IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,343

DOMINICK OCCHICONE,

Appellant,

V.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PASCO COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Occhicone's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

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 instant 3.850 appeal to this Court;

"App." -- appendix to Rule 3.850 motion.

REQUEST FOR ORAL ARGUMENT

Mr. Occhicone has been sentenced to death. The resolution of the issues involved in this action will therefore 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 at issue and the stakes involved. Mr. Occhicone, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

I. Course of Proceedings and Disposition in Court Below

The Circuit Court of the Sixth Judicial Circuit, Pasco County, Florida, entered the Judgments and Sentence at issue on November 18, 1987 (R. 1646-9). On July 15, 1986 a Grand Jury indicted Mr. Occhicone on two counts of first degree murder (R. 1373). Mr. Occhicone pled not guilty (R. 1374).

Mr. Occhicone's trial was held from September 14, 1986 to September 18, 1986. The jury found Mr. Occhicone guilty on both counts of first-degree murder (R. 864-5). A penalty phase proceeding was held on September 21, 1986, after which the jury recommended death on both counts by a vote of 7 to 5 (R. 1364-5). The Court thereafter sentenced Mr. Occhicone to life on Count I and to death on Count II (R. 1585, 1688-9).

On direct appeal, Mr. Occhicone's conviction was affirmed. Occhicone v. State, 570 So. 2d 902 (Fla. 1990). Mr. Occhicone then filed a Petition for Writ of Certiorari in the United States Supreme Court, which was denied on May 20, 1991. Occhicone v. Florida, 111 S. Ct. 2067 (1991).

On July 7, 1992, Mr. Occhicone filed a Petition for Writ of Habeas Corpus in the Florida Supreme Court, which was denied on April 8, 1993. Occhicone v. Singletary, 618 So. 2d 730 (Fla. 1993). On May 20, 1993, pursuant to Fla. R. Crim. P. 3.850, Mr. Occhicone filed his Motion to Vacate Judgements of Conviction and Sentence (PC-R. Vol. I, 6-169). On July 17, 1995, the lower court issued an order denying the motion for postconviction

relief in part (PC-R. Vol. I, 171-99). The Court summarily denied claims IV-VII, partially denied claim II and ordered the State to respond to claims I-III (PC-R. Vol. I, 171-99).

On February 2, 1996, in it's response, the State conceded that an evidentiary hearing was necessary regarding a portion of claims II and III (PC-R. Vol. II, 201-20).

Thereafter, the lower court issued an order summarily denying claim I and a portion of claim III (PC-R. Vol. II, 231). The court also summarily denied another subsection of claim II, despite the fact that the State had conceded an evidentiary hearing was necessary on that portion of Mr. Occhicone's claim (PC-R. Vol. II, 227). The court granted an evidentiary hearing on the remaining issues (PC-R. Vol. II, 232-3). Those issues included specific allegations regarding ineffective assistance of counsel at both the guilt and penalty phases of Mr. Occhicone's capital trial (PC-R. Vol. II, 226-33).

On August 28, 1997, Mr. Occhicone filed a motion to reconsider the scope of issues for presentation at the evidentiary hearing (PC-R. Vol. III, 395-424). On September 17, 1997, the lower court denied the motion (PC-R. Vol. III, 446).

At the conclusion of the evidentiary hearing, the lower court ordered written closing arguments prior to rendering a ruling (PC-R., Vol. IV, 566). On May 18, 1998, the court denied the remaining portions of Mr. Occhicone's motion for postconviction relief (PC-R. Vol. IV, 594-605), although it failed to address in its order the "ineffective assistance of

counsel at penalty phase" claim. Timely notice of appeal was filed on June 11, 1998 (PC-R. Vol IV, 606). This appeal is properly before this Court.

II. Statement of Facts

a. Facts introduced at Trial and Sentencing

Mr. Occhicone was sentenced to death by a 7-5 jury vote on each count of murder (R. 1364-5). The lower court subsequently sentenced Mr. Occhicone to life on Count I and to death on Count II (R. 1585, 1688-9). On direct appeal, Justice Kogan dissented from the penalty decision on the ground that death for Mr. Occhicone was disproportionate. Occhicone v. State, 570 So. 2d 902 (Fla. 1990).

At trial, Mr. Occhicone did not contest the evidence that he committed the homicides, but contended that they were not premeditated (R. 225-6, 742, 831). The defense failed to present any witnesses at the guilt phase of Mr. Occhicone's trial.

At the penalty phase, the defense presented the testimony of one lay witness, two correctional officers, the defendant and three mental health experts. Two of the experts, Dr. Fireman and Dr. Delbeato, rendered an opinion that Mr. Occhicone did not have the capacity to form a premeditated intent (R. 1042, 1043, 1102, 1104, 1008). This testimony was not utilized at the guilt phase of Mr. Occhicone's trial.

b. Facts introduced at Evidentiary Hearing

To prove that his trial counsel had been ineffective at his capital trial, Mr. Occhicone presented the testimony of his trial

attorneys, Bruce Boyer, Bruce Young and Craig LaPorte; two experts, Dr. Fireman and Dr. Mussendun; and several lay witnesses.

Mr. Boyer, Mr. Occhicone's lead trial attorney, (PC-R. Vol. V, 789), testified that he had never previously tried a death penalty case as a defense attorney, although he had done so as a prosecutor (PC-R. Vol. V, 768-9). Likewise, co-counsel, Mr. Young, had never tried a capital case as a defense attorney (PC-R. Vol. V 826). Additionally, Mr. LaPorte had been an attorney for approximately three years before becoming involved in this case (PC-R. Vol. V, 873). Mr. LaPorte did not sit at the counsel table during the trial, but he was part of the strategic discussions (PC-R. Vol. V, 874).

With respect to Mr. Occhicone's allegations that trial counsel was ineffective at the guilt phase of his trial, Mr. Boyer conceded that the primary theory of defense was to avoid the death penalty "by convincing the jury that the alcohol that the client had consumed had been such that it would be appropriate to give him life in prison as opposed to death" (PC-R. Vol. V, 772-3). Mr. Boyer acknowledged that the defense was gearing its theory at guilt phase completely towards proving its case in penalty phase (PC-R. Vol. V, 773), and that the goal of the whole trial was to get life in prison (PC-R. Vol. V, 785).

With regard to the defense theory of using the guilt phase to set up the penalty phase, Mr. Boyer stated that:

> The way we understood the case law at the time to get the alcohol consumption,

> diminished capacity before the jury through the experts it required more than simply the client's self-serving statements of the consumption. And what we needed at the guilt phase was testimony from witnesses that would establish the consumption and its effects on the client so that the expert psychiatrist and psychologist would then be allowed to testify somewhere in –- the place we wanted them to testify was on the penalty phase.

(PC-R. Vol V, 773-4).

Mr. Boyer testified that prior to the beginning of the trial, defense counsel intended to present witnesses at the guilt phase "only if we had to do that to establish the alcohol consumption sufficient to get the experts on at the penalty phase." (PC-R. Vol V, 777).

Mr. Boyer also emphasized that he did not have any concerns about not presenting witnesses at the guilt phase:

> We could not find anything that we could do that we had not accomplished already with the State's witnesses. The only thing that we could do on the guilt phase would be make our case worse. There was nothing left that could help us that we were aware of.
>
> Plus, what we were really concerned about was establishing the predicate on alcohol to get the doctors on penalty phase and we felt we had done that. The only other thing we considered was putting the doctors on on the guilt phase and we didn't see that the jury would ever buy doctors twice. We couldn't do them twice. And they weren't going to help us on the guilt phase, they were all going to come back with he had the intent. Plus, they'd get into all the details of we he told them; we just weren't interested in that.

(PC-R. Vol V, 792).

Despite Mr. Boyer's theory regarding the defense strategy, Mr. Young and Mr. LaPorte maintained that the theory of defense at the guilt phase included presenting a defense of voluntary intoxication and anything else that would somehow mitigate or negate first-degree murder (PC-R. Vol. V, 828, 875). Mr. LaPorte added that the "first goal was to try to get a second-degree murder conviction, and after that had failed obviously the secondary goal was to get a life sentence." (PC-R. Vol. V, 909).

While both Mr. Boyer and Mr. Young could not recall whether trial counsel was able to elicit any information about Mr. Occhicone's level of intoxication on the day of the offense (PC-R. Vol V, 808, 865), Mr. Laporte acknowledged that they did not present any testimony regarding Mr. Occhicone's level of intoxication on the day of the offense (PC-R. Vol. V, 880). Rather, Mr. LaPorte felt that they were able to obtain, through testimony on cross-examination, a suggestion of intoxication, by way of habit, in that Mr. Occhicone was a heavy drinker, and also by way of the testimony of Anita Gerrety that Mr. Occhicone seemed to stagger just prior to the murder (PC-R. Vol. V, 880-1). Despite this statement, Mr. LaPorte later rationalized that the presentation of witnesses toward a voluntary intoxication defense would be cumulative to the State's case (PC-R. Vol. V, 904), and he felt that the defense had already developed the voluntary intoxication defense on cross-examination of the State's witnesses (PC-R. Vol. V, 902).

In order to prove trial counsel's ineffectiveness and

failure to properly present an intoxication defense, several witnesses were called at the evidentiary hearing. These witnesses established that Mr. Occhicone was severely intoxicated for at least thirty-six (36) continuous hours before commission of the crime.

On the afternoon of June 8, 1986, the day before the crime, Mr. Occhicone was involved in a car accident wherein he crashed his car into a palm tree in front of Patricia Goddard's house (PC-R. Vol. VI, 998). After speaking to Mr. Occhicone, Ms. Goddard testified that she determined Mr. Occhicone was under the influence of alcohol (PC-R. Vol. VI, 999-1000). Ms. Goddard believed that Mr. Occhicone "had a lot to drink" because he smelled of alcohol, his speech was slurred, and he had trouble standing (PC-R. Vol. VI, 1000).

In addition, Mr. Occhicone was upset and emotional, not because he had been involved in a car accident, but instead because of his relationship with a woman named Anita (PC-R. Vol. VI, 1005).

Kimberly Connell, Ms. Goddard's sister, was also at the house when the accident occurred on June 8 (PC-R. Vol. VI, 1011). After speaking to Mr. Occhicone, Ms. Connell also concluded that Mr. Occhicone was intoxicated (PC-R. Vol. VI, 1014).

Following the accident, Ms. Connell accompanied Mr. Occhicone to a bar where Mr. Occhicone consumed a large quantity of alcohol (PC-R. Vol. VI, 1014). Ms. Connell testified that while at the bar Mr. Occhicone "was a mess," and at times that

she could not understand what he was saying because his speech was slurred, and he was crying (PC-R. Vol. VI, 1015).

Ms. Connell and Mr. Occhicone eventually left the bar and went to his house (PC-R. Vol. VI, 1015). There, she and Mr. Occhicone consumed more alcohol and smoked marijuana (PC-R. Vol. VI, 1015). Again, Ms. Connell testified that at this point, Mr. Occhicone was very drunk, and that he was crying and upset (PC-R. Vol. VI, 1015).

Ms. Connell eventually fell asleep at about 3:00 or 4:00 in the morning of June 9 (PC-R. Vol. VI, 1015). Ms. Connell testified that Mr. Occhicone was still awake when she went to sleep, and when Ms. Connell awoke the next morning, Mr. Occhicone was already awake (PC-R. Vol. VI, 1015).

Ms. Connell testified that she and Mr. Occhicone were back in the bar by 7:00 a.m. on June 9, where she and Mr. Occhicone continued to drink (PC-R. Vol. VI, 1015).

Lilly Lawson, a State witness from the trial, corroborated Ms. Connell’s testimony about Mr. Occhicone on the morning of June 9, 1986 (PC-R. Vol. VI, 1037-8). Although Ms. Lawson testified at trial, she was never asked about having contact with Mr. Occhicone on the day and evening prior to the murders (R. 444-63). Ms. Lawson testified at the evidentiary hearing that Mr. Occhicone was at the bar throughout the morning of June 9, beginning at 7:00 a.m., at which time he consumed approximately ten shots of root beer schnapps and also had a vodka and cranberry (PC-R. Vol. VI, 1037-8).

After separating from Mr. Occhicone at some point in the afternoon, Ms. Connell testified that she briefly saw Mr. Occhicone at her apartment at approximately 5:30 p.m. (PC-R. Vol. VI, 1015-16). Ms. Connell stated that Mr. Occhicone was again intoxicated (PC-R. Vol. VI, 1016).

While Ms. Connell's contact with Mr. Occhicone lapsed periodically throughout the day, Shooters bartenders and patrons provided testimony about Mr. Occhicone during those periods when he wasn't with Ms. Connell. Cheryl Hoffman, a bartender at Shooters, worked the afternoon shift on June 9 (PC-R. Vol. VI, 1054-5). Although she testified at trial, Ms. Hoffman was never asked about seeing Mr. Occhicone on June 9 (R. 463-77). Had she been asked, Ms. Hoffman would have testified that she served Mr. Occhicone alcoholic beverages during her shift, and that she could tell he had been drinking prior to her shift (PC-R. Vol. VI, 1055-7).

Ms. Lawson testified that she saw Mr. Occhicone again at Shooters at approximately 7:30 p.m., at which time Mr. Occhicone was still consuming alcohol (PC-R. Vol. VI, 1038). She believed that Mr. Occhicone was intoxicated because she had known Mr. Occhicone for several years and "could tell by his appearance and everything that he was not quite in control of his facilities (*sic*)." (PC-R. Vol. VI, 1039). At some point prior to 11:00 p.m. on June 9, Ms. Lawson recalled seeing Mr. Occhicone leave the bar, and that he took a bottle of vodka with him (PC-R. Vol. VI, 1039-40).

Michael Stillwagon corroborated Ms. Lawson’s testimony because he saw Mr. Occhicone at Shooters at approximately 6:30 p.m. on June 9 (PC-R. Vol. VI, 1072). Mr. Stillwagon agreed with Ms. Lawson that Mr. Occhicone appeared to be intoxicated (PC-R. Vol. VI, 1073). Also, Mr. Stillwagon testified that he left the bar with Mr. Occhicone in Mr. Occhicone's Corvette later in the evening (PC-R. Vol. VI, 1073).

In the early morning hours of June 10, 1986, shortly before the crime, Mr. Occhicone returned to Ms. Connell’s apartment (PC-R. Vol. VI, 1016). At that time, Mr. Occhicone was still intoxicated, as well as very upset and emotional over his breakup with Ms. Gerrety (PC-R. Vol. VI, 1016). Mr. Occhicone left after about fifteen (15) minutes (PC-R. Vol. VI, 1016).

The testimony of these witnesses directly contradicts trial counsel's statements that they had presented everything they possibly could concerning Mr. Occhicone’s alcohol consumption (PC-R. Vol. V, 849), and that any additional testimony would be cumulative (PC-R. Vol. V, 904).

Also, at the evidentiary hearing, postconviction counsel confronted trial counsel with their failure to present expert testimony that would have substantiated Mr. Occhicone's voluntary intoxication defense.

Despite the fact that Mr. Boyer had previously conceded his intent to use the experts solely at the penalty phase, Mr. Young and Mr. LaPorte testified that some of their concerns about presenting mental health experts at guilt phase arose from the

fact that Mr. Occhicone's vivid recall on the night of the murders would be exposed through the taped statements of Dr. Mussenden, that Mr. Occhicone used swear words in the tapes, and also that Mr. Occhicone made contradictory statements to the experts (PC-R. Vol. V, 858, 877, 903, 919, 924). Also, Mr. Young was aware that Dr. Mussenden would have opined that Mr. Occhicone was not suffering from any form of alcohol intoxication at the time of the murders (PC-R. Vol. V, 858).

Dr. Gerald Mussenden, a clinical psychologist, was appointed to determine Mr. Occhicone's competency at the time of the offense (PC-R. Vol. VII, 1134). At trial, Dr. Mussenden was used as a State witness during the penalty phase, and was of the opinion that Mr. Occhicone had the cognitive ability to premeditate (PC-R. Vol. VII, 1162). However, at the evidentiary hearing, Dr. Mussenden testified that he had changed his opinion about Mr. Occhicone's ability to premeditate based on several affidavits provided to him by postconviction counsel (PC-R. Vol VII, 1145, 1162, 1149, 1195-6, 1197, 1198).

Dr. Mussenden also testified that with the exception of the initial evaluation and the deposition, he had no contact with the defense attorneys in this case (PC-R. Vol. VII, 1135).

Another expert, Dr. Fireman, a psychiatrist, testified that he had been a defense witness at the time of trial (PC-R. Vol. VII, 1220). Dr. Fireman testified that the trial attorneys never consulted him about assisting them in preparing the guilt phase of Mr. Occhicone’s trial (PC-R. Vol. VII, 1222). They never

communicated to him that they were attempting to put on a voluntary intoxication defense during the guilt phase, (PC-R. Vol. VII, 1225), and they did not ask for his assistance in that regard (PC-R. Vol. VII, 1225).

Dr. Fireman testified that had he been utilized at guilt phase, he could have aided the defense in impeaching the State's expert, (PC-R. Vol. VII, 1231, 1233); Dr. Fireman's testimony adequately rebutted any testimony with regard to Mr. Occhicone's vivid recall of the events surrounding the murder (PC-R. Vol. VII, 1228). He also explained how it was possible that Mr. Occhicone could perform certain cognitive acts such as driving a car and at the same time be unable to premeditate (PC-R. Vol. VII, 1228-30, 1234). Dr. Fireman concluded that Mr. Occhicone did not have the ability cognitively to premeditate on the night of the crime (PC-R. Vol. VII, 1246).

Over postconviction counsel's objection, (PC-R. Vol. VII, 1260), Michael Halkitis was called as a rebuttal witness for the State, (PC-R. Vol. VII, 1306). Mr. Halkitis was the lead prosecutor at the evidentiary hearing and also at the time of trial (PC-R. Vol. VII, 1307). Mr. Halkitis testified that after Dr. Mussenden was appointed as a mental health expert to determine competency, Mr. Halkitis sent Dr. Mussenden a letter outlining his version of the facts of the case, as well as some depositions (PC-R. Vol. VII, 1307-8).

Another of Mr. Occhicone's allegations regarding the ineffectiveness of his trial counsel dealt with their failure to

call Audrey Hall to testify at Mr. Occhicone's trial.[1] During their testimony at the evidentiary hearing, all of Mr. Occhicone's trial lawyers conceded that they were aware of Audrey Hall, who could have testified at trial that it was common practice for Mr. Occhicone to park his car on the corner of Sugarbush and Berry Hill, away from Ms. Gerrety's house, and where it was found after the murders (PC-R. Vol. V, 784, 840, 887). This testimony would have refuted the State's argument at trial that the location of Mr. Occhicone's car was evidence of premeditation (PC-R. Vol. V, 880, 887-8).

As to why they didn't call Ms. Hall, trial counsel's strategic reasoning was that this had already been brought out through cross-examination of Ms. Gerrety (PC-R. Vol. V, 784, 840, 880). Each trial attorney testified to this point (PC-R. Vol. V, 784, 840, 880).[2] However, Mr. Laporte recognized the importance of Ms. Hall's testimony (PC-R., Vol. V, 887). He stated at the evidentiary hearing that the defense wanted to make sure that the jury recognized that it was Mr. Occhicone's normal custom and practice to park the car there (PC-R. Vol. V. 887-8). But again,

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[1]Postconviction counsel informed the court that Ms. Hall was unavailable as a witness at the evidentiary hearing because of her incompetency from Alzheimer's disease (PC-R. Vol. VI, 1091-2). Postconviction counsel was permitted to present her testimony through Randy Edwards, a postconviction investigator who had previously obtained an affidavit from Ms. Hall (PC-R. Vol. VI, 1102-106). However, this testimony was considered only as penalty phase evidence (PC-R. Vol. VI, 1101).

[2]Despite trial counsel's belief, a review of the trial record fails to support their contention that this was brought out through the cross-examination of Anita Gerrety. (See Argument I.A.1)

Mr. Laporte's recollection was that the testimony of Ms. Gerrety on cross-examination confirmed that point (PC-R. Vol V., 880). In addition, Mr. Young believed that the State had a rebuttal witness who could counter Ms. Hall’s testimony (PC-R. Vol. V, 860).

Mr. Occhicone also presented evidence of his counsel's ineffectiveness at the penalty phase of his trial. Mr. Boyer and Mr. Young agreed that the defense strategy was to present mitigating evidence regarding Mr. Occhicone’s alcohol consumption through the use of expert testimony (PC-R. Vol. V, 790-91, 830), and also to present the fact that Mr. Occhicone had a son (PC-R. Vol. V, 790, 830).

With regard to other mitigation witnesses, Mr. Boyer stated that he personally spoke to people but did not find anyone helpful (PC-R. Vol. V, 797). Mr. Young stated that “the notes reflect every witness that was given to us by Mr. Occhicone or anybody else we developed would not testify or could not help us” (PC-R. Vol. V, 862). Mr. LaPorte didn’t recall if he personally interviewed any of the witnesses for guilt or penalty phase (PC-R. Vol. V, 882), although he was aware of Ann Montana through his investigators (PC-R. Vol. V, 897). Ms. Montana was not called as a witness.

Anna Montana testified at the evidentiary hearing about valuable non-statutory mitigation. She was available at the time of trial and would have provided information about Mr. Occhicone's: obsession with Ms. Gerrety (PC-R. Vol. VI, 982);

fragile emotional state after Ms. Gerrety left him (PC-R. Vol. VI, 981-3); religious faith and prayers that Ms. Gerrety would come back to him (PC-R. Vol. VI, 982-3); and the fact that Mr. Occhicone's first wife had died of cancer (PC-R. Vol. VI, 993).

Furthermore, Father Edward Lamp testified at the evidentiary hearing that Mr. Occhicone came to him sometime in 1984 or 1985 to discuss his relationship with Ms. Gerrety and seek premarital instructions (PC-R. Vol. IV, 623). However, due to their incompatibility, Father Lamp decided that he could not marry them (PC-R. Vol. IV, 624-25). Father Lamp had additional contact with Mr. Occhicone after this time (PC-R. Vol. IV, 625). Mr. Occhicone told Father Lamp about problems he had with Anita, and about the recent deaths in his family (PC-R. Vol. IV, 625-26). Father Lamp described Mr. Occhicone as emotionally unstable (PC-R. Vol. IV, 626). Mr. Occhicone also told Father Lamp that he had been drinking heavily, (PC-R. Vol. IV, 628), which prompted Father Lamp to encourage Mr. Occhicone to attend an Alcoholics Anonymous meeting (PC-R. Vol. IV, 628). Father Lamp also testified that Mr. Occhicone was very protective of and loved his son (PC-R. Vol. IV, 629). Father Lamp said if he were contacted, he would have been able to testify on Mr. Occhicone’s behalf at his trial (PC-R. Vol. IV, 633).

At the evidentiary hearing, postconviction counsel attempted to call several more mitigation witnesses (PC-R. Vol. VI, 964-76). However, the lower court denied Mr. Occhicone this opportunity on the grounds that he failed to lay a predicate that

trial counsel was aware of these witnesses (PC-R. Vol. VI, 964-76, 1115-16). Mr. Occhicone was permitted to proffer the affidavits of these witnesses (PC-R. Vol. VI, 1115-16).

In rebuttal to Mr. Occhicone's claims of ineffectiveness, the State called Peter Proly to testify (PC-R. Vol. IV, 656). Mr. Proly is a criminal attorney and partner of Mr. LaPorte (PC-R. Vol. IV, 657). Mr. Proly didn't have much involvement in the Occhicone case (PC-R. Vol. IV, 658). At about the time that the State rested at trial, Mr. Laporte contacted Mr. Proly for advice (PC-R. Vol. IV, 660). Mr. Proly stated that given the information that Mr. LaPorte had told him, he felt that it was a good idea not to put on a defense case (PC-R. Vol. IV, 660).

SUMMARY OF ARGUMENT

1. Mr. Occhicone proved at the evidentiary hearing that he received ineffective assistance of counsel at the guilt phase of his trial. He established that his trial counsel's failure to establish a voluntary intoxication defense at the guilt phase of his trial constituted ineffective as prejudicial assistance of counsel.

2. Trial counsel failed to present the testimony of Patricia Goddard and Kimberly Connell, whose testimony establishes that Mr. Occhicone was intoxicated at the time of the offense. Their testimony should have been presented at trial and was crucial in that it provided specific evidence of Mr. Occhicone's degree of intoxication at the time of the offense.

3. Trial counsel was further ineffective at the guilt

phase of Mr. Occhicone's trial in that they failed to effectively cross-examine Lilly Lawson and Cheryl Hoffman regarding Mr. Occhicone's intoxication.

4. Trial counsel failed to present the testimony of Michael Stillwagon, who provided important testimony about the degree of Mr. Occhicone's intoxication on the night of the offense.

5. Trial counsel failed to rebut testimony regarding Mr. Occhicone's lack of intoxication by effectively cross-examining witnesses.

6. Counsel's failure to investigate and present the available evidence of alcohol consumption and intoxication on the night of offense constitutes prejudicial ineffective assistance of counsel.

7. Trial counsel was ineffective at the guilt phase for failing to call experts, who, at the evidentiary hearing, testified that they would have provided important evidence that Mr. Occhicone could not have formed the premeditation necessary for finding a first-degree murder because of his intoxication and his mental illness.

8. Trial counsel was ineffective at the guilt phase for failing to call Audrey Hall as a witness. Ms. Hall could have provided crucial testimony to rebut the evidence of premeditation.

9. Mr. Occhicone was denied a full and fair evidentiary hearing in violation of due process in the sixth, eighth, and

fourteenth amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

10. The lower court prevented Mr. Occhicone from presenting his case during the post-conviction evidentiary hearing by refusing to allow the testimony of multiple mitigation witnesses. This is where and in the courtroom and prepared to testify that the trial court erroneously ruled that the proper predicate had not been laid for their testimony.

11. The lower court errored in allowing the post-conviction State Attorney to testify at the evidentiary hearing.

12. The lower court erred in summarily denying Occhicone's claims without granting the defendant an evidentiary hearing.

13. The defendant was entitled to the evidentiary hearing on the claim that the State knowingly presented false evidence and failed to disclose exculpatory information.

14. The State withheld material witnesses and evidence relevant to the defendant's state of mind at the time of the offence. These witnesses included a number of witnesses which State investigators interviewed and whose interviews provided material exculpatory evidence.

15. Further, the State failed to disclose a deal with a key prosecution witness, thus, the defense was unable to impeach the witness and the State did nothing to correct his untruthful testimony.

16. Mr. Occhicone was not granted an evidentiary hearing on his claim that he was denied his rights to a pre-trial competency

hearing.

17. The lower court erroneously denied Mr. Occhicone an evidentiary hearing on his claim that the jury instructions at the penalty phase were unreasonably vague and confusing and otherwise Constitutionally deficient.

18. Mr. Occhicone should have been granted an evidentiary hearing on his claim that his death sentence is based upon an unconstitutionally obtained prior conviction.

19. Mr. Occhicone was entitled to a hearing on his claim that the cumulative impact of judicial error denied him his right to a fair trial.

20. Mr. Occhicone should have been granted an evidentiary hearing on his claim that he received an effective assistance of counsel at the guilt phase regarding his claims of counsel's failure to present evidence of Mr. Occhicone's cocaine use, counsel's failure to supply experts with sufficient background materials, counsel's failure to question potential jurors as to a possible taint, and counsel's failure to object to the testimony about defendant's refusal to take an atomic absorption test.

21. Mr. Occhicone should have been allowed to have a full evidentiary hearing on his claim of ineffective assistance of counsel at the penalty phase on the issues of whether the defense experts were supplied with sufficient background information, whether counsel should have presented evidence that Mr. Occhicone had long standing mental and substance abuse problems, marital problems, and whether evidence could have been presented

regarding cocaine addiction, and whether he should have been allowed to present special jury instructions adequately defining his aggravating circumstances.

ARGUMENT I

THE LOWER COURT'S RULING FOLLOWING THE POSTCONVICTION EVIDENTIARY HEARING WAS ERRONEOUS.

At the evidentiary hearing, Mr. Occhicone presented evidence substantiating his claims regarding ineffective assistance of counsel at the guilt and penalty phases of his trial. Based on the testimony presented, Mr. Occhicone was certainly entitled to relief.

A. INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE

1. Trial counsel's failure to establish a voluntary intoxication defense

In Strickland v. Washington, 466 U.S. 668 (1984), the United States 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." Strickland requires a defendant to plead and demonstrate both unreasonable attorney performance and prejudice to prevail on an ineffective assistance of counsel claim. Id. Mr. Occhicone has fulfilled each requirement.

"One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial." Magill v. Dugger, 824 F.2d 879, 886 (11th Cir. 1987); "pretrial preparation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most

critical stage of a lawyer's preparation." House v. Balkcom, 725 F.2d 608, 618 (11th Cir.), cert. denied, 469 U.S. 870 (1984); Weidner v. Wainwright, 708 F.2d 614, 616 (11th Cir. 1983). As stated in Strickland, an attorney has a duty to undertake reasonable investigation or "to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691.

Trial counsel's representation of Mr. Occhicone fell below acceptable professional standards in several respects. Each of these failures, discussed below, severely prejudiced Mr. Occhicone. To prove prejudice, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. Id. Had counsel performed effectively, there is a reasonable probability that the outcome would have been different -- that is, that Mr. Occhicone would have been convicted of a lesser offense, rather than first-degree murder, and would not now be facing execution.

At the evidentiary hearing, the lower court heard testimony from Mr. Occhicone's trial counsel, who testified at various points that the theory of defense was one of voluntary intoxication.[3] (PC-R. Vol. V, 828, 875). Inexplicably, however,

[3]Mr. Occhicone was represented at trial by three attorneys: Bruce Young, Bruce Boyer and Craig Laporte. Each of these attorneys testified at the evidentiary hearing. Although Mr. Boyer stated that the goal of the whole trial was to get life in prison (PC-R. Vol. V, 785), Mr. Young and Mr. LaPorte maintained that the theory of defense at the guilt phase included presenting (continued...)

trial counsel failed to present available evidence which would have supported this defense.

Under Florida law, voluntary intoxication is a valid defense to specific intent crimes. Gardner v. State, 480 So. 2d 91, 92-93 (Fla. 1985). See also Presley v. State, 388 So. 2d 1385, 1386 (Fla. 1980); Harris v. State, 415 So. 2d 135, 136 (Fla. 5th DCA 1982); Heathcoat v. State, 430 So. 2d 945, 947 (Fla. 2nd DCA 1983).

At the evidentiary hearing, Mr. Craig Laporte, one of Mr. Occhicone's trial attorneys, conceded that counsel was unable to get any testimony at trial regarding Mr. Occhicone's level of intoxication on the day of the offense (PC-R. Vol. V, 880-1). Mr. Laporte contended that trial counsel was able to elicit, through cross-examination of State witnesses, a suggestion of intoxication, by way of habit, in that Mr. Occhicone was a heavy drinker, and also by way of the testimony of Anita Gerrety that Mr. Occhicone seemed to stagger just prior to the murder (PC-R. Vol. V, 880-1). Despite such an acknowledged paucity of evidence of voluntary intoxification, Mr. LaPorte rationalized that the presentation of witnesses toward a voluntary intoxication defense would be cumulative to the State's case (PC-R. Vol. V, 904).

According to Linehan v. State, 476 So. 2d 1262 (1985), voluntary intoxication is an affirmative defense which requires

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(...continued)
a defense of voluntary intoxication and anything else that would somehow mitigate or negate first-degree murder (PC-R. Vol. V, 828, 875).

defendant to come forward with evidence of intoxication at the time of the offense sufficient to establish that he was unable to form intent necessary to commit the crime charged. By Mr. Laporte's own admission, trial counsel failed to introduce actual evidence of intoxication at the time of the offense. An inference or suggestion of intoxication is certainly not sufficient to establish a voluntary intoxication defense. Trial counsel was ineffective because, as demonstrated through the testimony of the numerous witnesses at the evidentiary hearing, trial counsel had, or should have had, this evidence at their disposal and failed to utilize it.

Inexplicably, trial counsel represented to the jury in his opening statement that the defense would present this very type of evidence:

> You will hear testimony as to the amount of alcohol he drank, and you will hear testimony, as I'm sure you already know, somebody that drinks a lot manages to walk a line. But you will hear testimony as to the amount of the alcohol that was consumed prior to the incident, and had been for days.
>
> You will hear testimony from a doctor telling you the affect this has on somebody's operation of his mind. You will also hear all the circumstances, some Mr. Halkitis didn't bring out, most he did, that play into this situation. And you're going to hear from the doctors that there was no intent to kill Mr. or Mrs. Artzner.

(R. 228) (emphasis added). Counsel's credibility was dashed as these promises went unfulfilled.

a) Failure to present the testimony of Patricia Goddard and Kimberly Connell

Patricia Goddard testified at the evidentiary hearing that she came into contact with Mr. Occhicone in the late afternoon of June 8, 1986 after he crashed his Corvette into a palm tree in her front yard (PC-R. Vol. VI, 998). Ms. Goddard spoke to Mr. Occhicone and smelled alcohol on his breath (PC-R. Vol. VI 999). Ms. Goddard could tell Mr. Occhicone "had a lot to drink" and was under the influence of alcohol by the fact that his speech was slurred, and he had trouble standing (PC-R. Vol. VI 1000). In addition, Ms. Goddard further stated that Mr. Occhicone was upset and emotional, and that this had nothing to do with the fact that he just wrecked his car (PC-R. Vol. VI, 1000). Instead, a conversation about a woman named Anita caused Mr. Occhicone to become upset (PC-R. Vol. VI, 1005).

Kimberly Connell, Ms. Goddard's sister, was also at the house when the accident occurred on June 8, 1986 (PC-R. Vol. VI, 1011). According to Ms. Connell's testimony, she recalled hearing a crash, going outside, and eventually speaking to Mr. Occhicone (PC-R. Vol. VI, 1011-12). Ms. Connell also testified that Mr. Occhicone smelled of alcohol, that he was intoxicated, and that he did not seem concerned at all about the condition of his car (PC-R. Vol. VI, 1014).

Following the accident, Ms. Connell eventually left the house with Mr. Occhicone and went to a bar with him, where Mr. Occhicone consumed a large quantity of alcohol (PC-R. Vol. VI, 1014). Also, while at the bar, Ms. Connell testified that Mr. Occhicone "was a mess," that half the time Ms. Connell could not

understand what he was saying because his speech was slurred, and he was crying and blubbering a lot (PC-R. Vol. VI, 1015).

After spending the evening of June 8 with Mr. Occhicone at a bar, Ms. Connell went to Mr. Occhicone's house with him (PC-R. Vol. VI, 1015). There, she and Mr. Occhicone consumed alcohol and smoked marijuana (PC-R. Vol. VI, 1015). Again, Ms. Connell testified that at this point, Mr. Occhicone was very drunk, and that he was crying and upset (PC-R. Vol. VI, 1015).

Ms. Connell eventually went to sleep at about 3:00 or 4:00 in the morning on June 9 (PC-R. Vol. VI, 1015). Mr. Occhicone was still awake when she went to sleep, and when Ms. Connell awoke the next morning, Mr. Occhicone was already awake (PC-R. Vol. VI, 1015). In light of the fact that Ms. Connell recalled being at a bar with Mr. Occhicone by 7:00 in the morning on June 9 (PC-R. Vol. VI, 1015), Mr. Occhicone obviously did not get very much sleep.

While at the bar on the morning of June 9, Ms. Connell and Mr. Occhicone continued to drink (PC-R. Vol. VI, 1015). After separating from Mr. Occhicone at some point in the afternoon, Ms. Connell briefly saw Mr. Occhicone at her apartment at approximately 5:30 p.m. (PC-R. Vol. VI, 1015-16). Ms. Connell stated that Mr. Occhicone was again intoxicated (PC-R. Vol. VI, 1016).

Ms. Connell saw Mr. Occhicone again when he returned to her apartment at approximately 2:30 in the morning on June 10, 1986, just a short time before the murders (PC-R. Vol. VI, 1016). Mr.

Occhicone was intoxicated, as well as very upset and emotional over his fiancee (PC-R. Vol. VI, 1016). After about 15 to 20 minutes, Ms. Connell asked Mr. Occhicone to leave, and he did so (PC-R. Vol. VI, 1016). This is the last time that Ms. Connell saw Mr. Occhicone (PC-R. Vol. VI, 1016-17).

Each of these witnesses, Ms. Goddard and especially Ms. Connell, would have been vital to establishing a voluntary intoxication defense. Ms. Connell's testimony alone would have shown that Mr. Occhicone was in fact intoxicated and emotional at the time of the crime. However, neither of these witnesses was called to testify. In fact, neither witness was ever even contacted by Mr. Occhicone's attorneys or investigators (PC-R. Vol VI, 1000, 1017). Had they been contacted, each stated under oath that she would have testified in the same manner as she did at the evidentiary hearing (PC-R. Vol. VI, 1000, 1017).

Trial counsel was, or through diligent investigation, should have been aware of these witnesses. Ms. Goddard was interviewed by the Pasco County Sheriff's Office and the Pasco County State Attorney's Office (Vol. VI, 1006). At the evidentiary hearing, trial counsel LaPorte even acknowledged that he was aware of Patricia Goddard (PC-R. Vol. V, 906). He was sure that Ms. Goddard had testified at trial (PC-R. Vol V, 906). Mr. LaPorte further stated that he was not aware of Ms. Connell during the trial (PC-R. Vol. V, 906-7).

Neither Ms. Goddard nor Ms. Connell testified at trial. Counsel never contacted them. Trial counsel's failure to present

or even contact these essential witnesses constitutes ineffective assistance of counsel.

b) Failure to effectively cross-examine Lilly Lawson and Cheryl Hoffman

In addition to Ms. Goddard and Ms. Connell, there were several other witnesses who testified at the evidentiary hearing regarding Mr. Occhicone's intoxication. One such witness was Lilly Lawson, a bartender at Shooters (Vol. VI, 1037).

Although Ms. Lawson did testify at trial for the State (R. 444-63), she was never asked about having contact with Mr. Occhicone on the day and evening prior to the murders. Ms. Lawson would have testified at trial, had she been asked, that Mr. Occhicone was intoxicated on June 9 (Vol. VI, 1039, 1053). Specifically, Ms. Lawson testified at the evidentiary hearing that Mr. Occhicone was at the bar throughout the morning of June 9, beginning at 7:00, at which time he consumed approximately ten shots of root beer schnapps and also had a vodka and cranberry (Vol. VI, 1037-8). Ms. Lawson's testimony reveals that she saw Mr. Occhicone again at Shooters at approximately 7:30 that evening at which time Mr. Occhicone was consuming alcohol (Vol. VI, 1038). Ms. Lawson testified that Mr. Occhicone was intoxicated, that she had known Mr. Occhicone for several years and "could tell by his appearance and everything that he was not quite in control of his facilities (*sic*)." (Vol. VI, 1039). At some point prior to 11:00 in the evening on June 9, Ms. Lawson recalled seeing Mr. Occhicone leave the bar, and that he took a bottle of vodka with him (Vol. VI, 1039-40). The last time Ms.

Lawson saw Mr. Occhicone, he was intoxicated (Vol. VI, 1053).

Cheryl Hoffman, another bartender at Shooters, worked the afternoon shift on June 9 (Vol. VI, 1054-55). Although she also testified at trial, Ms. Hoffman was never asked about seeing Mr. Occhicone on June 9 (R. 463-77). Had she been asked, Ms. Hoffman would have testified that she served Mr. Occhicone alcoholic beverages during her shift, and that she could tell he had been drinking prior to her shift (Vol. VI, 1055-57).

Ms. Lawson and Ms. Hoffman both testified at trial (R. 444-63, 463-77). They both gave depositions in this case (Vol. VI 1045, 1056). Obviously, they were available to defense counsel. However, each stated at the evidentiary hearing that with the exception of the deposition, neither had any contact with trial counsel (Vol. VI, 1040, 1056).

c) Failure to present the testimony of Michael Stillwagon

The last lay witness called at the evidentiary hearing whose testimony would have been pertinent to a voluntary intoxication defense was Michael Stillwagon. Mr. Stillwagon testified that he saw Mr. Occhicone at Shooters at approximately 6:30 p.m. on June 9, 1986 (PC-R. Vol. VI, 1072). According to Mr. Stillwagon's testimony, Mr. Occhicone appeared to be intoxicated (PC-R. Vol. VI, 1073). Also, Mr. Stillwagon testified that he left the bar with Mr. Occhicone in Mr. Occhicone's Corvette later in the evening (PC-R. Vol. VI, 1073). During this time, Mr. Stillwagon had the opportunity to observe the damage that Mr. Occhicone's Corvette had sustained in the accident on June 8 (PC-R. Vol. VI,

1074). While testifying at the evidentiary hearing, Mr. Stillwagon was shown an impound receipt from the Pasco County Sheriff's Office for Mr. Occhicone's Corvette, dated June 10th (PC-R. Vol. VI, 1076). The impound receipt indicated that there was further damage to the car than when Mr. Stillwagon had previously seen it (PC-R. Vol. VI, 1076). This testimony would have established the probability that because of his intoxication, Mr. Occhicone had another accident just hours preceding the murders.

Through reasonable diligence, defense counsel would have become aware of Mr. Stillwagon. In her testimony at the evidentiary hearing, Cheryl Hoffman established the presence of Michael Stillwagon at Shooters on the evening of June 9 (PC-R. Vol. VI, 1056). Furthermore, Ms. Lawson testified that she saw Mr. Occhicone leave the bar on the evening of June 9 with Mr. Stillwagon (PC-R. Vol. VI, 1039). Counsel's failure to obtain such readily available information from either Ms. Hoffman or Ms. Lawson is a further indication of their ineffectiveness.[4]

d) Failure to rebut testimony regarding Mr. Occhicone's lack of intoxication

The only evidence the jury heard concerning Mr. Occhicone's alcohol consumption and his state of mind on the day of the offense was from the State's witness, Debra Newell, who was a bartender at Shooters. Ms. Newell testified that Mr. Occhicone

[4]Mr. LaPorte testified at the evidentiary hearing that trial counsel was not aware of Michael Stillwagon's existence until after the completion of the guilt phase and just prior to the penalty phase (PC-R. Vol. V, 896).

came into the bar at about 1:30 in the morning on June 10th, had two drinks, and left at around 2:30 in the morning (R. 491-492). She also testified that Mr. Occhicone did not appear intoxicated (R. 492). This left the jury with only one reasonable conclusion, that based on the only evidence presented, Mr. Occhicone had two drinks prior to the murders and was not intoxicated. As shown at the evidentiary hearing, this was simply not the case. Defense counsel, in failing to investigate and present the aforementioned evidence, failed to rebut Ms. Newell's testimony.

e) Conclusion

As a result of trial counsel's failure to investigate and present the aforementioned testimony, the prejudice is clear. There is more than a reasonable probability that, had counsel investigated and presented the evidence available to support a defense of voluntary intoxication, Mr. Occhicone would not have been convicted of first-degree murder but, rather, of a lesser degree of homicide.

Counsel failed to investigate or present the available evidence of actual alcohol consumption and intoxication on the night of the offense, and therefore failed to effectively argue that defense. Considering the fact that there was no other viable defense available based on the information in trial counsel's possession, counsel's failure to investigate the voluntary intoxication defense was simply inexcusable. See Middleton v. Dugger, 849 F.2d 491, 494 (11th Cir. 1988) (no

strategic reason for failure to investigate was "contrary to prevailing professional norms.") Kimmelman v. Morrison, 477 U.S. 365, 385 (1986); Cunningham v. Zant, 928 F.2d 1006, 1016.

Despite the evidence presented at the evidentiary hearing, the lower court, in its order denying the remaining portions of Mr. Occhicone's motion for postconviction relief, dismissed the aforementioned testimony as being cumulative to Anita Gerrety's testimony, and to testimony at trial regarding Mr. Occhicone's heavy drinking on a constant basis in the month leading up to the murders (PC-R. Vol. IV, 596-601). For example, the lower court stated that with regard to the testimony of Ms. Connell, "[w]hile it is undeniable that this is relevant and material testimony, it is once again difficult to imagine how this would have been anything but cumulative testimony." (PC-R. Vol. IV, 600).

The facts and rationale of the lower court, which are essentially identical to trial counsel's testimony at the evidentiary hearing, fail to mention one instance of actual evidence regarding the significant amount of alcohol that Mr. Occhicone had consumed immediately prior to the murders, as well as Mr. Occhicone's mental and emotional state during this time.

Thus, the lower court's determination that the testimony at the evidentiary hearing was "cumulative" to trial testimony is erroneous. Considering the fact that trial counsel presented no actual evidence as to the level of Mr. Occhicone's intoxication and mental state, and since such evidence was available through diligent investigation, it is evident that trial counsel's

"suggestion of intoxication" approach amounted to ineffectiveness, in that trial counsel essentially failed to utilize any defense whatsoever. Had trial counsel presented the testimony of Patricia Goddard, Kimberly Connell, Mike Stillwagon, Lilly Lawson and Cheryl Hoffman, there is a reasonable probability that the outcome of the trial would have been different. Mr. Occhicone is entitled to relief.

Additionally, the lower court, in its order denying relief, noted that "there is also evidence that Lawson may well have harmed the defense by testifying that the defendant made comments to her indicating premeditation" (PC-R. Vol. IV, 598). The lower court further stated that "[i]t is also clear that the defense gave serious consideration to Lawson in that defense attorney Bruce Boyer indicates that he had Lawson under subpoena but decided not to call her in view of the fact that they were able to establish what they needed regarding the intoxication defense by cross-examination of the State's witnesses" (PC-R. Vol. IV 598).

The lower court's order is completely erroneous and confusing. First, Lilly Lawson's testimony at trial did produce damaging statements by Mr. Occhicone regarding premeditation (R. 446). These statements were made at least a week before the murder (R. 446). Secondly, Mr. Boyer's comments are senseless in that he had the opportunity to cross-examine Ms. Lawson with regard to Mr. Occhicone's intoxication on the day and evening prior to the offense, yet he inexplicably failed to do so.

The lower court also made a similar statement with regard to Cheryl Hoffman, "[w]hile Hoffman's testimony would have been cumulative as to the defendant's heavy drinking and close to the time of the murder, it is clear that her testimony was also harmful in that she provided evidence of threats directed by the defendant to the murder victims and consequently assisted in the State's efforts to show premeditation" (PC-R. Vol. IV, 599-600).

Again, the lower court's rationale is mystifying. While it is true that Ms. Hoffman's testimony at trial also produced damaging statements by Mr. Occhicone regarding premeditation, this certainly does not signify that trial counsel is prohibited, as the lower court is implying, from eliciting beneficial testimony on cross-examination to offset such damage.

An additional reason supplied by the lower court concerns the fact that according to Mr. Laporte, Mr. Occhicone failed to tell his attorneys about Stillwagon until after the guilt phase of the trial (PC-R. Vol IV, 600). However, the lower court ignores the testimony of Cheryl Hoffman and Lilly Lawson at the evidentiary hearing, who establish the presence of Michael Stillwagon at Shooters on the evening of June 9th (PC-R. Vol. VI, 1039, 1056). Counsel's failure to obtain such readily available information from either Ms. Hoffman or Ms. Lawson is evidence of their ineffectiveness.

Further, whether Mr. Occhicone informed trial counsel about the presence of Mr. Stillwagon does not relieve trial counsel of its duty to investigate. Where, as here, counsel unreasonably

fails to investigate and prepare, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 384-88 (1986) (failure to request discovery based on mistaken belief state obliged to hand over evidence); Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991)(failure to conduct pretrial investigation was deficient performance); Chambers v. Armontrout, 907 F.2d 825, (8th Cir. 1990)(en banc) (failure to interview potential self-defense witness was ineffective assistance); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses).

As a result of trial counsel's ineffective performance, Mr. Occhicone's jury never heard evidence which would have established a voluntary intoxication defense and would have resulted in a lesser conviction and sentence.

2. Trial counsel's failure to call experts at the guilt phase

A second issue at the evidentiary hearing concerned whether Mr. Occhicone's trial counsel was ineffective in failing to present any experts at the guilt phase. At this hearing, trial counsel gave multiple, conflicting explanations for not utilizing any experts at the guilt phase.

Mr. Boyer, who testified that the goal of the whole trial was to get life in prison (PC-R. Vol. V, 785), wanted to use the guilt phase to set up the ability to use the experts at the penalty phase:

> The way we understood the case law at the

> time to get the alcohol consumption, diminished capacity before the jury through the experts it required more than simply the client's self-serving statements of the consumption. And what we needed at the guilt phase was testimony from witnesses that would establish the consumption and its effects on the client so that the expert psychiatrist and psychologist would then be allowed to testify somewhere in –- the place we wanted them to testify was on the penalty phase.

(PC-R. Vol V, 773-4) (emphasis added).

Mr. Boyer further testified that, prior to the beginning of the trial, defense counsel intended to present witnesses at the guilt phase "only if they had to do that to establish the alcohol consumption sufficient to get the experts on at the penalty phase" (PC-R. Vol V, 777).

Despite Mr. Boyer's concession that he intended to use the experts solely at the penalty phase, Mr. LaPorte and Mr. Young indicate that the defense refrained from presenting this testimony at the guilt phase because of their concerns with the potential rebuttal testimony of Dr. Mussenden, that Mr. Occhicone's vivid recall on the night of the murders would be exposed through the taped statements of Dr. Mussenden, and also that Mr. Occhicone had made contradictory statements to the experts (PC-R. Vol. V, 858, 877, 903, 919, 924).

In order to prove trial counsel's ineffectiveness in failing to call expert witnesses at the guilt phase, Dr. Mussenden and Dr. Fireman were called as witnesses at the evidentiary hearing.

Dr. Gerald Mussenden, a clinical psychologist, was appointed to determine Mr. Occhicone's competency at the time of the

offense (PC-R. Vol. VII, 1134). At trial, Dr. Mussenden was used as a State witness during the penalty phase, and was of the opinion that Mr. Occhicone had the cognitive ability to premeditate (PC-R. Vol. VII, 1162). However, at the evidentiary hearing, Dr. Mussenden testified that he had changed his opinion about Mr. Occhicone's ability to premeditate based on several affidavits provided to him by postconviction counsel (PC-R. Vol. VII, 1145, 1162, 1149, 1195-6, 1197, 1198).[5] These affidavits shed light on Mr. Occhicone's severe suffering from his relationship with Ms. Gerrety, and included the fact that Ms. Gerrety sexually teased and mentally abused Mr. Occhicone (PC-R. Vol. VII, 1145-6);

As a result, Dr. Mussenden opined that Mr. Occhicone went to Anita Gerrety's house on the night of the murders in a state of rage and turmoil, and ultimately without the intent to kill (PC-R. Vol. VII, 1147).

With these revelations, Dr. Mussenden's testimony was dramatically favorable to the defense. In supporting his position that Mr. Occhicone lacked premeditation, Dr. Mussenden opined that Mr. Occhicone's act of ripping out the telephone lines was one of rage and anger because Anita was cheating on him (PC-R. Vol. VII, 1148), and that Mr. Occhicone's ability to open the door and shoot the second victim four times was part of an

[5]The affidavits were by Lilly Lawson, Joanna Parmenter and Ann Montana (PC-R. Vol. VII, 1145); See affidavits of Lilly Lawson (PC-R. Vol. I, 98-101), Joanna Parmenter (PC-R. Vol. I, 120-3) and Ann Montana (PC-R. Vol. I, 126-9).

isolated explosive episode where Mr. Occhicone lost temporary control (PC-R. Vol. VII, 1151-2). With regard to the significance of Mr. Occhicone's statements that he was going to kill Ms. Gerrety's parents weeks before the murder, Dr. Mussenden stated that:

> I see that more as an alcoholic just talking tough and saying things that he personally could never cope with directly; as opposed to verbally confronting someone he would talk to everyone. Displacement of his anger.

(PC-R. Vol. VII, 1152). Dr. Mussenden did not view this as evidence of premeditation (PC-R. Vol. VII, 1153).

At the evidentiary hearing, Dr. Mussenden testified that, with the exception of the initial evaluation and the deposition, he had no contact with the defense attorneys in this case (PC-R. Vol. VII, 1135, 1207). Additionally, Dr. Mussenden stated that, had the defense attorneys contacted him and shown him the affidavits of these additional witnesses, he would have testified consistently with the way he testified at the evidentiary hearing (PC-R. Vol. VII, 1164).

Another expert, Dr. Fireman, a psychiatrist, testified at the evidentiary hearing that he had been a defense witness at the time of trial (PC-R. Vol. VII, 1220). Dr. Fireman testified that the trial attorneys never consulted him about assisting them in preparing the guilt phase of Mr. Occhicone’s trial, even though they were aware that they could have accessed his expert testimony in the area of diminished capacity by reason of

voluntary intoxication (PC-R. Vol. VII, 1222).[6] Furthermore, trial counsel never communicated to him that they were attempting to put on a voluntary intoxication defense during the guilt phase, (PC-R. Vol. VII, 1225), and they did not ask for his assistance in that regard (PC-R. Vol. VII, 1225).

Dr. Fireman testified that had he been utilized at guilt phase, he could have aided the defense in impeaching the State's expert, Dr. Mussenden, due to the fact that Dr. Mussenden was inadequately informed of the complexity of the case, the data bank that he used was unreliable for the conclusions that he had, and the presence of other people during the evaluation put a constraint on the free flow of dialogue (PC-R. Vol. VII, 1225-27).

Dr. Fireman's testimony demonstrates that, had he been consulted about being utilized as an expert at the guilt phase, he would have alleviated trial counsel's unfounded concerns about not presenting experts at this portion of the trial. For example, Dr. Fireman adequately rebutted inconsistencies in Mr. Occhicone's version of events to the experts and explained his good recall of the night of the offense:

> I think you could almost use common sense to recognize that he was frightened and in a hostile environment of inquiry and lost his way with answers. And in some ways it almost validates the idea that I don't really think he could say with certainty what happened

[6]At the penalty phase of Mr. Occhicone's trial, Dr. Fireman testified on several occasions that Mr. Occhicone lacked premeditated intent (R. 1042, 1043, 1102).

> that evening without the coaching that is appropriate to preparing him the next day. You know, do you know you did this yesterday, do you know what happened, do you realize this, do you realize that, and then he has to somehow match as best he can with what he is subsequently informed, if only by the newspaper.

(PC-R. Vol. VII, 1231).

* * * *

> I think while I don't believe that he achieved the level of blackout, I believe that his memory of what happened without corroboration by significant-observing others left a great deal to be desired and is consistent with the memory of an intoxicated person.

(PC-R. Vol. VII, 1233).

In addition, Dr. Fireman would also have been valuable in stressing the insignificance of Mr. Occhicone's threats toward Ms. Gerrety's parents, which came out through several State witnesses, and that this wasn't necessarily inconsistent with his testimony that Mr. Occhicone was unable to premeditate:

> The best way to answer that is that, A, it is not inconsistent with what I've said; B, that of the many, many, many people who say that they will kill someone, only a very, very few do. And it is a very--it is not hard science to know of those who say--to determine from those who say who do.

(PC-R. Vol. VII, 1232).

Dr. Fireman also could have explained how Mr. Occhicone's actions on the night of the murders were not indicative of premeditation:

> See, I think--you can say that he could pull wires, smash a door, go through, but you can't say that his errant was to murder that

> person. I mean, we don't know what his crazed energy was, who he was looking for, what he was going to do. So, I mean, the idea that I am--there's a homicide outside, I am now meditating I'm going to go inside, I'm going to kill someone else, I think that's a very--that's a leap of judgment that I don't think the data of the case satisfies.

(PC-R. Vol VII, 1230).

Finally, Dr. Fireman would have explained how it was possible that Mr. Occhicone could perform certain cognitive acts such as driving a car and at the same time be unable to premeditate, in that "there's a clear distinction that has to be drawn between cognitive and sort of meditated behaviors and reflex or robot behaviors that many alcoholics become quite adept at." (PC-R. Vol. VII, 1228-9, 1234). At the evidentiary hearing, Dr. Fireman concluded that Mr. Occhicone did not have the ability cognitively to premeditate on the night of the crime (PC-R. Vol. VII, 1246).

In light of this testimony, trial counsel's excuse for not calling an expert at the guilt phase is transparent. They had an available expert to counter all of their "concerns", as well as to address other alleged indicia of premeditation that were brought out at trial. It is incredible that, despite trial counsel's strategy to utilize a voluntary intoxication defense (PC. R. Vol. V, 820, 875), they never even consulted their own expert about it (PC-R. Vol. VII, 1227).

Furthermore, if trial counsel was so concerned with Dr. Mussenden's testimony, they should have pursued another avenue with regard to defusing it. Trial counsel should have contacted

Dr. Mussenden, who was a court-appointed witness, and provided him with materials they felt would be relevant to Mr. Occhicone's mental state. However, trial counsel failed to do so. As demonstrated at the evidentiary hearing, had Mr. Occhicone's trial counsel provided Dr. Mussenden with additional materials, such as statements from witnesses regarding Ms. Gerrety's sexual teasing of Mr. Occhicone, Dr. Mussenden's testimony would have been much more favorable.

Also, had trial counsel asked, Dr. Mussenden would have admitted that he too thought his evaluation had some problems. For instance, Dr. Mussenden himself didn't feel he communicated effectively with Mr. Occhicone due to the presence of others in the room (PC-R. Vol VII, 1136). As a result, Dr. Mussenden conceded that "after having evaluated everything and looking at all of my data and everything else that I've learned Mr. Occhicone was very guarded, very inhibited, did not share material that I felt he would have shared with me had it been a one-to-one relationship." (PC-R. Vol VII, 1137).

Trial counsel was ineffective in failing to put any experts on at the guilt phase and in failing to contact Dr. Mussenden. Had Dr. Fireman testified, and had Dr. Mussenden been provided with proper materials, there is a strong probability that Mr. Occhicone would not have been convicted of first-degree murder. Mr. Occhicone is entitled to relief.

In addition to the multiple "reasons" already cited by trial counsel, Mr. Boyer supplied yet another excuse for failing to

present experts at the guilt phase:

> The only other thing we considered was putting the doctors on on the guilt phase and we didn’t see that the jury would ever buy doctors twice. We couldn’t do them twice. And they weren’t going to help us on the guilt phase, they were all going to come back with he had the intent. Plus, they'd get into all of the details of what he told them; we just weren't interested in that.

(PC-R. Vol. V, 792).

This statement alone verifies the ineffectiveness of trial counsel. First, trial counsel admittedly withheld expert testimony at the guilt phase in order to strengthen their stance at the penalty phase. This action unquestionably prejudiced the outcome of Mr. Occhicone's trial. Expert testimony would have been effective in establishing that Mr. Occhicone was unable to commit first-degree premeditated murder.

Secondly, trial counsel was obviously and inexplicably unaware of the standard penalty phase jury instructions, which were given at Mr. Occhicone's trial:

> Your advisory sentence 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.

(R. 1357). The jury was instructed, by law, to base their advisory sentence on guilt phase testimony **and** penalty phase testimony. Therefore, trial counsel's infatuation with "saving" the experts for the penalty phase was pointless, in that guilt phase testimony has to be considered at the penalty phase. Counsel, in not knowing the law failed to "bring to bear such

skill and knowledge as [was required to] render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 668.

Finally, Mr. Boyer's statement that all the experts were "going to come back with he had the intent" directly contradicts the evidence at trial. At multiple times during the penalty phase, trial counsel's experts indicated that Mr. Occhicone did not have the capacity to form premeditated intent (R. 1042, 1043, 1102, 1104, 1008). Mr. Boyer's statements are simply not credible.

In its order denying the remaining portions of Mr. Occhicone's motion for postconviction relief, the lower court stated:

> In Paragraphs 38 through 42 of Claim II, the defendant assigns as evidence of ineffectiveness of trial counsel, the failure of trial counsel to present expert testimony regarding the defendant's extensive use of alcohol and drugs and the effect that it may have had upon him. In response, trial counsel testified that there really wasn't any such testimony to present. They indicate that Dr. Mussenden did not think the defendant was intoxicated at the time of the incident and Dr. Delbeato opined that the defendant did not have any major mental disorder but simply had a personality disorder. In addition, they indicate the presentation of Dr. Mussenden's testimony would have exposed the extremely detailed tape recorded statement the defendant made, which would have been inconsistent with a defense of voluntary intoxication. When Mussenden was called as a witness during the hearing on this motion, he initially claims not to have known much of the testimony about the extent of the defendant's drinking and the depth of the defendant's dismay over his breakup with Anita Gerrety. Dr. Mussenden

> indicates that trial counsel never spoke to him except at his deposition. This testimony on the part of Dr. Mussenden is contradicted by the testimony of Assistant State Attorney Michael Halkitis who indicates that he sent depositions to Dr. Mussenden and had conversations with him on these topics. It is also clear that the defendant's statement would have exposed something concerning the extent of the defendant's drinking

(PC-R. Vol IV, 602-3) (emphasis added).

The lower court's ruling is erroneous. The lower court once again ignores the testimony at the evidentiary hearing, which is highlighted by the fact that the court completely fails to address the testimony of Dr. Fireman, avoids Dr. Mussenden's criticisms of his own evaluation and his testimony that trial counsel failed to contact him.

Instead, the lower court relies completely and erroneously on the self-serving statements of trial counsel, without considering any of the evidence presented, even to the extent that trial counsel's statements totally contradict the testimony at the evidentiary hearing and the facts in the record. The fact is that the experts testified at length at the penalty phase regarding Mr. Occhicone's extensive use of alcohol. Additionally, at multiple times during the penalty phase, trial counsel's experts indicated that Mr. Occhicone did not have the capacity to form premeditated intent (R. 1042, 1043, 1102, 1104, 1008).

Furthermore, the lower court erroneously relies on trial counsel's statements that Dr. Delbeato opined that the defendant did not have any major mental disorder but simply had a

personality disorder. Again, this is simply not true. At the penalty phase, Dr. Delbeato testified that Mr. Occhicone was alcohol dependent, which is a category of a major mental disorder (R. 963, 997, 998); that Mr. Occhicone was emotionally disturbed (R. 968), and that Mr. Occhicone had severely high chronicle depression which would make him a good candidate for suicide (R. 991).

Despite the lower court's ruling, it is evident that trial counsel was ineffective in failing to call experts at the guilt phase. Mr. Occhicone is entitled to a new trial.

3. Trial counsel failed to call Audrey Hall as a witness.

Another issue presented at the evidentiary hearing concerned trial counsel's failure to have an available, critical witness testify at the guilt phase. During their testimony at the evidentiary hearing, each of Mr. Occhicone's trial lawyers conceded that they were aware of Audrey Hall, who could have testified at trial that it was common practice for Mr. Occhicone to park his car on the corner of Sugarbush and Berry Hill, away from Ms. Gerrety's house, and where it was found after the murders (PC-R. Vol. V, 784, 840, 887). This testimony would have refuted the State's argument at trial that the location of Mr. Occhicone's car was evidence of premeditation (PC-R. Vol. V, 880, 887-8).

As to why they didn't call Ms. Hall, trial counsel's strategic reasoning was that this had already been brought out through cross-examination of Ms. Gerrety (PC-R. Vol V, 784, 840,

880). Each trial attorney testified to this point (PC-R. Vol. V, 784, 840, 880). However, Mr. Laporte recognized the importance of Ms. Hall's testimony (PC-R. Vol V. 887). He stated at the evidentiary hearing that the defense wanted to make sure that the jury recognized that it was Mr. Occhicone's normal custom and practice to park the car there (PC-R. Vol. V, 887-8). But again, Mr. Laporte's recollection was that the testimony of Ms. Gerrety on cross-examination confirmed that point (PC-R. Vol. V. 880). In addition, Mr. Young believed that the State had a rebuttal witness, Cheryl Nickerson, who could counter Ms. Hall's testimony (PC-R. Vol. V, 860). However, Ms. Nickerson's testimony at trial was silent on this point.

Trial counsel's decision to refrain from calling Ms. Hall was unreasonable. First, the fact is that Ms. Gerrety did not testify that Mr. Occhicone regularly parked his car on the corner of Sugarbush and Berry Hill. The only reference she made on cross-examination was that Mr. Occhicone "used to sit on the street corner when I would be going by in the morning driving to work." (R. 302). Ms. Gerrety said nothing more about the subject. Certainly, this statement had no relevance toward negating premeditation on the part of Mr. Occhicone. It definitely did not establish that Mr. Occhicone normally parked his car in the same spot where he parked it on the night of the murders. Trial counsel's strategic reasoning is meritless here, and counsel unreasonably failed to call a witness who they recognized was important.

Secondly, according to the transcript of the trial, Mr. Occhicone's trial counsel did not even list Ms. Hall as a witness until **after** Ms. Gerrety testified:

> Mr. Boyer: I have filed a reciprocal witness list and also listed tangible evidence on it. Regarding the witness list, the person listed is a lady named Audrey Hall. Ms. Hall became a witness--strike that. We located and spoke with Ms. Hall yesterday evening in response to Anita Gerrety' testimony as a follow-up investigation. In discussing with Ms. Hall her involvement with the case, she explained to Mr. Laporte who was the attorney interviewing her that she had been contacted by the police the day or shortly after the incident, her statement was taken as part of a neighborhood survey.
>
> That witness was never disclosed to us by the State Attorney's office. In light of Ms. Gerrety's testimony yesterday, subsequent investigation by us, we were able to find her to disclose her today that we intend to use her.

(R. 485-486) (emphasis added). In effect, Mr. Boyer stated that he hadn't been aware of Ms. Hall, and that it was Ms. Gerrety's testimony that led him to locate and procure a statement from Ms. Hall. And the reason Mr. Boyer wanted to call Ms. Hall was to respond to testimony from Ms. Gerrety that the defense felt was untruthful:

> Mr. Boyer: The defense did not feel that testimony from Anita Gerrety was truthful. The defense had not anticipated Anita Gerrety providing the testimony in the manner that she provided it. Based upon Anita Gerrety's testimony, the defense did subsequent follow-up investigation and located Ms. Hall. Ms. Hall, the State would submit, is the lady whose house is next to the location where Mr. Occhicone's Corvette was parked. Where Mr. Occhicone's Corvette was found by the police

> officer after the shooting. Her house is the house that he was parking in front of or beside, however it is situated on the map.
>
> Ms. Hall has testimony we feel that contradicts Anita Gerrety's testimony yesterday regarding Mr. Occhicone's visits to Anita Gerrety's residence. We contacted Ms. Hall last night following up on where the Corvette was parked. It's my understanding that Mr. LaPorte spoke with her last night and we were able to confirm that she has testimony which we feel is contradictory to Anita Gerrety and material to the defense.

(R. 615-616).

The State objected to this supplemental witness being presented so late in the trial:

> Mr. Halkitis: I'm just going to tell the Court now, I don't intend to take the deposition of this witness who has been listed at this point in time. We're in the midst of finishing up the State's case and, Judge, this is improper, this is discourteous, this is unprofessional.

(R. 483-484). Mr. Halkitis further stated:

> And as to Ms. Gerrety, you mean her testimony yesterday was different than the testimony she gave in October of '86, Judge, is ludicrous. If counsel says he just learned of this witness based on what Ms. Gerrety said yesterday, Judge, that has no merit at all.

(R. 488).

When the Court pressured the defense for a reason as to why they failed to uncover Ms. Hall as a witness at an earlier time, this extended, but telling, exchange ensued:

> The Court: Let me ask you this. You have taken the deposition of Anita Gerrety, so what you're saying then is her trial testimony differed or surprised you from what

you anticipated her testimony to be based upon her deposition, is that essentially correct?

Mr. Young: Ms. Gerrety went out of her way to minimize a lot of her statements, and on depo-

The Court: Well, see the reason I'm asking the question is because if you were anticipating this the fact that she didn't testify to yesterday wouldn't have any meaning. It would only be if you were surprised that--I mean, completely surprised then we would be more attuned to your suggestion that you couldn't have apprised Mr. Halkitis because you didn't know it was going to arise. So, hence the question: Were you surprised?

Mr. Halkitis: I'm trying to find out if it was that was different.

Mr. Young: I still have a problem with the initial--the lack of investigation is not a specific prejudice.

The Court: Well, how about answering my question, you haven't answered my question. Are you telling me that after you deposed her that you didn't anticipate this happening, whatever it is that she supposedly said?

Mr. Boyer: Your Honor, we had anticipated the testimony to be different from Anita Gerrety or--I don't want to mislead the Court, I want to be fair about it. We had anticipated the testimony and I'm not going to say different, it's like black and white. But a lot more emphatic on issues than what was actually presented.

And whether or not we would call Ms. Hall, of course, would depend upon the Court's ruling. And I'd still like Ms. Hall to have an opportunity to say whether or not she provided this information to the police originally. And if she provided it to the police and they never disclosed it to us and it's exculpatory information, then we'd like the information--to at least proffer it to the Court if not present it as testimony.

> The Court: All right. Are you now prepared to tell us in what because we're kind of dancing around the pen here. Are you prepared to tell us with some specificity where it is in her testimony that Ms. Hall's testimony would be impeaching?
>
> Mr. Boyer: I think it goes to the issue of Mr. Occhicone's visits to Ms. Gerrety's residence.
>
> The Court: Do one of you fellows want to step out and see if she's here?
>
> Mr. Boyer: Can we have a short recess on this for a second, please?
>
> The Court: How short is short?
>
> Mr. Boyer: Give us three minutes in private.
>
> The Court: Just to talk about it by yourselves?
>
> Mr. Boyer: Yes, sir.
>
> The Court: We'll do that.

(R. 624-626).

After the recess, the following exchange occurred:

> Mr. Boyer: We'd like to withdraw our potential witness.
>
> The Court: All right, sir, that takes care of that. Okay. We'll let Mr. Halkitis go ahead and depose those others after the case is completed before the penalty phase.

(R. 626-627).

Trial counsel's testimony at the evidentiary hearing that they did not call Ms. Hall in light of Ms. Gerrety's testimony is incredible. Rather, as demonstrated above, trial counsel was adamant in utilizing the testimony of Audrey Hall to counter Ms. Gerrety's testimony. However, trial counsel's failure to list

Ms. Hall as a witness proved to be detrimental towards presenting her testimony. Trial counsel's deficient performance was prejudicial. There is a reasonable probability that the jury would have returned with a second-degree murder conviction had they not been needlessly permitted to believe that Mr. Occhicone's parking spot away from the house was evidence of premeditation.

In its order denying the remaining portions of Mr. Occhicone's motion for postconviction relief, the lower court erroneously relied on the incorrect testimony of the trial attorneys that they had brought this information out on cross-examination:

> The trial attorneys indicate that the had Ms. Hall under subpoena to say that the defendant parked his car in the usual place and could have used her even though she had not been properly listed as a witness, as long as the State got an opportunity to depose her before she testified. <u>They further indicate that it wasn't necessary to use her since Anita Gerrety admitted on cross-examination that the defendant always parked where he parked on the night of the murders.</u>

(PC-R. Vol. IV, 603) (emphasis added).

* * * *

> <u>Once again, given the fact that Ms. Gerrety admitted on cross-examination that the defendant parked in the place he customarily parked, it would seem to have been unnecessary for the defense to give up the right to open and close the final argument to simply put on cumulative testimony.</u>

(PC-R. Vol. IV, 603-4) (emphasis added).

As evidenced by its ruling, the lower court seems to ignore

the trial record in favor of accepting trial counsel's inaccurate representations.

Additionally, the lower court should have considered the testimony of Ms. Hall, admitted through the testimony of Randy Edwards for penalty phase purposes only, in its analysis of the guilt-phase issues as well. At the time of the evidentiary hearing, Ms. Hall was suffering from Alzheimer's disease, and postconviction counsel presented evidence that competency proceedings were underway to appoint a guardian for Ms. Hall (PC-R. Vol. VI, 1091). Since there was no dispute over Ms. Hall's proposed testimony, Mr. Occhicone should not be prejudiced a second time for counsel's failure to present her as a witness at trial.

B. INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE

Mr. Occhicone was denied the effective assistance of counsel at the sentencing phase of his capital trial. Counsel's failure to investigate and prepare directly resulted in Mr. Occhicone's death sentence. Further, counsel failed to discover and use significant mitigation evidence without which no individualized consideration of Mr. Occhicone could occur. Had counsel adequately prepared and discharged their Sixth Amendment duties, overwhelming mitigation evidence would have been presented and would have precluded a sentence of death.

As it was, the jury recommended death by the slimmest possible majority -- seven to five. One single vote would have swung the balance. Cf. Preston v. State, 564 So. 2d 120 (Fla.

1990).

Proper investigation and preparation would have resulted in evidence establishing an overwhelming case for life on behalf of Mr. Occhicone and would have, at a minimum, delivered the one necessary vote for a jury recommendation of life. The difference between the Occhicone caricature presented at trial and the fully fleshed and humanized Dominick Occhicone, a man with a life story whose mental health problems would have come to light had counsel properly prepared, is startling. Had counsel properly prepared, the judge and jury could have known the real person. Had counsel provided the mental health experts who testified at the penalty phase with this critical information, and with the overwhelming evidence of his drug and alcohol use on the day of the offense, they too could have testified about the real person.

In Strickland, 446 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. Strickland requires a defendant to plead and demonstrate: (1) unreasonable attorney performance, and (2) prejudice. Mr. Occhicone pleads each.

Defense counsel must also 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 Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). The state and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration, object to inadmissible evidence or improper jury instructions, and make an adequate closing argument. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985). Trial counsel here did not meet these rudimentary constitutional standards.

Counsel at trial argued that this case was about "intent, the state of mind of Dominick at the time the killing occurred." (R.742). Counsel was right. This case is about Mr. Occhicone's state of mind at the time the killings occurred. However, in light of that statement, the glaring absence of any testimony at trial concerning Mr. Occhicone's state of mind and state of intoxication on the day of the offense is inexcusable. The only evidence presented by the defense concerning Mr. Occhicone's

state of mind and state of intoxication on the day of the offense came from the mental health experts who were left to rely solely upon the self-report of Mr. Occhicone. Surely, the lack of testimony from someone other than the defendant on these critical issues had a profoundly negative effect on the jury.

The absence of any evidence at the penalty phase regarding Mr. Occhicone's intoxication at the time of the offense was plainly prejudicial. Such evidence of intoxication was available (See Argument I, A., 1,), but counsel failed to investigate and effectively present this evidence, despite the fact that it is relevant mitigation under Florida law. Hargrave v. Dugger, 832 F.2d 1528, 1534 (11th Cir. 1987); Foster v. Dugger, 518 So. 2d 901, 902 n.2 (Fla. 1987); Waterhouse v. Dugger, 522 So. 2d 341, 344 (Fla. 1988).

In addition to testimony related to Mr. Occhicone's state of mind at the time of the offense, testimony was presented at the evidentiary hearing regarding trial counsel's failure to call other mitigation witnesses.

Ann Montana testified at the evidentiary hearing about valuable non-statutory mitigation. She was available at the time of trial and would have provided information about Mr. Occhicone's: obsession with Ms. Gerrety (PC-R. Vol. VI, 982); fragile emotional state after Ms. Gerrety left him (PC-R. Vol. VI, 981-3); religious faith and prayers that Ms. Gerrety would come back to him (PC-R. Vol. VI, 982-3); and the fact that Mr. Occhicone's first wife had died of cancer (PC-R. Vol. VI, 993).

Father Lamp would also have testified had he been contacted (PC-R. Vol. IV, 633). At the evidentiary hearing, Father Lamp testified that Mr. Occhicone came to him sometime in 1984 or 1985 to discuss his relationship with Ms. Gerrety and to seek premarital instructions (PC-R. Vol. IV, 623). However, due to their total lack of compatibility, Father Lamp decided that he could not marry them (PC-R. Vol. IV, 624-5). Father Lamp had additional contact with Mr. Occhicone after this time (PC-R. Vol. IV, 625). Mr. Occhicone told Father Lamp about problems he had with Anita, and about the recent deaths in his family (PC-R. Vol. IV, 625-6). Father Lamp described Mr. Occhicone as emotionally unstable (PC-R. Vol. IV, 626). Mr. Occhicone also told Father Lamp that he had been drinking heavily, (PC-R. Vol. IV, 628), which prompted Father Lamp to encourage Mr. Occhicone to attend an Alcoholics Anonymous meeting (PC-R. Vol. IV, 628). Father Lamp also testified that Mr. Occhicone was very protective of and loved his son (PC-R. Vol. IV, 629).

In addition to Ann Montana and Father Lamp, Mr. Occhicone had other witnesses available to provide mitigating testimony at the evidentiary hearing, but he was erroneously precluded from doing so by the lower court (See Argument II, A.)

Trial counsel had evidence of mitigation that they failed to present at the penalty phase. Under Lockett v. Ohio, 466 U.S. 668 (1978), Mr. Occhicone was certainly entitled to present such evidence. Because Mr. Occhicone's sentencing jury recommended death by the slimmest possibility, 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 trial counsel properly and adequately investigated and presented the compelling mitigating evidence outlined above to the judge and jury at the penalty phase of Mr. Occhicone's trial, it would have made a difference.

In its order denying relief, the lower court fails to address this claim (PC-R. Vol. IV, 594-605). There is no indication as to whether the court simply dismissed it, or perhaps forgot to address it. Whatever the reason, Mr. Occhicone is entitled to be informed of the basis for his denial. The lower court's baseless ruling is erroneous.

ARGUMENT II

MR. OCCHICONE WAS DENIED A FULL AND FAIR EVIDENTIARY HEARING IN VIOLATION OF DUE PROCESS AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

A. THE LOWER COURT PREVENTED MR. OCCHICONE FROM PRESENTING HIS CASE DURING THE POSTCONVICTION EVIDENTIARY HEARING BY REFUSING TO ALLOW THE TESTIMONY OF MULTIPLE MITIGATION WITNESSES.

In Claim III of his motion to vacate, Mr. Occhicone alleges that trial counsel failed to present available life history evidence. This evidence would have enabled the judge and jury to learn about Mr. Occhicone's life prior to his turbulent downfall.

To support this claim, Mr. Occhicone included in his 3.850

motion the proposed testimony of several mitigation witnesses through affidavits or detailed descriptions. These witnesses were Kenny Volpe, Andy Kinash and Brenda Balzano (See Affidavits, PC-R. Vol. I, 130, 133; PC-R. Vol. I, 71-3).

In its order granting an evidentiary hearing with regard to counsel's ineffectiveness at the penalty phase, the lower court held that, "[b]ecause little similar life history evidence was presented at the penalty stage, an evidentiary hearing is warranted to determine whether counsel acted reasonably in not presenting such evidence." (PC-R. Vol. II, 232-3).

Mr. Occhicone's counsel was denied the opportunity to present the aforementioned testimony at the evidentiary hearing, despite the fact that his witnesses were present (PC-R. Vol. VI, 964-76, 1115-16). When Mr. Occhicone's counsel attempted to call the first of the aforementioned witnesses, Brenda Balzano, the State objected:

> We do have an objection because we heard from the attorneys yesterday that they never heard of a Brenda Balzano, and there has to be a predicate laid that they knew about Brenda Balzano.

(PC-R. Vol. VI, 964).

Mr. Occhicone's counsel maintained that this specific issue was approved for a hearing in the lower court's order, and that Ms. Balzano would allege that no one ever contacted her (PC-R. Vol. VI, 964-5).

In response, the lower court stated, inter alia, that:

> Well, they probably didn't question a lot of

people in India either or Pakistan.

(PC-R. Vol VI, 965).

* * * *

> [I]t does us no good to spend hours saying here's what was available, unless showing that there's some reason that counsel was deficient in not finding it back then. Now, if it was there, if this lady contacted them, wrote them a letter, if she knows in some fashion that her name was furnished to them and they didn't follow up with it.

(PC-R. Vol. VI, 966).

Mr. Occhicone's counsel emphasized that:

> Well, the problem with that is, your Honor, if I may, she wasn't contacted, and had she been contacted she would have been there. However, I can point in--I believe it was in the statement that Mr. Occhicone gave to Dr. Mussenden early on, the one that Mr. Halkitis referred to yesterday, there's a psychiatric examination May 7, 1987, Dominick refers to growing up in the same area the she lived in Carmel, New York.

(PC-R. Vol. VI, 966).

The Court rejected this statement:

> I don't know how big Carmel, New York is, but--does that men that somehow someone's supposed to dispatch an investigator to Carmel, New York to drive up and down the streets saying does anybody know Dominick Occhicone? I don't think so. I hope to God not. We're never going to try any cases in this state or any other if that's the situation.
>
> So all I'm looking for--put the lady on, but I need something more than just yeah, I was out there if somebody would have either, A, looked for me, or B, known to look for me. So what am I supposed to do, flip a coin as to which one it was? You got to give me something that shows that counsel at the time had some reason to find this lady, not just some reason to stand in the town square at

Carmel, New York and shout.

(PC-R. Vol. VI, 966-7).

Mr. Occhicone's counsel countered:

> My understanding is that when you get to this type of litigation the burden is on the Defense attorneys to find mitigation, to find witnesses in mitigation. And the fact that they didn't find any, any family or friends or anybody to come and testify for him I think shows that--I mean, I think that's my predicate, your Honor. I can't you know--

(PC-R. Vol. VI, 968).

The court rejected this argument by stating that, "[t]hen your understanding and mine are different, okay." (PC-R. Vol. VI, 969).

The lower court stood by its ruling requiring some showing that there was not an adequate predicate for Ms. Balzano's testimony (PC-R. Vol. VI, 976), which was then proffered into the record (PC-R. Vol. VI, 974-6).

Similarly, Mr. Occhicone was not allowed to present the testimony of Andy Kinash and Ken Volpe (PC-R. Vol. VI, 1115). Their testimony was also proffered (PC-R. Vol. VI, 1115-16).

The court's ruling was erroneous. State and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration. See Phillips v. State, 608 So. 2d 778 (Fla. 1992); State v. Lara, 581 So. 2d 1288 (Fla. 1991); Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Bassett v. State, 541 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929, 930 (Fla. 1988); O'Callaghan v.

State, 461 So. 2d 1154, 1155-56 (Fla. 1984). See also Eutzy v. Dugger, 746 F. Supp. 1492 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. 1990); Harris v. Dugger, 874 F. 2d 756 (11th Cir. 1989); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded for reconsideration, 104 S.Ct 3575, adhered to on remand, 739 F.2d 531 (11th Cir. 1984); King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), vacated and remanded, 104 S.Ct 3575 (1984), adhered to on remand, 748 F.2d 1462 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985). See also Kenley v. Armontrout, 937 F.2d 1298, 1304 (8th Cir. 1991) (counsel's performance may be found ineffective is s/he performs little or no investigation); Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991) (an attorney is charged with knowing the law and what constitutes mitigation); Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989) (at a capital penalty phase, "[d]efense counsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and focus the jury on any mitigating factors"); Eldridge v. Atkins, 665 F.2d 228, 232 (8th Cir. 1981) ("[i]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty").

It is certainly not unreasonable to expect counsel to seek out and present testimony on the life history of their client

This did not occur in Mr. Occhicone's case. A full and fair evidentiary hearing and, thereafter, Rule 3.850 relief is warranted.

Additionally, postconviction litigation is governed by due process. See Teffeteller v. Dugger, 676 So. 2d 369 (Fla. 1996). The right to call witnesses is essential to due process. Chambers v. Mississippi, 93 S. Ct. 1038 (1973). A defendant has a right to present a full and fair defense. Lewis v. State, 591 So. 2d 922, 925 (Fla. 1991); Roberts v. State, 510 So. 2d 885, 892 (Fla. 1987). Mr. Occhicone was unable to present his case due to the Court's and State's actions. This denied due process, and prejudiced Mr. Occhicone.

B. THE LOWER COURT ERRED IN ALLOWING THE POSTCONVICTION STATE ATTORNEY TO TESTIFY AT THE EVIDENTIARY HEARING.

At the evidentiary hearing, the State called Michael Halkitis, who was the lead attorney for the State at this proceeding, as a rebuttal witness (PC-R. Vol. VII, 1260). Mr. Occhicone objected on the basis that Mr. Halkitis was present during the entire hearing even though the Rule had been invoked (PC-R. Vol VII, 1260), on the basis of relevancy (PC-R. Vol. VII, 1260), on the basis of the Rules of Professional Conduct ("a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client...") (PC-R. Vol. VII, 1286), and on caselaw indicating that a prosecutor must not act as a prosecutor and witness (PC-R. Vol. VII, 1289).

After several discussions, the lower court overruled Mr. Occhicone's objection:

> With that having been said then I think the bottom line is I am overruling the objection, for the reasons I have hopefully stated in enough detail for an appellate court to get its teeth into, and with the idea that all I'm saying is that Mr. Halkitis can testify to what he sent to Dr. Mussenden and what information he conveyed to Dr. Mussenden.

(PC-R. Vol. VII, 1306).

Mr. Halkitis proceeded to testify that he was the lead prosecutor at the time of trial (PC-R. Vol. VII, 1307). Mr. Halkitis testified that after Dr. Mussenden was appointed as a mental health expert to determine competency, he sent Dr. Mussenden a letter outlining his version of the facts of the case, as well as some depositions (PC-R. Vol. VII, 1307-8). Mr. Halkitis did not recall all of the depositions that he sent to Dr. Mussenden, but he does remember that they included those of Anita Gerrety, Lilly Lawson, Debra Newell, William Anderson, Joanna Carrico and Detective Petrosky (PC-R. Vol. VII, 1312).

To permit the State Attorney to provide factual testimony, which the lower court relied on in its order (PC-R. Vol. IV, 602-3), violates Mr. Occhicone's right to due process because the credibility of the witness is inappropriately buttressed by his position with the State and simultaneously undercut by his position as an advocate. See Holloway v. State, 705 So.2d 646, (Fla. 4th DCA 1998) (the practice of acting as a prosecutor and a witness "is not to be approved and should be indulged in only under exceptional circumstances.")

Mr. Occhicone was denied a full and fair hearing. He is therefore entitled to a new postconviction proceeding to establish his entitlement to relief.

ARGUMENT III

THE LOWER COURT ERRED IN SUMMARILY DENYING MERITORIOUS CLAIMS WITHOUT THE BENEFIT OF AN EVIDENTIARY HEARING.

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

The court below summarily denied Occhicone relief on Claims I, IV, V, VI and VII (PC-R., Vol I. 171-199; Vol. II 231). The Court partially denied Claims II and III (PC-R., Vol. II, 227, 231). Each of these claims, on which Mr. Occhicone is entitled to an evidentiary hearing, is addressed below.

A. THE STATE KNOWINGLY PRESENTED FALSE EVIDENCE AND FAILED TO DISCLOSE EXCULPATORY INFORMATION IN VIOLATION OF MR. OCCHICONE'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS WELL AS THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In claim I of his motion to vacate, Mr. Occhicone alleges that the State withheld the names of material witnesses, withheld evidence of Mr. Occhicone's intoxication on the night of the offense, pressured witnesses to testify untruthfully, and failed to disclose a deal with a key prosecution witness.

The State knew that: Mr. Occhicone's state of mind at the time of the offense was the key issue in this case; that his state of intoxication at the time of the offense would be an issue; that his mental and emotional state of mind would be an issue. Nevertheless, the State began to build its case, the prosecutors withheld favorable evidence and molded testimony to fit their theory of premeditated murder. As a result of the State's misconduct, counsel for Mr. Occhicone was misled, the jury was misled, and the trial court was misled.

The prosecution's suppression of evidence favorable to the accused violates due process. Brady v. Maryland, 373 U.S. 83 (1963); Agurs v. United States, 427 U.S. 97 (1976); United States v. Bagley, 105 S. Ct. 3375 (1985). The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt-innocence or punishment, and regardless of whether counsel requests the specific information. Bagley, 105 S. Ct at 3375. It is of no constitutional importance whether a prosecutor or a law enforcement officer is responsible for the misconduct. Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984).

The United States Constitution provides a broadly interpreted mandate that the State reveal anything that benefits the accused, and the State's withholding of information such as that contained in its files renders a criminal defendant's trial fundamentally unfair. Brady; Bagley. A defendant's right to confront and cross-examine witnesses against him is violated by

such State action. See Chambers v. Mississippi, 410 U.S. 284 (1973); see also Giglio v. United States, 405 U.S. 150 (1972). Counsel cannot be effective when deceived; consequently, Mr. Occhicone's Sixth Amendment right to effective assistance of counsel was also violated. Cf. United States v. Cronic, 466 U.S. 648 (1984). The resulting unreliability of a guilt or sentencing determination derived from proceedings such as those in Mr. Occhicone's case also violates the Eighth Amendment requirement that in capital cases the United States Constitution cannot tolerate any margin of error. See Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Beck v. Alabama, 447 U.S. 625 (1980); Gardner v. Florida, 430 U.S. 349 (1977). Here, these rights, designed to prevent miscarriages of justice and ensure the integrity of fact-finding, were abrogated.

Counsel for Mr. Occhicone made repeated requests for exculpatory, material information pretrial. Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Smith (Dennis Wayne) v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Brady, 373 U.S. at 87 (reversing death sentence because suppressed evidence relevant to punishment, but not guilt-innocence). The evidence set forth below meets that test, but it was not turned over. The Bagley materiality standard is met and reversal required once the reviewing court concludes that

there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of [both phases of the capital] proceeding would have been different." 105 S. Ct. at 3833. Such a probability undeniably exists here.

An even more serious due process violation occurs when the State deliberately presents false and/or misleading testimony. See Bagley; Mooney v. Holohan, 294 U.S. 103 (1935); Alcorta v. Texas, 355 U.S. 28 (1957); Napue v. Illinois, 360 U.S. 264 (1959); Miller v. pate, 386 U.S. 1 (1967); Giglio v. United States, 405 U.S. 150 (1972); Agurs. In such a case, the defendant is entitled to relief if there is "any reasonable likelihood" that the testimony "could have" affected the judgment of the jury. Bagley, 105 S. Ct. at 3382 (quoting Agurs, 427 U.S. at 103 (emphasis supplied)).

1. The State's withholding of material witnesses and evidence relevant to the Defendant's state of mind at the time of the offense

The State withheld material, exculpatory evidence regarding four witnesses--Lilly Lawson, Anita Gerrety, Debra Newell, Phillip Baker--who presented false testimony that could have been impeached had Mr. Occhicone received this evidence. These witnesses were critical to the State's case. Moreover, the State withheld material, exculpatory evidence regarding three other witnesses--David Hoffman, Barbara Talbert, Kimberly Connell. These witnesses were critical to Mr. Occhicone's case since they supported his voluntary intoxication defense. The names of these witnesses interviewed by the State were never disclosed to the

defense. The withholding of this evidence undermines confidence in the outcome of Mr. Occhicone's conviction and sentence.

Postconviction counsel obtained witness interview notes from the State Attorney's files which were never disclosed to Mr. Occhicone. The interview notes contain information which directly support Mr. Occhicone's voluntary intoxication defense and the identity of witnesses interviewed who were never disclosed to the defense.

For example, the undisclosed notes of an interview of David Hoffman contain the following pertinent information:

> David Hoffman: Part-time bartender at Shooter's Bar. Witness met defendant about 4 months ago. Defendant told witness about Anita and her abortion. About 2 weeks before murder, witness asked to borrow gun to shoot alligator. Witness saw defendant about 6:30 PM at Shooter's. Defendant seemed normal and appeared rational. Defendant had buzz. Defendant could hold liquor well. (Don't need as witness).

Notes from State Attorney's files, (PC-R. Vol. I, 102).

Mr. Hoffman was interviewed after this report was discovered. He confirms that in 1986, he was interviewed by a detective with the Pasco County Sheriff's Department concerning the homicide case against Dominick Occhicone. He told the detective that he knew Mr. Occhicone and that he had seen him at Shooter's on the night of the murders at about 6:30 p.m. He cannot say whether Mr. Occhicone left before he did or not. According to Mr. Hoffman, Mr. Occhicone definitely had a "buzz" on, meaning he was drunk. By suppressing its discovery of Mr. Hoffman, the State kept this material evidence from the jury.

Beyond the significance of his knowledge, Mr. Hoffman would have led counsel to other witnesses as well. This information is especially troubling in light of the prosecutor's statement at trial that there was no evidence to support the voluntary intoxication defense. In closing argument, the prosecutor argued:

> You know, you heard testimony -- you heard a lot of adjectives here, sly, obsessed, intelligent. Many adjectives to describe the defendant, but you never heard one witness who took that stand and said on June 10th the defendant was intoxicated.

(R. 816). Ironically, he was right. The jury never heard any witness testify that Mr. Occhicone was intoxicated on June 10th because of the misconduct of the State.

The only evidence the jury heard concerning Mr. Occhicone's alcohol consumption on the day of the offense was from the State's witness, Debra Newell. Ms. Newell, a bartender at Shooter's Liquor Lounge, testified that Mr. Occhicone came into the bar around 1:30 a.m., had two drinks, and left around 2:30 a.m. (R. 492). Had the State not wrongfully withheld material information, Mr. Occhicone could have shown that during the thirty-six (36) hour period preceding the instant offense, he engaged in constant alcohol consumption. Also, Ms. Newell's testimony could have been impeached.

The State also interviewed but failed to disclose Barbara Talbert as a witness. Notes of her interview indicate that she saw Mr. Occhicone on the night of the offense at Shooter's:

Barbara Talbert: Employee at Shooter's Bar

> who met defendant 6 month ago as patron of bar. Defendant spoke about Anita constantly and heartbroken because she left him. Defendant mentioned that Anita's parents disliked him. Witness saw defendant on day of shooting and defendant left about 6:00 PM. (Don't need as witness).

Notes from State Attorney's Files, (PC-R. Vol. I, 102).

Ms. Talbert refused to be interviewed by members of Mr. Occhicone's postconviction defense team. Nevertheless, Ms. Talbert should have been disclosed on the State's witness list. She admitted seeing Mr. Occhicone on the night of the offense at Shooter's. This is in direct contradiction of Ms. Newell's trial testimony. Further, as with Mr. Hoffman, the notation, "Don't need as a witness" indicates an intentional decision to not disclose her as a witness.

The witness interview notes also mention another witness who was not disclosed by the State. The notes indicate that Pat Goddard mentioned her sister, Kim Connell, as being present on the evening of June 8, 1986, when Mr. Occhicone was involved in an alcohol-related accident in her front yard. The notes clearly indicate that Ms. Goddard told the State that her sister was with Mr. Occhicone on the day of the offense. Thus, Ms. Connell could have provided material evidence concerning Mr. Occhicone's state of mind and state of intoxication on the day of the offense (See Argument I, A., 1, a.). The State failed to disclose this crucial information. (PC-R. Vol. I, 103).

The interview notes also contain material and relevant information concerning Ms. Gerrety's observations of Mr.

Occhicone on the night of the offense. The notes indicate that Ms. Gerrety stated that as Mr. Occhicone came around the front of the house just prior to the shooting "he was having some difficulty walking and appeared to stagger a little bit." This information would have been critical to an effective cross-examination of Ms. Gerrety because, at trial, she attempted to back off from her sworn deposition testimony concerning Mr. Occhicone staggering because he had been drinking.

The lower court summarily denied this claim without an evidentiary hearing. The court's ruling is primarily based on the contention that trial counsel failed to meet the due diligence prong of the Brady standard:

> As Defendant has failed to allege otherwise, the Court can assume that Defendant knew that he drank prior to the murders and spent time at Shooters, and therefore was aware of those who witnessed this. See, e.g., Roberts v. State, 568 So.2d 1255 (Fla. 1990). Defendant fails to allege that he does not recall or was not aware that these people saw him in the 24 hours prior to the murders, to satisfy the second element of Brady. See Mendyk, 592 So.2d at 1079. Even had Defendant alleged such, it was common knowledge that Defendant visited Shooters frequently as evidenced by pre-trial deposition testimony (see, Anderson, Lawson, and Newell deposition excerpts attached). Therefore, this claim fails to satisfy the second element of Brady because a diligent investigation by defense counsel as to Defendant's presence there the days prior to the murders would have revealed these witness' identities. Accordingly, these allegations are denied.

(PC-R. Vol. II, 222).

In arriving at this conclusion, the court has "assumed" facts outside of the record. A Rule 3.850 litigant is entitled

to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986). There is no evidence in the record that the defendant was conscious of everyone who witnessed his drinking. The court's reach for inferences beyond the record is evidence that an evidentiary hearing is required. Additionally, assuming that it was common knowledge that the defendant frequented Shooters, this does not in and of itself indicate a lack of due diligence. An evidentiary hearing is the proper forum to resolve the issue of whether counsel conducted an adequate investigation. For example, the notes of trial counsel's investigator indicate that he attempted to question employees of Shooters and another local bar about Mr. Occhicone. Nevertheless, the witnesses informed the investigator that they were instructed by the Sheriff's Office to not speak to anyone except the State Attorney's Office. As a result, counsel's failure to discover evidence of Mr. Occhicone's state of mind and degree of intoxication on the day of the offense did not involve lack of diligence but, rather, was in large part the direct result of the State's misconduct. See United States v. Cronic, 466 U.S. 648 (1984).

The Court also provided an additional reason for denying this claim:

> [Th]e State Attorney notes attached by Defendant appear to be the prosecutor's trial

> preparation notes as the comments therein of "need as a witness" or "don't need as a witness" indicate. The notes do not contain signatures or approvals by the witnesses of the statements to whom they were attributed. As such, this type of material is generally not subject to discovery or disclosure, and is therefore not evidence of prosecutorial misconduct. See, e.g., Williamson v. Dugger, 651 So.2d 84 (Fla. 1994).

(PC-R. Vol. II, 223). The court's argument is misplaced. The State was obligated to turn over the names of these witnesses, which it failed to do.

In addition to the State's failure to disclose the names of several witnesses, one of the State's key witnesses at trial, Ms. Lilly Lawson, has stated in a sworn affidavit that her trial testimony was affected by pressure put on her by the police pretrial:

> I testified at Dominick's trial. There was tremendous pressure put on me by the police pretrial; they made things very difficult for me, and they put words in my mouth. They wanted me to testify a certain way, and they made sure that I did so. It was an incredibly stressful time for me.

Affidavit of Lilly Lawson, (PC-R. Vol. I, 93).

In its order summarily denying this claim, the lower court stated that Ms. Lawson's testimony regarding premeditation "was not the only such evidence and was therefore not the basis for the conviction, failing the first prong under Dehaven" (PC-R. Vol. II, 224). The court also concluded that "Lawson has not gone so far as to sufficiently allege that she lied, committed perjury, or testified falsely as to any particular statement she made at trial" (PC-R. Vol. I, 225).

Prior to the evidentiary hearing, Mr. Occhicone filed a motion to reconsider the scope of issues for presentation at the evidentiary hearing (PC-R. Vol. III, 395). In this motion, Mr. Occhicone alleged additional information buttressing Mr. Occhicone's claim that the State permitted knowingly perjured testimony. The motion alleged that the State did not advise the Defense that Ms. Lawson had pending grand theft charges and was under investigation for trafficking cocaine at the time of Mr. Occhicone's trial (PC-R. Vol. III, 397).

The denial of this motion and disregard of material evidence was erroneous. Mr. Occhicone is entitled to an evidentiary hearing on these Brady claims.

2. The State's failure to disclose a deal with a key prosecution witness

Phil Baker, a jail-house snitch, was used by the State as a witness at Mr. Occhicone's trial. The State relied heavily upon Mr. Baker's testimony to rebut the defense argument that Mr. Occhicone was not guilty of premeditated murder. However, the State failed to disclose to the defense that they had struck a deal with Mr. Baker concerning charges that he had pending against him in exchange for his testimony. The prosecution also remained silent when Mr. Baker testified falsely on cross-examination when he was asked whether there was any "understanding" between him and the prosecutor concerning what sentence he would receive in exchange for his testimony:

> Q. Okay. So when you came -- you have disposed of that last grand theft. When you came to court on this last grand theft, you

stood in front of the Court convicted of four felonies?

A. yes.

Q. And on probation, is that correct.

A. On parole.

Q. On parole, is that correct?

A. Yes.

Q. And did you have any understanding with the prosecutor for testifying here in this trial what your sentence would be on that grand theft?

A. No.

Q. No?

A. No.

Q. Did you in fact get straight probation.

A. Yes.

Q. You did not go to jail anymore for this last charge?

A. No.

Q. But you didn't have any understanding with the prosecutor?

A. No.

Q. Did you have a hope?

A. Yes. The sentence carried probation, community control or 12 to 30 months.

Q. Just so the jury understands, 12 to 30 months in the --

A. The penitentiary, yes.

(R. 571-2).

Mr. Baker's testimony that there was no agreement -- no

understanding -- between him and the prosecutor concerning the sentence he would receive was false. The affidavit of Kathleen Stanley, Baker's victim of that grand theft, proves that his testimony was false:

> My name is Kathleen Stanley, and I live in Broward County, Florida. I was the victim of fraud in the case of State of Florida v. Philip Baker, Sixth Judicial Circuit In and For Pasco County, Criminal Case No. 86-2769.
>
> In 1984, my husband of 40 years, Ward Stanley, was entrapped in a drug deal and sent to prison. My husband's health was already bad before he went to prison, and it got much worse after he was in prison for awhile. I was frantic with worry about my husband's health and well-being in prison, and I wanted to anything I could to legally gain his release so he could obtain good medical care.
>
> While he was in prison, my husband met another inmate named Philip Baker. My husband was a very good man, and he was very trusting and unsuspicious. Mr. Baker told my husband that Mr. Baker had a very good attorney, Robert Harper of Tallahassee, who was very knowledgeable about getting medical paroles. My husband felt this was proven by the fact that Mr. Baker was released supposedly through Mr. Harper's efforts.
>
> After my husband's appeal was denied, my husband asked me to get in touch with Mr. Baker about having Mr. Harper take my husband's case. I was unsure about what to do but scared for my husband's very life, so I called Mr. Baker. After several conversations, Mr. Baker convinced me that, for a fee of $10,000, his lawyer would take the case, and he assured me that his lawyer would meet with the parole board and arrange a medical parole within 30 days. I was ecstatic at the thought of my husband coming home and getting well.
>
> Unfortunately, I am not wealthy enough to simply have $10,000 to give Mr. Baker. To

get this money, I applied for a second mortgage on the home in which we had lived for 25 years and raised our six children, and I pawned all the jewelry my husband had given me over the years of our marriage.

Mr. Baker told me that, since Mr. Harper was representing him in another lawsuit, it would save me time and travel if I simply dealt with Mr. Baker who would then deal with the lawyer for me and my husband. I realize now how gullible and naive this sounds but at the time, I was so distraught over my husband's welfare, I wasn't thinking straight. In any event, I sent Mr. Baker three payments, of $5,000, $3,000 and $2,000.

Mr. Baker told that my husband would be released on November 5, 1985. I went to Starke, Florida, and waited for three days in a motel, unable to find out what, if anything, was happening concerning my husband's release. Finally, I called Mr. Baker back and spoke to his wife. She told me that Mr. Baker and Mr. Harper had both been arrested for bribery and there was nothing he could do to help my husband. Of course, I found out this was absolutely untrue.

Eventually, I called Mr. Harper personally. Mr. Harper was shocked and said he would help me to bring fraud charges against Mr. Baker. I sent him the paperwork I had, and he told me to take it all to the Broward County State Attorney's Office. I did, and consequently charges were filed against Mr. Baker in Pasco County, where he lived.

I was very anxious to get my money back from Mr. Baker because I was unable to make the payments on the second mortgage and was in imminent danger of losing my home. I kept in close touch with the Pasco County State Attorney's Office so that I would know when Mr. Baker's trial was coming up and so that I could get my money back from Mr. Baker as soon as possible.

In May of 1987, I was informed that Mr. Baker's case was coming before the court on June 5th. I drove all night the night before

in order to be in New Port Richey on that date. I called the State Attorney's Office as soon as I arrived and told them I was there.

When I got to the courthouse, I saw Mr. Baker running out of the door, with two men in suits escorting him. I didn't know what was going on, so I asked the bailiff to please find someone in the State Attorney's Office I could speak to. Michael Halkitis came and told me that Mr. Baker's case had been postponed. I was furious because they had not let me know this before, and I asked him why it was postponed. Mr. Halkitis told me that Mr. Baker was their only witness in a murder case and they needed him for that trial. He then abruptly left.

I went to the State Attorney's Office and insisted on seeing someone about this. mr. halkitis again spoke with me and told me that Mr. Baker was their only witness in a murder trial and that they needed him to make their case. He said that Mr. Baker would get probation on my case but that they would see to it that he made restitution.

Over a month later, on July 30, 1987, I again went to Pasco County, this time for Mr. Baker's sentencing. I knew that Mr. Baker was going to get off easy because of testifying for the State, and I was furious. To allow someone who is a liar, a swindler, and a con man to testify against someone else to help himself is reprehensible. I know Philip Baker, I certainly wouldn't put it past him to lie and see a man get the electric chair, just to get himself out of trouble.

In court that day, Greg Miller was the State Attorney and Lowell Bray was the judge. Both the State Attorney and the judge acknowledged on the record that Mr. Baker was being allowed to plead and would be placed on probation in exchange for his testimony in another trial.

I did lose my home, and I had to really struggle for years because of what that man did to me. Worst of all, I had absolutely no

> money to hire another lawyer to help my husband obtain a medical parole, and he died on January 31, 1989, while still incarcerated. Although the judge told Mr. Baker he would have to make restitution as a condition of his probation, Mr. Baker didn't begin paying me back until almost two years later, after my husband had died. He made monthly payments for a while, then in August of 1990, I got a check for $6,000, which really shocked me. I've always wondered where a no-good person like Philip Baker could come up with that kind of money.
>
> No one has ever contacted me before about what I know about Philip Baker and the deal he made with the State Attorney's Office. If they had, I would have been happy to testify about this at any time.

Affidavit of Kathleen Stanley, (PC-R. 110).

The prosecutor knew that Mr. Baker's testimony was false but did nothing to correct it. Thus, Baker's false testimony misled the defense, the jury and the judge on a very crucial matter.

In it's order denying this claim, the lower court stated:

> Notwithstanding that the hearsay statements in the Stanley affidavit do not prove any deal was made, this Court's review of the public record in the Baker case, 86-2769CFAWS, indicates that on July 30, 1987, Baker received a downward departure sentence to probation instead of two and one-half to three and one-half years' incarceration, as was recommended under the guidelines, solely because of his agreement with the State to testify in Defendant's trial. Based on this evidence, <u>the Court concedes a deal was made</u>.

(PC-R. Vol. II, 225) (emphasis added).

Despite the lower court's acknowledgment that a deal had been made, and that the defendant testified falsely while the State sat mute, the lower court denied Mr. Occhicone a hearing on this claim on the basis that: The issue of Baker's credibility

was collateral to Mr. Occhicone's case and therefore not crucial; defense counsel could have corrected this testimony by the time of trial; Baker's testimony was already questionable; and because there were other damaging statements of premeditation (PC-R. Vol. II, 225-6).

"The deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." Giglio v. U.S., 92 S. Ct. 763, 765 (1972).

A conviction must be overturned which rests in part upon the knowing use of false testimony if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Agurs v. U.S., 427 U.S. 97 (1976).

"The thrust of Giglio and his progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, in that the prosecution not fraudulently conceal such facts from the jury." Routly v. State, 590 So.2d 397, 400 (1991) (quoting Smith v. Kemp, F.2d 1459, 1467 (11th Cir.), cert. denied, 464 U.S. 1003 (1983).

Here, the State permitted the presentation of false testimony. Had the jury learned of Baker's deal with the State, they might well have discounted his version of Mr. Occhicone's statements regarding premeditation. Without this testimony, Mr. Occhicone would not have been convicted of first degree murder. Mr. Occhicone is entitled to a new trial.

B. MR. OCCHICONE WAS DENIED HIS RIGHTS TO A PRETRIAL COMPETENCY HEARING, AND HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION WERE VIOLATED BECAUSE HE WAS FORCED TO UNDERGO CRIMINAL JUDICIAL PROCEEDING WHILE LEGALLY INCOMPETENT.

In Claim IV of his motion to vacate, Mr. Occhicone plead that he was denied his rights to a pretrial competency hearing and his constitutional rights were violated because he was forced to undergo a criminal judicial proceeding while legally incompetent (PC-R. Vol. I, 77-80).

The United States Constitution guarantees a defendant's right not to stand trial or be sentenced while he is incompetent. Pate v. Robinson, 383 U.S. 375 (1966). This guarantee in turn requires trial courts to conduct competency hearings whenever there are reasonable grounds to suggest incompetency. Hill v. State, 473 So. 2d 1253, 1256-7 (Fla. 1985). A trial court's failure to hold a hearing deprives the defendant of a fair trial and entitles him to postconviction relief. Hill, 473 So. 2d at 1259; Bundy v. Dugger, 816 F.2d 564 (11th Cir. 1987). Mr. Occhicone's trial court violated his constitutional rights by failing to hold a competency hearing sua sponte, Further, his attorneys provided ineffective assistance by failing to properly investigate his mental health, to obtain adequate mental health evaluations, and to request a competency hearing.

Mr. Occhicone's trial attorney had a duty to investigate his mental health. Futch v. Dugger, 874 F.2d 1483, 1487 (11th Cir.

1989). There is 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). However, Mr. Occhicone's counsel failed to adequately investigate his mental health, failed to provide the expert with relevant and necessary background data, failed to properly present this information to the court, and failed to request an evidentiary hearing on competency. The failures of the court, the pre-trial evaluator, and Mr. Occhicone's counsel were interrelated. Everyone charged with the duty to protect Mr. Occhicone's rights instead simply ignored his mental infirmities.

No adequate psychological evaluation of Mr. Occhicone on the issue of competency was conducted in this case, although trial counsel noticed that something was seriously wrong with Mr. Occhicone's comprehension of his situation. Consequently, a mentally ill man was allowed to proceed to trial.

Mr. Occhicone was incompetent to stand trial, and counsel unreasonably failed to seek a competency hearing. Had counsel conducted minimal investigation in response to the clues before him and presented the necessary background information to the mental health experts, they would have discovered that their client was mentally and emotionally ill, neurologically impaired, clinically depressed, in the throes of alcohol withdrawal, and unable to assist in his defense. Thus, if counsel had requested a hearing, there is a reasonable probability that Mr. Occhicone

would have been found incompetent to stand trial.

A claim of incompetence to stand trial is cognizable in a Rule 3.850 proceeding. Hill v. State, 473 So. 2d 1253 (Fla. 1985). This is so because an incompetent defendant cannot waive his or her right to assert the fact -- he is incompetent. Similarly, Mr. Occhicone could not waive the right to raise other issues because of his severely compromised ability to think and reason. Many of the issues in this motion involve his mental condition, and an evidentiary hearing is necessary to resolve these fact-based claims. Accordingly, the lower court's denial of this claim was erroneous. Relief should be granted.

C. THE JURY INSTRUCTIONS AT THE PENALTY PHASE WERE UNREASONABLY VAGUE AND CONFUSING; AS A RESULT, THE INSTRUCTIONS CREATED A PRESUMPTION IN FAVOR OF DEATH, AND THE JURORS' DISCRETION WAS NOT SUITABLY GUIDED, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION.[7]

Mr. Occhicone's penalty phase jury instructions violate the Eighth Amendment because there is a "reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde v. California, 494 U.S. 370, 380 (1990). To analyze "reasonable likelihood," courts have speculated on jurors' subjective understanding of instructions. Now however, two recent studies provide a basis from empirical assessment of instructions. One study, conducted in Illinois, supported the granting of federal habeas relief in United States ex rel. Free

[7]Claim V of 3.850 (PC-R. Vol. I, 81-89).

v. Peters, 806 F. Supp. 705 (N.D. Ill. 1992) (Free II). Similarly, a Florida study by Professor Radelet,[8] established that Occhicone's penalty-phase instructions were also defective.

The Free II court wrote:

> [T]o the extent that Boyde was sufficiently analogous to the present case, the Supreme Court rejected Boyde's claim based entirely on judicial speculation as to how the jurors in that case viewed the background evidence. See Boyde, 494 U.S. at 383, 110 S. Ct. at 119 ("we think it unlikely that reasonable jurors would believe the court's instructions transformed all of this 'favorable testimony into a virtual charade'"). . . . While such judicial speculation would have provided guidance in the absence of empirical data on the matter, Free has presented overwhelming empirical evidence indicating that it is reasonably likely that his jury in fact summarily rejected all evidence regarding nonstatutory mitigating factors. Under such circumstances, Free's sentence cannot stand.

Free, 806 F. Supp. 705 at 725-26.

Like the instructions at issue in Free II, Occhicone's instructions were reasonably likely to confuse the jury concerning whether a finding of any aggravating circumstance requires the imposition of the death penalty in the absence of any mitigating circumstances, and whether the jurors must impose the death sentence if they find that aggravation and mitigation are equally balanced. The instructions are vague and confusing, especially with respect to nonstatutory mitigating circumstances that are similar to, but do not satisfy the standards for, statutory mitigating circumstances. Further, the instructions

[8]See Radelet Affidavit, (PC-R. Vol. I, 154).

give the jury no guidance on whether the State must prove beyond a reasonable doubt that aggravation outweighs mitigation and whether the defense has a burden to prove that mitigation outweighs aggravation. Finally, the instructions fail to make the jurors understand that they are required to weigh, rather than count, the aggravating and mitigating circumstances.

In sum, the Occhicone instructions create an impermissible risk that the death penalty was imposed arbitrarily and capriciously in violation of Furman v. Georgia, 408 U.S. 238 (1972).

D. MR. OCCHICONE'S DEATH SENTENCE IS BASED UPON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND COUNSEL WAS INEFFECTIVE IN FAILING TO LITIGATE THIS CLAIM.[9]

United States v. Tucker, 404 U.S. 443, 447-49 (1972), held that a sentence in a non-capital case must be set aside as a violation of due process if the trial court relied upon "misinformation of constitutional magnitude." In Zant v. Stephens, 462 U.S. 862 (1983), the Supreme Court held that Tucker applies in a capital case. Id. at 887-88, n.23. Accordingly, under Stephens and Tucker, a death sentence should be set aside if the sentencing court relied on a prior unconstitutional conviction as an aggravating circumstance supporting the imposition of a death sentence. Accord, Douglas v. Wainwright, 714 F.2d 1532, 1551 n.30 (11th Cir. 1983). Under Stephens, this rule does not depend upon the presence or absence

[9]Claim VI of 3.850 (PC-R. Vol. I, 89-91).

of other aggravating or mitigating factors. Reconsideration of the sentence is required. See Tucker, 404 U.S. at 448-49; Lipscomb v. Clark, 468 F.2d 1321, 1323 (5th Cir. 1972).

In Occhicone, the judge and jury relied on a prior conviction for resisting arrest with violence to establish an aggravating circumstance upon which his death sentence was based. The sentencing court found this aggravator, and relied on it to justify the sentence of death. See (R.1646).

The underlying conviction upon which Mr. Occhicone's sentence of death rests was obtained in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments. His death sentence, founded upon that unconstitutionally obtained prior conviction, thus also violates his constitutional rights. Johnson v. Mississippi, 108 S. Ct. 1981 (1988). Thus, Mr. Occhicone's sentence of death must be vacated.

E. THE CUMULATIVE IMPACT OF JUDICIAL ERROR DENIED MR. OCCHICONE OF HIS RIGHT TO A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Numerous Constitutional violations contaminated the Occhicone trial.[10] These errors should be considered cumulatively, as well as individually. See Noeling v. State, 40 So. 2d 120, 121 (Fla. 1949) ("It is probable that any one of the above errors may not in and of itself constitute reversible error, but when considered as a whole we are satisfied that the ends of justice require a new trial.")

[10]Claim VII of 3.850 (PC-R. Vol. I, 91-92)

The United States 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 v. Georgia, 408 U.S. 238 (1972) (Brennan, 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. The cumulative impact of the errors in his trial infect Mr. Occhicone's conviction and sentence.

F. INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE

In claim II of his motion to vacate, Mr. Occhicone alleged that he was denied the effective assistance of counsel at the guilt phase of his trial (PC-R. Vol. I, 28-52). Although the lower court granted a partial hearing on this claim, it also partially denied a portion of this claim (PC-R. Vol. I, 173; Vol. II 226-30). Specifically, the lower court denied an evidentiary hearing on the following issues on the basis that they were either refuted by the record or procedurally barred: 1) counsel's failure to present evidence of Mr. Occhicone's cocaine use; 2) counsel's failure to supply their experts with sufficient background materials; 3) counsel's failure to question potential jurors as to a possible taint; and 4) counsel's failure to object to the testimony about defendant's refusal to take an atomic absorption test (PC-R. Vol. I, 173, Vol. II 226-30).

1. Trial counsel failed to investigate Mr. Occhicone's use of cocaine

Joanna Carrico Parmenter could have told counsel of Mr. Occhicone's cocaine problem:

> I testified at Dominick Occhicone's trial and at that time my name was Joanna Carrico. I have reviewed my trial testimony and the depositions that I gave. I had additional information that I would have given to Dominick's lawyers if I was asked. I only spoke with them at the deposition and at trial.
>
> I was a friend to Dominick and saw a rapid decline in his abilities to think and function. I went to Shooters Bar, several times, and took Dominick home because he was unable to drive. As I testified to at trial, after his breakup with Anita, Dominick began to drink more and more. He also started. using cocaine very heavily. He told me that he was afraid to go to sleep and had to use something to keep him going.
>
> After Dominick's trial, I spoke with Lilly Lawson who told me that she was with Dominick, at Shooters, on the night of his arrest. Lilly told me that Dominick was "really messed up." She said she was one of the last ones to see him before he was arrested. Lilly said her boyfriend Kenny, and her friend, Gene Swaggart, were also there that night. Lilly told me that she, Kenny and Gene talked about how messed up Dominick was that night.
>
> Dominick hung around with some of the largest cocaine dealers in the area there at Shooters. Some of the employees at Shooters provided Dominick with cocaine and I have seen them use cocaine with Dominick. I have seen Dominick them use cocaine with Dominick. I have seen Dominick purchase cocaine from one of the employees at Shooters. I was at the bar when Dominick used cocaine, and I was completely taken aback by the amount that he used and the frequency that he used cocaine.
>
> I have also socialized with Dominick outside

> the bars and saw him use large amounts of cocaine. His cocaine usage increased just after a time when Anita was at Dominick's house and told him that she had an abortion.

Affidavit of Joanna Parmenter, (PC-R. Vol. I, 120).

Counsel failed to investigate Mr. Occhicone's escalating use of cocaine during the time period leading up to the offenses. This evidence could have been instrumental in establishing a voluntary intoxication defense. (See Argument I, A.).

2. Failure to present experts with sufficient background information to conduct an adequate evaluation

Postconviction counsel has obtained the services of Dr. Glenn R. Caddy, who has evaluated Mr. Occhicone and has reviewed a wealth of background materials on Mr. Occhicone. Dr. Caddy opines that the pretrial evaluations done on Mr. Occhicone were inadequate in large part due to the fact that the experts did not have sufficient information to conduct a competent and professional evaluation of Mr. Occhicone. Based on his evaluation, Dr. Caddy would testify that at the time of the offense, Mr. Occhicone was functioning in an altered mental state in which his capacity to premeditate, to plan a course of action, and to make judgments was significantly diminished because of his intoxicated state.

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).

3. Failure to question jurors regarding a possible taint

The performance of counsel was deficient during voir dire. After learning that a spectator had been talking with prospective jurors and expressing her opinion concerning Mr. Occhicone's guilt, counsel failed to inquire of the prospective jurors to discern if they had in fact been tainted.

During voir dire, it came to the court's attention that a courtroom spectator was making statements that Mr. Occhicone was guilty (R. 144-5). The spectator was telling this to a prospective juror (R. 145). Counsel noted that when this spectator was pointed out to him, she was talking to another prospective juror (R. 146).

The spectator, Lela Loretta Lochard, was brought before the court to explain her conduct (R.147-54). She stated that she was a member of the "Homicide Victim's Group" appearing at the trial in support of Anita Gerrity, the victims' daughter (R. 148). She admitted making statements that Mr. Occhicone was guilty but denied saying he should get the death penalty (R. 149). These statements were made to a prospective juror who was later excused from the jury panel by defense peremptory strike (R.150, 161, 142). She denied telling anyone else except her husband about her belief in Mr. Occhicone's guilt (R. 151).

The trial judge reprimanded the spectator and ordered her not to discuss the case any further "in such a way so that it could be overheard by anyone else in that courtroom." (R. 154). Counsel then moved for a mistrial saying that other prospective jurors might have overheard the Victim's Group member (R. 154). The court denied the motion for mistrial, observing that there was no proof that "anyone has been tainted." (R. 155).

Another witness from the courtroom then testified that she was seated in the row right behind Ms. Lochard (R. 157-8). There were five prospective jurors in Ms. Lochard's immediate vicinity (R. 158). Ms. Lochard was saying that Mr. Occhicone was guilty in a loud voice (R. 158-9). Everyone in the back three rows could hear everything that she was saying (R. 159).

The trial judge adhered to his previous ruling on the defense motion for mistrial (R. 163). He told counsel that he could inquire about the matter on voir dire of the prospective jurors (R. 163). Inexplicably, counsel failed to question the prospective jurors to determine if they had been tainted by Ms. Lochard's comments.

The Sixth Amendment to the United States Constitution, and Article I, Section 16, of the Florida Constitution guarantee a criminally accused the right to a fair trial by an impartial jury. Misconduct by a courtroom spectator is grounds for a mistrial where the misconduct could "prejudice the defendant or influence the verdict." People v. Spain, 154 Cal. App. 3d at 851, 201 Cal. Rprt. 555 at 558 (Cal. Ct. App. 1984).

A court's failure to inquire whether jurors have been exposed to prejudicial information and, if so, whether they can still render an impartial verdict requires reversal for a new trial. Robinson v. State, 438 So. 2d 8 (Fla. 5th DCA), rev. den., 438 So. 2d 834 (Fla. 1983); Ferrante v. State 524 So. 2d 742 (Fla. 4th DCA 1988). The trial here put that burden of inquiry on counsel for Mr. Occhicone. Counsel's failure to do so is inexcusable and cannot be deemed a strategic decision. This court should now remand this case for an evidentiary hearing for which post-conviction counsel can interview the jurors in Mr. Occhicone's case to determine if any of the jurors overheard the spectator's remarks and, if so, whether the remarks might have influenced the verdict and sentence.

4. Failure to object to testimony regarding Mr. Occhicone's refusal to take an atomic absorption test

Counsel was ineffective for failing to timely object to the State's presentation of testimony, through Deputy Corrigan, that Mr. Occhicone refused to submit to an atomic absorption test when the refusal was based on advice of counsel. As a result, the jury heard the evidence and the State then improperly used the refusal as rebuttal to Mr. Occhicone's voluntary intoxication defense (R. 529-30).

In State v. Burwick, 442 So. 2d 944 (Fla. 1983), cert. denied, 466 U.S. 931 (1984), the Florida Supreme Court held that it was error to permit the state to rebut an insanity defense by introducing evidence that the defendant exercised his right to remain silent and requested to speak with an attorney after

receiving Miranda warnings. The Burwick decision rests on two independent rationales. First, the court found that post-Miranda silence has dubious probative value as it relates to mental condition. Secondly, the Burwick court held that the Due Process Clause of the United States Constitution, Fourteenth Amendment and Article I, Section 9 of the Florida Constitution, would not permit the state to benefit by assuring the defendant that he would not be penalized by exercising his Miranda rights and then impeaching him with testimony that he invoked his rights.

The United States Supreme Court has agreed that fundamental fairness guaranteed by the Due Process Clause of the Fourteenth Amendment is violated when the state uses the defendant's exercise of post-Miranda silence as evidence to obtain his conviction. Doyle v. Ohio, 426 U.S. 610 (1976). In Wainwright v. Greenfield, 474 U.S. 284 (1986), the court found the Doyle holding equally applicable where the state introduces the exercise of these constitutional rights to rebut an insanity defense. Commenting that the state could prove that the defendant's behavior appeared rational at the time of his arrest without mentioning exercise of his constitutional rights, the Greenfield court barred evidentiary use of an individual's exercise of constitutional rights after the state's assurance that the individual would not be penalized for the exercise of those rights.

Mr. Occhicone presented a defense of diminished capacity to the charge that he premeditated the shooting deaths of Mr. and

Mrs. Artzner. Therefore, the Greenfield and Burwick holdings are equally relevant to his situation.

The Third District, in Herring v. State, 501 So. 2d 19 (Fla. 3d DCA 1986), has addressed the admissibility of a defendant's refusal to take a "hand swab test." The Herring court held that fundamental fairness forbids the use of the defendant's refusal as proof of guilt unless the defendant was specifically told that the test was compulsory. Otherwise, the State could mislead the defendant into thinking that no adverse consequences would result from refusing the test.

Nothing in Deputy Corrigan's testimony indicates that Mr. Occhicone was advised that refusal to take the atomic absorption test could be used as evidence against him. Even more prejudicial was the use of this refusal in the prosecutor's closing argument. The prosecutor commented:

> As I was saying, at that point in time Deputy Corrigan went and attempted to get an atomic absorption test done of this Defendant, and the Defendant physically refused and told him: You have to fight me for this. This is a fellow who is so intoxicated, so clouded by poison, by alcohol, by marijuana, that he doesn't know what he's going that night. Yet, he knows enough not to give the identification technician his hands to do an atomic absorption test.

(R. 794).

Had counsel made a timely objection and proffered that Mr. Occhicone had already invoked his rights, requested counsel, spoken with counsel and been advised by counsel to refuse the test, the evidence would not have been presented to the jury.

Because of counsel's failure to object in a timely manner, the prosecution was allowed to argue that Mr. Occhicone's refusal was indicative of a sober and rational mind when it was merely the advice of counsel. Surely this evidence was prejudicial to Mr. Occhicone's voluntary intoxication defense as well as his penalty phase mitigation case.

5. Conclusion

Mr. Occhicone was denied a fair trial. Trial counsel's performance here was deficient, either because of the State's misconduct, or because of their own failures. Under either rationale, there was no adversarial testing. Accordingly, relief must be granted. At a minimum, this case should be remanded for a full and fair evidentiary hearing. At such time, Mr. Occhicone will establish his entitlement to Rule 3.850 relief.

G. INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE

Although the lower court granted a partial hearing on this claim, it also partially denied a portion of this claim (PC-R. Vol. II 230-3). The court denied an evidentiary hearing on the following issues: 1) counsel's failure to provide their experts with sufficient background information; 2) counsel's failure to present evidence regarding Mr. Occhicone's personal hardships; 3) counsel's failure to present evidence of Mr. Occhicone's cocaine problem; and 4) counsel's failure to request a special jury instruction adequately defining the aggravating circumstances (PC-R. Vol. II, 230-3).

1. Failure to provide experts with sufficient background information

Although Mr. Occhicone was evaluated by several mental health experts pretrial, they had no background information on Mr. Occhicone, and no information about Mr. Occhicone's mental state on the night of the homicides. As a result, they were easily attacked by the State during cross-examination. Had they been provided with this information, they could have effectively answered the State's questions on cross-examination.

Because of counsel's lack of investigation and preparation, Mr. Occhicone's judge and jury were presented with an incomplete picture of Mr. Occhicone. As a result, he lost the full impact of compelling statutory and nonstatutory mitigating evidence. Although counsel presented the testimony of several mental health experts, their lack of necessary background information is apparent from the record. The mental health experts, because of insufficient background information were unable to explain Mr. Occhicone's mental illness and brain damage in the context of his life history and background. Reasonable investigation would have resulted in the jury seeing the total picture of Mr. Occhicone's life history, his mental health problems and his significant substance abuse problem. This total picture would have presented the significant statutory and nonstatutory mitigation evidence in a consistent and rational manner, and would have precluded a sentence of death. 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).

Dr. Caddy would provide expert testimony concerning Mr. Occhicone's mental state at the time of the offense. He would graphically explain how Mr. Occhicone's intoxication affected his behavior on the night of the offense. Moreover, he would explain how Mr. Occhicone's mental health problems were aggravated by personal problems and by alcohol and substance abuse. As Dr. Caddy opines, at the time of the offense Mr. Occhicone was suffering from the combined effects of organic brain damage, major depression, chronic substance abuse, and related mental disorders. In addition, he was suffering from the lingering effects of the death of his wife and mother, the abortion, and the continuing torture that Ms. Gerrity put him through.

Counsel failed to investigate, develop, and present this significant mitigating evidence. As a result, compelling and substantial statutory and non-statutory mitigation evidence was lost. Given the fact that Mr. Occhicone was one vote shy of a life sentence, this evidence would have made a difference.

2. Failure to present evidence of Mr. Occhicone's cocaine use

Counsel failed to investigate Mr. Occhicone's increasing use of cocaine during the time period leading up to the offenses. Joanna Carrico Parmenter could also have told counsel of Mr.

Occhicone's cocaine problem. See (Argument III, F., 1).

3. Failure to present evidence regarding Mr. Occhicone's personal hardships

Mr. Occhicone's mental, emotional and substance abuse problems were of a long-standing nature. Nevertheless, those problems did not begin to cause any real hardships until Mr. Occhicone moved to Florida and began having marital difficulties with his wife, Sharon. His depression and his reliance on alcohol increased with the deaths of Sharon and his mother. Then Anita Gerrity came into his life, and the emotional roller-coaster went from borderline to beyond the line.

Counsel failed to investigate, develop and present this compelling and important information to Mr. Occhicone's jury. Just as significant, this information was not given to the mental health experts.

4. Failure to request special jury instructions

Counsel was ineffective for failing to request special penalty phase instructions which adequately defined the aggravating circumstances for the jury's consideration. Counsel did argue that the aggravating factors did not apply to Mr. Occhicone's case in light of the Florida Supreme Court's limiting construction of those aggravating factors. However, counsel should have requested special instructions which incorporated those limiting constructions. Counsel's failure to do so was unreasonable and not the result of a tactical or strategic decision. This failure was prejudicial to Mr. Occhicone's defense. See Occhicone v. Singletary, 618 So. 2d 730 (Fla.

1993).

5. Conclusion

Mr. Occhicone should have been granted an evidentiary hearing on each of these issues. Counsel's deficient performance at the penalty phase certainly prejudiced Mr. Occhicone, especially when these issues are considered in conjunction with those in which Mr. Occhicone was granted an evidentiary hearing. (See Argument I, B.).

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Occhicone's rule 3.850 relief. This Court should order that his convictions and sentences be vacated and remand the cases for a new trial, an evidentiary hearing, or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE & FONT

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief, which was generated in a Courier non-proportional, 12 point font, has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March 12, 1999.

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