IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,675

RICHARD BARRY RANDOLPH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal from the denial, by Circuit Judge Robert K. Mathis, of Mr. Randolph's motion for post-conviction relief filed pursuant to Fla. R. Crim. P. 3.850.

Citations in this brief shall be as follows:

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

"PCR___." -- record on 3.850 appeal to this Court;

"Ex.___." - Defendant's exhibits submitted at the 3.850 evidentiary hearing;

All other references will be self-explanatory or otherwise explained herein.

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REQUEST FOR ORAL ARGUMENT

Mr. Randolph 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. Given the seriousness of the claims involved and the stakes at issue, a full opportunity to air the issues through oral argument would be more than appropriate in this case. Mr. Randolph, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

A. Procedural History

Police found Minnie Ruth McCollum the morning of Monday, Aug. 15, 1988 at the Handy-Way store she managed in Palatka, Florida (R 1045-59). She was alive but had been beaten and stabbed (R 1060-89). Randolph was arrested Aug. 15 on charges of armed robbery and auto theft. McCollum then died at Shands Hospital in Gainesville. On Aug. 22 Randolph was arrested for first-degree murder (R 1-10). The Court appointed the Putnam County Public Defender (R 8) and Asst. Public Defender Howard B. Pearl[1] was assigned to represent Randolph. On Sept. 1, the grand jury indicted Randolph on first-degree murder, armed robbery, sexual battery and grand theft charges (R 11-12). At Randolph's Sept. 20 arraignment, trial was tentatively set for Nov. 14 before Circuit Judge Robert R. Perry (R 18-20).

On Oct. 10, Pearl asked Judge Perry to appoint Dr. Harry Krop as a confidential defense expert to access competency, sanity, and statutory and non-statutory mitigation (R 21). Judge Perry granted the request (R 22).

On Oct. 22 or 26th, Krop conducted a psychological evaluation of Randolph at the Putnam County Jail (R 1716; PCR 852 and 900). On Oct. 31, Krop provided his report to Pearl:

> I am writing to advise you that I conducted a psychological evaluation of Mr. Randolph at the Putnam County Jail on October 22, 1998. Mr. Randolph was cooperative during the evaluation and provided an account of his involvment in the offense in a manner fairly consistent with previous disclosures. From his

[1] Now deceased.

account, it is clear that he entered the facility to obtain money to support his drug habit and to take care of his family and once he became involved in a struggle with the victim, his behavior became increasingly violent and his judgment became more increasingly impaired. He reports that he had been using crack cocaine throughout the day and night of the incident and had also consumed a considerable amount of beer. Despite his apparent intoxicated state, it is this examiner's opinion that Mr. Randolph was Sane at the time of the offense and his is currently Competent to Stand Trial.

Significant factors derived from Mr. Randolph's report include a history of physical abuse and feelings of neglect. There were also a number of psychological dynamics pertaining to this individual's physical stature which can be explored further as to non-statutory mitigating factors but it does not appear that there are any known statutory mitigating factors at this time. I would recommend verification if possible of his alcohol and drug use on the day and night of the offense and I would like to interview the Defendant's parents to obtain additional background information. I have contacted Mr. Christine and he has indicated a willingness to provide me with any information or witnesses that I would consider helpful in my evaluation.

Thank you for referring this interesting client. As this case proceeds, I would like to discuss Mr. Randolph's evaluation with you in greater detail.

(PCR 900-01).

At a Nov. 3 pre-trial hearing, trial was continued to Dec. 1 at Pearl's request[2] (R 30, 31, 29). Pearl requested the State be required to elect between counts of the indictment. Pearl also requested a forensic pathologist (R 25-28, see also 71). Peter Lipkovic, M.D. was appointed (R 34-5; 52-3).

On Nov. 30, Pearl asked for another continuance again citing the incomplete status of the mental health evaluations,

[2] His motion pointed to the incomplete status of mental evaluations, depositions, discovery and investigation (R 30).

forensic evaluations, investigation, discovery, and depositions (R 36). Judge Perry granted the motion and a pre-trial conference was set for Jan. 5, 1989 (R 37).

On Dec. 22, the Court entered an order granting Pearl's request for a neurologist and Dr. B. J. Wilder of Gainesville was appointed (R 42-43).

On Dec. 29, Wilder saw Randolph at Shands Hospital (PCR 903). Randolph provided Wilder with his mother Pearl Randolph's address in Englehard, NC and two phone numbers for her, as well as a phone number for his father (PCR 903).

In his report Wilder reported Randolph's 1979 closed head injury, which rendered him unconscious for 1 hour, a childhood psychiatric referral, drug use, and high blood pressure[3]. Wilder reported that he had Randolph perform simple arithmetic calculations, draw a map and a clock and a cube, and take 2 short memory tests. Neither these tests nor the gross motor function tests revealed neurological abnormalities (PCR 906-07; see also Wilder's five lines of notes at PCR 905).

On Jan. 5, 1989, trial was set for February 20 (R 44).

On Feb. 1, Krop saw Randolph and conducted the MMPI, Beck Depression Inventory, and ALCAAD tests (an instrument for assessing a person's substance abuse tendencies)(R 1716-20; PCR 852-56). Krop reviewed witness statements, police depositions, and spoke to Randolph's father and girlfriend.

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[3] Putnam County Jail incarceration records confirm high blood pressure and that Randolph was treated for anxiety, headaches and hypertension (PCR 945-46).

On Feb. 2, the state filed its answer to demand for discovery listing 37 witnesses (R 54-5; see also 61-2). The defense announced ready for trial (R 56). Trial counsel filed his witness list for trial with 3 witnesses, Janete [sic] Betts, Verna Betts, and Dr. Krop (R 58).

On Feb. 13, Pearl conducted a re-trial of the Johnny Robinson case in St. Augustine, Florida (R 712; 786; 1873)[4].

On Feb. 16, an attorney from the Public Defender's Office hurriedly[5] filed motions on Randolph's behalf. The motions were to declare chapter 921.141(5)(i) unconstitutional, to request special penalty phase verdict forms, for correction of Caldwell error, and for individual and sequestered voir dire (R 105-32).

Trial commenced Monday Feb. 20. Counsel stipulated to the admission of 9 items of State's evidence (R 193). The State sought an additional penalty phase jury instruction regarding the great weight the court would give the jury's recommendation (R 194). Asst. Public Defender Larry B. Henderson argued Randolph's 4 pending motions and presented a proposed preliminary jury instruction regarding the Caldwell issue. The Court denied Randolph's motion for individual and sequestered voir dire and Henderson's request for an evidentiary hearing. Henderson argued that sections 921.141(5)(h) & (i) were

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[4] The record includes numerous references to this fact, which this Court has already judicially noticed.

[5] Undersigned assumes preparation was hurried because these motions contain errors in their prayers for relief and occasionally refer to the defendant as "Robinson" rather than "Randolph" (R 123, 126, 127).

unconstitutional and the State proposed submitting additional jury instructions (R 775-93).

The jury convicted Randolph of first degree murder, armed robbery, sexual battery, and grand theft (R 583). This Court's opinion affirming the convictions on direct appeal summarizes the evidence presented at trial. Randolph v. State, 562 So. 2d 331 (Fla. 1990). On Friday, Feb. 24, the penalty phase occurred. According to this Court's opinion:

> Randolph presented the testimony of Dr. Harry Krop, a psychologist who examined Randolph. He opined that none of the statutory mitigating circumstances existed, although several nonstatutory circumstances most likely contributed to the offense. He testified that Randolph, who was adopted when he was five months old, had problems getting along with people in school, and his behavior problems caused him to be referred to psychotherapy for a year in the third grade. His mother was emotionally unstable and was hospitalized for psychiatric reasons on a number of occasions, and his father was physically abusive, and administered discipline by tying him and beating him with his hands, a broomstick, and a belt.
>
> Despite his emotional deficiencies, Randolph graduated from high school. He received an honorable discharge from the Army; however, he started using drugs during his service, including marijuana and cocaine. In 1984 he began using highly-addictive crack cocaine. Dr. Krop testified that, unlike alcohol intoxication, crack cocaine's effects are not readily apparent from merely looking at a person. When someone regularly uses crack cocaine, the effects of the drug stay in the blood; one's personality and behavior are affected, not necessarily by an immediate ingestion of the drug, but rather by its use over time. He believed that Randolph's abnormal personality was greatly influenced by his drug addiction at the time of the offense.
>
> Dr. Krop further testified that Randolph regretted what had happened; he was ashamed and embarrassed that he had lost control, and was remorseful about what he had done. The psychologist believed that Randolph had nothing against Mrs. McCollum, that he fully intended only to enter the store and steal the money while she was outside, but that things happened that caused him to panic. He

concluded that Randolph's criminal behavior was influenced by his drug addiction.

Randolph, 562 So. 2d at 334. (See R 868-81; 1732-45).

In his testimony, Krop also stated that the background information, that which he was aware of, was consistent with Randolph's self-report and that Randolph appeared to be candid and acknowledged responsibility for the offense (R 1720-23; PCR 856-59). Trial counsel Pearl specifically elicited the following from Krop regarding the existence of statutory mitigating circumstances (PCR 861-2; R 1725-27):

> [] we had difficulty obtaining conclusive or verification to support the nature of this disturbance, it's referred to in the DSM III - which is the diagnostic and statistical manual of mental disorders. This is basically the Bible used by psychologists and psychiatrists to determine what the diagnosis is - it's referred to as an atypical personality disorder.
>
> It meant the person has several traits, but we cannot classify it as any one kind of personality disturbance.
>
> We know, at least from the father's report and also a self-report, that Mr. - Mr. Randolph had psychotherapy for about a year when he was in the third grad. He was referred by his teachers. The father indicated tome that he took him for therapy.
>
> The father was not particularly a good historian in terms of the nature of any kind of diagnosis, so again, we don't have records, we just know that he was in trouble in terms of seeking professional help from a young boy.
>
> And, again, there are various traits that he exhibits that would sort of run the gamete [sic], some types of inadequacies and so forth.
>
> So he has an ongoing personality disorder, and that was certainly operating at the time of the offense.
>
> Q. Well, Doctor, let me interrupt just a moment. You have chosen to interpret the term "extreme emotional disturbance," because there is no judicial guidance to tell you what that means, as opposed to mere mental disturbance; is that so?
>
> A. That's correct.

Q. Could there be a disagreement among members of your profession as to whether - as to the meaning of the term "extreme"?
A. I'm sure there could be, yes.
Q. Would it be possible - is it possible that some members of your profession, who have your same expertise, could say that in their opinion Richard Randolph suffered from an extreme mental disturbance at the time of the commission of the capital felony, even though you disagree, based upon the same factors and same information and the same conduct?
A. Again, depending on the, I guess, internal criteria that each mental health professional uses, I certainly would expect that there may be some disagreement.

Again, I have chosen my own criteria based on numerous evaluations to use the term extreme when those certain factors exist. Certainly others might disagree with me on that.
Q. But would you agree or disagree with me if I were to suggest that the term extreme in that phase [sic] is somewhat vague and subject to subjective interpretation?
A. Well, sure. I think that anytime a psychologist is rendering opinion or interpreting, there's some subjectivity that goes into that.

One of the - one of the advantages of being able to use DSM III, or subsequently the DSM-IIIR, which is the revised version and has some slight modifications, is that there are some specific criteria listed as far as when we can and when we cannot diagnosis a person according to a particular diagnosis.

Again, you're correct in asserting that there's nothing in here that states extreme or substantial.

Those are more or less judicial kinds of terms, and psychologists may interpret that differently.

(R 1727-30; PCR 863-66)

Krop explained that he did not know what Randolph's use of crack cocaine was around the time of the offense. Krop said he understood Randolph's general use of crack cocaine (R 889-90; PCR 1753-54).

By 8 to 4, the jury recommended death (R 1850).

On March 1, Pearl filed Randolph's Motion for New Trial (R 600-604). On March 7, Pearl submitted a letter outlining non-statutory mitigation (R 606-07).

On March 9, Randolph's Probation officer interviewed Randolph for the Pre-Sentence Investigation [PSI] (PCR 981-82; 984-89). Randolph provided Probation with the telephone numbers of his mother's neighbor Mary Jane in Engelhard, NC, as well as his mother's address.

Randolph's North Carolina high school, Mattamuskeet School, provided Probation a summary of his marks. The summary showed that Randolph had a 1.07 average and ranked 77th in a class of 82 students (PCR 994). On March 27, 1989, attorney Pearl gave Probation his input (PCR 983).

On March 31, Probation issued its PSI (PCR 948-63). The PSI indicated Randolph was a street person at the time of the offense and had been homeless for several weeks, sometimes sleeping in a dumpster at the Handy Way. Probation classified Randolph's mother as an alcoholic. Probation spoke with North Carolina Police Officer Willie Gibbs who explained that because Pearl Randolph drank heavily, she and Barry had had problems.

Judge Perry sentenced Randolph April 5, 1989. Pearl, relying on Randolph's statement of remorse in the PSI, urged the Court to consider Randolph's extreme remorse and sorrow for the victim's family. Pearl then referred to his March 7, 1989 letter to the court and asked the Court to sentence Randolph to two 25-year consecutive sentences rather than death (R 1888-90). John Tanner presented the State's argument which was responded to briefly by Pearl (R 1890-93). Judge Perry sentenced Randolph to 9 years prison for the armed robbery and to 27 years prison for the sexual battery. Then, Judge Perry read the judgment and

sentence, sentencing Randolph to death on the murder charge, into the record (R 1893-1905). Judge Perry then signed and filed it (R 1906; 641-52).

The Judgement and Sentence read in pertinent part:

F.S.921.141(5): RELEVANT AND APPLICABLE AGGRAVATING CIRCUMSTANCES

(d) THE CAPITAL FELONY WAS COMMITTED WHILE ENGAGED IN THE COMMISSION OF FLIGHT AFTER COMMISSION OF A SEXUAL BATTERY

This aggravating factor has been proven beyond a reasonable doubt by the state.

The facts adduced at trial show conclusively that the Defendant was engaged in and completed the crime of Sexual Battery as to the victim. Upon completion of the extremely brutal beating, the Defendant, by his own admission, masturbated and placed his penis inside of her vagina culminating in sexual orgasm after the victim had been stripped of her lower clothing and while she lay helpless on the convenience store floor. The Defendant's version of the sexual battery in this Court's opinion runs contrary to the evidence introduced at trial. Autopsy photos that this Court admitted into evidence but did not allow the jury to view, in order to insure the Defendant a fair trial, show massive bruising and trauma between the upper thighs and the general vaginal area which, in this Court's mind, are consistent with that of a brutal and violent rape. The Defendant's version of the rape is incredible and most unbelievable. Non-motile sperm was detected by FDLE analysts on a swab that a University of Florida resident obstetrician-gynecologist prepared from a swabbing deep within her vagina. The jury found the Defendant guilty of sexual battery with force likely to cause serious personal injury or with a deadly weapon as charged in the indictment.

(e) THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST

This aggravating factor has been proven beyond a reasonable doubt by the state.

It was apparent, based on all the facts at trial, that Minnie Ruth McCollum was murdered because she could identify the Defendant, RICHARD BARRY RANDOLPH, as the perpetrator of criminal acts, and thus report such facts to law enforcement which would lead to his lawful arrest for Robbery.

The Defendant knew the victim and had previously worked with her at the Handy Way store until his employment ended by store officials. It is clear that she could have positively identified him to law enforcement personnel. In addition, the Defendant's statement to detectives were to the effect that he had to do it, because she knew him! In addition, her screams and moans, according to the Defendant's statements, were such that the Defendant found it necessary to silence his victim to prevent his detection and arrest.

(f) THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN

This aggravating factor has been proven beyond a reasonable doubt by the state.

The facts adduced at trial show conclusively that the Defendant was interrupted by the victim when in the process of attempting to steal money and/or lottery tickets from the Handy Way story. The jury specifically found that a robbery was committed and that the Defendant took as part of the robbery, lottery tickets which he cashed the winning ones elsewhere, her car keys and her Buick Automobile which he used as a getaway car.

(g) THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

This aggravating factor has been proven beyond a reasonable doubt by the state.

RICHARD BARRY RANDOLPH had been employed at the Handy Way store in East Palatka and was familiar with the layout of the store, the victim's daily routine and the combination to the safe. Apparently the Defendant had a need from money and consequently went to the store on August 15, 1988 to steal money from the store's safe. When Minnie Ruth McCollum interrupted the Defendant in the process of stealing from the store he brutally beat her about the head with his hands and fists, kicked her, strangled her with a ligature and stabbed her with a knife, inflicting wounds which medical evidence showed caused her death on August 21, 1988. The Defendant went back to the victim on four or five separate occasions while attempting to murder he. His statements reflect the fact that she was much tougher than he thought and that he had to repeat the beatings and/or strangulations. From her repeated screams during the beatings, strangulation, and stabbing in the throat it is clear that the victim agonized over he injuries and impending death.

F.S.921.141(6): MITIGATING CIRCUMSTANCES PRESENTED BY THE DEFENDANT

(a) THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY

This mitigating factor has not been proven by a preponderance of the evidence.

Although not specifically offered by the Defendant, there was discussion and testimony by the defense regarding the Defendant's criminal history. The Court has become aware of multiple convictions in North Carolina and Florida as referenced in the presentence investigation.. Consequently, this Court cannot find this mitigating circumstance appropriate.

(b) THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

This mitigating circumstance is not supported by a preponderance of the evidence. According to Dr. Harry Krop, clinical psychologist, the Defendant was diagnosed as having an A-Typical personality disorder, a recognized anti-social disorder, as found in the Diagnostic And Statistical Manual of Mental Disorders, 3rd Ed., DSM-III, but oddly deleted and placed in a catch-all "all others disorders" category in the most recent DSM-III-R (revised edition). Regardless, it was Dr. Krop's expert opinion that this did not rise to the level of extreme mental or emotional disturbance. The Court finds upon reviewing all the evidence that this statutory mitigating circumstance has not been proven.

The Court notes that the Defendant has not proven or argued any other statutory mitigating circumstances. The Court, upon reviewing all of the evidence finds that none of the other statutory mitigating circumstances have been proven.

SPECIALLY PROFERRED MITIGATING CIRCUMSTANCES (NON-STATUTORY)

This Court has considered all the evidence presented with reference to consideration of non-statutory mitigating circumstances including, but not limited to, those hereafter set forth and finds said factors even if proven would not outweigh any one of the aggravating factors standing alone.

1. THE DEFENDANT WAS A CRACK COCAINE ADDICT

This non-statutory mitigating factor taken at its best light does not outweigh the aforementioned statutory aggravating factors. Regardless, testimony was consistent that the Defendant was not under the

influence of any intoxicating drug or substance at the time of the offense. This fact is substantiated by friends and relatives who saw and observed the Defendant shortly after the commission of this crime. The purposeful manner in which this offense was committed and all circumstances surrounding this offense undermine the Defendant's self-serving assertion that he was under the influence of crack cocaine at the time of the offense.

2. THE DEFENDANT WAS ADOPTED AND NEVER BONDED WITH HIS MOTHER.

The Defendant, having been adopted, never had a loving relationship with his mother. This testimony adduced through Dr. Harry Krop, shows a young man whose mother had a history of mental problems. Regardless, Dr. Krop testified that the Defendant was loved by both parents. Thus, this factor even if proven does not rise to the level of a mitigating circumstance which would, in conjunction with Paragraph One, outweigh the aggravating circumstances found to exist.

3. THE DEFENDANT POSSESSES AN A-TYPICAL PERSONALTIY DISORDER.

This mitigating circumstance while proven by a preponderance of the evidence is of such a weak nature that it does not rise to the level of a mitigating factor when viewed in conjunction with the above mitigating factors that would outweigh the statutory aggravating factors.

4. THE DEFENDANT EXPRESSED SHAME AND REMORSE FOR HIS CONDUCT.

This mitigating factor adduced through the testimony of Dr. Harry Krop, and argued to the jury by defense counsel is not a mitigating factor when viewed in conjunction with the other mitigating factors that would rise to the level of such that would outweigh the statutory aggravating factors. This factor is of very little weight given the circumstances of this offense.

THEREFORE, this Court having considered the aggravating factors proven by the state beyond a reasonable doubt and all mitigating factors established by the defense, along with all other relevant testimony and argument as the statutory and non-statutory mitigating factors, this Court does hereby find, by law and evidence, that said mitigating factors do not outweigh the aggravating factors found to exist. In fact, any of the aggravating factors

found to exist would outweigh all mitigating factors, statutory and non-statutory.

(R 641-46).[6]

Randolph's appeal raised 9[7] issues. This Court found 2 errors: 1) that it was error for the State to elicit testimony from his girlfriend, Janene Betts that he lacked remorse, and 2) that it was error for the State to present evidence of the effect of the blood transfusions on the victim. This Court found the errors harmless and affirmed. Randolph v. State, 562 So. 2d 331 (Fla. 1990), *cert. denied* 498 U.S. 992 (1990).

On April 6, 1992, Randolph filed his first Motion to Vacate Judgment and Sentence (Case No. 81,950 ROA at 1-12). That motion was later amended (Case No. 81,950 ROA at 47-171, PCR 6337-58). On April 8, 1992, Florida Supreme Court Chief Justice Shaw requested that the Chief Judge of the Seventh Judicial

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[6] Upon commitment to the Department of Corrections [DOC], Randolph was placed in the Special Management Wing because of his impulsive behavior, suicidal or homicidal ideation, mood deterioration, and an inability to stand noise (PCR 1506). DOC found that he was coherent but depressed, angry, hostile, and chronically immature, especially demonstrating immaturity toward socialization, relationships and in his sense of right or wrong. Randolph was confined and treated with Vistaril 50 mg every morning and 100 mg. every afternoon (a sedative) plus Choridine .2 mg. daily (an anti-hypertension drug)(PCR 1506). DOC placed Randolph on suicide watch and he continued to demonstrate impulsive behavior. DOC maintained Randolph on administrative confinement for some time but eventually he adjusted to confinement. DOC continues to treat Randolph for hypertension.

[7] Witherspoon error; denial of motion for individual and sequestered voir dire; and regarding a comment by a potential juror; admission of autopsy photos, admission of evidence of regarding the effects of the blood transfusions to the victim; the heinous, atrocious, or cruel aggravating factor; non-statutory mitigating factor jury instruction; jury findings in penalty phase; trial court failure to findings; and death penalty statute is unconstitutional.

Circuit consolidate all cases in which capital post-conviction defendants had raised "Howard Pearl" claims. Justice Shaw assigned Judge B.J. Driver (Senior Judge) to hear all cases involving the "Howard Pearl" issue. Judge Driver denied all relief.[8] This Court vacated Judge Driver's order and remanded Randolph's case for another evidentiary hearing. Randolph v. State, 676 So. 2d 369 (Fla. 1996).

Over objection,[9] Judge Mathis conducted that evidentiary hearing, and a hearing on Randolph's Motion to Compel[10] on July 22-24, 1997.

The State was unwilling in advance of the hearing to stipulate to the admissibility of the prior record from the "Howard Pearl" hearing. Once former Sheriff Donald Moreland testified, the State agreed to stipulate to the admissibility of the evidence from the prior hearing (PCR 2997; 2986-3016).

Randolph had subpoenaed James Hunter to testify at the hearing regarding Randolph's drug use near the time of the offense. Hunter, represented by CCR Middle Region attorney

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[8] This Court granted Randolph's motion to consolidate the record of the proceedings in Case No. 81,950 into this case. Randolph relies on that record and the Statement of the Case and Facts presented in the Initial Brief of that case, for the facts contained therein.

[9] Randolph had requested a continuance because his lead attorney would not be able to be present at the evidentiary hearing without a continuance. See Argument III.

[10] Randolph sought compliance with his chapter 119 requests for public records in a Motion to Compel filed March 6, 1989 pursuant to Florida Rule of Criminal Procedure 3.852 (PCR 1-10). The hearing on that motion lasted all day July 22 (PCR 2884-3133).

Pamela Izakowitz, moved to quash the subpoena on the grounds that Hunter would assert his fifth amendment rights (PCR 275-77; 3126-40). Judge Mathis granted the Motion to Quash (PCR 3140).

Randolph then asked the State to jointly file a continuance motion in this Court. Randolph wanted to investigate and if needed amend the Motion to Vacate due to the voluminous records produced during the first day of hearing[11] (PCR 3153-54). The State refused (PCR 3141-59). The hearing continued. See infra part C, Statement of the Case and Facts, and Arguments II-VII.

During the course of the hearing, Judge Mathis granted Randolph's request to depose the custodian and investigator of the Palatka State Attorney's Office, and Allen Miller of the FDLE, because these witnesses could not or did not appear at the hearing (PCR 3131).

When the custodian of the Palatka State Attorney's Office, Assistant State Attorney John Stevenson, was deposed, he produced a banker's box of documents (PCR-S 75-132)[12]. In the box, undersigned found a draft judgment and sentence (Ex 1; PCR 4681). Judge Mathis granted Randolph leave to file an Amended Motion for Postconviction Relief based on the draft judgment and sentence (PCR 4211-12). Randolph filed his 3rd Amended Motion

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[11] Of course, a continuance would also have permitted Randolph to have the benefit of a knowledgeable and experienced lead counsel at his hearing. See Argument III.

[12] Undersigned estimated that the box contained 2200+ pages of documents; well over the 797 copies provided to postconviction counsel in 1992 (See PCR 3760). The State Attorney's Office eventually provided a copy of that box of records on Nov. 26, 1997.

to Vacate Judgement of Conviction and Sentence raising claims XX (regarding the draft judgment and sentence) and XXI (regarding Florida's electric chair)(PCR 4239-4562).

On Feb. 24, 1998, Judge Mathis issued an order granting an evidentiary hearing on claim XX and denying claims I-XIX and XXI (PCR 4586-4615; PCR-S 239-1811).

On or about April 15, 1998, undersigned filed a Motion to Disqualify the State Attorney's Office (PCR 4640-44). The Court denied the motion (PCR 4648-49). Undersigned also filed a Motion to Permit Discovery pursuant to State v. Lewis[13] requesting permission to depose State Attorney John Tanner, Asst. State Attorney Sean Daly, and 7th Judicial Circuit Judge John Alexander. Each of these individuals had participated in the prosecution of Randolph's case (PCR 4645-47). Alexander had refused undersigned's request to discuss the matter and neither Tanner nor Daly had come forward with any information about the draft judgment and sentence (PCR 4646 fn.1). Undersigned requested a hearing on the motion but Judge Mathis denied the motion without a hearing (PCR 4648-49). Undersigned sought reconsideration (PCR 4650-56).

The evidentiary hearing on claim XX was conducted April 24, 1998.[14] See infra part B, Statement of the Case and Facts, and Argument I. After the Claim XX hearing, Judge Mathis issued an

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[13] 656 So. 2d 1248 (Fla. 1994).

[14] The Court originally scheduled the hearing for March 3, 1998 (PCR 4614; PCR-S 133-34) but granted Randolph's Emergency Motion for Continuance and rescheduled the hearing to April 24, 1998 (PCR 4567-85; 4616-38; 4639).

order denying the claim (PCR 5182-5203). Randolph filed a Motion for Rehearing addressing various claims (PCR 5204-13) and attaching a letter dated Aug. 19, 1997 from Krop to undersigned and an affidavit by former law clerk for Judge Perry, Pamela Koller.[15] Judge Mathis denied the Motion for Rehearing after considering it and its attachments (PCR 5214). This appeal follows (PCR 5215).

B. April 1998 Evidentiary Hearing: Argument I Facts

At the April 24, 1998 hearing, the State stipulated that the draft judgment and sentence came from the State Attorney's file (PCR 5313; Ex. 1).

The draft judgment and sentence is an original document bearing a mark commonly recognized to mean "insert." That mark appears between two sentences near the bottom of page 1 (PCR 4681). In the final judgement and sentence, the following language appears at that location:

> The Defendant's version of the sexual battery in this Court's opinion runs contrary to the evidence introduced at trial. Autopsy photos that this Court admitted into evidence but did not allow the jury to view, in order to insure the Defendant a fair trial, show massive bruising and trauma between the upper thighs and the general vaginal area which, in this Court's mind, are consistent with that of a brutal and violent rape. The Defendant's version of the rape is incredible and most unbelievable.

At the judge's signature line, the draft judgment and sentence bears the initials "R.P.R." and the date. On the final

[15] Koller's affidavit explains that "[a]t no time did [she] personally remove any documents from [her] file and place them in a different file maintained by the Seventh Circuit State Attorney's Office." (PCR 5212-13).

judgment and sentence, the judge's actual signature appears as well as a date written by the judge.[16]

Randolph presented evidence that neither the draft judgment and sentence nor any information revealing its existence had ever been previously disclosed by the State. Howard Pearl, Jeff Walsh, Martin J. McClain, and Gail Anderson - Randolph's former attorneys and former CCR investigator, each testified regarding this issue (PCR 5228-5321; 5359-72).

The State's only witness was Asst. State Attorney R. Robin Strickler who testified that when he was the division chief of the Palatka branch office in 1992 and responsible for responding to Randolph's public records request, he "went through the file, [and] took out lawyer's notes" (PRC 5371), but claimed no formal exemptions from disclosure. He stated there was no record of what he turned over and what he did not (PCR-5372).

Collateral counsel then presented Pamela Koller, an attorney working as an Asst. State Attorney in Palatka. Koller testified that from Jan. 1989 until April 1992, she was Judge Perry, Judge Eastmore and Judge Boyles' law clerk.

Regarding the preparation of the Randolph judgment and sentence, Koller testified that prosecutor Alexander worked with her at her computer on the language of the order (PCR 5344). Koller explained that she "recall[ed] being in [her] office in front of the computer, my computer. And I remember he was there

[16] The draft judgment and sentence is otherwise identical to the final judgment and sentence.

and was assisting me with the wording." Specifically, "John Alexander assisted with some language about that, even if the Court should not find one of the aggravating factors sufficient, any one of these aggravating factors would outweigh all of the mitigating factors that were presented." (PCR 5324).

Clerk Koller knew that it was after the guilty verdict that prosecutor Alexander helped her write the order (PCR 5324) and that neither Randolph, Pearl nor Perry were there (PRC 5324-25; 5347). She believed that prosecutor Alexander must have reviewed the entire draft judgment and sentence to be able to instruct her where to insert the language[17], but she did not remember that he read it in her presence (PCR 5340-41).

Koller examined the State's draft judgment and sentence (Ex. 1) and testified to never seeing it before reviewing it in preparation for her testimony[18] (PCR 5327). Koller also testified that she had no recollection of ever seeing a document initialed like the State's draft judgment and sentence and that no draft or copy in her files bore similar initials (PCR 5332; 5339).

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[17] She was very clear that prosecutor Alexander was there "to add [] language" which was particularly important to Judge Perry and to help ensure that the order would not be reversed on appeal (PCR 5340; 5344).

[18] Asst. State Attorney Daly was the first to show Koller the draft judgment and sentence. Daly faxed it to her on February 17, 1998. Undersigned later showed it to her again when undersigned met Koller in her office and interviewed her about the order (PCR 5338).

Koller testified that she had no recollection of ever giving the State a draft copy of the judgment and sentence, but it appeared to her that the State's draft judgment and sentence was printed from her printer. She had no idea how it came to be in the State Attorney's file (PCR 5337-39).

Koller explained that she did not know whether Judge Perry had contacted prosecutor Alexander or vice versa, just that "Judge Perry wanted to make sure that this order would be upheld on appeal" and that was why prosecutor Alexander was there to help her (PCR 5344). She did however assume that prosecutor Alexander and Judge Perry spoke at some point about the order because she did not "think that [she] would have amended [the] order without -- at some point Judge Perry [giving] [her] permission to do so" (PCR 5351-2). Whatever out-of-court contact prosecutor Alexander and Judge Perry had was out of her presence (PCR 5346).

Koller testified that the reason she could not be specific about how soon after the jury convicted Randolph she learned that Perry intended to sentence him to death was because "he never intended to do anything else" once he heard the evidence at trial (PCR 5350-53).

Collateral counsel also presented Thomas Vastrick, a handwriting expert. Vastrick testified to reviewing the State's draft judgment and sentence, the final sentencing order, over 130 samples of Judge Perry's known initials or signature (PCR 5392), and several miscellaneous handwritten documents from the State Attorney's file (PCR 5387-8). Vastrick found "significant

differences" in the format and character of the writing on the draft judgment and sentence (ex. 1) and that on the known samples of Judge Perry's handwriting and that therefore he did not believe Judge Perry wrote the initials and date on the draft (PCR 5393).[19] Vastrick also found that there were "significant similarities" between handwriting found on documents in the State Attorney's file and that on the draft judgment and sentence (PCR 5413-14).

C. July 1997 Evidentiary Hearing: Argument II-VI Facts

At the July 22-24, 1997 hearing, Randolph presented the following evidence in support of his remaining Rule 3.850 claims.

1. Howard Pearl

Pearl testified that Randolph was a cooperative client (PCR 3180) and that he had hired Krop as a confidential expert to conduct the entire mental health investigation and to examine Randolph for competency, sanity and mitigating circumstances (PCR 3181-82). Pearl explained he shared Krop's written report with the prosecutor (PCR 3183).

Pearl testified that had he known of Timothy Calhoun, Ronzial Williams, Michael Hart, or James Hunter, he would have provided the information to Krop because the information might have satisfied Krop that there was a mitigator or other evidence to rebut intent (PCR 3186-88).

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[19] The Circuit Court made a contemporaneous finding to this effect (PCR 5397).

Pearl explained he requested neither school (PCR 3189) nor military records (PCR 3191), nor could he have had a strategic reason for not providing them to his expert, because he did not have them (PCR 3192-93). Pearl said that he would have left it to Krop to "be the judge, really, of what was relevant in Mr. Randolph's life that might help us to present to the jury mitigating circumstances" (compare PCR 3191-92, with Pearl's examination of Krop indicating he knew Krop felt that the law did not provide adequate guidance of what was a statutory mitigating circumstances and therefore Krop had made up his own standard at R 1727-30). He further explained that he neither interviewed Randolph about his school experiences nor would have reviewed school records (if he had them) with much interest, but rather would have forwarded them to Krop as "he was the expert in this area, not I" (PCR 3194). Pearl explained that his approach to the penalty phase investigation was to leave it to Krop to: 1) be the judge of what was relevant and 2) conduct any investigation required (PCR 3181; 3193).

Pearl did not interview Shirley Randolph, Timothy Randolph, or Pearl Randolph (PCR 3194; 3196). Pearl's general practice was to rely on Krop to conduct the interviews and present the "history of the patient" (PCR 3194). He relied on Krop to "find[] these things out. He selects those things which he feels are relevant to the testimony he wants to give" (PCR 3194). He had Krop present the information so he would not have to worry about "loose cannons [family and lay witnesses] on the deck," (PCR 3195).

Regarding Randolph's adoptive father, Timothy Randolph, Pearl explained that he did not interview Timothy but would have wanted Krop to provide whatever information Timothy had about Randolph's early life. Pearl explained he do not intend to travel to North Carolina or send his investigator to do so, so he did not seek authorization for travel (PCR 3195).

Regarding Randolph's adoptive mother, Pearl Randolph, attorney Pearl testified he would have wanted Krop to inquire of Randolph's parents, whether he, as counsel, had the information or not. Pearl said if Krop had had the information provided by Pearl Randolph, he would have elicited the information during Krop's testimony (PCR 3197).

Pearl also testified that in his experience, drug use and drug addiction was relevant to statutory mitigation in Randolph's case only if there was drug use on the day of the incident (PCR 3200-01). Pearl said Randolph told him that he was under the influence of crack cocaine or "he wouldn't have done what he did" (PCR 3201) but the only other person he spoke to about Randolph's drug use was his girlfriend, Janene Betts, who was a state witness.

Pearl conceded that without voir diring the jury panel on the defense of voluntary intoxication, there was no way to know about the particular biases of the potential jurors (PCR 3267-68).

Pearl conceded he was ignorant of how this Court approaches capital appeals because he only "occasionally read a case now and then"(PCR 3279).

Pearl testified that he did not call various witnesses because he did not know they existed (PCR 3260).

2. Hyman H. Eisenstein, Ph.D - Neuro-psychologist

Collateral counsel presented neuro-psychologist Hyman H. Eisenstein, Ph.D. (Def. Ex. 23, PCR2 807-09; 3365-3516). Eisenstein, a clinical psychologist, practices in Dade and Broward counties, interned at Fairfield Hills Hospital in Newtown, Connecticut, performed his post-doctorate at Yale University Medical School, had at the time 15 years experience as a neuro-psychologist and clinical psychologist (PCR 3366), and is board certified in neuro-psychology by the American Board of Professional Neuro-psychology (PCR 3367).

Eisenstein conducted extensive evaluations of Randolph on 4 different occasions (a total of 20-25 hours) (PCR 3383).

Eisenstein's evaluation consisted of conducting clinical and family interviews, standardized psychological and neuro-psychological tests and reviewing documents (PCR 3384-85). Eisenstein reviewed this court's decision on direct appeal[20], the judgement and sentence imposing death, the penalty phase testimony of Krop, Krop's report, the files and report of Wilder, Randolph's statement, Randolph's Putnam County Jail records, Florida Probation and Parole file, prison inmate and medical files, school records and military records, and affidavits of Pearl Randolph, Timothy Randolph, Ronzial

[20] Because it sets forth the evidence presented at trial.

Williams, Janene Betts, Michael Hart and Timothy Calhoun (Def. Ex. 24-28; PCR 3398-99).

Eisenstein conducted the Halstead-Reitan neuro-psychological battery on Randolph twice and found significant organic brain damage (PCR 3391-3402). Based on the background materials, head traumas, cognitive impairment due to chronic drug use and as shown by the Halstead-Reitan, the history of learning disabilities and emotional trauma, Eisenstein's found that 2 mental health statutory mitigating circumstances existed at the time of the offense as well as a plethora of non-statutory mitigation (PCR 3417-19). As non-statutory mitigation Eisenstein found: Randolph was raised in a chaotic and abusive home, his mother was an alcoholic and violently dangerous, Randolph was treated by a psychiatrist for 2 years and prescribed medication, Randolph had severe temper tantrums from an early age, exhibited bizarre behavior such as biting his fingers and hands incessantly when upset, and self-medicated to escape his own inability to deal with the emotions of anger, frustration and disappointment, conditions exacerbated by his particularly demanding and disapproving father (PCR 3429-30).

Eisenstein explained in detail how the statutory mitigating factors apply despite the fact that Randolph attempted to open the safe, tore the video camera from the wall, etc. For example, he was incapable of actually doing the one thing he supposedly "planned" to do: open the safe. He could not remember the numbers, he could not get the sequence straight, and he could not open the safe. Further, he explained that some

of Randolph's conduct was "rote" and therefore not inconsistent with the impairments he found. In fact, most of Randolph's planning went awry because he couldn't extricate himself from the situation because of his impairments and this conduct reveals the impaired judgement that underlies the existence of the mitigating factors (PCR 3506-08). For example, Randolph pulled a video camera off the wall, but rather than thinking to take it, he left it behind (and the police found it).

In addition to statutory mental health mitigating factors, Eisenstein testified to the existence of substantial non-statutory mitigating circumstances. This testimony explained Randolph's psychological disorders, the psychological significance of Randolph's adoption, troubled childhood, feelings of abandonment and rejection, repeated efforts by Randolph to lead a responsible lifestyle, Randolph's military service and job history, relationship with his father which included physical abuse, his relationship with his mother which while loving, was emotionally unstable due to Mrs. Randolph's instability and alcohol abuse.

3. Timothy Randolph

Randolph's father, Timothy Randolph, testified that he and his first wife Pearl Randolph adopted Barry[21] in 1963 at age 4 months. He and Pearl lived in Brooklyn, New York, having met and married there in 1957 and had no other children. Timothy was a New York City cab driver and Pearl worked for the

[21] The name his family uses.

Metropolitan Life Insurance Company as a keypunch operator. He moved the family to Remsen Avenue where Barry first attended school (PCR 3618). According to his father, Barry was never suspended nor expelled from school (PCR 3619), was a good child who did his chores and shared love with his parents (PCR 3620).

In 1969 or 1970, the school, concerned about Barry's behavior, recommended that Timothy and Pearl take Barry to a psychiatrist for medication to control his behavior (PC-R 3624). Barry was medicated for over 2 years and the medication seemed to help the situation and control things (PCR 3624-25). Timothy explained that to attempt to control Barry's disruptive behavior he would punish and beat Barry, but that Barry never skipped school despite his problems at school (PCR 3642-45).

Timothy explained that Pearl lost her job in 1971 because of her "nerves" (PCR 3622-23). Timothy explained that Pearl loved Barry until she lost control when Barry was a little boy (PCR 3645).

Timothy and Pearl divorced in 1972 (PCR 3619) when Barry was 10 because of Pearl's drinking problem and resulting behavior (PCR 3620). When Pearl was intoxicated she would frequently burn meals and there would be bouts of uncontrollable behavior (PCR 3620). Timothy explained that they frequently argued in front of Barry (PCR 3622).

Timothy moved out and left Pearl and Barry in the family house. A year later Barry went to live with Timothy who was then living in that house (PCR 3623).

Timothy remarried September 1973. He and his second wife, Shirley, had a son in January of 1975 (PCR 3625). Barry lived with his father and Shirley and had a very close relationship to his baby brother Jermaine (PCR 3626).

Pearl had since moved to North Carolina. Barry went to live with her during his senior year of high school (PCR 3626). Barry had not done well in grade 11 and was worried he would not graduate. It was decided he should attempt graduation while living with his mother (PCR 3627).

Barry returned to New York after graduation, found a job, later joined the service and went to Germany. A short time later, Barry called to tell his father that he was back in the United States. Much later, Timothy learned that Barry had been in trouble and was returned by the military and placed in the stockade before being discharged (PCR 3627-29). Not long thereafter, Barry took a job in a nightclub (PCR 3630-32).

In 1985, Timothy and Shirley moved to Lakeland, Florida to retire and Timothy lost track of Barry's whereabouts until Barry moved to Palatka, Florida in 1986. Timothy eventually met Janene, her family and their child. He was disappointed that Barry had become involved with someone much younger who did not appear to have the ability to properly raise the child (PCR 3632-35). Only later did Timothy understand that Barry was using drugs. One day he found Barry in his car sleeping and suspected drug use (PCR 3635-36). Timothy would see Barry and urge him to get his life together. When Barry was arrested for

murder in Palatka, he regretted that he had never given help after learning Barry had a drug problem (PCR 3637).

Timothy testified that he was contacted to attend the judge sentencing after Barry was convicted and sentenced to death by the jury. He attended with his brother and 12 year old son Jermaine (PCR 3646). Timothy testified to having no recollection of being contacted by Barry's attorney but does remember a call from someone asking about Barry's medical history. Finally, Timothy explained that had he been asked to testify, he would have done so very willingly (PCR 3640).

4. Shirley Randolph

Barry's stepmother, Shirley, also testified. Shirley told how Barry came to live with her and Timothy shortly after they were married and stayed until his senior year. Shirley described their relationship as not the best, but not terrible (PCR 3649), and explained that Barry did have a good relationship with Jermaine, his young stepbrother (PCR 3649). Shirley explained that Barry did not speak about Pearl or express much emotion (PCR 3649) and never saw Pearl while living with her and Timothy. To her recollection, Pearl never called, sent for him, came to visit, sent him birthday cards or called him on his birthday (PCR 3650; 3651). Shirley also explained however that neither she nor Timothy ever celebrated Barry's birthday (PCR 3655). During those years, she did not remember Barry skipping school or being in trouble with the police; she felt Barry performed okay in school (PCR 3650-51).

Once Barry, Shirley and Timothy were in Florida, Shirley also did not have suspicion that Barry was using drugs (PCR 3653). She was however concerned about Janene and Barry's ability to raise and care for their baby. Shirley was never contacted by trial counsel or any other member of Barry's trial defense team but would have testified had she been asked (PCR 3654).

5. Pearl Randolph

Pearl Randolph testified next. Pearl, born and raised in Englehard, North Carolina, met and married Timothy Randolph in 1957 while living in New York (PCR 3658). As a newlywed, Pearl wanted children very badly (PCR 3659). Pearl had come from a large family and had always loved children (PCR 3659). Pearl suffered after efforts to have a child failed; she was very upset and hurt (PCR 3659-60). Timothy, sad for Pearl, suggested they adopt a child (PCR 3660). Having never heard of adoption, Pearl was initially not agreeable, but eventually agreed (PCR 3660).

Pearl explained that she went to an agency and after 2 years, was told the agency had a boy child for her. They named the child Richard Barry Randolph (PCR 3661). Timothy worked as a taxi driver when they met and later was working for the Transit Authority working evenings and nights at the time of the adoption (PCR 3661-62). Pearl stayed home with Barry for the first 2 years and then began to work days. During the first 2 years, Pearl noticed Barry not acting normally. He cried such that Pearl believed something was out of the ordinary (PCR 3662-

63). Barry would have tantrums, grit his teeth and do unusual things. Pearl noticed that neither his hands nor feet developed normally (PCR 3663). Pearl came to believe that the adoption agency knew something was wrong with the infant or the mother but had not told her (PCR 3663). Barry's unusual behavior continued as he grew up.

When Barry was told of his adoption, he was extremely upset, screaming and crying, and could not accept the news. Barry was 4 or 5 years old at the time (PCR 3664-65).

About her marriage to Timothy, Pearl explained that it was Barry who learned that Timothy was talking on the phone to other women and Barry who eventually told Pearl (PCR 3665). Barry told Pearl that when she went to work, women called Timothy and that Barry had listened in on the phone (PCR 3665). Barry was afraid to tell his mother, who had never spanked him, and he first asked her if she would spank him if he told her (PCR 3665-67). After he told her, Pearl realized that the knowledge upset Barry very much (PCR 3666). Pearl was curious about the spanking reference Barry made because she had never spanked Barry (PCR 3667; 3677).

Once Pearl learned of Timothy's infidelities, their marriage fell apart (PCR 3668). Later, after Timothy left Pearl, she witnessed him beat Barry harshly (PCR 3667). Pearl told Timothy to hit her instead and explained that Timothy had once beaten her badly with a broom requiring that she call the police (PCR 3668). Initially Timothy left the house in Brooklyn and then moved Pearl into a little room and gave her nothing

from the house (PCR 3668). She had no private kitchen or bath (PCR 3669). Barry was 7 at the time. Pearl stayed in the room and rented it on her own (PCR 3669). She felt terrible being put out of her house, especially because Timothy moved a girlfriend into the house the next day and started painting the house and having fun (PCR 3670). Timothy filed for and obtained a divorce from Pearl (PCR 3678).

Later because of the problems she was going through, Pearl returned to North Carolina in 1975 (PCR 3670-71; 3677). Pearl had to get psychological help when she learned that Timothy was going to remarry (PCR 3671). Pearl relieved her emotional pain usually by drinking beer (PCR 3671).

Barry came to North Carolina for a summer and his senior year of high school (PCR 3672). During his senior year, Pearl noticed he was still having tantrums and still gritting his teeth, as he had always done before (PCR 3675).

Barry lived with her off and on after he graduated and the rest of the time with his father (PCR 3680). She was aware that after Barry finished school he worked in a small town called Manteo in North Carolina (PCR 3679). She never spoke with him about his experience in the service (PCR 3680).

At the time Barry was arrested for murder in Florida, Pearl was living in North Carolina without a working telephone. Someone contacted her through her next door neighbor (a phone number where she could be reached) and told her about the arrest (PCR 3675; 3681). No one from Barry's defense team ever attempted contact by telephone or letter. She explained that

she would have certainly testified on her son's behalf if asked (PCR 3676).

6. Verna Whitney Betts

As additional mitigation evidence, collateral counsel presented the testimony of Janene Betts' mother, Verna Whitney Betts (PCR 3297). Mrs. Betts met Barry Randolph in Fairfield, North Carolina in 1986 when he was Janene's boyfriend (PCR 3298). She remembered that Barry had a job in Manteo, North Carolina (PCR 3332-33). Whether it was McDonald's, Hardee's, Burger King, Sav-a-Lot, or Handy-Way, Barry kept a job all the time and tried to provide for Janene (PCR 3333).

Janene and Barry had a daughter named Sherisa (PCR 3298). Betts found Barry to be a nice person and they became better acquainted once Barry moved with the Betts family to Palatka (PCR 2398; 3334). Barry and Janene worked with Betts during potato season, lived with the her for awhile, and frequently visited her home even after they moved into a trailer together (PCR 3299; 3335-36). Barry used to drive to see them in a car with no brakes or he would walk to their house (PCR 3336). He called Verna "mama" and wanted her to be his mother because she did not use punishment in the unusual and severe way his father had (PCR 3336; 3339).

Betts and Barry became close. Barry had suffered severe punishment for minor things during his childhood (PCR 3318). His parents put him in a room or closet for 2-3 days in the dark and forced him to eat alone (PCR 3318; 3339). Barry was required to be an "A" student by his father and tried and tried

to get "A" and "B" grades to avoid punishment. Barry felt badly because he saw Mrs. Betts' treatment of her children and it hurt him that he was not treated as a "real" child of his father's or as well as his father's natural son (PCR 3319; 3324). Barry felt like an outcast in his own family (PCR 3325).

When Betts knew Pearl Randolph in North Carolina, she was very aware of Pearl's alcoholism (PCR 3321).

Betts explained that when she saw Barry get angry, many times she noticed he would bite himself on the arm, hand, and fingers (PCR 3321-22). Janene and Barry's daughter has similar behavior (PCR 3322). Barry would also do things to harm himself when he was frustrated (PCR 3326). Once when he was frustrated he badly damaged his hand by punching through a window at her home (PCR 3326). While he did bodily harm to himself when he was frustrated, Betts never saw him hurt anyone else (PCR 3326).

She was aware of his drug use because he would have red eyes and be different at times. While she found it difficult to tell exactly the difference between when he was on drugs and when he was not, she thought she could tell the difference (PCR 3334). She had of course never actually seen him take drugs because he would not do it in front of her (PCR 3336). Betts observed Barry walk the floors and talk to himself many times at the house as well as walk the floors and bite himself (PCR 3327). To her, Barry was a little "squirrelly" all the time (PCR 3334).

Betts had five other children when Barry lived with her. He had good relationships with all the children and would try to play with them (PCR 3323).

Betts lived in Palatka at the time of the trial (PCR 3328). However, she did not recall anyone from Randolph's defense team interviewing her (PCR 3302). She would have shared what she knew about Barry or testified if asked (PCR 3302). She was aware that her daughter was a witness at the trial but she did not attend the trial (PCR 3328) and on her own, did not realize that things she knew about Barry would have been useful to Barry's attorney or to his case (PCR 3302).

7. Ronzial Williams

Collateral counsel also presented the testimony of Ronzial Williams[22] as to the extent of Randolph's chronic use of crack cocaine and his very large crack cocaine use the night before the offense.

Williams, who knew Barry as "Shorty,"[23] testified that he met Barry in 1987 when he moved into north Palatka. Barry was dating Janene. They were friends and went around together (PCR 3703-04). During their time together, Williams observed Randolph smoking rock cocaine. According to Williams, Randolph would smoke $300-$400 worth of crack cocaine any chance he could get it (PCR 3705-06). The effect of the crack cocaine on Barry was that it would cause Barry to have mood swings, to talk to

[22] And Michael Hart.
[23] Randolph is 5' 3 1/2" (PCR 948).

himself, and to get anxious when he wanted more crack and could not get more (PCR 3706). Barry would want to do something to make money so he could get more crack cocaine. They would drive people places and sell things for money (PCR 3106). To Williams' knowledge, Janene was not aware of Barry's crack cocaine use (PCR 3706).

Williams was with Randolph the night before he was arrested. They did the same thing they did every night they were together - Williams smoked marijuana and Barry smoked crack cocaine (PC.R2 3109). In Williams' estimation, that night, Barry smoked $300 worth of crack cocaine (PCR 3109).

Williams' explained that on the day before Randolph was arrested, Barry took him to visit with Williams' fiancée, Constance Davis (PCR 3725), in Welaka and they spent most of the day there (PCR 3719). Around 4:00 or 5:00 p.m., they went back to Palatka and Barry went home for a couple of hours and then picked Williams up at his sister's house (PCR 3719). They went out to the country until around 9:00 p.m., then they rode around with some other friends, and around 11:00 p.m. went to Lemon Street because the crowd was picking up there at that time. He and Barry both hung out in the area after that but eventually went their separate ways (PCR 3719).

Williams testified that while he and Barry were together that day, Barry smoked crack cocaine the entire time (PCR 3720). Barry smoked from a $100 rock of crack cocaine given to him by Elijah, a friend of Williams', in the car on the way to Weleka (PCR 3723-24). Neither Williams nor his girlfriend smoked any

of that crack cocaine, as they were not in the habit of smoking cocaine (PCR 3725). In Weleka, Barry finished the $100 rock (PCR 3725).

Back in Palatka, Barry got another $200 rock of crack cocaine (PCR 3725). Barry smoked off that rock of crack cocaine when they drove to the country (PCR 3725). Later that night, different guys they gave a ride to gave Barry additional crack cocaine (PCR 3726-27).

Williams also saw Barry smoke crack cocaine on Lemon Street (PCR 3719-20; 3726). From around 1:00 in the afternoon, until around 11:00 p.m. or midnight, except for the short time they were apart in the afternoon, Williams witnessed Randolph's crack cocaine consumption (PCR 3720). Because he saw the many pieces Randolph smoked, his estimation was that Barry smoked about $300 worth (PCR 3720). He last saw Barry at about 11:00 or 12:00 that night (PCR 3728). All the crack cocaine Barry got that night was "fronted" because there was a lot of crack cocaine available (PCR 3730). In Barry's dealings with crack cocaine, he would often be "fronted" drugs (PCR 3730).

Williams was aware that Randolph worked for Champion Rental and delivered furniture and TVs and had worked at the Handy-Way (PCR 3727). He saw Randolph nearly every weekday in Palatka, but not usually on the weekends (PCR 3727-28). He remembered when they first met there were times when Barry was not smoking crack cocaine (PCR 3728).

Williams described north Palatka, where he was raised and later met Barry Randolph, as a place built around "making fast

money" (PCR 3707). Most of the people he knew sold drugs and did drugs. He had observed people doing drugs and crack cocaine many times and explained that $300 worth of crack was a large amount, about 7 grams (PCR 3708). Williams explained that no one from Randolph's defense team ever spoke with him about Barry's drug use but he would have testified at trial as to the same information had he been asked (PCR 3710).

8. Timothy Calhoun

Collateral counsel attempted to introduce a 1992 affidavit of Timothy Calhoun with proof of the affiant's subsequent death (PCR 231-36). Randolph sought to admit the affidavit in support of Randolph's penalty phase claims on the basis that it would have been admissible hearsay in the penalty phase (PCR 3734). The Circuit Court refused to admit the affidavit stating that: 1) the an evidentiary hearing is not a penalty phase, 2) the affidavit is hearsay, 3) there is no exception for the affidavit, and 4) the affidavit does not go to mitigation (PCR 3737). Collateral counsel argued for admission and objected to the court's ruling (PCR 3732-37). The affidavit was proffered (PCR 3737; 231-36).

9. Dr. Milton Burglass - Addictionologist

Collateral counsel also presented Dr. Milton Burglass, an expert in addiction medicine.

Burglass described the effects of Randolph's drug use generally and at the time of the offense (PCR 3546-56). Further Burglass found that Randolph suffered from "uncinate fits" in childhood characterized by sudden onset, brief duration, sudden

resolution, subjective feelings of rage, expression of physical violence usually directed at the environment (punching walls or breaking things), the concurrent overwhelming urge to bite or chew on anything (he has scars on both thumbs from having bitten and chewed himself over the years), the concurrent perception of an acrid smell, "something like a burning tire or like burning metal," and the concurrent coloring of the entire visual field (red, for Randolph). Randolph continued to suffer from uncinate fits as an adult and the use of cocaine and other drugs would have exacerbated Randolph's neurological disease.

Other history with neuro-psychiatric implication found by Burglass include:

> A) Randolph's 1979 closed head injury with brief loss of consciousness;
> B) Randolph's bed-wetting that continues to the present (even in prison);
> C) Randolph's sleep-walking and sleep-talking;
> D) Randolph's breath-holding when angry as a child;
> E) Randolph's multiple allergies and frequent nosebleeds (unrelated to cocaine); and
> F) Randolph's drug treatment in grade school which "calmed him down and made him sleepy," suggesting the use of a psychostimulant (Dexedrine or Ritalin) for a likely diagnosis of "hyperactivity" or "minimal brain dysfunction."

Burglass reported that Randolph has a history of use of multiple drugs: he began drinking at the age of 11-12 by sneaking half cans of beer from his alcoholic adopted mother, in adolescence he drank beer mostly on weekends, and after graduating high school and entering the Army, increased his daily alcohol use. From 1983 until the date of his arrest, he drank 12-24 beers daily, the quantity of consumption varying with his concurrent use of cocaine. Throughout this period he

used alcohol, marijuana, and (occasionally) snorted heroin to "take the edge off" the excessively stimulating, dysphoric effects of cocaine (PCR 2671-79).

Randolph began using cannabinoids at age 15-16 years. In his senior year of high school (age 17), Randolph began to smoke on a daily basis ("about $5 to $10 worth a day"). After joining the Army, he began to use hashish heavily. Randolph continued to use marijuana from that time (1980) until his arrest. As his cocaine use increased, he would use marijuana concurrently with alcohol to "take the edge off the coke" (PCR 2671-79).

Randolph tried mescaline, LSD, and PCP (phencyclidine). Randolph experimented with inhaled model airplane glue ("Testor's") earlier during latency and early adolescence. In approximately 1983, while working in New York City, he began to snort heroin (very occasionally only) to come down from too much ccocaine (PCR 2671-79).

Randolph tried snorting methamphetamine "a few times" during 1983-1984. Finally, Randolph began snorting cocaine in the Army sometime between 1980 and 1982. While working as a D.J. in an after hours club in New York City (1983-1984), he began using cocaine every night. He estimated his maximum use at about 2 grams per night during this period. Sometime in 1983 is when Randolph free-based cocaine for the first time. By November 1984, he was using crack heavily every day. He was using, at his peak, more than $1600 worth of crack cocaine a night. In November 1984, in an attempt to get away from the crack cocaine scene, to get out of New York, he moved to a small

town in North Carolina where his mother was living. While he was living in North Carolina from November 1984 until May 1987, he managed to quit using cocaine. He did, however, continue to drink 12-18 beers a day and to smoke marijuana every day (PCR 2671-79).

Once in Palatka, despite his best efforts to control his use, within less than a month he relapsed to his previous pattern of using "massive amounts of crack" at night (concurrently with alcohol and marijuana) and trying to sober up and work by day. While using cocaine, particular in the form of crack, Randolph experienced the following well documented and recognized signs and symptoms of high dose cocaine use: a) seizures; b) heavy sweating, requiring frequent showers every day to lower the body temperature; c) occasional blackouts (45 minutes maximum); d) coke bugs; e) visual, auditory, and haptic hallucinations; f) significant weight loss; g) paranoia; h) suspiciousness; i) hypervigilence; j) feelings of superiority and invincibility; k) exacerbation of an already "bad temper" and "short fuse;" l) frequent verbal and physical confrontations; m) loosely organized delusions; (n) diminished pain perception; o) grossly impaired judgment; and (p) inexorable progression of use despite multidimensional adverse consequences (PCR 2674).

SUMMARY OF ARGUMENT

1. Randolph was denied a neutral detached judge in violation of his due process and fair trial rights. Judge Perry and/or his clerk Pamela Koller engaged in unconstitutional and improper

ex parte with prosecutor Alexander and perhaps other prosecutors on Randolph's case. Clerk Koller testified that she and Alexander worked together at her computer on adding language to the judgment and sentence order without Randolph or his attorney present. Moreover, the unsigned original draft judgment and sentence order found in the State Attorney's files bears an "insert" mark where additional text appears in the final order. Delegation, impropriety, and improper *ex parte* contact have been shown. Moreover, Judge Perry unconstitutionally pre-determined sentence. This Court should order a new trial and/or penalty phase.

2. Randolph's attorney was ineffective in the penalty phase. Randolph's attorney was ineffective when he failed to investigate and present mitigation evidence, failed to ensure an adequate mental health evaluation, and conceded aggravating factors. Counsel's closing argument is little more than concession after concession. Counsel failed to act as an advocate. Randolph is entitled to a resentencing because he demonstrated these deficiencies and that absent these deficiencies, Randolph would have had an effective advocate, an adequate mental health evaluation and substantial mitigation, both statutory and non-statutory, to present. Given the jury recommendation of 8-4, counsel's ineffectiveness renders the death sentence unreliable.

Further, counsel failed to object to various Eighth Amendment errors which occurred throughout the penalty phase. The jury was given unconstitutional burden shifting instructions

and the judgment and sentence applies the same erroneous standard. Vague aggravating factors were relied on and vague instructions given to the jury. Randolph's death sentence rests on an unconstitutional automatic felony-murder aggravating circumstance. Counsel was ineffective in failing to object and in conceding the State's entitlement to automatic aggravation. Counsel failed to object to unconstitutional burden shifting in the jury instruction and trial court's sentencing calculus and failed to object to the vague aggravating factors and vague jury instructions. The Judge's assertion that the jury could not consider sympathy was error and counsel was ineffective for failing to object. The instruction to the jury regarding the effect of a 6-6 vote was error and counsel was ineffective for failing to object.

Trial counsel was also ineffective for failing to object to improper prosecutorial argument.

Finally, Randolph was absent from a critical stage. Counsel was ineffective for failing to object.

3. Randolph was denied a full and fair hearing and an adequate opportunity to develop the facts in support of his claim of judicial impropriety, *ex parte* contact, bias, pre-determination of sentence and delegation. The Circuit Court erred in not permitting depositions of Alexander, Daly and Tanner. Randolph was denied a full and fair hearing and an adequate opportunity to develop the facts in support of his claims of ineffectiveness by the Court's refusal to consider the affidavit of Timothy Calhoun. The Circuit Court erred in not

considering the affidavit as penalty phase evidence. Randolph was denied a full and fair hearing and an adequate opportunity to develop the facts in support of his claims of ineffectiveness by the Circuit Court and this Court's refusal to continue the evidentiary hearing ordered on remand. Randolph was denied the representation of a knowledgeable and experienced attorney, his lead attorney Gail Anderson, in violation of his right to effective assistance of postconviction counsel.

4. Randolph's attorney was ineffective in the guilt phase when he conceded guilt, distanced himself and/or affirmatively prejudiced his client, and ignored the defense of voluntary intoxication. The outcome is rendered unreliable by the evidence of counsel's ineffectiveness.

5. Trial counsel's harbored an undisclosed conflict in violation of Randolph's rights to conflict-free counsel.

6. Judge Perry's status as a special deputy sheriff is further evidence of his bias. Judge Perry was obligated to disclose his law enforcement affiliations. Randolph's due process and fair trial rights were violated.

7. The heinous atrocious or cruel aggravating factor and the jury instruction regarding the factor violated the Eighth Amendment.

ARGUMENT I

RANDOLPH WAS DENIED A NEUTRAL, DETACHED JUDGE IN VIOLATION OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL. JUDGE PERRY AND/OR CLERK KOLLER ENGAGED IN UNCONSTITUTIONALLY IMPROPER *EX PARTE* CONTACT WITH PROSECUTOR ALEXANDER. PERRY AND/OR KOLLER WORKED TOGETHER WITH PROSECUTOR ALEXANDER TO PREPARE THE SENTENCING ORDER WITHOUT NOTICE TO RANDOLPH OR HIS ATTORNEY HOWARD PEARL. JUDGE PERRY IMPERMISIBLY DELEGATED HIS INDEPENDENT DUTY TO THE STATE. JUDGE PERRY HARBORED BIAS AGAINST RANDOLPH AND UNLAWFULLY PRE-DETERMINED THAT HE WOULD SENTENCE RANDOLPH TO DIE. RANDOLPH IS ENTITLED TO A RESENTENCING AND/OR A NEW TRIAL.

A. The Trial Court Engaged In Unconstitutionally Improper *Ex parte* Contact With The State Regarding the Preparation of the Judgment and Sentence.

An issue in this case is whether Randolph's rights to due process and a fair trial were violated by the *ex parte* contact between prosecutor Alexander, Judge Perry, and Judge Perry's law clerk Pamela Koller regarding the order sentencing Randolph to death. Litigants, including criminal defendants, must be provided a neutral and detached judicial officer in judicial proceedings. This fundamental requirement is dictated by the constitutional protections of due process and a fair trial. Even the appearance of impropriety on the part of a magistrate's neutrality is disallowed. See e.g., Marshall v. Jericho, Inc., 446 U.S. 238, 242 (1980)(and cases cited therein); Carey v. Piphus, 425 U.S. 247, 262 (1978); Taylor v. Hayes, 418 U.S. 488, 501 (1974); Tumey v. Ohio, 273 U.S. 510 (1927). The impartiality of the judiciary is particularly important in "first-degree murder case[s] in which [the Defendant's] life is at stake and in which the circuit judge's sentencing decision is so important." Livingston v. State 441 So. 2d 1083, 1087

(1983). This Court has explained how and why improper *ex parte* contact violates constitutional dictates. Rose v. State, 601 So. 2d 1181 (Fla. 1992). In Rose, this Court wrote:

> The judicial practice of requesting one party to prepare a proposed order for consideration is a practice born of the limitations of time. Normally, any such request is made in the presence of both parties or by a written communication to both parties. We are not unmindful that in the past, on some occasions, judges, on an *ex parte* basis, called only one party to direct that party to prepare an order for the judge's signature. The judiciary, however, has come to realize that such a practice is fraught with danger and gives the appearance of impropriety. See generally Steven Lubet, *Ex parte* Communications: An Issue in Judicial Conduct, 74 Judicature 96, 96- 101 (1990).
>
> Canon 3 A(4) of Florida's Code of Judicial Conduct states clearly that:
>
> > A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding.
>
> Fla. Bar Code of Jud. Conduct, Canon 3 A(4) (emphasis added). Nothing is more dangerous and destructive of the impartiality of the judiciary than a one - sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments.
>
> As Justice Overton has said for this Court:
>
> > [C]anon [3 A(4)] implements a fundamental requirement for all judicial proceedings under our form of government. Except under

> limited circumstances, no party should be allowed the advantage of presenting matters to or having matters decided by the judge without notice to all other interested parties. This canon was written with the clear intent of excluding all *ex parte* communications except when they are expressly authorized by statutes or rules.

In re Inquiry Concerning a Judge: Clayton, 504 So.2d 394, 395 (Fla.1987).

We are not here concerned with whether an *ex parte* communication actually prejudices one party at the expense of the other. The most insidious result of *ex parte* communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question. In the words of Chief Justice Terrell:

> This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge.... The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.
>
> ... The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.

State ex rel. Davis v. Parks, 141 Fla. 516, 519-20, 194 So. 613, 615 (1939). Thus, a judge should not engage in any conversation about a pending case with only one of the parties participating in that conversation. Obviously, we understand that this would not include strictly administrative matters not dealing in any way with the merits of the case.

Rose, 601 So. 2d at 1183. See also Smith v. State, 708 So. 2d 253 (Fla. 1998)(holding that the contact between the judge and prosecutor in preparation of a sentencing order was improper ex parte and compromised the impartiality of the tribunal); Spencer

v. State, 615 So. 2d 688 (Fla. 1993)(reversing and finding that it was improper *ex parte* and a compromise of the impartiality of the tribunal when the judge, the prosecutor and the prosecutor's assistance were found together proofreading an order sentencing Spencer to death).

Canon 3B (7) of Florida's Code of Judicial Conduct states:

> A judge should accord to every person who has a legal interested in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:
>
> (a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized, provided:
>
> (i) The judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communications, and
>
> (ii) The judge makes provision promptly to notify all other parties of the substance of the *ex parte* communications and allows an opportunity to respond.

In this case, Randolph has produced the following unrebutted proof:

- Prosecutor Alexander helped Judge Perry's law clerk Pamela Koller write part of the judgment and sentence.
- Clerk Koller assumed prosecutor Alexander had spoken with Judge Perry about the language they were adding because she said she would not have added anything without knowing the Judge wanted it added.
- The language that clerk Koller remembers adding with prosecutor Alexander's help is the language that appears at R 646 and reads:

> In fact, any of the aggravating factors found to exist would outweigh all mitigating factors, statutory and non-statutory.

- Neither Randolph nor his attorney Pearl were present when prosecutor Alexander stood behind clerk Koller at her computer and helped her determine exactly what language to add to the Randolph judgment and sentence and where to add it.
- Before 1997, no attorney of Randolph's, including his trial attorney Pearl, was aware that this had happened.
- The State had possession of an original draft judgment and sentence in its files (ex. 1).
- That document was not disclosed to Randolph until 1997.
- The draft judgment and sentence bears a mark commonly recognized to mean "insert" on the bottom of the first page (PCR 4681).
- In the final judgment and sentence, language appears at the location of the "insert" mark that does not appear on the draft judgment and sentence. Compare R 641-42 with PCR 4681-82.
- That language reads:

> The Defendant's version of the sexual battery in this Court's opinion runs contrary to the evidence introduced at trial. Autopsy photos that this court admitted into evidence but did not allow the jury to view, in order to insure the Defendant a fair trial, show massive bruising and trauma between the upper thighs and the general vaginal area which, this Court's mind, are consistent with that of a brutal and violent rape. The Defendant's version of the rape is incredible and most unbelievable.

(R 641-42).

Based on the record[24], it is clear that Randolph's federal and Florida constitutional rights to due process and a fair

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[24] Which also includes a document from the State Attorney's file bearing the following notes:

> by beating her about the head w/ his hands and fists, by kicking her by strangling her with a ligature, and by stabbing her with in the neck and throat with a knife

Some words are crossed out on the note. The sentencing order itself contains a very similar sentence:

trial were violated and that this Court should reverse and remand for a new trial and/or new penalty phase.

B. The Circuit Court Erred When It Labeled The *Ex parte* Contact "Purely Ministerial."

A separate issue is whether the Circuit Court erred when it labeled the *ex parte* contact "purely ministerial."

Black's Law Dictionary provides the following definition of "ministerial":

> **Ministerial act.** That which is done under the authority of a superior; opposed to judicial. That which involves obedience to instructions, but demands no special discretion, judgment, or skill. An act is "ministerial" when its performance is positively commanded and so plainly prescribed as to be free from doubt. Official's duty is "ministerial" when it is absolute, certain and imperative, involving merely execution of specific duty arising from fixed and designated facts.
>
> One which a person or board performs under a given state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to or the exercise of his or their own judgment upon the propriety of the act being done.
>
> **Ministerial duty.** One regarding which nothing is left to discretion - a simple and definite duty, imposed by law, and arising under conditions admitted or proved to exist.
>
> **Ministerial function.** A function as to which there is no occasion to use judgment or discretion.
>
> **Ministerial officer.** One whose duties are purely ministerial, as distinguished from executive, legislative, or judicial functions, requiring

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"When Minnie Ruth McCullom interrupted the Defendant in the process of stealing from the store he brutally beat her about the head with his hands and fists, kicked her, strangled her with a ligature and stabbed her with a knife, inflicting wounds which medical evidence showed caused her death on August 21, 1988."

(R. 643).

> obedience to the mandates of superiors and not involving the exercise of judgment or discretion.

Black's Law Dictionary 689 (6th ed. 1991).

The decisions of this Court adhere to these time-tested straightforward definitions.

For example, in King v. State, 681 So. 2d 1136, 1139-39 (Fla. 1996), this Court explains the two-step process which is used in habitual felony sentencing proceeding under Florida Statute section 775.084. That process includes two distinct steps: 1) a ministerial step required by section 775.084(3) of the Florida Statutes, and 2) a judicial step. The first step is "ministerial" because section 775.084(3) of the Florida Statutes commands the judge to make a finding, pursuant to the statute, whether or not the defendant is or is not a habitual felony offender and prescribes the exact steps to be followed by the judge. One the other hand, the second step is "judicial" because under section 775.084(4)(c), the court is free to decide whether or not imposition of a habitual felony sentence is necessary for the "protection of the public." Id. It is the exercise of judicial discretion that thus makes this second step a judicial rather than ministerial function.

In Jones v. Chiles, 638 So. 2d 48 (Fla. 1994), this Court struck a statute eliminating the Governor's choice in the reappointment process of compensation claims judges and *required him* to reappoint any compensation claims judge the statewide nominating commission voted to retain. The statute violated separation of powers doctrine because the Governor's act of re-

appointing compensations claims judges was *"purely ministerial"* under the statute. Id. at 50. Because the statutory "procedure effectively eliminate[d] the power of the Governor to reappoint compensation claims judges as officers of the executive branch" the statute violated the Governor's inherent power to appoint executive officers to duty. Id. at 51.

The authority vested in a judge to reduce rulings rendered orally in a proceeding to writing subsequent to the filing of a motion for disqualification is authority retained to perform the act of reducing that ruling to writing because such an act is considered ministerial. Fischer v. Knuck, 497 So. 2d 240, 243 (Fla. 1986). However, subsequent substantive changes to a previously orally announced are not ministerial. Thus in Fischer, this Court explained that a judge against whom a disqualification motion was pending can do reduce his prior oral rulings to writing but no more. Id.

Other comments by this Court on what constitutes a "ministerial" function are plentiful. Argonaut Insurance Co. v. May Plumbing Co., 474 So. 2d 212 (Fla. 1985)(holding that it is a purely ministerial duty of the trial judge or clerk of court to add appropriate amount of interest to principal amount of damages awarded and thus finder of fact should not consider the time-value of money in its consideration and that amount of interest is either contractually or legislatively determined but is not a matter over which the judiciary has discretion); Brunner Enterprises, Inc. v. Dep't of Revenue, 452 So. 2d 550 (Fla. 1984)(holding that it was not error for trial court to

comply with this Court's mandate because compliance with mandate is ministerial given that lower courts cannot change law of the case decided by this Court); Gazil v. Super Food Service, 356 So. 2d 312 (Fla. 1978)(holding that Florida's prejudgment replevin statute does not violate due process in part on the grounds that the law required applications for replevin without notice be presented to a judge, as opposed to a ministerial court official); Galbut v. Garfinkl 340 So. 2d 470 (Fla. 1976)(reversing trial judge's entry of dissolution order without receipt or consideration of evidence trial judge announced he would consider and quoting Ryan v. Ryan, 277 So. 2d 266 (Fla. 1973) for the proposition that under Florida's dissolution law, circuit judge is not reduced to ministerial officer but must make findings upon appropriate evidence).

Justice Harding discussed the administrative duties of Circuit Court judges in his concurring opinion in Rose v. State, explaining that even in the exercise of administrative duties, the Circuit Courts should use care to avoid the appearance of impropriety:

> I concur with the majority opinion and write only to emphasize that, in my experience as a trial judge, where more than one attorney or party has made an appearance in a case, I found that there were few administrative matters which would require or justify an ex parte communication with a judge. The most obvious administrative matter would relate to setting hearings on motions and other matters. Care should be exercised even in this regard.
>
> In maintaining calendar control, many judges deem it appropriate to personally screen and approve the setting of cases which require more than a set period of time, that is, thirty minutes. If the judge must become personally involved, in any way, in the setting

> of a hearing, care should be given that all parties have equal opportunity to participate in the setting of that hearing. Judge's calendars and dockets are generally very crowded. Time on them is a precious commodity which should be distributed in a fair manner. It probably will be common knowledge that an explanation to the judge is required to set a hearing lasting longer than a set time. Thus, if all parties are not involved in setting the case, it will be assumed that there was an ex parte communication with the judge in order to obtain the time. Ex parte communications with a judge, even when related to such matters as scheduling, can often damage the perception of fairness and should be avoided where at all possible.
>
> The number of lawyers has grown significantly in recent years in most locations. It is impossible for lawyers to know each other and the judges with the same degree of familiarity that they did in the past. It is also more common for lawyers to appear in courts "away from home" than it was in the past. This growth in numbers and mobility places a greater burden on the judge to ensure that neutrality continues to exist. Judges should be ever vigilant that every litigant gets that to which he or she is entitled: "the cold neutrality of an impartial judge." State ex rel. Davis v. Parks, 141 Fla. 516, 519-20, 194 So. 613, 615 (1939).

Id.

Perhaps most helpful is the body of law surrounding the issuance of writs of mandamus. A requirement for the issuance of a writ of mandamus "is that the legal duty of the public officer or agency must be ministerial, and not discretionary (footnote omitted)." PHILLIP J. PADAVANO, FLORIDA APPELLATE PRACTICE § 28.2 (2nd ed. 1997). Mandamus may be "employed only to enforce a right by compelling performance of a corresponding [ministerial] duty, and not to litigate an entitlement to the right." Id. "A duty or act is defined as ministerial 'when there is no room for the exercise of discretion, and the performance being required is directed by law.'" Id. (quoting Town of Manalapan v.

Rechler, 674 So. 2d 789 (Fla. 4th DCA 1996), citing Solomon v. Sanitarians' Registration Bd., 155 So. 2d 353 (Fla. 1963). In a 1943 opinion, this Court stated it this way:

> It is well settled that mandamus is the proper remedy to compel a court to exercise its jurisdiction when such court possesses jurisdiction and refused to exercise it, but mandamus cannot be maintained to control or direct the manner in which such court shall act in the lawful exercise of its jurisdiction. In other words, this court can compel an inferior court to act in the exercise of its lawful jurisdiction, but it cannot direct how it should act. If such action turns out to be erroneous, the aggrieved party can obtain a review therof on appeal. Such is the general rule.

State ex rel. North St. Lucie River Drainage Dist. V. Kanner, 11 So. 2d 889 (Fla. 1943). See Heath v. Becktell, 327 So. 2d 3 (Fla. 1976)(holding that the action requested in the mandamus petition was not ministerial because the clerk did not have a clear legal duty to received praecipes or issue subpoenas duces tecum for deposition to a defendant in a criminal case); American Institute of Defensive Driving, Inc. v. Traffic Court Review Committee, 543 So. 2d 218 (Fla. 1989)(granting a writ of mandamus directing Respondent Traffic Court Review Committee to perform its "purely ministerial" task of licensing petitioner since the Chief judge of the Circuit had determined that petitioner driver improvement school met requirements for certification).

Clerk Koller testified that prosecutor Alexander was there to help her with specific language going to the issue of weighing the aggravating and mitigating circumstances and that neither Randolph nor his attorney Howard Pearl was there at the

time. In the State Attorney's file was an original draft judgment and sentence bearing an "insert" mark. In the final judgment and sentence the following sentence appears at that location:

> The Defendant's version of the sexual battery in this Court's opinion runs contrary to the evidence introduced at trial. Autopsy photos that this court admitted into evidence but did not allow the jury to view, in order to insure the Defendant a fair trial, show massive bruising and trauma between the upper thighs and the general vaginal area which, this Court's mind, are consistent with that of a brutal and violent rape. The Defendant's version of the rape is incredible and most unbelievable.

(R 641-42).

The Circuit Court erred as a matter of law. Rather than "ministerial," the evidence shows that the contact was substantive and went to the exercise of the trial court's judicial power to make findings of fact and weigh aggravating and mitigating circumstances. As such, the contact was prohibited and Randolph is entitled to a new trial and/or sentencing.

C. The Trial Court Impermissibly Delegated Its Independent Duty To Weigh Aggravating And Mitigating Circumstances To The State.

Another issue in this case is whether the unrebutted evidence establishes that Judge Perry improperly delegated part or all of his independent duty to prepare the sentencing order to the State.

A fundamental requirement of both federal and Florida capital sentencing jurisprudence is that the sentencer must afford the capital defendant an individualized, reliable, and

independent sentencing determination. Florida's death penalty statute requires a court to conduct an independent assessment before sentencing an individual to death. The statute requires the following:

> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH -- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set for in writing its findings upon which the sentence is based as to the facts:
>
> (a) The sufficient aggravating circumstances exist as enumerated in subsection (5), and
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with S. 775.082

Fla. Stat. § 921.141(3)(emphasis added).

In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), this Court emphasized the importance of the trial judge's independent weighing of aggravating and mitigating circumstances. In Patterson, the trial judge failed to engage in an independent weighing process and, like in Randolph's case, delegated the responsibility to the state attorney:

> [W]e find that the trial judge improperly delegated to the state attorney the responsibility to prepare the sentencing order, because the judge did not, before directing preparation of the order, independently determine the specific aggravating and mitigating

> circumstances that applied in the case. Section 921.141, Florida Statutes (1985), requires a trial judge to independently weigh the aggravating and mitigating circumstances to determine whether the death penalty or a sentence of life imprisonment should be imposed upon a defendant.

Id. at 1261 (emphasis added). See also, Bouie v. State, 559 So.2d 1113, 1116 (Fla. 1990),("the independent exercising of reasoned judgement needed to support a death sentence"); Nibert v. State, 508 So. 2d 1 (Fla. 1987); Muehleman v. State, 503 So. 2d 310 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986).

The independent weighing of aggravating and mitigating circumstances implicates the Eighth and Fourteenth amendment concerns for reliable, individualized, and fundamentally fair sentencing proceedings. Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986); Ross v. State, 388 So. 2d 1191, 1197 (Fla. 1980).

A judge's most solemn duty when dealing with a death penalty case is to conduct an independent evaluation of the evidence, the aggravating and mitigating factors. This is one of the bedrock principles of death penalty jurisprudence. In Proffitt v. Florida, 428 U.S. 250 (1976), the Supreme Court explained that, in response to Furman v. Georgia, 408 U.S. 238 (1972), the Florida legislature adopted a new statutory scheme providing that if a defendant is found guilty of a capital offense, "a separate evidentiary hearing is held before the trial judge and jury to determine his sentence." Id. at 248. Following a decision by the jury as to the recommended sentence, "[t]he trial judge is also directed to weigh the statutory

aggravating and mitigating circumstances when he determines the sentence to be imposed on a defendant." Id. at 250.

In carrying out the constitutional obligation under Proffitt to assess the appropriateness of the death penalty, the Supreme Court was very specific in explaining that in order to be constitutional, a death sentence must be the result of a considered and sober weighing process by the trial judge:

> The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty shall be imposed. This determination requires the trial judge to focus on the circumstances of the crime and the character of the defendant. He must, *inter alia*, consider whether the defendant has a prior criminal record, whether the defendant acted under duress or under the influence of extreme mental or emotional disturbance, whether the defendant's role in the crime was that of a minor accomplice, and whether the defendant's youth argues in favor of a more lenient sentence than might otherwise be imposed. The trial judge must also determine whether the crime was committed in the course of one of several enumerated felonies, whether it was committed for pecuniary gain, whether it was committed to assist or to prevent a lawful arrest, and whether the crime was especially heinous, atrocious, or cruel. To answer these questions, . . . the sentencing judge must focus on the individual characteristics of each homicide and each defendant.

Id. at 251-52.

Clerk Koller testified that:

> Q. In examining the documents, would you please identify the language or the part of the judgment and sentence which reflects the input of Mr. Alexander in your office?
>
> A. When I was looking at it earlier, I think it has to do with -- of course, it is not numbered. I think it is the fourth page. And I think it had to do with where it says, "this Court", at the bottom, "had considered all of the evidence presented and that basically finds that said factors, even if proven, would not outweigh any one of the aggravating factors

> alone", State referring to the mitigating factors. I don't know that for a fact, that those exact words, but I recall that was the issue that Mr. Alexander had some input on.
>
> I think it may be on the second to the last page, it might be in the middle of the therefore clause, it says, "In fact any of the aggravating factors found exist would outweigh all mitigating factors statutory, non-statutory." That is the same theme.

(PCR 5329-32).

The draft judgment and sentence in the State Attorney's file bears a mark on the first page between two sentences which is commonly recognized to mean "insert". In the final judgment and sentence at that location, the following sentences appear:

> The Defendant's version of the sexual battery in this Court's opinion runs contrary to the evidence introduced at trial. Autopsy photos that this court admitted into evidence but did not allow the jury to view, in order to insure the Defendant a fair trial, show massive bruising and trauma between the upper thighs and the general vaginal area which, this Court's mind, are consistent with that of a brutal and violent rape. The Defendant's version of the rape is incredible and most unbelievable.

(R 641-42).

Furthermore, the draft located in the State Attorney's file was not signed or unsigned but bore the mark "R.P.R." and the date in handwriting that is not Judge Perry's.

The Circuit Court erred when it denied that Randolph proved impermissible delegation.

Based on the testimony and evidence presented below, it is clear that the state and the sentencing court participated in improper *ex parte* communications regarding the substance of the order sentencing Randolph to death. Furthermore, based on the testimony of Randolph's trial attorney at the hearing below, it

is clear that the defense was neither aware of the *ex parte* communications, nor given an opportunity to respond to the substantive matters discussed. This was fundamental error, and Randolph is entitled to a new trial and/or sentencing.

D. The Trial Court Harbored Bias Against Randolph And Unlawfully And Unconstitutionally Pre-Determined That He Would Sentence Randolph To Die.

Finally, Randolph presents the question of whether Judge Perry was unconstitutionally biased against Randolph and whether he unconstitutionally pre-determined that Randolph would die for Minnie Ruth McCollum's murder in violation of his Eighth, Sixth, and Fourteenth Amendment right.

In Porter v. State, 723 So. 2d 191, 195-196 (Fla. 1998), this Court quoted the Eleventh Circuit Court of Appeals' decision in the same case noting that it:

> [S]uccinctly stated the crucial necessity for the impartiality of a trial judge as to sentencing in capital cases in Florida by stating:
>
> > In the Florida sentencing scheme, the sentencing judge serves as the ultimate factfinder. If the judge was not impartial, there would be a violation of due process. The law is well-established that a fundamental tenet of due process is a fair and impartial tribunal. Marshall v. Jerrico, Inc., 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980). There the Supreme Court said:
> >
> > > The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, ***196** the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by

> affected individuals in the decision making process.... The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law.... At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," ... by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.
>
> 446 U.S. at 242, 100 S.Ct. at 1613 (citations omitted).

Porter, 49 F.3d at 1487-88.

Id.

Continuing, this Court further explained that:

> In sum, due process under Florida's capital sentencing procedure requires a trial judge who is not precommitted to a life sentence or a death sentence but rather is committed to impartially weighing aggravating and mitigating circumstances. As we have repeatedly stressed, a trial judge's weighing of statutory aggravating factors and statutory and nonstatutory mitigating circumstances is the essential ingredient in the constitutionality of our death penalty statute. Grossman, 525 So.2d at 839. It is for this very reason that we have found it essential for trial judges to adequately set forth their weighing analyses in detailed written orders. Walker v. State, 707 So.2d 300, 318-19 (Fla.1997); Campbell v. State, 571 So.2d 415, 419 (Fla.1990).

Id.

Randolph has presented unrebutted testimony from Judge Perry's law clerk Pamela Koller that Judge Perry had a fully formed and fixed intention of sentencing Randolph to death before the penalty phase, before the jury deliberated its

recommendation, and before the final sentencing hearing. Thus, Randolph has shown his entitlement to relief.

ARGUMENT II

RANDOLPH WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT PENALTY PHASE.

A. Investigation And Presentation of Mitigation Evidence

Strickland v. Washington, 466 U.S. 668 (1984) states that counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 688. Strickland requires a defendant to demonstrate: 1) unreasonable attorney performance and 2) prejudice. De novo review of Randolph's claims of ineffective assistance of counsel should demonstrate that Randolph has proved both unreasonable attorney performance and prejudice.

1. Deficient Performance

Ineffectiveness of counsel occurs when "acts or omissions of counsel ... not []the result of reasonable professional judgment," or "outside the wide range of professionally competent assistance" are committed by trial counsel. Id. at 690. It is "axiomatic [] both from our case law and from common sense, that notwithstanding general competence and success, a lawyer can fail to provide effective assistance of counsel in a given case." Williams v. Head, 185 F. 3d 1223, 1246 (11th Cir. 1999)(J. Barkett dissenting). In making that determination, this Court must "keep in mind that counsel's function ... is to make the adversarial testing process work in that particular case." Strickland, 466 U.S. at 689. "An attorney has a duty to

conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994). Failure to interview family members is indicative of ineffective assistance of counsel. See Baxter v. Thomas, 45 F.3d 1501, 1513 (11th Cir. 1995) (finding that reasonable investigation would have included family members where trial counsel spoke to defendant's mother and brother, but not other family members); Blanco v. Singletary, 943 F.2d 1477, 1501-02 (11th Cir. 1991)(finding counsel ineffective for failing to undertake investigation into mitigating evidence from family members); Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989)(finding counsel deficient for neglecting to undertake investigation into family, military, and employment background); Elledge v. Dugger, 823 F.2d 1439, 1445 (11th Cir. 1987)(finding counsel's investigation unreasonable where counsel was aware of defendant's difficult childhood, but "did not even interrogate [the defendant's] family members to ascertain the veracity of the account or their willingness to testify").

As Justice Barkett recently stated in a well reasoned dissent:

> The thinking behind these cases is reflected clearly in the seminal treatise advising lawyers on how to represent a death penalty client, Federal Habeas Corpus Practice and Procedure, which lists 17 major information sources necessary for fact gathering in post-conviction proceedings. Besides the client, the family is the most important source to look for

relevant information when pursuing post-conviction relief in state or federal court. [FN7][25]

Williams v. Head, 185 F. 3d at 1247.

Counsel must reasonably inquire and follow-up on the information counsel already has. Jackson v. Herring, 42 F.3d 1350, 1367 (11th Cir. 1995)(finding investigation into mitigating evidence unreasonable where counsel "had a small amount of mitigating evidence regarding [the defendant's] history, but ... inexplicably failed to follow up with further interviews or investigation"); Cunningham v. Zant, 928 F.2d 1006, 1018 (11th Cir. 1991)(finding failure to present evidence concerning defendant's mental retardation unreasonable "in light of the ready availability of this evidence"); Middleton v. Dugger, 849 F.2d 491, 493-94 (11th Cir. 1988)(finding that counsel's investigation was unreasonable where counsel failed to uncover "readily discoverable" mitigating evidence concerning defendant's psychiatric problems).

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[25] FN7. The 1988 version of this treatise reads as follows:
Potential sources of factual information include:
(A)The client.
(B) Members of the client's family, including:
1. Family members in contact with the client since trial
2. Family members who attended the trial
3. Family members in contact with the client at the time of the arrest and pretrial incarceration
4. Family members in contact with the client at the time of the offense
5. Family members in contact with the client at any time prior to the offense

2 James S. Leibman, Federal Habeas Corpus Practice and Procedure 737-38 (1988) (footnotes omitted).

Purported tactical decisions must be informed decisions. Failure to investigate and present mitigating evidence can not possibly be tactical where counsel is unaware of the evidence. The case of having the information and deciding not to present it is different from neglecting to gather relevant information in the first place. See Williams, 185 F. 3d at 1249, Jackson, 42 F.3d at 1368 ("[A] legal decision to forgo a mitigation presentation cannot be reasonable if it is unsupported by sufficient investigation.").

Justice Barkett further explained in Williams that:

> If the decision was a tactical one, it will usually be upheld, since counsel's tactical choice to introduce less than all available mitigating evidence is presumed effective. See Jackson v. Herring, 42 F.3d 1350, 1366 (11th Cir.1995). "Nonetheless, the mere incantation of 'strategy' does not insulate attorney behavior from review; an attorney must have chosen not to present mitigating evidence after having investigated the defendant's background, and that choice must have been reasonable under the circumstances." Stevens v. Zant, 968 F.2d 1076, 1083 (11th Cir.1992); see also Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir.1991) ("[O]ur case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them.").

Williams, 185 F. 3d at 1249 fn 13.

Pearl's delegation of preparation and abrogation of his independent duty to assure adequate investigation of penalty phase mitigation was professionally unreasonable. Had trial counsel conducted a thorough investigation, he would have discovered evidence he would have presented through his mental health expert.

Pearl's failures to investigate independently fell outside the reasonable bounds of professional conduct and in this case rendered the outcome of Randolph's penalty phase unreliable.

Pearl testified that while he assumed there would be a penalty phase, it was his practice to rely on Krop to investigate any possible mitigation evidence. Pearl testified that he did not interview any family members and that he believed family member witnesses were "loose cannons" and should never be allowed to testify. Pearl admitted that he did not conduct any investigation in Florida or North Carolina and did not intend to do so. Pearl admitted never attempting to contact Randolph's mother who lived in North Carolina.

No tactical motive can be ascribed to omissions based on lack of knowledge, see Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979), or on the failure to properly investigate and prepare. Kimmelman v. Morrison, 477 U.S. 365 (1986).

In Robinson v. State, 707 So. 2d 688 (Fla. 1998), this Court found that Pearl's delegation of his duty to investigate was questionable and thus his inactivity constituted deficient performance. Pearl's deficiency in Robinson was that he "certainly displayed suspect judgment in not 'closing the loop' with Krop on investigating possible mitigation. Pearl should have been more proactive and more directly involved. In that sense, his performance was probably deficient." Robinson, 707 So. 2d at 697. Randolph has presented at least the same measure of evidence of deficient performance.

Pearl testified that Randolph was a cooperative client (PCR 3180) and that he had hired Krop as a confidential expert to conduct the entire mental health investigation and to examine Randolph for competency, sanity and mitigating circumstances (PCR 3181-82). Pearl explained that Krop wrote a report which he, Pearl, shared with the prosecutor (PCR 3183).

Pearl explained he requested neither school (PCR 3199) nor military records (PCR 3191), nor could he have had a strategic reason for not providing them to his expert, because he did not have them (PCR 3192-93). He further explained that he neither interviewed Randolph about his school experiences nor would have reviewed school records (if he had them) with much interest, but rather would have forwarded them to Krop as "he was the expert in this area, not I" (PCR 3194).

Pearl explained that his approach to the penalty phase investigation was to leave it to Krop to be the judge of what was relevant and to conduct any investigation (PCR 3181; 3193).

Pearl did not interview Shirley Randolph, Timothy Randolph, or Pearl Randolph (PCR 3194; 3196). Pearl's general practice was to rely on Krop to conduct the interviews and present the "history of the patient" (PCR 3194). He relied on Krop to "select those things which he feels are relevant to the testimony he wants to give" (PCR 3194). He had Krop present the information so he would not have to worry about "loose cannons on the deck," referring to family and lay witnesses (PCR 3195).

Pearl explained he do not intend to travel to North Carolina or sending his investigator to do so, so he did not seek authorization to travel (PCR 3196).

Pearl testified that he would have wanted Krop to inquire of the parents of Randolph, whether he, as counsel, had the information or not. Pearl said if Krop had had the information provided by Pearl Randolph, he would have elicited the information during Krop's testimony (PCR 3197).

Pearl conceded his ignorance of how this Court approaches capital appeals because he admitted he only "occasionally read a case now and then"(PCR 3279).

Pearl testified that he did not call or contact witnesses Ronzial Williams, Michael Hart, Timothy Calhoun or James Hunter because he did not know they existed (PCR 3260).

This Court must perform an independent de novo review, granting deference only to fact-findings supported by competent substantial evidence. De novo appellate review is appropriate to "ensure the correct and uniform application of the law." Stephens v. State, 24 Fla. L. Weekly S554 (Nov. 24 1999). This Court should find that counsel's performance was deficient in this case.

2. Prejudice

Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or that the deficiencies substantially impair confidence in the outcome of the proceedings.

Strickland, 466 U.S. at 695; Robinson, 707 So. 2d at 695. The question is whether "the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687.

On direct appeal, this Court found that Randolph presented no evidence of statutory mitigating circumstances, but did present evidence of non-statutory mitigating circumstances, several of which likely contributed to the offense:

- Randolph was adopted when he was five months old
- Randolph had problems getting along with people in school and he was referred to psychotherapy for a year in the third grade.
- Randolph's mother was emotionally unstable and was hospitalized for psychiatric reasons on a number of occasions.
- Randolph's father was physically abusive, and administered discipline by tying him and beating him with his hands, a broomstick, and a belt.
- Randolph graduated from high school.
- Randolph received an honorable discharge from the Army; however, he started using drugs during his service, including marijuana and cocaine. In 1984, he began using highly addictive crack cocaine.
- That unlike alcohol intoxication, crack cocaine's effects are not readily apparent from merely looking at a person.
- That when someone regularly uses crack cocaine, the effects of the drug stay in the blood; one's personality and behavior are affected, not necessarily by an immediate ingestion of the drug, but rather by its use over time.
- That Randolph's abnormal personality was greatly influenced by his drug addiction at the time of the offense.
- Randolph regretted what had happened; he was ashamed and embarrassed that he had lost control, and was remorseful about what he had done.
- Randolph had nothing against Mrs. McCollum, that he fully intended only to enter the store and steal the money while she was outside, but that things happened that caused him to panic.
- Randolph's criminal behavior was influenced by his drug addiction.

Randolph v. State, 562 So. 2d at 334. Thus, Randolph's jury recommended death by a very slim margin of 8 to 4.

The evidence collateral counsel presented and asserts there is a reasonable probability would have resulted in a life sentence includes evidence that:

- Randolph was under the influence of extreme emotional or mental disturbance at the time of the murder.
- Randolph's capacity to appreciate the criminality of his conduct of to conform his conduct to the requirements of law was substantially impaired.
- Randolph is significantly brain damaged.
- Randolph's mother noticed immediately after he was adopted that Barry was not normal.
- Randolph had tantrums, grit his teeth and did unusual things as a child.
- Randolph's hands and feet never developed normally.
- Randolph's adoptive mother Pearl came to believe that the adoption agency knew something was wrong with the infant or the mother but that they did not tell her the true story.
- Randolph was raised in a chaotic and abusive home.
- Randolph's mother was an alcoholic and violently dangerous.
- Randolph had severe temper tantrums from an early age.
- Randolph exhibited bizarre behavior such as biting his
- fingers and hands incessantly when upset.
- Randolph's unusual behavior continued as he grew up.
- Randolph had to be taken to a psychiatrist for medication to control his behavior.
- Randolph learned of his adoption at age four or five and was extremely upset.
- Randolph was the one to learn of his father's infidelities and tell Pearl.
- Randolph's parents' marriage fell apart once Pearl learned of Timothy's infidelities.
- Randolph's mother Pearl later became aware of Timothy's harsh beatings of Barry.
- Randolph and his mother were put out of the house when Randolph was seven years old.
- Randolph's mother Pearl lost her job in 1971 because of her "nerves."
- Randolph's mother Pearl "lost control" when Barry was a little boy and ceased properly caring for him.
- Randolph's parents divorced in 1972 when Barry was ten years old because of Pearl's drinking problem and resulting behavior.

- Randolph's mother Pearl Randolph's mother drank heavily and would burn meals or have bouts of uncontrollable behavior due to her drunken state.
- Randolph's parents frequently argued in front of him.
- Randolph's mother Pearl had to get psychological help when she learned that Timothy was going to remarry.
- Randolph worked as hard as he could and was never suspended or expelled from school.
- Randolph was as a good child who did his chores and shared love with his parents.
- Randolph's father used harsh punishment and beatings to attempt to control Barry's disruptive behavior.
- Randolph self-medicated to escape his own inability to deal with the emotions of anger, frustration and disappointment and these conditions were exacerbated by his particularly demanding and disapproving father.
- Randolph suffers psychologically from the Randolph's adoption, troubled childhood, and feelings of abandonment and rejection.
- Randolph's father remarried in September of 1973 and Barry had a very close relationship to their child, his baby brother Jermaine.
- Randolph never saw his mother while he lived with Shirley and Timothy.
- Randolph's mother Pearl never called, sent for him, came to visit, sent him birthday cards or called him on his birthday.
- Randolph's father and Shirley also never celebrated Barry's birthday.
- However, Randolph stayed out of trouble during those years.
- Randolph's grades in 11th grade were not good and he worried he would not graduate, so went to live with his mother for 12th grade.
- Randolph continued, even during his senior year in high school, to have tantrums and grit his teeth as he had always done before.
- Randolph repeatedly made efforts to lead a responsible lifestyle as demonstrated by his military service and job history.
- Randolph kept a job most of the time and tried to provide for his young girlfriend Norma Janene .
- Randolph and Norma Janene have a daughter named Sherisa.
- Randolph had a close relationship with Norma Janene's mother Verna and called "mama" because he wanted her to be his mother because she did not use punishment with her children in the unusual and severe way his father did.
- Randolph suffered severe punishment for minor things during his childhood.
- Randolph's was put in a room or closet for 2-3 days in the dark and forced him to eat alone in his room on those days.

- Barry was required to be an "A" student by his father and tried and tried to get "A" and "B" grades to avoid punishment.
- Randolph never felt he was treated as well as his father's natural son.
- Randolph felt like an outcast in his own family.
- Randolph loved his mother Pearl and tried to take care of her because she had problems and was an alcoholic.
- Medical evidence describing Randolph's fits in childhood.
- Medical evidence that Randolph's fits would have influenced how cocaine affected Randolph.
- Medical evidence that the use of cocaine and other drugs exacerbated Randolph's neurological disease.
- Medical evidence that Randolph's 1979 closed head injury with brief loss of consciousness; bed-wetting (even in prison); sleep-walking and sleep-talking; breath-holding when angry as a child; multiple allergies and frequent nosebleeds (unrelated to cocaine); and drug treatment in grade school which "calmed him down and made him sleepy," suggesting the use of a psychostimulant (Dexedrine or Ritalin) for a likely diagnosis of "hyperactivity" or "minimal brain dysfunction" all had neuro-psychiatric significance.
- Randolph began drinking at the age of 11-12 by sneaking half cans of beer from Pearl Randolph.
- Randolph, after graduating high school and entering the Army, increased his alcohol use to 12-18 beer daily.
- Randolph problems with his mother were because she drank heavily.
- Randolph, from 1983 until the date of his arrest, continued to drink 12-24 beers daily, with the quantity of consumption varying with his concurrent use of cocaine.
- Randolph, throughout this period used alcohol, marijuana, and (occasionally) snorted heroin to "take the edge off" the excessively stimulating, dysphoric effects of cocaine.
- Randolph began using cannabinoids at age 15-16 years in social context with age peers, using "nickel bags" of low-grade marijuana 2-3 times a week.
- Randolph, in his senior year of high school (age 17), began to smoke on a daily basis ("about $5 to $10 worth a day").
- Randolph, after joining the Army, he began to use hashish heavily.
- Randolph continued to use marijuana daily from that time (1980) until his arrest.
- Randolph experimented with other drugs: oral mescaline while in the Army; LSD; PCP (phencyclidine); model airplane glue; methamphetamine.
- Randolph began snorting cocaine in the Army sometime between 1980 and 1982.

- Randolph, while working as a D.J. in an after hours club in New York City (1983-1984), began using 2 grams cocaine every night.
- Randolph first used free-based cocaine in 1883.
- Randolph, by November 1984, was using crack cocaine heavily every day.
- Randolph, in November 1984, attempted to get away from the crack scene and get out of New York moved to a small town in North Carolina where Pearl was living.
- Randolph, from November 1984 until May 1987, managed to quit using cocaine but continued to drink beer heavily and smoke marijuana every day.
- Randolph, once in Palatka, relapsed to his previous pattern of using "massive amounts of crack" at night (concurrently with alcohol and marijuana) and trying to sober up and work by day.
- Medical evidence that Randolph experienced recognized signs and symptoms of high dose cocaine use: a) seizures (tonic-clonic, brief, with loss of consciousness); b) heavy sweating, requiring frequent showers every day to lower the body temperature; c) occasional blackouts (45 minutes maximum); d) coke bugs; e) visual, auditory, and haptic hallucinations; f) significant weight loss; g) paranoia; h) suspiciousness; i) hypervigilence; j) feelings of superiority and invincibility; k) exacerbation of an already "bad temper" and "short fuse;" l) frequent verbal and physical confrontations; m) loosely organized delusions; n) diminished pain perception; o) grossly impaired judgment; and p) inexorable progression of use despite multidimensional adverse consequences.
- Randolph, as an adult in Palatka continued to do things like bite himself on the arm, hand, and fingers if he became upset but was not known to hurt others.
- Randolph's daughter has the same behavior pattern.
- Randolph would walk the floors, talk to himself, and bite himself.
- Randolph had good relationships with the Betts' children.
- As an adult, Randolph was known as "Shorty" because of his unusually short stature.
- Randolph would smoke $300-$400 worth of crack cocaine any chance he could get it during the years from 1987 until the murder of Mrs. McCullom.
- Randolph suffered mood swings and anxiety when he wanted more crack cocaine and could not get more.
- Randolph's girlfriend, Janene was not aware of Barry's crack cocaine use.
- Randolph was a street person at the time of the offense and had been homeless for several weeks, sometimes sleeping in a dumpster at the Handy Way.

- The night before the murder Barry smoked $300 worth of crack cocaine.[26]

Randolph has demonstrated prejudice because had his counsel discovered and presented the available mitigating circumstances, there is more than a reasonable probability that 2 additional jurors would have voted for life and that the balance of aggravating and mitigating circumstances would have been different. Randolph has demonstrated that his attorney's deficiencies substantially impair confidence in the outcome of the proceedings. Strickland, 466 U.S. at 695; Robinson, 707 So. 2d at 695. Randolph has shown that "[the] death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687.

This Court must perform an independent de novo review, granting deference only to fact-findings supported by competent substantial evidence. De novo appellate review is appropriate to "ensure the correct and uniform application of the law." Stephens v. State, 24 Fla. L. Weekly S554 (Nov. 24 1999).

In Robinson, this Court found that the evidence collateral counsel alleged that Pearl should have presented, evidence of good character, would have opened the door for the State to present rebuttal evidence that just a week after the murder he committed an armed robbery and rape of a disabled woman. This Court explained:

> In this case, the trial court found three nonstatutory mitigators on resentencing: Robinson had a difficult childhood; Robinson suffered physical and sexual abuse

[26] Emphasis added to those items which should be considered especially weighty.

> during childhood; and Robinson had a psychosexual disorder. Robinson, 574 So.2d at 109 n. 3. The lay witnesses Robinson identifies certainly could have presented more testimony regarding the first two nonstatutory mitigators, as well as presenting good character evidence about some of the loving relationships Robinson has had with several women and the good deeds he has performed. However, as in Breedlove, the State could have presented, in rebuttal, evidence that less than one week after the St. George murder, Robinson allegedly committed an armed robbery and rape with Fields after coming upon a woman with a disabled car on the interstate. [footnote omitted] In other words, those alleged crimes were an almost exact replay of what happened with Ms. St. George, minus the murder. ***697** The trial court could have concluded that Pearl was not ineffective in not opening the door to this potentially devastating rebuttal evidence.

Robinson, 707 So. 2d 696-97.

This Court denied Robinson relief because if found:

> [] when taken as a whole, Robinson has not demonstrated error in the trial court's conclusion that no prejudice resulted from Pearl's relative inaction. Considering the five valid aggravators, the cumulative nature of the proffered lay testimony, and the modification of Krop's testimony, we find no error in the trial court's finding that Robinson has not demonstrated the prejudice necessary to mandate relief. Rose, 675 So. 2d at 570; Breedlove.

Id. Here, the evidence trial counsel failed to discover and present was evidence that showed substantial mitigation. This Court should grant relief the basis of counsel's failure to investigate and present mitigation evidence in the penalty phase.

B. Inadequate Expert Assistance

Additionally, counsel failed to ensure that Randolph was provided adequate mental health expert assistance. 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). In this regard, 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). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Fessel; Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Mason v. State, 489 So. 2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

Counsel failed in this instance to ensure that Randolph was provided an adequate assessment. Moreover, to the extent the obligation to conduct a complete investigation was Krop's, he failed to conduct a professionally adequate investigation. Either counsel or his expert had a responsibility to conduct an adequate penalty phase investigation. Either or both failed to ensure that an adequate investigation was made. Randolph's due process right to the effective assistance of a mental health expert went unprotected.

C. Closing Argument

Counsel's conduct in closing argument was actually prejudicial to Randolph rather than helpful. Counsel conceded the "in the course of a felony" (R 1534), "avoiding arrest" (R

1897), and "pecuniary gain" (R 1533) aggravating factors without Randolph's consent. By conceding elements, trial counsel bolstered the state's case and failed to challenge the aggravating factors.

Finally, counsel argued:

> even the racial difference may have a bearing on your thinking and reaction, raises thoughts, I think, that might be described as vengeance. A feeling that what you want to do is come out of the box and punish him yourself.

(R 153). Counsel unreasonably prejudiced his client in closing argument.

D. Prosecutorial Misconduct

Improper prosecutorial misconduct can "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); see Sawyer v. Smith, 497 U.S. 227 (1990); see Pope v. Wainwright, 496 So. 2d 798, 801 (Fla. 1986). An intimation that a jury's capital sentencing recommendation is unimportant is incorrect. Hitchcock v. Dugger, 481 U.S. 393 (1987).

Randolph's prosecutor told the jury to believe its penalty phase determination meant no more than having the family dog put to death:

> When you take that old pet that can't get up anymore, and if you can afford to go to the vet you take him to the vet. If you can't, I think my father-in-law put the dog in the trunk of the car and gave him gas, carbon monoxide.

(R 1810). Counsel was ineffective for failing to object to this argument, which was improper and also diminished the jury's sense of responsibility.

E. Jury Instructions and Other Eighth Amendment Error.

1. Burden Shifting Standard

Under Florida law, a capital sentencing jury must be:

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

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This standard was never applied at Randolph's penalty phase proceeding. Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Dixon, for such instructions erroneously shift to the defendant the burden with regard to the ultimate question of whether he should live or die.

Randolph's jury was instructed as follows:

> If you find the aggravating circumstances do not justify the death penalty your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years.
>
> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstance.

(R 1842-43)(emphasis added). This unconstitutional burden shifting violated Randolph's due process and Eighth Amendment rights. Mullaney v. Wilbur, 421 U.S. 684 (1975); Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988); State v. Dixon, 283 So. 2d 1 (Fla. 1973).

Once told that it need not consider mitigating circumstances unless those mitigating circumstances were

sufficient to outweigh the aggravating circumstances, the jury was also precluded from considering mitigating evidence and from evaluating the "totality of the circumstances" in considering the appropriate penalty. Mills v. Maryland, 486 U.S. 367 (1988); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987); Dixon v. State, 283 So. 2d at 10.

In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination in violation of the Eighth Amendment. Caldwell v. Mississippi, 472 U.S. 320 (1985); Hitchcock v. Dugger, 481 U.S. 393 (1987); Maynard v. Cartwright, 486 U.S. 356 (1988).

The sentencing order employs the same standard :

> THEREFORE, this Court having considered the aggravating factors proven by the state beyond a reasonable doubt and all mitigating factors established by the defense, along with all other relevant testimony and argument as to statutory and non-statutory mitigating factors, this Court does hereby find, by law and evidence, that said mitigating factors do not outweigh the aggravating factors found to exist.
>
> The Court has considered these mitigating circumstances and finds that they are insufficient to outweigh the aggravating circumstances set forth above.

(R 646). Thus, the same standard was applied in sentencing. Counsel was ineffective when he failed to object to the burden shifting instruction and to the Court's reliance on the erroneous standard.

2. Sympathy Precluded

Mercy and/or sympathy are valid considerations in a capital sentencing. Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985). The sentencer is to evaluate the circumstances of the crime and

the character of the offender before deciding whether death is an appropriate punishment. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 586 (1978). Any admonition to disregard the consideration of sympathy improperly suggests to the sentencer "that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U.S. 538 (1987)(O'Connor, J., concurring).

Before the penalty phase deliberations, Randolph's jury was admonished that sympathy could play no part in their deliberations:

> In this phase of the case, when you retire to deliberate, your sentence should be based upon the evidence, not upon emotion, pity, or sympathy, anger, or hatred. But only upon the evidence and the law as His Honor will give you.

(R 1802). Counsel's failure to object to the judge's erroneous admonition regarding sympathy and his failure to educate the judge that the Eighth Amendment not only permitted but required consideration of such was deficient performance. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).

3. Majority Vote of Life

A majority vote is required for a death recommendation and thus a 6-6 vote is a life recommendation. Rose v. State, 425 So. 2d 521 (Fla. 1983); Harich v. State, 437 So. 2d 1082 (Fla. 1983). Judge Perry instructed the jury as follows:

> In these proceedings it is not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury.
>
> The fact that the determination of whether a majority of you recommend a death sentence, or sentence of life imprisonment in this case be reached

> by a single ballot, should not influence you to act hastily or without due regard to the gravity of these proceedings.

(R 1844). These instructions rendered Randolph's death sentence fundamentally unfair. It is likely that jurors were swayed by their mistaken belief that a tied jury would be a hung jury and thus changed their votes from life to death to avoid this eventuality. The correct statement of the law contained in the passage read from the standard jury instructions was inadequate to correct the previous instruction misinforming the jury. Incorrect and misleading statements of the law regarding the responsibilities of capital sentencing juries irrevocably reduces the reliability of the sentencing determination.

Trial counsel was ineffective when he failed to object to this erroneous instruction.

4. Vague Aggravating Circumstances, Automatic Aggravating Circumstances, Vague Jury Instructions, And The Court's Failure To Apply Adequate Limiting Constructions

The Eighth Amendment requires that juries receive instructions that guide and narrow the application of aggravating circumstances and thus capital punishment. A lack of adequate instructions leaves juries free to ignore limiting constructions and therefore without a principled way to apply aggravating circumstances. The sentencing jury must receive instructions comporting with Eighth Amendment principles. Espinosa v. Florida, 505 U.S. 1079 (1992). The sentencer must not be allowed to consider improper aggravating circumstances. Stringer v. Black, 503 U.S. 222 (1992). Moreover, "in a 'weighing' State, … it is constitutional error for the sentencer

to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain." Richmond v. Lewis, 506 U.S. 40, 46-47 (1992). A facially vague and overbroad aggravating factor may be cured where "an adequate narrowing construction of the factor" is adopted and applied. Id. However, in order for the violation of the Eighth and Fourteenth Amendments to be cured, the narrowing construction must be applied during a sentencing calculus free from the taint of the facially vague and overbroad factor. Id. at 48-49. In Randolph's case, the aggravating factors were overbroadly applied. Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988). Thus, they failed genuinely to narrow the class of persons eligible for the death sentence. In Randolph's case, the jury instructions did not cure the facially vague and overbroad statute. The jury did not receive instructions as to the narrowing constructions, also known as the elements, of the aggravating circumstances. The jury was left with "open-ended discretion" in violation of Maynard v. Cartwright, 486 U.S. 356 (1988) and the Eighth and Fourteenth Amendments.

a. In The Course Of A Felony

Where an aggravator merely repeats an element of the crime of first degree murder the aggravator is facially vague and overbroad. Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990). An aggravator cannot provide "open-ended discretion." Maynard, 486 U.S. at 362. Since Randolph's conviction could rest on the felony murder rule, the "in the course of a felony"

aggravating factor was facially vague and overbroad. Moreover, this Court has held that this aggravating factor cannot support a death sentence by itself. Rembert v. State, 445 So.2d 337 (Fla. 1984). The failure to advise the jury of the essential elements necessary to return a death recommendation violated the principles of Maynard. Rather than object to this vague factor and instruction, counsel conceded the State was entitled to have it given (R 1766).

"[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 876 (1983). "[L]limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988). The conviction was based on the State's felony-murder theory (R 1566-68). The "in the course of a felony" was thus not "a means of genuinely removing the class of death-eligible persons and thereby channeling the jury's discretion." Stringer v. Black, 503 U.S. ____, 233 (199___). Rather than object to this automatic aggravation, counsel conceded the State was entitled to have it considered (R 1766).

b. Pecuniary Gain

The "pecuniary gain" aggravating factor applies only where pecuniary gain is shown the primary motive for the murder. Peek v. State, 395 So. 2d 492, 499 (Fla. 1981); Small v. State, 533 So. 2d 1137, 1142 (Fla. 1988). Without this limitation, the

statute setting forth the "pecuniary gain" aggravating factor is facially vague and overbroad. The prosecutor argued that:

> [Randolph] "committed for the crime for financial gain, both that that was taken inside the store, and the automobile itself. Inferentially was he to take himself and perhaps his girlfriend to North Carolina on the bicycle? Only one way he was going to get that automobile, and that was to take it."

(R 1804). Trial counsel was ineffective for failing to object to this argument. The jury received no guidance regarding the elements of the "pecuniary gain" aggravating factor. The facially vague and overbroad statute gave the jury "open-ended discretion." Maynard, 486 U.S. at 362. Counsel was ineffective for failing to object to this factor and this instruction.

c. Avoiding Lawful Arrest

The death sentence must be vacated where facts fail to establish that the "dominant motive for the homicide was the elimination of witnesses" but the jury was instructed to consider this aggravating circumstance and the Court found this aggravating circumstance. Dailey v. State, 594 So. 2d 254, (Fla. 1991), White v. State, 403 So. 2d 331, 338 (Fla. 1981). The record does not demonstrate that the dominant or only motivating reason for the homicide was the elimination of witnesses or that the trial court based its application of this circumstance on such a limiting construction. Moreover, the jury was not advised of this requirement. The factor and the instruction are vague and counsel was ineffective for failing to object.

F. Conclusion

In a capital sentencing proceeding, the jury is asked to weigh the mitigation presented against the aggravation presented. Had counsel investigated and presented the available mitigation evidence, evidence that was readily available, more weight would have been present on the life side of the scale. It was counsel's duty to place that weight on the life side of the scale and he was deficient in failing to do so. Randolph was sentenced to death by a vote of 8 to 4. Due to this and counsel's other failures in the penalty phase, the outcome of the penalty phase is unreliable.

ARGUMENT III

RANDOLPH WAS DENIED A FULL AND FAIR POSTCONVICTION EVIDENTIARY HEARING IN VIOLATION OF DUE PROCESS

A. The Circuit Court Abused Its Discretion and Violated Due Process and Randolph's Right to Effective Assistance of Counsel When It Denied His Discovery Motion.

Randolph filed a Motion to Permit Discovery requesting permission to depose 7th Judicial Circuit State Attorney John Tanner, Asst. State Attorney Sean Daly, and Circuit Court Judge John Alexander about matters related to his Claim XX regarding the draft judgment and sentence found in the State Attorney's file (PCR 4645-47). The Court denied Randolph's motion (PCR 4648). In Lewis, this Court held that the trial court, in exercising proper discretion in post-conviction discovery requests, shall consider the issue presented, the time elapsed, the relative burdens on the parties, alternative means of securing the evidence, and any other relevant facts. The Court

failed to consider the relevant facts and erred in denying Randolph's motion. This Court in Lewis, found that Lewis was entitled to depose a judge whose partiality was a central issue to be investigated in a pending Rule 3.850 Motion. The issue here is very similar in that it involves allegations of judicial bias, improper *ex parte* contact, and delegation of judicial duties. Moreover, one of the people counsel sought to depose was Circuit Judge John Alexander.[27] Here, Randolph was aware of the existence of a draft judgment and sentence found in the State Attorney's file but could not obtain additional information about it unless those officials in the Court and the State Attorney's Office came forward with the information. Counsel requested an opportunity to discuss the State's draft judgment and sentence with Judge Alexander but he refused (PCR 4646). Randolph's other prosecutors did not come forward; therefore Randolph had no alternative means of securing the sought after information or fully investigating the issue.

The Court's failure to grant Randolph leave to depose Tanner, Daly and Alexander violated Lewis, due process, Randolph's right to a full and fair evidentiary hearing and his right to develop facts in support of his claims for relief.

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[27] Counsel was later made aware of John Alexander's role in the preparation of the judgment and sentence by clerk Koller. When Judge Mathis denied the discovery request he suggested in his order that the parties interview Jill Brown, Judge Perry's former secretary. Undersigned interviewed Ms. Brown, who had no recollection of a draft judgment and sentence or the preparation of the judgment and sentence in this case, but did refer undersigned to clerk Koller. Clerk Koller then told undersigned about the participation of prosecutor Alexander.

These violations are particularly egregious viewed in light of the fact that the State Attorney's hid the draft judgment and sentence in their undisclosed files for years, undisclosed, before ever being revealed to Randolph's counsel.

In the circumstances here, Judge Mathis abused his discretion when he denied Randolph's discovery request. In the event this Court does not grant the relief sought in Argument I, this Court should reverse and remand, as it did in Lewis, with instructions to the Circuit Court to grant Randolph's Motion to Permit Discovery[28].

B. The Circuit Court Abused Its Discretion and Violated Randolph's Due Process Rights and Right to Effective Assistance of Counsel When It Failed To Admit The Affidavit Of Timothy Calhoun Into Evidence.

Collateral counsel attempted to introduce a 1992 affidavit of Timothy Calhoun with proof of the affiant's subsequent death (PCR 231-36). Randolph sought to admit the affidavit in support of Randolph's penalty phase claims on the basis that it would have been admissible hearsay in the penalty phase (PCR 3734). The Circuit Court refused to admit the affidavit stating that: 1) the an evidentiary hearing is not a penalty phase, 2) the affidavit is hearsay, 3) there is no exception for the affidavit, and 4) the affidavit does not go to mitigation (PCR 3737). The Circuit Court ruling was error. The reasoning stated by the court ignored that mitigation may be presented in the form of hearsay, that the evidence was mitigating, that here

[28] And depose any additional relevant witnesses revealed following that discovery.

a valid exception applied, and that at an evidentiary hearing on penalty phase ineffective assistance of counsel, evidence admissible at a penalty phase, must be considered. Moreover, the ruling denied Randolph a full and fair opportunity to develop and present the facts supporting his claims for relief.

C. The Circuit Court Abused Its Discretion and Violated Randolph's Due Process Rights and Right to Effective Assistance of Counsel When It Failed To Grant Randolph's Motion for Continuance.

The Circuit Court and this Court's failure to provide adequate time for the preparation and presentation of the evidentiary hearing this Court ordered on remand denied Randolph a full and fair hearing. The Circuit Court's failure to conduct preliminary proceedings such as public records hearings or a Huff hearing denied Randolph the opportunity to develop the facts of his claims. Randolph was forced to go forward without his lead counsel and without qualified counsel and conduct lengthy public records proceedings at the same time he was expected to present evidence in support of his claims for relief. These circumstances rendered his state court opportunity to develop facts in support of his claims inadequate and denied him the effective assistance of counsel.

In March 1997 Asst. State Attorney Ben Fox contacted collateral counsel and indicated that the parties had been directed by the Circuit Court to file a motion with this Court seeking an enlargement of the time for the remand. The motion was jointly filed and unopposed. In the motion, then collateral counsel for Randolph, Gail Anderson, told this Court that her

excessive caseload and workload prevented her from adequately preparing to represent Randolph in the immediately near future. Counsel Anderson was lead counsel on 19 other capital postconviction cases and co-counsel on 3 other capital postconviction cases and thus had an excessive caseload. Moreover, attorney Anderson had an overburdened workload.[29] A status conference was then set to be held in Circuit Court on April 30. This Court granted the motion and enlarged the time for the conducting of the evidentiary hearing until July 24. Anderson then requested permission to appear telephonically at the April 30 Motion to Compel hearing (PCR 26-27) and a continuance or order directing the county to cover the costs of

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[29] For example, Anderson was in Bartow, Florida, from March 2 through 5 for an evidentiary hearing in Johnson v. State; on March 6, Anderson was in Tampa, Florida, for a settlement conference ordered by the federal court in Glock v. Singletary; on March 17, Anderson was again in Tampa for a status conference in Glock v. Singletary; Anderson was to be back in Tampa from March 29 through April 2 or 3 for an evidentiary hearing in federal court in Glock v. Singletary. Preparations for the Glock evidentiary hearing consumed most of Anderson's time in March. Additionally, on March 17, 1997, Anderson filed a Rule 3.850 motion in Gamble v. State. On March 27, 1997, the initial brief in Melendez v. State was due to be filed in this Court. On March 28, 1997, the initial brief in Bryan v. Singletary was due to be filed in the Eleventh Circuit. On March 28, the motion for rehearing in Breedlove v. State was due to be filed in this Court. By April 7, counsel was due to prepare and file a Traverse in Koon v. Singletary in federal district court. By April 24, counsel was to prepare and file a federal habeas petition in federal district court in Lopez v. Singletary. Former co-counsel for Randolph, Harun Shabazz, had resigned recently and thus was not available to assist in proceedings on this case. Further, on March 12, the Governor of Florida issued a death warrant on Leo Jones, whose execution was scheduled for April 17. Anderson had been co-counsel for Jones since 1991. Due to the death warrant, Anderson was to devote all available time to Jones' case after the completion of the Glock evidentiary hearing.

her appearance. Anderson had been instructed by the then CCR, Michael Minerva, that no funds for travel or long-distance telephone calls would be approved (PCR 28-30). Judge Nichols conducted the hearing on April 30 without Randolph or his counsel. Only a representative for the State was present (PCR 87-89). At that hearing, the Court did not hear the Motion to Compel, but instead set the Rule 3.850 motion for evidentiary hearing on June 2 (PCR 33).

On May 8, Randolph filed a Motion to Disqualify Judge Nichols and a Motion to Reconsider the order setting the evidentiary hearing (PCR 54-83; 35-53). On May 19, Judge Nichols disqualified himself (PCR 85-86).

On May 20, Randolph filed a Notice of Defendant's Inability to Proceed/Motion for Continuance (PCR 90-114). On May 27, Judge Robert K. Mathis was assigned to the case (PCR 161). On June 3, Judge Mathis granted Randolph's request for a continuance and scheduled a hearing on Randolph's Rule 3.850 motion and Motion to Compel for July 22-24 (PCR 165-66).

On July 16, Randolph filed a request for a continuance of the evidentiary hearing because his lead counsel, Gail Anderson, was unavailable. Anderson was also a lead attorney on the Leo Jones case (PCR 174-274). Randolph also sought an enlargement of time from this Court in which to conduct the evidentiary hearing because of Anderson's obligations to assist in preparing a brief for this Court regarding Jones' electric chair claim. This Court denied that motion and instead granted Anderson 10 additional days in which to brief Jones' case.

Unfortunately, this Court's ruling did not solve the conflict for Anderson and she was unable to attend Randolph's evidentiary hearing. In the absence of an enlargement of time from this Court, Judge Mathis denied Randolph's motion for continuance (PCR 2886-88).

Randolph had repeatedly requested an opportunity to have a Huff hearing and a Motion to Compel hearing before any evidentiary hearing. However, the Circuit Court never held a any pre-hearing proceedings such as public records hearings or a Huff hearing in this case, thus the July 1997 hearing was the first and appeared at the time to be the only opportunity to address public records issues. Because in another Putnam County case, State v. Colina, CCR had learned that the Putnam County Sheriff's Office had not fully responded to all prior public records requests made by CCR clients, several deputies were subpoenaed as well as officers and custodians of several other agencies. The lead detective in Randolph's case produced his personal materials for the first time at the July 1997 hearing.

D. Conclusion

Randolph is entitled to effective assistance in his post-conviction proceedings. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988); Spaziano v. State, 660 So.2d 1363, 1370 (Fla. 1995). Randolph was entitled to a full, fair and adequate opportunity to vindicate his constitutional rights. Art. V, sec. 3(b)(9), Fla. Const.; Fla. R. Crim. P. 3.850; Holland v. State, 503 So. 2d 1250 (Fla. 1987). These rights were violated here.

ARGUMENT IV

INEFFECTIVE ASSISTANCE OF COUNSEL IN THE GUILT PHASE

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland 466 U.S. at 688. Strickland requires a defendant to demonstrate: 1) unreasonable attorney performance, and 2) prejudice. Randolph has demonstrated both. Under Strickland, ineffectiveness of counsel occurs when trial counsel's conduct so undermines the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. De novo review of Randolph's claims of ineffective assistance of counsel should demonstrate that Randolph has proved both unreasonable attorney performance and prejudice.

A. Concessions of Guilt

Rather than advocate on behalf of his client, counsel relieved the State of its burden to prove Randolph guilty and aided the State in persuading the jury there was no reasonable doubt (R 1532-57; 1577-83). Counsel conceded the rape charge without Randolph's consent (R 1534). Counsel conceded the robbery and grand theft charges without Randolph's consent (R 1532). Finally, counsel conceded that the victim's death occurred in the course of a felony without Randolph's consent (R 1534). Counsel rendered ineffective assistance.

B. Available Voluntary Intoxication Evidence

Throughout the trial, testimony was given that Randolph was addicted to crack cocaine. Evidence was available that Randolph smoked $300 worth of crack cocaine the day and night before the murder. Expert testimony, both medical and psychological, was available regarding the affects of Randolph's crack cocaine addiction and Randolph's crack cocaine use before the crime. Counsel's failure to discover and present this evidence constituted ineffective assistance of counsel.

C. Consultation And Advise

During the Feb. 22, 1989 guilt phase charge conference the following occurred:

> THE COURT: Good. There are no affirmative defenses in the case, that I'm aware of. Is he going to claim alibi tomorrow? You haven't filed a notice, have you?
>
> MR. PEARL: Sure haven't. No, no, he's not going to claim alibi.
>
> You'll find that whatever he testifies to is going to be absolutely consistent with his -- with the written statement he made, or he's going to come in here on a stretcher. One or the other.

(R 1512)(emphasis added).

> MR. PEARL: And here is the other one which I offer conditionally based upon whether the Defendant testifies tomorrow, and testifies as I think he will.
>
> THE COURT: Conditionally. I love conditionally. Whoa, yeah.
>
> MR. PEARL: Well, if he testifies to the fact to an intoxication or impairment by crack cocaine, I think you've got to give it. If he screams and hollers about it.
>
> THE COURT: This is the old intoxication charge.
>
> MR. PEARL: Well, I mean, Linehand said that was okay.

MR. ALEXANDER: 45(e) of your book, Judge.

MR. PEARL: I mean, Haritch (sic) versus -- what is it, Dugger, Wainwright, whoever it is in the Eleventh Circuit. They thought that was just fine and couldn't understand why it was taken out.

They love it just the way it is.

(R 1514). The failure to investigate, consult and advise his client, reflected in these comments, constituted ineffective assistance.

D. Lack of a Complete Record

When errors or omissions appear, as here, re-examination of the complete record is required. Delap v. State, 350 So. 2d 462 (Fla. 1977). Many bench conferences were unreported (R 1017; 1102; 1229; 1376; 1447; 1450; 1596; and 1660). Randolph did not waive his right to a complete record on appeal, and, therefore, he is entitled to a full, fair and comprehensive inquiry into the accuracy of the record on appeal and to correct the record. Moreover, counsel rendered ineffective assistance in failing to assure that a proper record was made.

E. Presence

A criminal defendant has a Sixth and Fourteenth Amendment right to be present at all critical stages of the proceedings against him. Francis v. State, 413 So. 2d 493 (Fla. 1982); Illinois v. Allen, 397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 579 (1884); Diaz v. United States, 223 U.S. 442 (1912); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). Randolph was involuntarily absent from the February 24, 1989 proceeding which occurred immediately before the penalty phase

(R 1635-43). At this proceeding, trial counsel conceded the State could rely on felony murder, the court heard argument on whether Dr. McConaghie could discuss cause of death (R 1638-9), whether the State could use photographs to show heinous, atrocious, and cruel (R 1639), and whether or not there would be evidence introduced regarding the O negative blood issue (R 1641-3). Randolph never waived his presence at this proceeding. Because there is a "reasonable possibility," that Randolph's rights were prejudiced by his absence, he is entitled to relief. Proffitt, 685 F.2d at 1260. Counsel was ineffective.

ARGUMENT V

TRIAL COUNSEL HARBORED AN UNDISCLOSED CONFLICT OF INTEREST IN VIOLATION OF RANDOLPH'S SIXTH AMENDMENT RIGHTS TO CONFLICT-FREE COUNSEL.

In Claim V of his Rule 3.850 Motion, Randolph alleged that Howard Pearl's status as a special deputy sheriff constituted an unconstitutional conflict of interest. In support of this claim, Randolph would rely on the arguments presented at page 48-57 of his Initial Brief in Consolidated Case No. 81,950.

ARGUMENT VI

JUDGE PERRY HARBORED AN UNDISCLOSED BIAS IN VIOLATION OF DUE PROCESS.

To establish a basis for disqualification a movant need show "a well grounded fear that he will not receive a fair trial at the hands of the judge." Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983). Due Process also entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. Carey v. Piphus, 435 U.S. 247, 259-262, 266-

267 (1978); Mathews v. Eldridge, 424 U.S. 319, 344 (1976); Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

Judge Perry failed to reveal he was a special deputy sheriff. This fact became known only when he testified in December, 1992.[30] Had Randolph known previously, he would have filed a motion to recuse Judge Perry. Judge Perry, whose lack of impartiality has been otherwise demonstrated in this case, should have disclosed his status to Randolph and/or recused himself.

ARGUMENT VII

THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR VIOLATED THE EIGHTH AMENDMENT.

"[T]there is no serious argument that [the language 'especially heinous, cruel or depraved'] is not facially vague." Richmond v. Lewis, 506 U.S. 40, 46-47 (1992). Florida's statutory language ("especially heinous, atrocious, or cruel") is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments. Espinosa v. Florida, 505 U.S. 1079 (1992). Counsel objected to the factor as vague (R 1778) and to the jury instruction as vague (R 1783-84). On direct appeal, Randolph challenged the vagueness of the factor and that it was not sufficiently defined for the jury (Initial Brief at 55-59). This Court found the claims without merit. Randolph v. State, 562 So. 2d 331 (Fla. 1990). In light of Maynard, Richmond,

[30] Transcripts of the 1992 hearing are at CCRC Middle and counsel is unable to provide a citation to this testimony. Citation to this testimony will be included in the reply brief.

Espinosa, and their progeny, this Court must reconsider those claims.

The Circuit Court correctly found that this claim is properly preserved for postconviction review (PCR 4612).

CONCLUSION

Randolph has presented evidence of judicial impropriety that mandates a new trial and/or penalty phase. Randolph has presented evidence that raises substantial doubt about the appropriateness of a sentence of death. The convictions and sentence of death were obtained in violation of the Sixth, Eighth and Fourteenth Amendment. This Court should grant a new trial and/or penalty phase.

Respectfully submitted,

SYLVIA W. SMITH

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Judy Taylor Rush, Office of the Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, FL 32318 on January 27, 2000.

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