense did not object. Mr. Chalu was familiar with the prosecutor's use of this argument but was also unaware that such argument had not been found to be improper at the time. Mr. Alldredge testified that he was not aware that such argument was improper, that he would have objected had he known, and that he did not object. Assuming without deciding that penalty phase counsel was deficient in his performance for failing to object to this portion of the prosecutor's argument, this Court cannot and does not find that the alleged deficient performance resulted in prejudice which meets the prejudice prong of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), that is, a reasonable possibility that the outcome would have been different.

(PC-R. 451). Mr. Benito's argument has been consistently

condemned as improper by the Florida Supreme Court. In Taylor v. State, 583 So. 2d 323 (Fla. 1991), Mr. Benito gave the identical closing argument:

> [B]ut what about life in jail? What can one do in jail? You can laugh; you can cry, you can eat, you can read, you can watch tv, you can participate in sports, you can make friends.
>
> In short, you live to find out about the wonders of the future. In short, it is living. People want to live.
>
> If Geraldine Birch had the choice of life in prison or being in that dugout with every one [of] her organs damaged, her vagina damaged, what choice would Geraldine Birch have made? People want to live.
>
> See, Geraldine Birch didn't have that choice because this man right here, Perry Taylor, decided for himself that Geraldine Birch should die. And for making that decision he too deserves to die.

The Court found that Mr. Benito's argument was improper because it urged consideration of factors outside the scope of the jury's deliberations. And this was not the first time Mr. Benito had committed reversible error for improper closing argument.

These same arguments were held to be improper in Jackson v. State, 522 So. 2d 802 (Fla. 1988) and Hudson v. State, 538 So. 2d 829 (Fla. 1989), holding the prosecutor overstepped the bounds of proper argument. Citing to Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985), the Court defined improper argument:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects

> an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

See, Jackson, 522 So. 2d at 809. Mr. Benito's argument was meant to evoke an emotional response from the jury. The technique of obtaining death sentences by working the jury into a frenzy had obviously worked time and again as is evidenced by the litany of cases from the same State Attorney's office.[10] Cf. Presnell v. Zant, 959 F.2d 1524, 1528 (11th Cir. 1992). Unbelievably, the Supreme Court's rebuke fell on deaf ears as Mr. Benito continued to make the exact same improper argument in Taylor, even arguing that a Hudson footnote condoned the argument(583 So. 2d at 330). Even when the Hudson court found Mr. Benito's argument improper, he did it again and was reproached by the Florida Supreme Court for using Hudson as an argument.

At the evidentiary hearing on this issue, the State argued that Mr. Benito's improper closing at penalty phase argument was "innocuous because it stated the obvious."(PC-R. 439). The Florida Supreme Court disagreed with this position in Bertolotti v. State, 476 So.2d 130(Fla. 1985) and eventually in Jackson v. State, 522 So.2d 802(Fla. 1988), which dealt with Mr. Benito's argument directly. The hearing court was under the erroneous impression that it was acceptable to make this inflammatory

[10]See, Taylor v. State, 583 So. 2d 323 (Fla. 1991); Jackson v. State, 522 So. 2d 802 (Fla. 1988); Hudson v. State, 538 So. 2d 829 (Fla. 1989).

argument in 1987 because Jackson was not decided until 1988. This is incorrect. The argument was improper in 1987 and before that time. Because the Florida Supreme Court did not rule on Mr. Benito's exact argument specifically until 1988 makes no difference. The argument was still improper and objectionable under Bertolotti, which was a 1985 case. Cf. Campbell v. State, 679 So.2d 720(Fla. 1996).

Mr. Chalu should have known the argument was improper. He testified that he was very familiar with this argument. Mr. Chalu attempted to support his position that no error occurred regarding Mr. Benito's argument by testifying that he did not think the argument was "that prejudicial."(PC-R.Vol.IV,91). Apparently, this Court disagreed in Jackson and Taylor as did the defense attorneys in Mr. Chalu's office who objected to the argument in those two cases.

More importantly, Chalu, by his own admission, was not the attorney for penalty phase, and his opinion on the matter is irrelevant. Mr. Alldredge, who was responsible for the penalty phase, testified that he knew that Benito was going to make the argument. He simply did not object. He had no strategic reason for not objecting the argument which was improper (PC-R Vol.V, 151). The prejudice to Mr. Brown is that the jury heard this improper argument. Whether the argument standing alone was reversible error or simply improper argument is a difference

without a distinction. The jury heard it and the error cannot be considered harmless in the context of the 7 to 5 jury vote. Even if Jackson was not reversed on the basis of this improper argument, the fact remains that it is an error that can be viewed in conjunction with the other deficiencies in counsel's performance. See, Gunsby v. State, 672 So.2d 920(Fla. 1996).

The cumulative effect of this closing argument was to "improperly appeal to the jury's passions and prejudices." Cunningham v. Zant, 928 F.2d 1006, 1020(11th Cir.1991). Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S.647 (1974);United States v. Eyster, 948 F.2d 1196,1206 (11th Cir. 1991);Rosso v. State, 505 So.2d 611(Fla. 3rd DCA 1987). The prosecutor's argument went beyond a review of the evidence and permissible inferences. He intended his argument to overshadow any logical analysis of the evidence and to generate an emotional response, a clear violation of Penry v. Lynaugh, 109 S.Ct. 2934(1989). He intended that Mr. Brown's jury consider factors outside the evidence.

"A prosecutor's concern in a criminal prosecution is not that it shall win a case, but that justice shall be done." While a prosecutor 'may strike hard blows, he is not at liberty to strike foul ones.'" Rosso, 505 So. 2d at 614. The Florida

Supreme Court has called such improper prosecutorial commentary "troublesome." Bertolotti v. State, 476 So. 2d 130, 132 (Fla. 1985).

Arguments such as those made by the State Attorney in Mr. Brown's sentencing phase violate due process and the Eighth Amendment, and render a death sentence fundamentally unfair and unreliable. Drake v. Kemp, 762 F.2d 1449, 1458-61 (11th Cir. 1985)(en banc); Potts v. Zant, 734 F.2d 526, 536 (11th Cir. 1984); Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985); Newlon v. Armontrout, 885 F.2d 1328, 1338 (8th Cir. 1989); Coleman v. Brown, 802 F.2d 1227, 1239 (10th Cir. 1986). Here, as in Potts, because of the improprieties evidenced by the prosecutor's argument, the jury "failed to give [its] decision the independent and unprejudicial consideration the law requires." Potts, 734 F.2d at 536. In the instant case, as in Wilson, the State's closing argument "tend[ed] to mislead the jury about the proper scope of its deliberations." Wilson, 777 F.2d at 626. Consideration of such errors in capital cases "must be guided by [a] concern for reliability." Id. The Florida Supreme Court held that when improper conduct by the prosecutor "permeates" a case, as it has here, relief is proper. Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

b. Ineffective assistance of counsel

The adversarial process in Mr. Brown's trial broke down when

defense counsel failed to object to improper penalty phase argument by the State Attorney (R.636-637). First, defense counsel was prejudicially deficient by allowing jurors to consider factors outside the scope of their deliberations. Second, by failing to object to it and ask for a curative instruction, counsel allowed the jury to consider it as if it had been proper and relevant to the issue of Mr. Brown's sentence. The hearing court in its order said even if counsel's performance was deficient there was no prejudice (PC-R.451). The prejudice was that the jury heard this improper information without the benefit of a curative instruction. Counsel's inability to effectively litigate this issue was prejudicially deficient performance under Strickland.

This is the proper standard in which to evaluate this claim. The hearing court did not use the proper standard and refused to view counsel's performance in the context of the 7-5 jury vote. The standard of review for the hearing court should have been "a reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668 (1984). A duty to bear such skill and knowledge as will render the trial a reliable adversarial testing process is placed upon defense counsel under Strickland. Courts have repeatedly recognized that reasonably effective counsel 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 argument in accord with the applicable principles of law. Harrison v. Jones, 880 F.2d 1279 (11th Cir.1989).

Defense counsel was ineffective for failing to object. Well-established Florida law has condemned such impermissible argument. Starting with Bertolotti v. State, 476 So. 2d 130,134 (Fla.1985), the Court sounded an alarm that instances of prosecutorial misconduct were improper. "We are deeply disturbed [sic] as a Court by the continuing violations of prosecutorial duty, propriety and restraint. Later, in Jackson v. State, 522 So. 2d 802 (Fla.1988), the Court agreed that "the prosecutor's comment that the victims could no longer read books, visit their families, or see the sun rise in the morning as Jackson would be able to do if sentenced to life in prison was improper because it urged consideration of factors outside the scope of the jury's deliberations." Id,at809. Bertolotti and Jackson show the deficient performance of defense counsel when they fail to object to prosecutorial misconduct. See also, Hudson v. State, 538 So. 2d 829 (Fla. 1989). Plainly, the omission by the defense counsel in Mr. Brown's case meets the deficient performance standard set forth in Strickland.

Mr. Alldredge, the defense attorney handling penalty phase, was an assistant public defender with no prior experience in

penalty phase argument. Mr. Benito was well known for making improper argument. Reasonably effective counsel would have objected. When Mr. Benito persisted in his improper conduct, the Court further reprimanded Mr. Benito for telling the trial court that this type of closing argument was permissible.

> The Jackson opinion, which was issued a year before this trial, clearly prohibits this type of argument. While neither counsel called the court's attention to Jackson, the very brief to which the prosecutor referred cited Jackson for the proposition that such an argument should not be made. Finally, any doubt that the prosecutor should have known of Jackson is belied by the fact that the Jackson case was tried by his own state attorney's office.[11]

Hudson v. State, 583 So. 2d at 330. If timely objection had been made, the trial court would have been able to correct the error. However, since the jury was permitted to hear Mr. Benito without objection, the offending argument constitutes reversible error. The prejudice to Mr. Brown is obvious. Had defense counsel performed effectively, Mr. Brown would been given relief on direct appeal. Even if not successful at trial, the objection would have preserved the issue for review. Because of counsel's failure, Mr. Brown's divided jury was left to consider impermissible factors for which he had no recourse for review by the appellate courts. Clearly, the improper conduct by the prosecutor "permeated" the trial, therefore, relief is proper. See Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

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[11]The brief used to substantiate Benito's argument was Hudson v. State, 538 So. 2d 829 (Fla. 1989), which only addressed this issue in a footnote.

c. Prosecutorial misconduct at the evidentiary hearing

During the week before the evidentiary hearing, Mr. Brown had filed a second motion to disqualify the State Attorney's office based on new facts which had arisen during preparation for the evidentiary hearing[12](PC-R.364-414). Mr. Brown filed this motion when he learned that the Hillsborough County Public Defender's office which had represented him at trial, had allowed Assistant State Attorney George Bedell to review a micro-fiche copy of Mr. Brown's confidential trial attorney file without postconviction counsel's knowledge nor Mr. Brown's consent (PC-R. 364). This event was particularly disturbing because postconviction counsel had agreed to allow Mr. Bedell to review her copy of the trial attorney files subject to the taking of exemptions on matters contained in the file which were not relevant to the postconviction proceeding. Mr. Bedell did not request to see the trial attorney's file in counsel's possession until after his secret review of the micro-fiche copy at the public defender's office. [13]

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[12]The motion had been filed on February 26, 1997. Both counsel and the state had attempted to get the motion heard before the evidentiary hearing began, however no judge had been assigned to take over the case. The motion was not addressed until the first day of the evidentiary hearing.

[13]During the evidentiary hearing, Mr. Brown learned that the reason Mr. Bedell had asked the public defender to review their micro-fiche copy of the defense attorney's files was because of a conversation he had with Mr. Chalu. Mr. Chalu disclosed that he had not seen some notes which he thought were a part of the file

It was not until the first day of the evidentiary hearing that Mr. Brown learned the truth about the disclosure of his confidential files. The state had not only reviewed the public defender's micro-fiche copy of his defense attorney's files prior to the hearing, but it had obtained a copy of the defense files, two years prior to the granting of an evidentiary hearing from the public defender's office(PC-R.Vol.IV,22-27).

> MR. BEDELL: Right. And what had happened in this case from my perspective was that a couple of years ago, I had asked Mr. Lopez, who was then the Chief Assistant at the Public Defender's Office, if they had the file so that Mr. Chalu and Mr. Alldredge could look at it. And I did that knowing that this day was going to come sometime, and he told me that they couldn't find the file. And so I didn't do anything for quite awhile.
>
> And I called back after he was elected judge and spoke with him before he left office one more time, and he turned over to me some microfiche, which I never looked at. I suspect they are duplicates of the microfiche that they have at the Public Defender's Office. However, what's on the microfiche is not even the case where Mr. Brown is charged with first-degree murder.
>
> What I finally figured out was that it is the case where he was charged with attempted first-degree murder and armed robbery, an entirely separate case. But I looked through that looking for notes because, again, Mr. Chalu had told me that they had not been able to find or see the handwritten notes they said should have been in Mr. Brown's file.
>
> * * *
>
> ...it was the attempted murder case that was

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while undersigned counsel was preparing him to testify at the evidentiary hearing. This is the same Mr. Chalu who had testified in the first motion to disqualify hearing before Judge Sexton that he had no conversations with Mr. Bedell regarding the substance of Mr. Brown's case (PC-R. 380).

> prosecuted simultaneously with the capital case and which Mr. Brown ultimately pled guilty to.
>
> However, what I saw in that file and what I made copies of and what I have right here that the Court can look at if you want to is virtually identical to what Ms. Backus turned over to me. And the purpose of making these copies again was to get Mr. Chalu and Mr. Alldredge to look at them so they could be prepared to answer questions that they were going to have to answer in this hearing. It wasn't to go snooping around to try to find out secrets of Mr. Brown. I wanted to know simply what he had disclosed to his lawyers and whether they had diligently pursued the information that he had given to them and that's what happened.

(PC-R. Vol. IV, 22-24). Mr. Bedell's excuse for improper conduct was that he knew postconviction proceedings were going to occur "someday." Mr. Bedell did not know an evidentiary hearing was going to be granted in this case. He did not know whether the trial defense attorneys would request their files or be shown the files by collateral counsel. This outrageous conduct is nothing more than a thinly veiled attempt to get confidential materials before an evidentiary hearing was granted and before collateral counsel could claim exemptions. Mr. Brown is entitled to have his files remain confidential. They are only discoverable by the state to the extent that trial counsel needs to defend himself against claims of ineffective assistance of counsel. See, Reed v. State 640 So.2d 1094(Fla. 1994); Lecroy v. State, 641 So.2d 853(Fla. 1994);Rules of Professional Conduct.

Mr. Brown is not aware of any instance in which Mr. Chalu or Mr. Alldredge requested that the State Attorney's Office get the

files for them. They did not request it because collateral counsel had told them and Mr. Bedell that she would give them time to review the files. Mr. Bedell knew that they had reviewed the files because he had a conversation with Mr. Chalu. Most disturbing is that Mr. Bedell only disclosed his surreptious activity when collateral counsel caught him reviewing files in the public defender's office. He was purposefully circumventing counsel to get confidential information he knew he may not be entitled to. He knew that he may not get the file if he didn't request it before Mr. Lopez left the public defender's office, so he requested it again and received a copy. This is a discovery and ethical violation of Mr. Brown's right to confidential trial attorney files and his right to claim exemptions.

The fact that Mr. Bedell reviewed a file which was not the subject of the hearing was even more egregious. Mr. Brown had an absolute attorney-client privilege as to the attempted murder case. Mr. Brown had not waived his privilege as to that case. More importantly, neither Mr. Chalu nor Mr. Alldredge had requested that the state assist them in retrieving these files.

The prejudice to Mr. Brown is twofold. One, Mr. Brown did not waive the privilege as to his entire file, particularly not in the attempted murder case. Information which he was entitled to have confidential was turned over to the state. The state attorney's office was privy to information which they used

against him at his evidentiary hearing. The Hillsborough County State Attorney's Office should have been disqualified. Second, communications between the public defender's office, Mr. Lopez and the state attorney's office were held before an evidentiary hearing had been granted. The public defender turned over confidential files without his permission and before any waiver occurred. The hearing court even turned over documents which it admitted were irrelevant to the proceedings. The state should not have had this information. The Hillsborough County State Attorney's Office should have been disqualified.

The improper viewing of Mr. Brown's confidential files and the loss or destruction of the original audio taped confession in this case by the State Attorney's office completed the circle of misconduct that began at Mr. Brown's trial. Even though the original taped confession was not admitted into evidence at trial, a portion of the tape was admitted in the form of a transcript. The lower court's finding that the original audio taped confession was not admitted into evidence is irrelevant. The information contained in the audio tape was communicated to the jury, collateral counsel is entitled to listen or test any evidence which was gathered at trial. The prejudice to Mr. Brown is in the fact that he does not have the opportunity to investigate or test the original audio tape. Destruction or loss of this important evidence is improper. The original audio taped

confession was an integral part of the case against Mr. Brown. According to Mr. Chalu, it determined which direction his defensive strategy was going to take (PC-R.Vol.IV). It is the only copy of the tape which memorializes the statements made by Mr. Brown. Failure to properly preserve this evidence in a death penalty case is misconduct, particularly where counsel, as he admitted, was fully aware that the case will be appealed in the future. The pattern of misconduct continued until the Hillsborough County State Attorney's Office was no longer involved in the case–when notice of appeal was filed. Mr. Brown has been denied a full and fair hearing. He is entitled to a new evidentiary hearing with a special prosecutor and a new trial.

ARGUMENT III

MR. BROWN WAS DENIED A FULL AND FAIR HEARING REGARDING THE EFFECTIVE ASSISTANCE OF COUNSEL AT GUILT PHASE OF HIS TRIAL

a. <u>The denial of a full and fair hearing and the lower court error</u>

In its five-page order, the lower court failed to address the merits of this claim. The sum total of the court's opinion on this issue which covered two days of testimony is in one paragraph:

> Claim 7 alleges ineffective assistance of counsel at guilt phase for failure to adequately investigate, object and prepare a challenge to the State's case and/or because the State withheld material evidence. The testimony of Mr. Chalu,

> guilt phase counsel for the defense, refutes any deficiency in investigation, objections, or preparation and the Defendant has failed to show any deficiency. Guilt phase counsel had a clear theory of defense, i.e., lack of intent, and the record shows that he meticulously prevented the introduction of highly prejudicial evidence against his client. Assuming once again that Defendant could show some deficient performance, he does not show how such resulted in prejudice. Even with the benefit of hindsight, it does not appear that guilt phase counsel would have done things differently.

(PC-R. 451-452).

No attachments were made to the court's order which would reflect what reasoned independent judgment the court exercised in coming to this conclusion. See, Rule 3.850. At trial, no evidence was presented by the defense save the argument of counsel, which is has no evidentiary value.

The lower court failed to address the merits of this claim even though evidence was adduced at the evidentiary hearing. For example, Mr. Brown alleged in his Rule 3.850 motion that he did not understand the implications of Mr. Chalu conceding guilt. Mr. Chalu testified that he "wasn't sure" how much of his trial strategy was understood by Mr. Brown because he was so slow. He also testified that Mr. Brown could not read or write very well at the time. Trial counsel failed to insure that Mr. Brown understood the implications of conceding guilt regarding felony murder and premeditated murder in guilt phase. There is no mention of this issue in the court's order.

Likewise, Mr. Chalu's testimony on the use of possible defenses in guilt phase was marred by his desire to have the opening and closing argument at the end of the trial. He characterized this as the "sandwich." Had counsel presented any evidence, he would have lost the opportunity to argue first and last at the end of guilt phase.[14] As a result, Mr. Chalu failed to adequately investigate the possibility of an intoxication defense and failed to question others at the trailer on the night of the crime which would have led to the discovery that Jimmy Brown had observed Mr. Brown's bizarre behavior immediately before the crime. Mr. Webb, the defense investigator, had already spoken with Jimmy Brown and prepped him to testify in penalty phase.[15] Contrary to the state's position, there were lay witnesses who could testify as to Mr. Brown's condition immediately prior to the crime. Mr. Chalu's justification for not raising any defenses regarding Mr. Brown's mental state was that a "diminished capacity defense was not possible in 1986 and

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[14]The jury was also instructed that argument cannot be considered as evidence.

[15]At page 11 of the State's Memorandum of Law (PC-R. 425-436), the State questions Jimmy Brown's credibility. However, the State, at the same time vouches for the credibility of his testimony at penalty phase and counsel's good judgment in putting him on the stand. The State cannot have it both ways. Jimmy Brown was sworn and testified under penalty of perjury. The State offered no evidence to rebut his statements nor did the State impeach his credibility on this issue. Trial counsel had no good faith basis for not discovering this information.

1987." However, Ake v. Oklahoma, 105 S.Ct. 1087 (1985), Mason v. State, 489 So.2d 734 (Fla. 1986), and Sireci v. State, 502 So.2d 1221 (Fla. 1987), were already decided and clearly delineated that mental health evidence could be presented even if not forwarding an insanity defense. The failure to explore this avenue of defense was deficient performance.

The lower court completely omitted the issue of counsel's failure to move for mistrial after one of the jurors had been exposed to a prejudicial newspaper article. The state's memorandum prior to the lower court's order argued that Mr. Brown cannot show how the introduction of a newspaper article in the Tampa Tribune describing another crime Mr. Brown was charged with but had not been admitted in this trial, affected the verdicts in this case. See,State's Memorandum at page 5. The lower court did not address how it is impossible for Mr. Brown to prove this claim without interviewing the jurors themselves. Mr. Brown's counsel is prohibited from interviewing jurors by Florida Rules of Professional Responsibility 4-3.5(d)(4). See, Argument XII. Without addressing the issue, Mr. Brown cannot determine what the court's disposition was.

A criminal defendant is entitled to a fair trial. To insure that an adversarial testing, and a fair trial occur, certain obligations are imposed upon both the prosecutor and defense counsel. Defense counsel is obligated "to bring to bear

such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668, 685 (1984).

The State's case rested on the testimony of the occupants of the duplex where the murder occurred. The defense failed to make an effective attack on the credibility of those witnesses or to discover and utilize mitigating evidence which would negate specific intent. Defense counsel was prevented from effective assistance when the state provided inaccurate witness information in the State's Notice of Discovery. These witnesses would have given credible testimony that Mr. Brown was "crazy and drank a lot." Their testimony would have provided critical corroboration to the defense experts had their whereabouts been known to defense counsel. At trial, defense counsel objected to the testimony of the state's first witnesses, Gail and Barry Barlow, because they had been subpoenaed by the defense for deposition but had not appeared (R.254-58). Mr. Benito argued that they should be allowed to testify because their location had only recently been discovered:

> I scrambled to find these people last week. I finally got a hold of them. They have moved three or four times.

(R. 256). The court admonished the State and ruled that it had a "continuing" duty to update witness addresses so that the defense could depose them under the "law and the Rules of Criminal

Procedure" (R. 257) However, relying on Mr. Benito's representation, the court permitted the witnesses to testify after defense counsel deposed the witnesses after the end of the first day of trial (R. 258). Mr. Benito's strategy was successful. Amid the rigors of the first day of trial, defense counsel was only able to take brief depositions of each witness with no time for follow-up investigation. The witnesses said they had knowledge of Mr. Brown's mental instability and alcohol abuse. Defense counsel had no time to investigate the claims of the witnesses for impeachment or mitigation purposes because they were to testify the next morning (R.412). Defense counsel did not cross-examine the witnesses at trial, present their testimony in penalty phase, or provide their brief depositions to the mental health experts (R.421,424).

The state was aware of the location of the witnesses and knew that it had critical information that was beneficial to Mr. Brown's defense. At trial, Prosecutor Benito argued that he had not provided the location of the witnesses to defense counsel because he had only learned of their address change the week before trial, which began February 16, 1987 (R. 256). However, in the state attorney's file provided under Chapter 119 disclosure, collateral counsel has learned that Mr. Benito in fact noted the witnesses' new address not once but twice on April 10, 1986, ten months before the trial began.

Had defense counsel known of the location of the state's witnesses, he could have cross-examined the witnesses at trial and discovered mitigating testimony and evidence critical to Mr. Brown's defense during both phases of his trial. Defense counsel could not provide effective assistance of counsel because the subterfuge of the state. He was deprived of the opportunity to investigate the mitigating testimony the witnesses had. This evidence would have provided much needed information at both phases of the trial and may" have pushed the jury over the edge into the region of reasonable doubt." Barkauskas v. Lane, 878 F.2d 1031 (7th Cir. 1989).

The jury never heard the witnesses testify that Paul Brown was mentally unstable, that he suffered from severe alcohol abuse and that he made up imaginary family members who were associated with the Mafia. If defense had been allowed to investigate and depose the witnesses prior to trial, he would have had the necessary independent evidence to corroborate the mental health testimony that the court found "suspect" in sentencing Mr. Brown to death (R. 912-16).

Further, counsel failed to inform the jury Mr. Brown's demeanor in court was affected by the influence of powerful drugs administered at the Hillsborough County Jail. During trial, Mr. Brown was under the influence of powerful anti-depressants and mood altering drugs, such as Mellaril. These drugs directly

effected Mr. Brown's demeanor in Court. Counsel failed to inform the jury that Mr. Brown was drugged during trial. His flat affect or inability to react during trial kept the jury from knowing his true mental state during his trial. This important factor was critical in the jury's assessment of whether Mr. Brown could have had the requisite specific intent to support his guilt, sufficient premeditation to support the aggravating factors, or support for his mental health mitigators at penalty phase. Counsel's failure to request that the medication be stopped, notify the jury of his medicated state, or request a medical reason for Mr. Brown's involuntary medication was ineffective assistance of counsel. Mr. Brown's Eighth Amendment right to a full and fair trial was violated. Riggins v. Nevada, 112 S. Ct. 1810, 1812 (1992). The lower court failed to address this issue in its order. Even though evidence was taken at evidentiary hearing regarding this issue, the lower court inexplicably failed to address it. As a result, Mr. Brown has no basis on which to challenge the court’s finding. This is error. Mr. Brown is entitled to a new trial.

The lower court also failed to address the state’s misrepresentation at trial that it had just located the witnesses which counsel had tried to locate, actively misled the judge and prevented a reliable Richardson hearing. In any event, no adversarial testing could occur under such circumstances. This

type of evidence would have made a difference in the 7-5 jury death recommendation. See, Barkauskas v. Lane. Because of the state's conduct, counsel could not cross examine the key state's witnesses and was foreclosed from investigating their testimony. See Blanco v. Singletary, 943 F 2d 1477, 1499 (11th Cir. 1991). Although the court allowed counsel to depose the witnesses during trial, defense counsel was prevented from investigating the case further. Reasonable defense counsel would have objected to the witnesses after their twenty-minute depositions or, in the alternative, moved for a continuance to investigate what he had learned. Counsel was ineffective for failing to investigate and present evidence or to object to the trial court's interference in preventing effective cross-examination and investigation.

The lower court also failed to address defense counsel's repeated concession of guilt and premeditation (R. 209,263,269, 457,459,460,469). Mr. Brown alleged in his Rule 3.850 motion that counsel did not adequately discuss this strategy with him. Mr. Chalu stated at the evidentiary hearing that he "wasn't sure" how much of the trial strategy Mr. Brown understood because he was so slow. He also testified that Mr. Brown could not read or write very well at the time. Trial counsel failed to insure that Mr. Brown understood the implications of conceding guilt.

Counsel not only conceded guilt as to the murders but as to the underlying crime as well. The Florida Supreme Court

remanded a case for an evidentiary hearing where it "is unclear as to whether [the client] was informed of the strategy to concede guilt and argue for second-degree murder." Harvey v. State, 656 So.2d 1253 (Fla. 1995);United States v. Swanson, 943 F.2d 1070(9th Cir.1991).

Concession of these elements actually bolstered the State's case. Counsel conceded that death was appropriate without his client's consent. The duty of counsel in a capital case is to neutralize the aggravating circumstances and present mitigation. Starr v. Lockhart, 23 F.3d 1280(8th Cir.1994). Mr. Brown's trial counsel failed to do either of these tasks and the lower court failed to rule on the merits of the issue.

Finally, counsel conceded that the victim's death occurred in the course of a felony. Mr. Brown did not knowingly consent to these concessions, which violated his Sixth Amendment rights. United States v. Swanson, 943 F.2d 1070 (9th Cir.1991). This was particularly egregious in light of the heavy medication Mr. Brown was being given during his discussions with counsel pre-trial and at trial. Francis v. Spraggins. This issue was also not addressed by the court’s order.

Trial counsel failed to act as an advocate. Mr. Brown's right to effective representation was breached. As a result, Mr. Brown suffered "actual and substantial disadvantage" which requires a reversal of his convictions.

The lower court also failed to address the issue of Mr. Chalu's failure to move for mistrial when a juror had been exposed to a prejudicial newspaper article. During trial, counsel failed to object or move for a mistrial after he learned that the jury had been exposed to a newspaper article in the Tampa Tribune. On the third day of trial, defense counsel requested that the court question the jury in regard to a Tampa Tribune newspaper account of the trial. After the court's inquiry, Juror Cleotelis admitted that she had "read at it" and that she had informed the bailiff that a copy of the article was circulating in the jury room (R.305). Defense counsel did not voir dire the witness as to what she read or who else in the jury room may have seen the paper (R.306). The article, entered as Court Exhibit 1, recounted the daily events of the trial and other crimes for which Mr. Brown had been charged but not convicted (R.304). This omission constituted ineffective assistance of counsel.

Mr. Alldredge testified that his efforts were hampered because the investigator assigned to Mr. Brown's case failed to undertake the requested investigation. Even though documents and records had been requested by Mr. Chalu, he either never got them or never told the attorneys about his inability to retrieve the documents. Mr. Alldredge testified that he would not work with this investigator after Mr. Brown's case because of his poor

performance. Mr. Chalu, however, testified to the contrary. This is understandable since he present no evidence at guilt phase.

Defense counsel was rendered ineffective for failing to present evidence of mental psychosis as well as sleep deprivation, exhaustion or intoxication at the time of the offense, all that were issues in Mr. Brown's case. See Bunny v. State, 603 So. 2d 1270 (Fla. 1992);Chestnut v. State, 536 So. 2d 820 (Fla. 1989);Gurganus v. State, 451 So.2d 815(Fla. 1984).

The lower court failed to address the issue of defense counsel's failure to explore a diminished capacity defense in guilt phase even though ample mental health issues were present. At evidentiary hearing, Mr. Chalu testified that he wanted to foreclose the use of evidence in guilt phase because he wanted to have the opening and closing argument at the end of the trial. He characterized this as the "sandwich." Had counsel presented any evidence, he would have lost the opportunity to argue first and last at the end of guilt phase.[16] As a result, Mr. Chalu failed to adequately investigate the possibility of an intoxication defense and failed to question others at the trailer on the night of the crime which would have led to the discovery that Jimmy Brown had observed Mr. Brown's bizarre behavior

[16]The jury was also instructed that argument cannot be considered as evidence.

immediately before the crime. Mr. Webb, the defense investigator, had already spoken with Jimmy Brown and prepped him to testify in penalty phase.[17] There were lay witnesses who could testify as to Mr. Brown's condition immediately prior to the crime. Mr. Chalu's justification for not raising any defenses regarding Mr. Brown's mental state was that a "diminished capacity defense was not possible in 1986 and 1987." However, Ake v. Oklahoma, 105 S.Ct. 1087 (1985), Mason v. State, 489 So.2d 734 (Fla. 1986), and Sireci v. State, 502 So.2d 1221 (Fla. 1987), were already decided and said that mental health evidence could be presented even if not pursuing an insanity defense. The failure to explore this avenue of defense was deficient performance. To the extent that this issue was what the lower court was referring to when it stated that Mr. Chalu had “meticulously prevented” the introduction of highly prejudicial evidence against his client, this is error. Evidence had already been presented that Mr. Brown was guilty of killing an adolescent girl and seriously injuring her friend. Mr. Chalu

[17]The state argued in its memorandum that Jimmy Brown’s credibility was questionable. The lower court ignored this issue. However, the state at the same time vouched for the credibility of his testimony at penalty phase and the good judgment counsel had in putting him on the stand. The State cannot have it both ways. Jimmy Brown was sworn and testified under penalty of perjury. The State offered no evidence to rebut his statements nor did it impeach his credibility on this issue. Trial counsel had no good faith basis for not discovering this information.

had conceded guilt on these crimes. He presented no evidence. The jury was left with no other possible conclusion than to find Mr. Brown guilty of these offenses, even the lesser included offenses. Because we do not know the substance of the “highly prejudicial evidence” the lower court’s order failed to adequately address this claim.

The purpose of the right to counsel is to assure a fair adversarial testing, United States v. Cronic. The Court noted that, despite counsel's best efforts, there may be circumstances where counsel could not insure a fair adversarial testing, and where counsel's performance is rendered ineffective. This is what happened here. At Mr. Brown's trial, no defense evidence reached the jury. Counsel's performance and failure to adequately investigate was unreasonable under Strickland . Confidence is undermined in the outcome. There is a reasonable probability of a different outcome. His trial was "a sacrifice of [an] unarmed prisoner [] to gladiators." United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir.), cert. denied sub nom.; Sielaff v. Williams, 423 U.S. 876 (1975). Accordingly, Mr. Brown's conviction must be vacated and a new trial ordered.

ARGUMENT IV

THE INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE CLAIM.

A. Introduction

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." 466 U.S. at 688 (citation omitted). Strickland v. Washington requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice. As part of the duty to provide effective assistance of counsel, a capital defense attorney must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976)(plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

Mr. Brown's counsel failed in these duties. Crucial evidence in mitigation was never presented to the judge and jury due to counsels' failure to fully investigate and develop mitigation. Counsel failed to object to improper closing argument

by the State. Counsel failed to adequately represent his client when he conceded the aggravating circumstances, without notice to Mr. Brown. No tactical motive can be ascribed to an attorney whose omissions are based on lack of knowledge, see Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979), or on the failure to properly investigate and prepare. See Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Mr. Brown's capital conviction and sentence of death are the resulting prejudice. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989).

Further, counsel failed to inform the jury that Mr. Brown's demeanor in court was affected by the influence of powerful drugs administered at the Hillsborough County Jail. During trial, Mr. Brown was under the influence of powerful anti-depressants and mood altering drugs, such as Mellaril. These drugs directly effected Mr. Brown's demeanor in Court. Counsel failed to inform the jury that Mr. Brown was drugged during trial. His flat affect or inability to react during trial kept the jury from knowing his true mental state during his trial. This important factor was critical in the jury's assessment of whether Mr. Brown could have had the requisite specific intent to support his guilt, sufficient premeditation to support the aggravating factors, or support for his mental health mitigators at penalty phase. Counsel's failure to request that the medication be stopped, notify the jury of his medicated state, or request a

medical reason for Mr. Brown's involuntary medication was ineffective assistance of counsel. Mr. Brown's Eighth Amendment right to a full and fair trial was violated. Riggins v. Nevada, 112 S.Ct. 1810,1812(1992).

A criminal defendant is entitled to expert psychiatric assistance when the state makes his or her mental state relevant to the proceeding. Ake v. Oklahoma, 105 S.Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523,529 (11th Cir. 1985). There exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979).[18]

Accepted mental health principles require that an accurate medical and social history be obtained "because it is often only from the details in the history" that organic disease or major mental illness may be differentiated from a personality disorder. R. Strub & F. Black, Organic Brain Syndrome, 42 (1981). This historical data must be obtained from the patient but from

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[18] When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. Fessel; Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Mason v. State, 489 So. 2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

sources independent of the patient. Patients are frequently unreliable sources of their own history, particularly when they have suffered from head injury, drug addiction, and/or alcoholism. Consequently, a patient's knowledge may be distorted by knowledge obtained from family and their own organic or mental disturbance, and a patient's self-report is thus suspect:

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information in the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Bonnie & Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case of Informed Speculation, 66 Va.L.Rev. 727(1980)(cited in Mason, 489 So.2d at 737).

B. At trial

Trial counsel failed to provide his client with "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake, 105 S.Ct. at 1096(1985). The mental health professionals did not obtain, and were not provided with, essential background materials such as school records, juvenile records or family background.

In Mr. Brown's case, the experts had no independent records

of Mr. Brown's childhood. Because they did not acquire, and were not supplied with background materials except those prepared for the prosecution, Dr. Berland was unable to make final determinations regarding Mr. Brown's mental state. Although he opined to the judge and jury that the statutory mental health mitigators probably applied, he testified that "...I don't have enough information to really give you -- give that." (R. 546) "I think there is a probability that he was, but I can't verify it to my satisfaction." (R. 566).

The damaging aspect of Dr. Berland's failure to consider background materials was the inability to explain the possibility of malingering. The state fully exploited this flaw in its closing argument to the jury:

> When you're comparing the weight to give the aggravating circumstances with the weight to give the mitigating circumstances, ladies and gentlemen, what kind of weight are you going to give the mitigating circumstances established by the testimony of these doctors? <u>The State would submit that you give little, if any, weight to the testimony of these two doctors</u>. Certainly there's not enough weight to outweigh the two aggravating circumstances that we've just gone over.
>
> Dr. Berland even tells you, "The man might have been faking his answers to me. A man in his position will try and manipulate his answers, and will try and exaggerate his condition."

(R. 633)(emphasis added). The failure to do so was devastating to Paul Brown's defense at the penalty phase. Although Dr. Afield testified that the statutory mental health mitigating factors applied, the State successfully discounted his opinion on

the basis that without background information to corroborate his opinion, Dr. Afield's opinion was unreliable.

> Dr. Afield, on the other hand, comes in here and tells you, "Yes, I found it to be extreme after reviewing Dr. Berland's report and a 45 minute interview in February."
>
> I think that is all you need to think about when you're back there in the jury room, when somebody says Dr. Afield, somebody should say, Forty-five minutes in February."

(R. 632).

The failure of the experts to have background material was the critical deciding factor in Mr. Brown's case. Judge Spicola's written findings clearly describe the prejudice which resulted due to the shortcomings of the mental health testimony:

> 2. <u>The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.</u> Section 921.141(6)(b), F.S.
>
> The evidence on this factor was conflicting. Dr. Berland could not say the defendant's mental or emotional disturbance was "extreme." The credibility of Dr. Afield's testimony under the circumstances of this case was suspect, and therefore, the Court did not give this circumstance great weight.
>
> * * * *
>
> 6. <u>The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.</u> Section 921.141(6)(f),Fla. Stat.

Again, the evidence from the expert witnesses was conflicting. Dr. Berland had some difficulty with finding "substantial" impairment, through his examination and testing of the defendant over a period of time. Dr. Afield, who examined the defendant on one occasion, for forty-five minutes, long after

the shooting, found that the defendant was "substantially impaired." Again, for purposes of this decision we can consider this circumstance and Section 921.141(6)(b), Fla. Stat., as established, but the Court does not give them great weight under the circumstances of this case.(R. 914)(emphasis added).

Had the records been obtained, the experts could have conclusively established that statutory and nonstatutory mitigating factors existed. At the evidentiary hearing, Mr. Brown provided these background materials to Doctors Sultan and Dee prior to their testimony. They relied upon this independent information in formulating their opinions. The school records contain dramatic evidence that Mr. Brown had been exhibiting bizarre behaviors since he was a child, eliminating the state's ability to say Mr. Brown was malingering. These records stated:

> Paul Brown, a ten year old boy enrolled in the 4th grade at the Bryan School, was referred by Mr. Vilchez as follows, "Paul appears to be an extremely nervous child. He bangs his head on the desk, makes noises imitating a moving train, crawls on the floor and lies on benches and tables in the rear of the classroom, wanders around aimlessly picking up books, plants, chalk, etc., occasionally speaking to this inanimate object, and sits facing open window for long periods of time pulling and playing with a venetian blind cord and speaking to himself."

Paul Brown's juvenile records are equally dramatic. At the age of 15 he was diagnosed as "psychotic" by the Hillsborough County Guidance Center:

> In a letter dated March 16th, 1965, from Dr. Jerry J. Fleischaker Director of the Guidance Center of Hillsborough County, the following information was obtained. Dr.

> Fleischaker reported that he believes that the defendant is a "psychotic boy" but is not overtly so at that time.
>
> * * * *
>
> His prognosis for the defendant at that time was very poor and perhaps eventually would require the defendant to be hospitalized. Dr. Fleischaker further went on to summarize that "My impression is of a seriously disturbed boy, who is going to have difficulty wherever he goes, or when ever placement plans are made. One possibility would be attempting to work with him in our follow up program here and attempting to use of some medication, as well as the parents and Paul's continuing here with the Court.
>
> * * * *
>
> I feel at this time Paul would benefit most from the training school; however, if he returns home immediately from training school, I believe he will be in serious trouble again after a short time. . . . ."

Although the experts and trial counsel were aware of the importance of obtaining background materials, it was never done. If the experts, the judge and the jury had been aware of these records, the statutory mental health factors of extreme mental or emotional disturbance and substantially impaired capacity, which were presented, would have been entitled to great weight. At the evidentiary hearing, counsel proved that her witnesses would have been more credible at trial if they had been provided with independent corroboration of their findings. In addition, the statutory factors of age and great duress could have been established, and the aggravating factor of cold and calculated could have been eliminated or greatly lessened.

As egregious as the failure to obtain background materials was, Mr. Brown was equally prejudiced by trial counsel’s failure

to conduct brain damage testing. Although Dr. Berland's screening tests indicated the presence of brain damage, no testing was performed to determine the severity of this condition. Collateral counsel introduced the testimony of Dr. Henry Dee, a qualified expert to conduct a complete battery of brain damage tests. The results were dramatic -- Mr. Brown is seriously brain damaged.

Mr. Brown not only suffers from brain damage but his test results are "grossly defective" and he is "severely impaired." Both sides of his brain are damaged but the left hemisphere is worse. He has suffered severe head injuries including a car accident resulting in hospitalization when he was 20 years old, and a blow to the head with a lead pipe. None of this evidence was presented to the judge or jury. Screening tests indicated the presence of brain damage. Testing should have been performed to determine the degree of impairment. Failure to conduct the appropriate tests was deficient performance by both the experts and trial counsel.

The jury and the Court had no idea that Mr. Brown was suffering from this severe degree of brain damage. Even without this information, the trial experts found that Mr. Brown was suffering from a "below average" mental capacity due to an IQ of 81. What the judge and jury never knew was that due to his severe organic brain damage, Mr. Brown was actually functioning

at a much lower level.

Judge Spicola's written findings of fact in support of the death sentence make the prejudice more than obvious. The Court rejected the "age" mitigating factor, or gave it little weight, due to the failure of the experts to present the readily available evidence that Mr. Brown was functioning on the mental level of a child.

Likewise, the defense failed to investigate the effects of that early incarceration had on Mr. Brown. When Mr. Brown was 16 years old, he saw a car in a neighbor's driveway with the keys in the ignition. He yielded to the temptation to take the car for a joy ride and was stopped by the police. For this offense, this mentally defective child was sent to Florida State Prison for two years at the age of 17. Mr. Brown later described the experience of being incarcerated with the most vicious prisoners in the state of Florida as "hell." This type of early incarceration is recognized by Florida law as a mitigating factor to be considered by a jury. However, it was never presented to Mr. Brown's judge and jury.

At the time of trial, the evidence presented at the penalty phase barely scratched the surface of the compelling evidence that was available in mitigation for Mr. Brown. Family members gave only sketchy details of his childhood. For example, no evidence was presented regarding the severe physical abuse

suffered by Mr. Brown when he was a child. Partly because the perpetrator of the abuse was the witness called by the defense.

At the evidentiary hearing, Mr. Alldredge testified that he was not satisfied with the degree and quality of the investigation that had occurred prior to his involvement in the case. As a result, counsel failed to provide the mental health experts who examined Mr. Brown with critical family background and medical history information; school records and other documents.

During the penalty phase, both mental health experts were hamstrung by the lack of background information. Dr. Berland believed that severe psychosis was present but did not have the background information necessary to resolve the confusion surrounding the MMPI results or to find statutory mitigation. Dr. Afield believed Mr. Brown to be schizophrenic but did not have the background information to corroborate his opinion. No evidence was presented regarding the grossly defective degree of Mr. Brown's brain damage. No evidence was presented regarding the severe physical child abuse suffered by Mr. Brown. No evidence was presented regarding his history of substance abuse and intoxication at the time of the offense. The prosecutor was only too eager to point out these deficits in the defense case to the judge and jury. From the preceding claim it is obvious, no defense was presented during the guilt/innocence phase of this

trial.

During prosecutor Benito's closing argument, he told the jury that the mitigation presented by Mr. Brown should be disregarded:

> I sympathize with the Defendant's rough childhood, his tough upbringing. I can sympathize with that, but what about the childhood of Pauline Cowell? What about the childhood of Tammy Bird?

(R. 631). Later, Mr. Benito returned to this theme:

> Mr. Chalu, I believe, eloquently stated in his closing argument that justice, as I recall him stating it, justice should also be for the least among us. I agree with that statement. What about justice for Pauline Cowell? She is no longer among us. I ask this jury for that justice on behalf of Pauline Cowell, justice in the form of a recommendation that Paul Alfred Brown be sentenced to death for the cold-blooded killing of this young girl.

(R. 637). Defense counsel was ineffective for failing to object to these and related improper arguments of the prosecutor. There was no tactic or strategy for failing to do so. Prejudice is manifest.

C. Lower court error at the evidentiary hearing

The lower court failed to address the merits of this issue:

> Claim 8 alleges ineffective assistance of penalty phase counsel for failing to obtain necessary background information. Most of the evidence presented addressed this issue, but it boils down to defense counsel's failure to discover earlier "presentence investigation report," and some school records. While Mr. Alldredge expressed dissatisfaction with the level of investigation provided by his office, the records eventually located by Defendant did not in any way change the opinion of the mental health experts and the opinion of the defense's mental health experts at the evidentiary hearing did not differ from the opinions

> offered at trial. The essence of the Defendant's allegation seems to be that the experts' opinions would have been given greater weight if they had the additional records upon which to base their opinions at trial, but the psychologist who testified at the hearing stated that although the additional information might have helpful, his opinion was unchanged.

(PC-R. 453). The court examined the evidence under the wrong standard. If confidence in the outcome becomes unreliable then relief should issue under Strickland. Mr. Brown need not show that the witnesses testimony would have been different. At trial, the weakness in the defense case was the lack of independent evidence of mental disorders–Dr. Berland testified that he gave Mr. Brown four MMPI tests because he thought he was "gilding the lily.". The state attacked his credibility because of his assumption of malingering and organic brain damage. Dr. Afield's testimony was equally attacked on cross-examination because he had only spent 45 minutes with Mr. Brown before determining that he found statutory mitigating factors (R.632). This was devastating to the defense. The defense could not give credence to its witnesses through independent evidence .

At evidentiary hearing, Mr. Brown showed the availability of independent corroboration to counter Dr. Berland's speculation. Dr. Sultan testified to the plethora of information which indicated that Mr. Brown was not malingering or "gilding the lily." Dr. Dee confirmed Dr. Berland's suspicion that Mr. Brown in fact had organic brain damage among other mental disturbances.

The significance of the missing records that the investigator never got was that it proved Mr. Brown had a long-standing history of mental disturbance.

The court acknowledged that Mr. Alldredge was unhappy with the quality of investigation he received (PC-R. 453). Mr. Alldredge said he would have used the additional information from Dr. Dee and Dr. Sultan to give credibility to his mental health defense. He testified that after this case, he would not have Mr. Webb conduct any further investigations for him. It was obvious to Mr. Alldredge that more follow-up investigation needed to be conducted of the penalty phase witnesses that were available and the records they had requested. Mr. Webb failed to find the school records, the complete Department of Corrections file, the files on Mr. Brown's prior offenses, the records of Dr. Fleischaker, the report cards in the possession of Mr. Brown's family, and more importantly, he failed to investigate the witnesses with regard to circumstances immediately before the crime (PC-R.Vol.IV,63;Vol.V,153).

Mr. Alldredge testified that these records were important to corroborate independently the testimony of his mental health experts in penalty phase, who were severely impeached by relying on inadequate background materials. The state argued that the school records which reflected that Mr. Brown was banging his head on his desk, speaking to inanimate objects and making noises

at the age of ten, were "approximately twenty years old, the school records were not as important as they would have been for a younger defendant." This argument is contrary to the state's own position at trial. The fact that the records were twenty years old is what made them so valuable to the mental health experts. They were indisputable proof that Mr. Brown suffered from psychological problems at an early age. The records showed that he was not malingering or faking his symptoms because his illness was longstanding and chronic. The age of the defendant now is irrelevant.

The records were meaningful and important. Dr. Sultan, Dr. Dee and Dr. Berland testified that these records were important for their presentation to the jury. Mr. Alldredge testified that he would have liked to have had the records and that he definitely would have presented them to the jury and to his experts. It was deficient performance for counsel not to have insured that these records were obtained after it is clear from the attorney's notes that Mr. Chalu knew how important it was to get those records. Mr. Alldredge testified that it was his responsibility to get the records when it was clear that Mr. Webb had not done it. He said there was no tactic or strategy for not getting the records(PC-R.Vol.V,150-169). The overriding prejudice is that the jury and the judge never knew this information which would have affected the 7-5 jury vote for

death. The lower court never understood this fact, instead it was hopelessly mired in the idea that it was necessary to prove that the outcome would have been different. This is not the standard.

The lower court again misconstrued the purpose of presenting additional witnesses:

> Counsel for the defense further claims that penalty phase counsel was ineffective for failing to call as lay witnesses family members and friends to testify concerning the Defendant's abuse as a child and low intelligence, but, in fact, two family members did testify to neglect and abuse and low intelligence (see pp. 521-531 and pp 591-597 of trial transcript and Defense exhibit No. 4–video taped testimony of Wanda Brown). The defense has failed to show any prejudice to the Defendant for failing to call a neighbor who saw the Defendant receive a whipping with a belt one time or a stepbrother who testified to essentially the same thing as the brother did at trial.

(PC-R. 453).

Because Ms. Conway only knew of one instance of the horrific physical abuse Mr. Brown suffered at the hands of his father, her testimony should not be discounted. According to Mr. Chalu and Mr. Alldredge, anything may be presented as mitigating at penalty phase. Ms. Conway's eyewitness account of the beating Mr. Brown experienced with a strap wrapped around his neck, bleeding and bruised was compelling. Her threat to Paul's father to stop beating the boy or she would hit him with a chair was riveting and unrebutted by the State. Her memory of the date of incident was irrelevant and one would suppose that her memory would have been better ten years ago had the defense put on her testimony

(PC-R.Vol.VII,360-365).

The incident Ms. Conway related occurred when Paul was a boy. Her account was not cumulative and was corroborated by Mr. Jackson, another penalty phase witness(PC-R.Vol.VII,368-383). There was no tactic or strategic reason for not putting on her testimony. Mr. Alldredge testified that he would have used her testimony. The fact that Mr. Alldredge did put on Mr. Brown's step-mother and father is irrelevant particularly where Paul's father was the perpetrator of much of the physical abuse Paul suffered. If the witnesses would have testified to anything that may have been mitigating, the jury was entitled to consider it. It cannot be said that in a 7-5 jury vote that one juror would not have been swayed by the introduction of Ms. Conway's testimony and the independent evidence presented through Dr. Dee and Dr. Sultan. The defense lack of preparation and investigation cannot be harmless in this situation.

These witnesses testified at the evidentiary hearing to incidents of abuse and neglect not heard by the jury. Mr. Jackson testified consistently with Ms. Conway and related stories of the horrible and unprovoked beatings that he and Mr. Brown suffered during their stay with the Brown's. The state suggests that the defense could not use his testimony because he knew that Paul had gotten in trouble for "messing" with children in the neighborhood. This is not a reasonable strategic decision

because the other family members that the defense presented at trial knew the same information. Jimmy Brown, Paul Brown, Sr. and Wanda Brown all knew this information, but the defense had them testify. The trial court had made a prior ruling that all of this information was not to come in. Therefore, the defense knew this information was not going to get to the jury. The compelling evidence of Mr. Brown's physical abuse never was presented to the jury even though the information was readily available. Mr. Alldredge testified that he thought this information would have been compelling for the jury to hear and that he would have presented it.

The lower court, which did not preside over the trial, cannot now say that these things would not have mattered especially when viewed in the context of the multiple errors which occurred–the improper closing argument, the improper jury instructions and the deficient performance of counsel.

Mr. Alldredge testified that he was not satisfied with the level of investigation that had been done prior to his involvement in the case and that he could have done more. He stated that he had no reason for not doing more. Understandably, the state, in light of the conflict of interest in this case, chose to present Mr. Chalu to rebut the penalty phase strategies because he was not responsible for it. However, this Court should consider Mr. Alldredge's testimony regarding his

strategies for penalty phase because he was admittedly responsible for the second phase.

The state argued in its memorandum that Mr. Chalu testified that the defense chose to accentuate the "positive aspects of the defendant's existence." This is contrary to what they presented at trial. During trial, Mr. Alldredge focused on the mental health experts to show the jury how difficult and horrendous Mr. Brown's life had been but he did not give them any independent evidence to do so. The experts relied heavily on Mr. Brown's self-report and some police reports and statements which were prepared for prosecution of the case. These were not positive aspects. Dr. Berland and Dr. Afield alluded to Mr. Brown's abusive environment but did not have independent evidence to support it.

The lower court and the state suddenly proclaimed the virtues of Dr. Berland and Dr. Afield's testimony at trial. This is decidedly different from the court and the state's position at trial when both doctors were severely impeached by the state. The state, in closing, argued to the jury to discount their testimony. Dr. Dee provided the neuro-psychological testing that was never done by trial counsel. It corroborated Dr. Berland's findings and Dr. Afield's testimony. Dr. Afield was impeached at trial for having spent only 45 minutes with Mr. Brown. According to the records, Dr. Berland spent a total of five hours speaking

with Mr. Brown. Both Dr. Dee and Dr. Sultan spent more time with Mr. Brown than either of the defense experts. Dr. Dee's findings were consistent with the organic brain damage that Dr. Berland said existed. That is why he recommended further testing at the time of trial. It was not done. Dr. Berland was impeached on that fact. Both Dr. Berland and Dr. Afield were impeached on their lack of independent evidence to support their findings. Had they been provided the information, they would have withstood the State's impeachment and been persuasive to the jury. Mr. Alldredge testified that he would have liked to have had the additional background information to provide to his mental health experts and that he would have used it. He did not have a tactical reason for not gathering the information in order to make an informed decision as to whether to use it. Neither Mr. Chalu nor Mr. Alldredge could make an informed decision if they did not know of the information's existence. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).

The lower court completely failed to mention the effect of medication on Mr. Brown’s demeanor in the courtroom and counsel’s failure to bring this to the jury and expert’s attention. Dr. Berland testified that he found out about Mr. Brown being medicated for the first time immediately prior to trial and in his February 11, 1987 letter (R.538-539). Dr. Szabo testified as

to the records that are now available. During the Chapter 119 proceedings in this case, the remaining County Jail medical records that were requested by Mr. Brown in 1992 had been destroyed. It is obvious from the presence of the County Jail medical records in the trial attorney file that these records existed back in 1987. Further, Dr. Szabo did not testify that Mr. Brown was no longer on medication at the time of trial. He testified that from the record, his medication was going to be reviewed in thirty days. It is obvious from Dr. Szabo and Dr. Berland's report that Mr. Brown was on medication at the time of trial. Likewise, Mr. Brown's reliance on Riggins v. Nevada, 112 S. Ct. 1810 (1992), is equally valid here in that counsel's strategy was to focus on penalty phase and their main focus was the presentation of evidence regarding mental health.

Where mental health is an issue and the main focus of the defense, the jury should have been told that Mr. Brown was under influence of Mellaril, which may have affected their evaluation of his demeanor in the courtroom.

D. Conclusion

The Florida Supreme Court has affirmed the need for appropriate background investigation at the penalty phase of trial. A new sentencing is required when counsel fails to investigate and as a result, substantial mitigating evidence is never presented to the judge or jury. Stevens v. State, 552

So.2d 1082 (Fla. 1989).

Because Mr. Brown's sentencing jury recommended death by the slimmest possible margin, 7 to 5, the mitigating evidence that was never made available for its consideration surely would have tipped the scales in favor of a life recommendation and provided a sound basis for the judge to find that many valid mitigating circumstances were strongly supported in this case. Had defense counsel properly and adequately investigated and presented the compelling mitigating evidence outlined above to the judge and jury at the penalty phase of Mr. Brown's trial, it would have made a difference.

ARGUMENT V

MR. BROWN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING VOIR DIRE.

Before jury selection, defense counsel made a written motion for additional peremptory challenges due to the highly publicized trial in the local area (R. 10). At the beginning of voir dire, defense counsel renewed the motion orally before the court. The trial court reserved ruling on the motion to "see what develops in voir dire"(R.11). Halfway through voir dire, defense counsel again asked for a ruling on the motion because it would affect the decisions on which jurors to strike. The court denied the defense motion for additional peremptory challenges(R.168). At the conclusion of voir dire, defense counsel proffered for the record that he would have exercised additional peremptory

challenges against jurors Montoya and Moser had he been allowed to by the court(R.241).[19] Ultimately, this jury panel recommended the death penalty by a 7 to 5 vote.

Mr. Brown was wrongly denied additional peremptory challenges. To the extent that defense counsel was prevented from exercising his peremptory challenges, he was rendered ineffective by the trial court's interference. Hamilton v. State, 547 So. 2d 630 (Fla.1989); Floyd v. State, 569 So.2d 1225 (Fla.1990). As a result, two prejudiced jurors remained seated on Mr. Brown's jury. This was reversible error. Trotter v. State, 576 So. 2d 691 (Fla.1990). Such actions violated Mr. Brown's rights under the Sixth, Eighth, and Fourteenth Amendments. Mr. Brown was prejudiced thereby. Relief is proper.

ARGUMENT VI

MR. BROWN'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE.

Mr. Brown was charged with first degree murder: "Murder from a premeditated design to effect the death of" the victims in violation of Florida Statute 782.04(R.814-16). It is unclear from the verdict form whether Mr. Brown was convicted on the basis of felony murder or premeditated murder(R.895). However, the judge found felony murder as a statutory aggravating

[19]Juror Moser had previously testified that he had been a childhood friend of the prosecutor, Michael Benito. Juror Montoya had a friend on the Sheriff's Department (R. 184, 192).

circumstance. The murder was committed while the defendant was engaged in the commission of a burglary.

An indictment such as this which "tracked the statute" charges both premeditated and felony murder(R.814-16); Lightbourne v. State, 438 So. 2d 380, 384(1983). Since felony murder was the basis for Mr. Brown's conviction, the use of the underlying felony as an aggravator violated the Eighth Amendment. This is because the aggravator of "in the course of a felony" was not a "means of genuinely removing the class of death-eligible persons and thereby channeling the jury's discretion." Stringer v. Black, 112 S. Ct. 1130, 1138(1992). Unlike the situation in Lowenfield v. Phelps, 484 U.S. 231(1988), the narrowing function did not occur at the guilt phase. Thus, the use of this non-narrowing factor "create[d] the possibility not only of randomness but of bias in favor of the death penalty." Stringer, 112 S. Ct. at 1139.

Under the particulars of Florida's statute, every felony murder would involve by necessity, the finding of a statutory aggravating circumstance which violates the Eighth Amendment. An automatic aggravating circumstance is created which does not narrow "the class of persons eligible for the death penalty..." Zant v. Stephens, 462 U.S. 862, 876(1983). "[L]imiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently

minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356,362(1988).

Since Mr. Brown was convicted of felony murder, he faced statutory aggravation for felony murder. This system is too circular to meaningfully differentiate between who should live and who should die, and it violates the Eighth Amendment.

ARGUMENT VII

MR. BROWN WAS DENIED A RELIABLE SENTENCING BECAUSE THE SENTENCING JUDGE FAILED TO FIND MITIGATION ESTABLISHED BY THE RECORD.

The sentencing judge in Mr. Brown's case found mitigating circumstances but gave them no "great weight." Finding three aggravating circumstances, the court imposed death (R.915). The court's conclusion that the mitigating circumstances did not outweigh the aggravators is belied by the record and the sentencing order itself.

> Mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence.

Santos v. State, 591 So. 2d 160 (Fla. 1991)(citing Hardwick v. State, 521 So.2d 1071, 1076 (Fla.), cert. denied, 488 U.S. 871 (1988)).

During the penalty phase, the defense presented a number of witnesses who testified to statutory and non-statutory mitigation. The State presented no witnesses. Unrefuted testimony by Doctors Robert M. Berland and Walter Afield

established that Mr. Brown's ability to appreciate the criminality of his actions was substantially impaired. Dr. Berland offered evidence that Mr. Brown suffered organic brain damage and was psychotic. During penalty phase, family members testified that they thought Mr. Brown was retarded because of a severe learning disability, that he was nonviolent, and was under the pressure of having to economically support his children or lose them when he had no job and no sleep for 2-3 days. (R.522-597). All of this evidence was uncontroverted.

The trial court, without any contrary evidence on the record, discarded the testimony of both mental health experts (R. 914-15). Then, in his sentencing order, the judge stated:

> The evidence indicates that the defendant is socially and economically disadvantaged and has a below average mental capacity. He also has a non-violent criminal past, and may have been under some stress at the time of the shootings.

(R. 915). Thus, the court acknowledged that mitigation existed but refused to find it present.[20] Parker v. Dugger, 111 S. Ct. 731 (1991).

On direct appeal, the record should be reviewed to determine whether there is support for the sentencing court's finding that certain mitigating circumstances are not present. Magwood v. Smith, 791 F. 2d 1438,1449(11th Cir. 1986). Where that finding

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[20]The Florida Supreme Court acknowledged that some mitigation did exist but that the Court determined that it did not outweigh any one of the aggravating circumstances.

is clearly erroneous, the defendant is "entitled to a new resentencing." Id. at 1450. The judge did not review this case in light of the standards discussed in Magwood and Parker.

Despite the presence of mitigating circumstances, the Court concluded that no mitigating factors were present. The Florida Supreme Court has recognized that trial courts "continue to experience difficulty in uniformly addressing mitigating circumstances." Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). Because of this, the court, citing Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982), suggested that capital defendants may have been deprived of their fundamental Eighth Amendment right to have all relevant mitigation considered by the capital sentencer. Zant v. Stephens, 462 U.S. 862, 879 (1983)(Eighth Amendment guarantees a capital defendant an "individualized determination" of the appropriate sentence).

In the face of uncontroverted evidence of mitigation, the judge declared that no mitigation existed. Under Eddings, Magwood, Santos, and Campbell, the sentencing court's refusal to accept and find all of the undisputed mitigating evidence was error. As a result of this error, Mr. Brown was denied individualized sentencing at penalty phase.

ARGUMENT VIII

THE MULLANEY CLAIM.

Under Florida law, a capital sentencing jury must be:

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

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). The court shifted to Mr. Brown the burden of proving whether he should live or die by instructing the jury that it was its duty to render an opinion on life or death by deciding whether there were "mitigating circumstances which [were] sufficient to have outweigh[ed] the aggravating circumstances..." (R. 658). Later the jury was misinstructed again with regard to this issue (R. 658, 659). The State highlighted the improper instruction and used it to their advantage during closing arguments (R. 627, 633).

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985), Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Maynard v. Cartwright, 108 S.

Ct. 1853 (1988).

Relief is proper.

ARGUMENT IX

THE CALDWELL CLAIM.

The jurors were misinformed and misled as to their role in sentencing. The jurors were consistently signalled that their recommendation was of an advisory nature only; was of less importance; and that the appropriateness of sentencing Mr. Brown to death would be determined by a more qualified authority -- the judge, who was free to disregard their advisory decisions under any circumstances.

During his initial instructions, the Court explained to the venire, "although the verdict of the jury is advisory in nature and not binding on the Court, the jury recommendation is given great weight and depthness when the Court determines what punishment is appropriate . . . " (R. 22). The court re-emphasized that the jury verdict was advisory in nature (R. 24, 25).

Voir dire was a general questioning before the entire venire panel and the prosecution continued repeating what the Court had already driven home -- that the jury's verdict was only advisory. Countless times, the prosecution asked jurors if they could recommend a death sentence (R. 196, 204, 205, 206, 207, 208).

Even defense counsel supported this unconstitutional view of

the sentencing process during voir dire by echoing and reinforcing the Court's dilution of the juror's sense of responsibility:

> MR. ALLDREDGE: Well, when you say it's the law you understand that the law is that a jury may deliberate and then they may recommend either a sentence of life or they can recommend death, and solely, it's the Judge's responsibility.
>
> Do you all understand that, that in Florida the jury's recommendation is non-binding in the Court. Do you all understand that? Do you understand that when we or if you all get to this stage it will be after you have already found this person guilty of first degree murder? Do you understand that?

(R. 145). In this regard, counsel rendered ineffective assistance; he was ignorant of longstanding Florida law.

The judge's initial instruction at the penalty phase was:

> THE COURT: Ladies and gentlemen of the jury, it is now <u>your duty to advise</u> the Court as to what punishment should be imposed upon the Defendant for his crime of murder in the first degree.
>
> As you have been told, <u>the final decision as to what punishment shall be imposed is the responsibility of the Judge</u>. However, it is your duty to follow the law that will now be given to you by the Court and render to the Court <u>an advisory sentence</u> based upon your determination as to whether significant, sufficient, aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> <u>Your advisory sentence</u> should be based upon the evidence that you have heard while trying the guilt or innocence of the Defendant and evidence that has been presented to you in these proceedings.
>
> * * * *
>
> Before you ballot you should carefully weigh, shift,

> and consider the evidence, and all of it realizing that human life is at stake and bring to bear your best judgment in reaching your advisory sentence.
>
> If a majority of the jury determines that Paul brown should be sentenced to death, your advisory sentence will be, and you will have a verdict form that will read: A majority of the jury by a vote of blank advise and recommend to the Court that it impose the death penalty upon Paul Brown.
>
> On the other hand, if by six or more votes the jury determines that Paul Brown should not be sentenced to death your advisory sentence will be: The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Paul Brown without possibility of parole for twenty-five years.
>
> A vote of 6 to 6 constitutes a life recommendation.
>
> You will now retire to consider your recommendation. When you have reached an advisory sentence in conformity with these instructions that form of recommendation should be signed by your foreman and returned to this Court.

(R. 658, 661-3). Later in this stage of the proceedings, the judge repeatedly hammered to the jury their sentence was only advisory (R. 658,659,660,661,662). The error was compounded by the prosecution's comment upon the jury's sentence at closing argument:

> We have gone over this many times before. By a majority vote, you are to render the advisory sentence to Judge Spicola. The recommendation will be this man be sentenced to death in Florida's electric chair or that he be sentenced to life in prison without the possibility of parole for twenty-five years.
>
> Judge Spicola will give your advisory sentence great weight when he makes the ultimate decision as to whether or not Paul Alfred Brown should live or die for the killing of Pauline Cowell.

> Now in reaching your advisory sentence you are to review all the evidence that has been presented i [sic] both phases of the trials, and to further assist you in determining whether or not you should recommend life or death, there are -- it has been enacted by the Florida Legislature certain aggravating circumstances and certain mitigating circumstances.

(R. 626). This is precisely what Caldwell addressed and condemned.

ARGUMENT X

THE INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING JURY MISCONDUCT CLAIM.

On the third day of trial, defense counsel requested that the court question the jury in regard to a Tampa Tribune newspaper account of the trial. After the court's inquiry, Juror Cleotelis admitted that she had "read at it" and that she had informed the bailiff that a copy of the article was circulating in the jury room (R. 305). Defense counsel did not voir dire the witness as to what she read or who else in the jury room may have seen the paper (R. 306). The article, entered as Court Exhibit 1, recounted the daily events of the trial and other crimes for which Mr. Brown had been charged but not convicted (R. 304). This omission constituted ineffective assistance of counsel and greatly prejudiced Mr. Brown at all phases of his trial. Relief is proper.

A criminal defendant is entitled to a fair trial. To ensure that an adversarial testing and a fair trial occurs, certain

obligations are imposed upon defense counsel. Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668, 688 (1984). Here, Mr. Brown's attorney failed his client. At the evidentiary hearing, Mr. Chalu testified that he did not think the jury had been prejudiced by the newspaper article. However, Mr. Chalu would have no way of knowing this fact because he failed to question the juror when given the opportunity to do so.

Courts have recognized that to render reasonably effective assistance an attorney must not fail to raise objections, to move to strike, or to seek limiting instructions regarding inadmissible, prejudicial testimony. Vela v. Estelle, 708 F. 2d 954, 961-66 (5th Cir. 1983). Likewise, 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), and he is responsible for presenting legal argument consistent with the applicable principles of law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).

ARGUMENT XI

THE CUMULATIVE ERROR CLAIM.

Mr. Brown did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v.

McNeel, 938 F. 2d 605 (5th Cir. 1991). The process itself failed Mr. Brown. It failed because the sheer number of and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive.

In Jones v. State, 569 So. 2d 1234 (Fla. 1990) the Florida Supreme Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added). In Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990) cumulative prosecutorial misconduct was the basis for a new trial. Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991); Ellis v. State 622 So. 2d 991 (Fla. 1993) (new trial ordered because of prejudice resulting from cumulative error);Taylor v. State, 640 So. 2d 1127 (Fla. 4th DCA 1994).

The Supreme Court has consistently emphasized the uniqueness of death as a criminal punishment. Death is "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity." Furman, 408 U.S. at 287 (Brennan, J., concurring). It differs from lesser sentences "not in degree but in kind. It is unique in its total irrevocability." Id. at 306 (Stewart, J., concurring). The severity of the sentence "mandates careful scrutiny in the review of any colorable claim of error." Zant v. Stephens, 462 U.S. 862, 885 (1983). Accordingly, the cumulative effects of error must be carefully scrutinized in capital cases.

A series of errors may accumulate a very real prejudicial effect. The burden remains on the state to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

The flaws in the system which sentenced Mr. Brown to death are many. They have been pointed out throughout not only this pleading, but also in Mr. Brown's direct appeal; and while there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence -- safeguards which are required by the Constitution. These errors cannot be harmless. The results of the trial and sentencing are not reliable.

ARGUMENT XII

THE RULES PROHIBITING MR. BROWN'S LAWYERS FROM INTERVIEWING JURORS TO EVALUATE JUROR MISCONDUCT VIOLATES U.S.CONSTITUTION.

Florida Rules of Professional Responsibility 4-3.5(d)(4) provides that a lawyer shall not initiate communications or cause another to initiate communication with any juror regarding the trial. The rule violates Mr. Brown's rights under the First, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and those corresponding provisions of the

Constitution of the State of Florida. This rule unconstitutionally has prevented Mr. Brown from investigating any claims of jury misconduct that may be inherent in the jury's verdict. Misconduct may have occurred that Mr. Brown can only discover by juror interviews. Cf. Turner v. Louisiana, 379 U.S. 466 (1965); Russ v. State, 95 So. 2d 594 (Fla. 1957).

Mr. Brown requests that this Court declare this ethical rule invalid as conflicting with the Eighth and Fourteenth Amendments to the United States Constitution, and to allow Mr. Brown discretion to interview the jurors in this case. The failure to allow Mr. Brown the ability to freely interview jurors is a denial of access to the courts of this state under Article I, Section 21 of the Florida Constitution and deprives him of due process.

Counsel for Mr. Brown has good cause to interview the jurors in this case. At least one juror had possessed a newspaper with an article regarding the trial during the trial (R. 412, 465). Florida's rule denies Florida inmates equal protection. The rule should be abolished.

ARGUMENT XIII

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY ON THE STANDARD BY WHICH THEY MUST JUDGE EXPERT TESTIMONY.

The trial court instructed the jury on expert witnesses as

follows:

> Expert witnesses are like any other witness with one exception. The law permits an expert witness to give an opinion. However, an expert's opinion is only reliable when given upon the subject about which you believe that person to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

(R. 500) (emphasis added). Defense counsel did not object to this instruction. The Court's instruction was an erroneous statement of law. The decision of whether a particular witness is qualified as an expert to present opinion testimony on the subject at issue is to be made by the trial judge alone. Ramirez v. State, 651 So. 2d 1164 (Fla. 1995) (citing Johnson v. State, 393 So. 2d 1069, 1072 (Fla. 1980), cert. denied, 454 U.S. 882 (1981)). The Court's instruction here permitted the jury to decide whether an expert was truly expert in the field in which the Court had already qualified him. In addition to judging his credibility, the jury was permitted to judge his expertise. That determination belongs solely to the judge.

By permitting the jury to accept or reject an expert's qualification, a question of law reserved exclusively for the Court, the instruction at issue here allowed the jury to reject the expert's opinions without legal basis for doing so. See Strickland v. Francis, 738 F.2d 1542, 1552 (11th Cir. 1984). In so instructing the jury, the Court violated Mr. Brown's fundamental right to present a defense at the penalty phase, guaranteed by the Sixth, Eighth, and Fourteenth Amendments.

Defense counsel failed to object to this erroneous instruction, and failed to offer an alternative instruction that correctly defined the limits of the jury's discretion regarding expert witnesses. Counsel had no tactical or strategic reason for permitting the jury to be misinstructed. As a result, the outcome of the jury's deliberations is fundamentally unreliable. The prejudice to Mr. Brown is manifest. Relief is proper.

ARGUMENT XIV

THE EXECUTION OF A MENTALLY RETARDED OFFENDER WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

Mr. Brown's significant mental deficiencies render the application of the death penalty in his case cruel and unusual. Mr. Brown is mentally retarded. His history and background show that his mental retardation precluded any achievement in school. He has never functioned normally. His level of intellectual functioning is such that he cannot control his behavior, plan ahead, realize the consequences of his actions, or anticipate the long term results. He is and will always be, in terms of mental functioning, a child. His execution would therefore offend the evolving standards of decency of a civilized society, See Trop v. Dulles, 356 U.S. 86 (1958), would serve no legitimate penological goal, see Gregg v. Georgia, 428 U.S. 153, 183 (1976), and would violate the Eighth and Fourteenth Amendments.

Capital punishment should not be imposed where a defendant

lacks the requisite "highly culpable mental state." Tison v. Arizona, 107 S. Ct. 1676, 1684 (1987). Mr. Brown lacks such a mental state. The background of the defendant (mental retardation and organic brain damage) reflects "factors which may call for a less severe penalty," Lockett v. Ohio, 438 U.S. 586, 605 (1978).

Mr. Brown's mental retardation warrants consideration. Mr. Brown has a limited ability to understand the external world, a limited repertoire of responsive and coping behaviors, and an inability to mediate and restrain aggression. Mr. Brown cannot fully or accurately understand the complex world in which he lives. As a result, he is continually subject to frustrations and confusions that the non-retarded never face. His limitations handicap him in trying to cope. See Handbook of Mental Illness in the Mentally Retarded, at 7 (F. Menolascino & J. Stark, eds. 1984). A significantly impaired and mentally retarded offender like Mr. Brown is the very opposite type of offender whose "highly culpable mental state" has been held to warrant imposition of the death penalty. Tison.

The Eighth Amendment forbids imposing the death penalty where a defendant lacks the requisite "highly culpable mental state." For this reason, the constitution requires an individualized inquiry in every capital case into the background and character of the defendant and the circumstances of the

offense to determine whether there exist "factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. 586, 605 (1978).

Paul Brown's brain was, and is, quite simply, malfunctioning, because of his mental retardation. This dysfunction was further compounded by other deficits (e.g., emotional deficiencies and brain damage). His level of functioning is well below that of a responsible and competent individual.[21] Eighth Amendment concerns apply to the execution of mentally retarded offenders like Mr. Brown: no defendant who is mentally retarded is "capable of acting with the degree of culpability that can justify the ultimate penalty." Thompson, 108 S. Ct. at 2692. In light of all of the above, relief is proper.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Brown respectfully urges this Court to reverse the lower court and grant a new trial, order a full evidentiary hearing before a fair and impartial judge who is familiar with the record on this case,

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[21]In Penry v. Lynaugh, the Supreme Court held that a mentally retarded person will not constitutionally be precluded from consideration for the death penalty. Penry v. Lynaugh. However, the Court held that the jurors should be permitted to hear and consider evidence of retardation for consideration as mitigation. Id. at 2951. In Mr. Brown's case the jury never got to hear evidence about his mental impairment during guilt phase because counsel was ineffective and failed to sufficiently investigate and pursue this evidence.

and grant such other relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on May 1st, 1998.

_____
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