
IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,134

DAVID COOK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
~~OF THE ELEVENTH JUDICIAL CIRCUIT,~~
IN AND FOR DADE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's summary denial of Rule 3.850 relief, as well as various rulings made during the course of Mr. Cook's request for postconviction relief. The following symbols will be used to designate references to the record in this appeal:

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

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

"PCR." -- record on postconviction appeal;

"Supp. PCR." -- supplemental record on postconviction appeal"

REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE

The Circuit Court for the Eleventh Judicial Circuit in and for Dade County Florida entered the judgements of conviction and sentence of death at issue. Mr. Cook was charged by indictment dated September 12, 1984, with two counts of first degree murder and related offenses (R. 1-4A). He pled not guilty.

Mr. Cook was tried by a jury August 6-9, 1985. The jury rendered verdicts of guilty (R. 1010-11).

After a penalty phase, the jury recommended death for both of the first degree murder convictions, by a vote of seven (7) to five (5) on Count One, and a vote of eight (8) to four (4) on Count Two (R. 1156).

On October 25, 1985, the trial court imposed a sentence of life imprisonment with a minimum mandatory of twenty-five (25) years on count one of first degree murder and a sentence of death on count two of first-degree murder. The court also imposed a

sentence of life imprisonment for the armed burglary, a sentence of fifteen years each for both of the counts of attempted robbery and suspended the sentence for count six, unlawful possession of a firearm. Each of these sentences was to be served consecutively (R. 233-34). The sentencing hearing at which these sentences were imposed was not recorded (See Supp.R2).

On direct appeal, this Court affirmed Mr. Cook's convictions, but remanded to the trial court for resentencing on the sentence of death. Cook v. State, 542 So. 2d 964 (Fla. 1989).

The trial court imposed a sentence of death for the conviction of first-degree murder ore tenus on February 5, 1990 (Supp.R. 22). No written sentence order was entered until March 30, 1990 (Supp.R1-4).

On direct appeal from the resentencing, this Court affirmed the convictions and sentences. Cook v. State, 581 So. 2d 141 (Fla. 1991). The United States Supreme Court denied certiorari on October 7, 1991. Cook v. Florida, 112S.Ct.252 (1991). On January 8, 1993, Mr. Cook filed a motion to vacate judgment of conviction and sentence with special request for leave to amend (PCR.100-157). He supplemented this on October 6, 1993 (PCR.202-242). Mr. Cook then filed a motion to compel production of public records on April 7, 1996 (PCR. 251-257). On December 4, 1996, the circuit court denied Mr. Cook's motion to vacate, having neither heard his motion to compel, nor granted a hearing on the motion to vacate (PCR.292-296). The trial court's order denying Rule 3.850

relief to Mr. Cook referred to Mr. Cook's legitimate attempts to obtain public records as a "sham". and accused counsel for Mr. Cook as using the public records process as "another tool to delay resolution", as well as labelling counsel for Mr. Cook as almost "contemptuous".

On the basis of the trial court's bias and prejudice against Mr. Cook and his counsel, as evidenced by the language of his order denying Rule 3.850 relief, on December 11, 1996, Mr. Cook filed a motion to disqualify the trial court (PCR.292) However, the court not only failed to disqualify himself, but failed to make any ruling alt all on the motion.

On December 24, 1996, Mr. Cook timely filed a motion for rehearing on the court's order denying Rule 3.850 relief (PCRS.12-144). The circuit court denied the motion for rehearing on July 31, 1998(PCR.145-146). Mr. Cook then filed a notice of appeal to this Court.

SUMMARY OF ARGUMENT

I. Mr. Cook is entitled to a Huff hearing on all of the claims raised in his Rule 3.850 motion. The trial court erred in summarily denying his motion without giving Mr. Cook the benefit of argument on any of his claims pursuant to Huff v. State, 622 So,2d 982 (Fla. 1993).

2. Mr. Cook is entitled to a full evidentiary hearing on all the claims raised in his Rule 3.850 motion. Mr. Cook pleaded specific detailed claims for relief, including claims of

ineffective assistance of counsel, Ake and Brady claims which are legally sufficient and are not refuted by the record.

3. The trial court was biased and prejudiced throughout Mr. Cook's capital trial, resentencing and post conviction proceedings. This is evidenced inter alia, by his order denying post conviction relief to Mr. Cook in which he categorized Mr. Cook's cognizable public records claim as a "sham" and "nothing more than another tool to delay resolution". It is also shown by his characterization of counsel's proper delegation of her appearance at the status conference to a second chair attorney from her office as "contemptuous". The trial court further erred by failing to recuse himself following Mr. Cook's motion to disqualify him, and by entering an order on Mr. Cook's motion for rehearing before reaching the motion to disqualify him.

4. Mr. Cook has been denied access to the files and records in the possession of certain state agencies which pertain to his case. The trial court erred by refusing to hear Mr. Cook's motion to compel production of public records, by ignoring the provisions of the then new Fla. R. Crim. P. 3.852, and by denying Mr. Cook the opportunity to amend his Rule 3.850 motion.

5. Mr. Cook has not been provided access to trial counsel's files. Collateral counsel is rendered ineffective through trial counsel's failure to turn over Mr. Cook's files.

6. The prosecutor's inflammatory and improper comments rendered MR. Cook's death sentence fundamentally unfair and

unreliable. The prosecutor's argument improperly incited the jury to find non statutory aggravation.

7. Mr. Cook was denied a proper direct appeal from his judgment of conviction and sentence of death due to omissions in the record. Large portions of the record are missing, including the entire original sentencing proceeding, rendering appellate counsel ineffective.

8. Constitutional error occurred during the jury instructions and trial counsel was ineffective for failing to object. These errors include, including the majority verdict instruction, the burden shifting instruction, the Caldwell error, the improper doubling of aggravating circumstances, and the automatic felony aggravating circumstance.

9. The judge improperly considered non statutory aggravating circumstances. The judge's order on resentencing Mr. Cook to death showed he considered the victim's small size, Mr. Cook's cocaine habit and impermissible victim impact evidence.

10. The trial court refused to find and weigh mitigation presented in the penalty phase. For example, Mr. Cook presented uncontroverted evidence of his alcohol and substance abuse, that he was a good husband, father and employee, that he was religious and a good candidate for rehabilitation, which the court did not weigh.

11. The pecuniary gain aggravating circumstance was improperly applied. The jury were instructed that they could

consider it, yet it was not proven beyond a reasonable doubt.

12. Mr. Cook was absent from critical stages of his capital trial and resentencing proceedings. In particular, he was absent from his resentencing proceeding.

13. The Rules prohibiting Mr. Cook from interviewing jurors are unconstitutional.

14. Juror misconduct occurred as evidenced, inter alia by the speed of the jury's verdict, indicating their predetermination of the verdict and lack of deliberation.

15. Gruesome photographs were introduced which were inflammatory, cumulative and prejudicial.

16. Mr. Cook is innocent of the death penalty, since none of the aggravating circumstances found by the trial court at resentencing are properly applied in his case.

17. The cumulative errors in Mr. Cook's capital trial and resentencing render his proceedings fundamentally unfair.

18. Mr. Cook's right to remain silent was violated because his mental disabilities were exploited when the police took his statement.

19. Judicial electrocution is cruel and unusual punishment.

20. This Court failed to conduct a meaningful harmless error analysis following its striking of the heinous, atrocious, or cruel and the cold, calculated and premeditated aggravating circumstances.

ARGUMENT 1

**MR. COOK IS ENTITLED TO A HUFF V. STATE
HEARING ON HIS RULE 3.850 MOTION**

Mr. Cook timely filed his initial postconviction motion (PCR.100-157), and supplement thereto (PCR. 200-242) as mandated by law. In order to facilitate production of public records, he then filed a motion to compel production of public records on April 7, 1996 (PCR.251-257).

At a status conference on November 22 1996, ¹and over objection by counsel, the court summarily denied the Rule 3.850 motion, neither conducting a hearing on the motion to compel, nor allowing amendment of the motion, nor conducting a Huff hearing. This was followed by written order dated December 4, 1996.²

Under Huff v. State, 622 So. 2d 982 (Fla 1993). this Court held

Because of the severity of punishment at issue in a death penalty postconviction case, we have determined that henceforth the judge

¹ The hearing was originally scheduled for August 30, 1996 but postponed due to the trial court's indisposition.

² During the course of the status conference. the trial court did offer counsel an opportunity to argue the merits of the case, but counsel was unprepared to do so, and did not do so both because the hearing was not noticed as a Huff hearing. PCR.258), and because the motion to compel was still pending. See Ventura v. State, 673 So.2d 479, 481 (Fla.1996) (dismissal of capital defendant's motion for postconviction relief, before public records sought by him were provided, was premature, and defendant was entitled to amend his motion once requested records were furnished.

must allow the attorneys the opportunity to appear before the court and be heard on an intimal 3.850 motion.

Huff v, State, 622 So. 2d at 983.

Contrary to Huff, the proceeding was not followed. The status conference on November 22, 1999 was not noticed as a Huff hearing. In any event, a Huff hearing at that juncture would have been premature, given the failure of the court to hear the pending motion to compel public records. and resolve other outstanding public records issues.³

At the status conference, Mr. Cook was represented by Rachel Day, who was standing in for Mr. Cook's lead counsel. Terri Backhus. Ms. Backhus was unable to attend the status conference due to the opening of the then Tampa branch office of CCR which she headed, and also because she was assigned to the John Mills case. John Mills was under death warrant at that time and was executed on December 6, 1996.

The practice of having second chair attorneys stand in for

³ At the time of the status conference, Fla. R. Crim. P. 3.852 had recently been implemented. Under the new rule, the trial court would not only have jurisdiction over agencies within the Eleventh Judicial Circuit, but all other state agencies from whom Mr. Cook had made public records requests. The new rule made specific provisions for individuals, such as Mr. Cook, who had already commenced public records litigation. Mr. Cook notified the Court of his intention to pursue records from those agencies, who were not listed in the April 1996 motion, but the court likewise refused to set a hearing on the matter.

lead counsel on routing or minor matters is well established and routine practice in Dade County, as in the rest of Florida. To insist on lead counsel always being present would be to cause unnecessary delay to the litigation of cases. However, the trial court in his order characterized Ms. Backhus' substitution by another attorney as follows:

Likewise the failure to appear and failure to notify the Court prior to the appointed time is a waiver of the right to argue the merits, if not openly contemptuous. As will appear below, perhaps her failure to appear has very much to do with having nothing to say that hasn't been said before or that has been waived.

(PCR.292).

Contrary to the court's assertion, nothing in the record of Mr. Cook's case supports the notion that Mr. Cook waived his right to argue the merits of his case. There is no authority for his proposition that having another attorney cover a routine status hearing constitutes a waiver of a proper Huff hearing. Had the hearing been noticed as a Huff hearing, clearly counsel would have notified the court of her conflicting schedule and moved for a continuance.

Mr. Cook was not given "fair notice and a reasonable opportunity to be heard." See Huff at 983, quoting Scull v. State, 569 So. 2d 1251 (Fla 1990). See also Mordenti v. State, 711 So. 2d 30 (Fla. 1998). This case should be remanded back to the circuit court for an opportunity to conduct a Huff hearing in accordance with the law.

ARGUMENT II

MR. COOK IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS RULE 3.850 CLAIMS

A. ERRONEOUS SUMMARY DENIAL

On January 8, 1993 Mr. Cook filed his initial Rule 3.850 motion (PCR 100-157), which he supplemented in October 6, 1993(PCR 200-242). He pleaded detailed issues and demonstrated his entitlement to an evidentiary hearing. However, at a status conference on November 22, 1996, the trial court summarily denied his motion without granting a hearing. The trial court held no hearing at which Mr. Cook could compel the compliance with Chapter 119 by state agencies. The trial court attached nothing to the order denying relief.

A trial court has only two options when presented with a Rule 3.850 motion: "either grant an evidentiary hearing or alternatively attach to any order denying relief adequate portions of the record affirmatively demonstrating that appellant is not entitled to relief on the claims asserted", Witherspoon v. State 590 So. 2d 1138 (4th DCA 1992). A trial court may not summarily deny without "attach[ing] portions of the files and records conclusively showing the appellant is entitled to no relief", Rodriguez v. State, 592 So. 2d 1261 (2nd DCA 1992). See also Brown v. State, 596 So. 2d 1025, 1028 (Fla.1992).

The law strongly favors full evidentiary hearings in capital post conviction cases, especially where a claim is grounded in

factual as opposed to legal matters. "Because the trial court denied the motion without an evidentiary hearing, and without attaching any portion of the record to the order of denial, our review is limited to determining whether the motion conclusively shows whether [Mr. Cook] is entitled to no relief."Gorham v. State, 521 So. 2d1067, 1069 (Fla; 1988). See also LeDuc v. State, 415 So. 2d 721, 722 (Fla. 1982).

Some fact based claims in post conviction litigation can only be considered after and evidentiary hearing, Heiney v. State, 558 So. 2d 398, 400 (fla. 1990). "The need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. Where a determination has been made that a defendant is entitled to such an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process and could never be harmless." . Holland v. State, 503 So. 2d 1250, 1252-3) Fla. 1087). Accepting the allegations . . .at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing", Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla 1989).

Mr. Cook has pleaded substantial factual allegations including ineffective assistance of counsel, Brady Ake violations which go to the fundamental fairness of his conviction and to the appropriateness of his death sentence. "Because we cannot say that the record conclusively shows [Mr. Cook] is entitled to no relief, we must remand this issue to the trial court for an

evidentiary hearing, Demps v. State, 416 So. 2d 808, (Fla. 1982).

Under Rule 3.850 and this Court's well settled precedent, a post conviction movant is entitled to evidentiary hearing unless the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief", Fla R. Crim. P. 3.850. See also Lemon v. State, 498 So. 2d 923 (Fla. 1986); Hoffman v. State, 613 So. 2d 1250, (Fla. 1987) O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984); Gorham. Mr. Cook has alleged facts, which, if proven, would entitle him to relief. Furthermore, the files and records in this case do not conclusively show that he is entitled to no relief.

The trial court's denial of Mr. Cook's Rule 3.850 motion flies in the face of the clear requirements of the law. It makes no use of the record or files in this case to show conclusively that Mr. Cook is not entitled to relief. It thus ignores the express requirements of Rule 3.850 and the substantial and unequivocal body of case law from this Court holding that courts must comply with the Rule.

This Court has "no choice but to reverse the order under review and remand" Hoffman, 571 So. 2d at 450, and order a full and complete evidentiary hearing on Mr. Cook's Rule 3.850 motion.

B. INEFFECTIVENESS PRETRIAL AND AT GUILT/INNOCENCE PHASE

Mr. Cook is entitled to an evidentiary hearing on his claim of ineffective assistance of counsel at his guilt/innocence claim.

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. An attorney is charged with the responsibility of knowing the law and presenting legal argument in accord with the applicable principles of law. See e.g. Garcia v. State, 622 So. 2d 1325 (Fla. 1993), Nero v. Blackburn, 597F.2d 1168 (5th Cir. 1970). In Mr. Cook's case, counsel rendered prejudicially deficient performance and a hearing is warranted.

1. The systemic flaws / conflict of interest issue.

Mr. Cook was represented at his capital trial by Arthur Carter. Mr. Carter was appointed to this case because a conflict existed between Mr. Cook and the Dade County Public Defender's Office. Mr. Carter was not qualified to represent Mr. Cook in his complex capital case. However, the flaws inherent in the system used to appoint special public defenders itself ensured inadequate representation of Mr. Cook, in violation of his Sixth, Eighth and Fourteenth Amendment rights. Mr. Cook was denied effective assistance of counsel through a system of judicial patronage that ran rampant through Dade County at that time.⁴ This system, which

⁴A series of articles published in the MIAMI HERALD in 1992 detailed the corrupt system through which a *coterie* of five private attorneys cornered the lucrative market of special public defender appointments. The article named five criminal defense attorneys, one of whom was Arthur Carter. The

should have protected Mr. Cook's rights to effective assistance of counsel in fact ensured the opposite. Counsel cut corners, failed to investigate and conducted the entire capital case as quickly as possible. No tactic nor strategy other than personal greed can be attributed to Carter's conduct. Mr. Cook was represented by an attorney whose interests were conflicted by his desire to curry favor for future appointments as a special public defender. Mr. Cook's interests were not his primary concern.

This conflict was further illustrated by the bills Mr. Carter submitted to Dade County for the time he supposedly spent on cases. The failure of the court to audit Mr. Carter's billing practices allowed him to hide his improper behavior in Mr. Cook's case and for years until he was finally exposed. Mr. Carter systematically overcharged Dade County for many cases, including that of Mr. Cook, in violation of fundamental principles of professional ethics prohibiting the collection of excessive fees. See Fla. R. P. Conduct 4-1.5(a).

practices exposed by the articles include a systematic *quid pro quo* in which the defense attorneys were appointed in return for large campaign contributions to individual judges, or through being on the individual judge's "good" list.

In an article dated April 14, 1992, Judge Carney was quoted as saying that many judges feel an obligation to give court appointments to those who helped keep their seat on the bench noting that " it is only human nature to reciprocate." Judge Carney's tacit indulgence of this objectionable practice is yet another instance of his bias and prejudice against individual indigent defendants.

It is unclear how much time Carter devoted to Mr. Cook's defense although he billed Dade County a total of \$4,240, representing 56 hours of in court time and 36 hours of out of court time. He was paid \$3,500, the maximum allowable for a capital case at that time. A preliminary review of Mr. Carter's affidavit of fees shows that this figure is a gross overstatement in two respects. First, the affidavit itself is internally inconsistent. Mr. Carter claimed 56 hours of in court time, yet the breakdown on the face of the affidavit shows only 49 hours. A review of the individual hours accounted for shows that Mr. Carter accounted for work that he did not do. While it is impossible to audit all the hours claimed, it is clear from the trial record that Carter's affidavit overstates the time he actually spent in court. On August 5, 1985 Carter charged four (4) hours for a motions hearing, which only lasted several minutes. On August 7, 1985 he charged seven (7) hours while only attending court for four (4) hours. Similarly Carter claimed to have attended court for four (4) hours on August 12, whereas the record reflects a much shorter hearing. The 56 hours Carter claims to have spent in court on Mr. Cook's cases was not accurate according to the record.⁵

⁵Carter was suspended from the practice of law in Florida following a public reprimand received for overcharging Dade County relating to appointments as a Special Public Defender. Mr. Carter was suspended following his failure to repay Dade County the sum of \$10,000 in restitution, relating to Court appointments

This conflict constituted a breach of counsel's duty of loyalty to Mr. Cook. See King v. Strickland, 748 F.2d 1462 (11th Cir. 1984). Prejudice is presumed where a defendant demonstrates that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 333, 348 (1980). Here the conflict is clear. Defense counsel was appointed as a result of his longstanding relationship with members of the Dade County judiciary. His lucrative practice depended on retaining a good rapport with judges in order to secure future appointments. Moreover, the statutory cap on lawyers fees in capital cases at that time ensured that lawyers such as Mr. Carter would benefit most from the system. The systemic flaws which allowed Mr. Carter to be appointed combined with Mr. Carter's flagrant abuses of that system establishes a clear conflict of interest.

The adverse consequences are evident. In this case Mr. Cook's counsel conceded guilt, and failed to investigate defenses or mitigation. Mr. Cook's counsel simply did not put in the time necessary to ensure Mr. Cook any meaningful representation in his

between 1988 and 1991. Mr. Carter frequently charged the court for more than 24 hours work in a single calendar day. Mr. Carter was suspended for failing to make restitution to Dade County as ordered by this Court. Mr. Carter pled guilty to the overbilling and was suspended from the Florida Bar on March 27, 1996. Earlier that month, Mr. Carter had been suspended again from the practice of law for entering a hospital under a false name and attempting to get medical treatment without payment.

capital case.

A defendant's waiver of counsel with an adverse conflict must be "established by clear, unequivocal and unambiguous language. The record should show in some way that the defendant is aware of the conflict of interest, realized the conflict could affect the defense, and knew of the right to obtain other counsel," U.S. v. Rodriguez, 982 F.2d. 474, 478 (11th Cir. 1986). Here, however, there is no indication in the record that Mr. Cook was specifically aware of the nature of the conflict. There is no indication that he realized the conflict could compromise his defense, through his attorney's failure to investigate the case properly. There is no indication that Mr. Cook was advised of his right to conflict free counsel. At best, the record is equivocal and ambiguous. In any event, Mr. Cook was incapable of making a knowing, intelligent and voluntary waiver of his right to conflict free counsel due to his substance abuse disorder. Had counsel investigated Mr. Cook's mental condition, he would have been aware of Mr. Cook's inability to waive.

The outcome of Mr. Cook's trial and his death sentence are thus unreliable. Mr. Cook is entitled to an evidentiary hearing at which he can further substantiate these claims. Relief is warranted.

2. Counsel conceded the case and abandoned his client

Counsel was ineffective when he conceded the entire case, every charge, and every element thereof, to the court and the

jury; failed to fully investigate the defense used at trial; abandoned his client; and breached his duty of loyalty to his client. Had counsel investigated, prepared and defended this case in a reasonable manner, there is a high probability that Mr. Cook would not have been convicted. Even if he had been convicted he would not have faced death penalty.

During his motion for a directed verdict of acquittal, counsel conceded felony murder, the issue to be decided by the court:

Whether or not it was committed during the course of a robbery, I would concede the evidence does show that. Whether or not it was an attempted robbery, I would concede the evidence does show that. Whether or not it was a burglary in legal terms, I would concede it shows that.

(R. 849). After conceding all of the charges against his client, counsel then asked the judge to enter a directed verdict of acquittal. Not surprisingly, this motion was denied (R. 850).

Trial counsel's actions relieved the State of the burden to prove Mr. Cook's guilt, and affirmatively aided the State in persuading the jury that there was no reasonable doubt that Mr. Cook was "guilty . . . as charged." Counsel improperly conceded the charge of premeditated and felony murder without Mr. Cook's consent (R. 849, 947, 965, 1136). See Harvey v. State, 656 So. 2d 1253 (Fla. 1995). Counsel conceded that any defense alibi witnesses they put on would be committing perjury then went on to name the witnesses Mr. Cook had requested he contact and what they

would say (R. 335). Counsel conceded that the victim's death occurred in the course of a felony (R. 1136). Again this was without consultation with Mr. Cook. Counsel also waived Mr. Cook's rights under Miranda without Mr. Cook's consent. Then, counsel commented on Mr. Cook's right to remain silent and not to testify during trial (R. 463, 464). These concessions violated the Sixth Amendment. United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991).

3. Failure to investigate intoxication defense

Trial counsel failed to investigate Mr. Cook's case. Mr. Cook's right to effective representation was breached and when he tried to get new counsel the court denied him that right (R.326,330). Mr. Cook was forced to go forward with trial counsel that didn't investigate or prepare his case enough to know who his wife was and counsel who regarded him as "ignorant" when he asked that witnesses be contacted (R. 329). As a result, Mr. Cook suffered "actual and substantial disadvantage" which requires reversal of his conviction.

Mr. Cook's trial counsel completely failed to use plentiful and available evidence of Mr. Cook's drug intoxication at the time of the offense. Counsel could have used this evidence in a number of significant ways both at trial and sentencing but instead counsel virtually ignored this area. Counsel failed to develop a defense of voluntary intoxication, failed to request a jury instruction on the issue, and failed to present evidence of intoxication to rebut the aggravating circumstance of premeditation.

21. Florida law on the voluntary intoxication defense is clear and long-standing, dating from the 19th century. See Garner v. State, 28 Fla. 113, 9 So. 35 (Fla. 1891). "Voluntary intoxication is a defense to the specific intent crimes of first-degree murder and robbery." Gardner v. State, 480 So. 2d 91, 92-93 (Fla. 1985)(citations omitted). Voluntary intoxication could have been employed as a defense to Mr. Cook's first-degree murder charge on both theories of first-degree murder: premeditated murder and felony murder. On the theory of felony-murder, the State must prove the required mental element for the underlying felony. The underlying felonies here, attempted robberies and burglary, are specific intent crimes.

Stewart v. State, 420 So. 2d 862, 863 (Fla. 1982), cert. denied, 460 U.S. 1103, rehearing denied, 462 U.S. 1124 (1983); Gardner, 480 So. 2d at 92-93. An intoxication defense could have defeated first-degree murder on the felony-murder charge as well.

The trial court, in his order denying post conviction relief to Mr. Cook, found that trial testimony refuted this claim. This is oxymoron. Since trial counsel did no investigation into presenting this defense therefore there could be no trial record refuting this claim. The testimony of co-defendants' stating that Mr. Cook was not drunk is not sufficient evidence that this defense was not viable. Counsel is required to investigate his case and request a mental health expert to assist in evaluating whether the facts supported this defense. Mr. Carter did not request an expert until the guilt phase ended, did not investigate Mr. Cook's background and presented nothing in his defense. The Courts' conclusion should be reconsidered.

Use of the intoxication evidence and an appropriate mental health expert would have prevented a verdict of first-degree murder on either premeditated or felony murder theories. Prejudice from counsel's failure is clear because Mr. Cook could not have formed specific intent for robbery or premeditated murder. See Bunney v. State, 603 So. 2d 1270 (Fla. 1992). Without the element of intent, Mr. Cook could have been convicted of nothing greater than second degree murder.

4. Failure to investigate forensic evidence

Counsel did not request, nor did Mr. Cook receive the

professionally adequate assistance of a pathologist who was able to render a reliable opinion regarding issues at trial or resentencing. As a result of counsel's failure independently to investigate the findings of the state's crime scene and medical examiner witnesses, he was unable to impeach their testimony effectively, to Mr. Cook's substantial prejudice.

A well informed independent medical expert could have opined that the bullet trajectories did not indicate that the decedent was kneeling at the time she was hit, and thus challenged the state's contention of an "execution style" killing, and thereby exonerated Mr. Cook. Relief is warranted.

There is an abundance of evidence that was available to refute the arguments advance by the state in support of Mr. Cook's conviction and death sentence. Counsel failed to conduct any forensic investigation. As a result of counsel's deficient performance, Mr. Cook was not provided with the assistance of a competent, confidential pathologist who was capable of rendering a reasoned opinion regarding the numerous forensic issues in this case. Lacking such medical expertise, the defense was unable to present critical information to the judge and jury. Counsel's failure to ensure that Mr. Cook received competent investigative assistance from a qualified expert was deficient performance.

Defense counsel failed to ensure that Mr. Cook received the assistance of a competent qualified pathologist to develop evidence rebutting aggravating factors and supporting mitigating

factors. At Mr. Cook's resentencing, counsel consulted with a pathologist, but unreasonably failed to equip this expert with the documents necessary to conduct a competent evaluation. Defense counsel's failure to furnish his retained expert with vital information denied Mr. Cook the adversarial testing to which he was entitled and constituted deficient performance. Mr. Cook was prejudiced by being denied any defenses to the death sentence based upon the available forensic evidence, and being deprived of the opportunity to present statutory and nonstatutory mitigating circumstances to the jury.

5. Ineffectiveness during jury selection

During the selection of the jury at trial the prosecutor's first two peremptory challenges excused black jurors (R. 478, 480). In fact, out of four peremptory challenges used by the prosecutor, two of the individuals challenged were black. There is no indication on the record that any black person sat on the final jury.

Counsel for Mr. Cook pointed out to the court that these two of the state's peremptories were used on black venire members, but failed to ask the court to require the state to explain on the record the race neutral reason for striking those particular jurors. The court did not ask the state to provide an independent reason, and the state did not do so.

Trial counsel's complete silence after making his objection was ineffective representation. He did not recognize State v.

Neil, 457 So. 2d 481 (Fla. 1984) (R. 309), he did not challenge the prosecutor's representations in any way, and he added nothing to the record.

Trial counsel failed to inform himself of the requirements of State v. Neil, 457 So. 2d 481 (Fla. 1984), and Batson v. Kentucky, 476 U.S. 79 (1986), both of which should have been central to his argument in the trial court.

6. Mr. Cook challenged the state's peremptory challenges under Neil, State v. Slappy, 522 So. 2d 18 (Fla. 1988), U.S. cert. denied, 108 S. Ct. 2873 (1988), and Batson v. Kentucky, 476 U.S. 79 (1986). But no proper Batson hearing was held by the trial court to determine any race neutral reasons for the prosecutor's challenges (R. 478, 480).

Trial counsel was unaware of even the basics of the law in this area, that the command of Batson is to eliminate, not merely minimize, racial discrimination in jury selection. Had trial counsel informed himself of even the basics in this area he would have been aware of his obligations under Slappy, 522 So. 2d at 20.

If trial counsel had acted effectively he would have notified the court of the need for a Batson hearing and challenged any reasons advanced by the state. Then the Neil process could have proceeded as intended. "The trial court may not simply accept, at face value, the state's rebuttal. Rather, the State's explanation must be an uncontested fact, supported by the record, or supported by observations of the trial judge placed in the record." Williams,

547 So. 2d at 180.

Trial counsel's ignorance of this basic law of jury selection was ineffective representation. "This lack of professional competence constitutes ineffectiveness within the meaning of Strickland." Harrison v. Jones, 880 F.2d 1279, 1281 (11th Cir. 1979). In addition to the ineffectiveness noted above, counsel was rendered ineffective by the trial court. During jury selection for Mr. Cook's trial, the trial court refused to grant Mr. Cook's motion to excuse Jurors Sergio and Boan for cause notwithstanding both jurors' admissions that due to their inadequate command of the English language, they would not be able to understand the proceedings fully (R. 476, 478). Mr. Cook then exercised two peremptory challenges to remove these jurors (R. 480, 481). Counsel for Mr. Cook requested two additional peremptory challenges, but was only given one additional challenge (R. 486). As a result of this, counsel was unable to strike an unsatisfactory juror because he had used all of his peremptory challenges (R. 486). Due to the trial court's action, counsel was thus rendered ineffective.

B. INEFFECTIVENESS DURING PENALTY PHASE

In Mr. Cook's capital penalty phase proceedings, substantial mitigating evidence, both statutory and non statutory was undiscovered, and never reached either the jury or the trial court. Mr. Cook was thus sentenced to death by a jury and judge who knew very little about him. The unreliable death sentence is

the resulting prejudice. As confidence in the result is undermined, relief is warranted., Strickland; Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995)

1. Failure to investigate mental health mitigation

Counsel failed to adequately investigate and present the plethora of available mitigation, even though the state conceded that mitigation existed. Because available mitigation was not presented to the sentencers, the resulting death sentence is rendered unreliable.

Crucial evidence regarding mental health mitigation never reached Mr. Cook's sentencers. Mr. Cook was entitled to expert psychiatric assistance when the State made his mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 470 U.S. 68 (1985). When mental health is at issue, as it is here, there is a duty to conduct proper investigation into the defendant's mental health background, and to assure that the defendant is not denied a professional and professionally conducted mental health evaluation. See State v. Michael, 530 So. 2d 929 (Fla. 1988). A professionally conducted mental health evaluation did not occur in Mr. Cook's case. Here, defense counsel did not request a mental health expert until the morning penalty phase was to begin:

MR. CARTER: ...The only thing I am asking for is to be able to present to these 12 people who convicted him who now must make a recommendation, any aspect of his background which would bear on their decision and I do

believe that if there is anything there emotionally or otherwise, they are entitled to hear it.

THE COURT: This causes me some concern.

MR. WAXSMAN: I don't like to say dilatory but the charge is first degree murder. The State never indicated it was ever waiving the death penalty. You can't wait until a trial is over. There was a strong possibility that we could have went right into penalty phase Friday afternoon. So the fact he had the weekend is something extra. I don't think a defendant could just walk in here on the time set, as a matter of fact a half-hour after the time set for the penalty phase, to say judge, I don't know of anything but I would like you to give me some time to look into it to check it out. He really hasn't set forth any reason other than who knows what they are going to find and this could have been done months ago.

(Supp. R. 10). The court eventually appointed Dr. Merry Haber, a clinical psychologist, as Mr. Cook's mental health expert. Despite the fact that defense counsel knew of Mr. Cook's substance abuse history, he failed to utilize a specialist in substance abuse disorders to explain the effect of his cocaine and alcohol use Mr. Cook's mental state. He failed to utilize a neuropsychologist who could have shown the effect of Mr. Cook's substance abuse on his brain functioning. As a clinical psychologist, the expert was thus limited to statistical evidence rather than hard data resulting from tests on Mr. Cook. Despite defense counsel's knowledge of Mr. Cook's drug and alcohol abuse and readily available family history, he failed to give Dr. Haber any background information as a basis for her diagnosis. Because

of a lack of preparation, defense counsel could not provide Dr. Haber with sufficient time to evaluate or test Mr. Cook professionally. As a result, Dr. Haber was forced to base her diagnosis on self-report and her observations in court that morning (R. 1069, 1073). The credibility of her testimony suffered as a result. The State argued in closing:

That's how impaired his judgment was, but Dr. Haber who was a Ph.D. -- you know what else she told us this morning. This morning she spoke to him and that's what he said. That's what he said this morning. Was that proven? You tell me.

(R. 1125). The weight Dr. Haber's testimony was given was evident by the judge's characterization in his sentencing order

The Court concludes, as did Dr. M.S. Haber, that the veracity of Defendant's statements is questionable. The Court further finds them not worthy of belief.

(R. 230). Dr. Haber was left to her own devices in testifying as to Mr. Cook's impaired judgment on the night of the offense. Without any independent testing or background information, Dr. Haber was forced to rely on a superficial evaluation and the defendant's statements alone. This was ineffective assistance of counsel.

Had he prepared, counsel's efforts clearly would have led to the existence of statutory and nonstatutory mitigation. Regarding mental health mitigation, an adequate investigation into Mr. Cook's past would have provided a defense expert with critical and necessary information in order to render a professionally adequate

assessment of Mr. Cook's mental condition. Family history, school records and substance abuse information was readily available had it only been sought. Only then, would a competent mental evaluation have found the presence of mitigating factors. Dr. Haber would have been available to justify her diagnosis and explain to Mr. Cook's jury the wealth of compelling mental health mitigation.

Both statutory and nonstatutory mitigating factors were readily supportable, yet Dr. Haber could not support her findings during the penalty phase because the information had never been gathered. Had defense counsel adequately investigated, a wealth of mitigation would have been discovered, and Dr. Haber would have been able to testify to these conclusions. Absent the time to conduct even the most superficial testing, Dr. Haber was not able to conduct a professionally adequate evaluation as is guaranteed Mr. Cook under Ake. Without this testimony the jury was not permitted to view Mr. Cook as the individual he was. Instead, the jury was subjected to a desperate attempt by defense counsel to present mental health testimony that had not been properly prepared.

2. Failure to investigate family background

A wealth of information upon which expert testimony can be presented was available at the time of Mr. Cook's penalty phase. This would not only have enabled counsel to consult with appropriate mental health experts, and have provided background

information which would have supported their testimony, but also provided valuable non statutory mitigation in its own right. Without a tactic or strategic reason, defense counsel failed to adequately investigate Mr. Cook's background and life history. Had this been done, statutory and nonstatutory mitigation could have been credibly presented to the jury from which the jury could have returned a binding life recommendation.

The jury never knew the circumstances of David Cook's early life in New Jersey, a life which presented a classic case of mitigation, and which had it been presented, would have required the imposition of a life sentence.

Tera Cook gave birth to David in Newark, New Jersey on February 1, 1964. The youngest of ten children, David's chances in life were immediately impaired by learning disabilities that went undiagnosed until high school.

In a constant struggle to provide for ten children, Tera Cook labored in various factories throughout Newark. David's father, John Cook, had a mechanic shop during the day and worked other manual jobs, like plumbing, painting and carpentry on the side to keep food on the table. While living in New Jersey, the Cooks founded their own Pentecostal church, which was the basis for their lives. Tera became an evangelist and John was a minister. In the Cook household religion was everything. The parents and all of the children went to church and prayed together. Aunts, uncles and cousins also attended the same church.

The Cook parents were harsh and abusive disciplinarians in the way they ran the household. Whipping the children with an electric cord or a switch was a common practice. David's mother would line them all up for a whipping. Their father would whip them in the bathtub with a bar of soap, so they would slip if they tried to run.

While growing up the Cook family lived hand-to-mouth. It was always a struggle to make sure the large family didn't go hungry and had clothes on their backs. Since David was the youngest his mother always took him with her. He stood in the welfare line and went to the government building where they gave away surplus food, peanut butter and Spam.

In 1973, when David was nine years old, he was traumatized by the death of one of his closest sisters, Tema. Tema had gone to the movies. When she didn't return home, the family began searching for her. Several days later, they discovered that she was in the hospital, a victim of a hit and run accident. David's mother and father rushed to the hospital, forcing the screaming and crying David to stay behind. Tema remained on life support, but died the next day. David never saw her again.

The event was so traumatic for David that he had vivid nightmares where he heard the impact and the car speeding off. He would see his father running out of the house with a gun, chasing after the car. Everyone would run downstairs, but David was made to stay on the porch and couldn't go to his sister in the street.

The whole family was profoundly affected by Tema's death. It was difficult for them to watch their mother and father break down. David would get up early to go to the bathroom and find his father in the living room, praying and talking to Tema. David's father was so profoundly upset that he passed out at the funeral and had to be rushed to the hospital.

After Tema's death, the parents wanted to get away from New Jersey because the painful memories were too much. The children didn't want to move because they feared racism, and were afraid it would really be harsh. In 1976, the family relocated to Florida. They settled in Leisure City. By moving to Florida they were uprooted and taken out of what they knew. The move was traumatic for all the family. David's mother was isolated, leaving behind great aunts, cousins, mother and sisters, who had been around her.

The boys had to leave their friends behind. A year or two after moving to Florida the older brothers and sisters moved off, getting married, going into the army or returning to New Jersey. The family became fragmented.

David and his brothers encountered racism to a degree they hadn't experienced before. Bottles were thrown at them and they were called "nigger, cracker and red-neck." At the same time, David's and his brother's learning difficulties in school came to the forefront. In junior high school, David tried to cover his problems by being the class clown. By the eighth grade, his grades were so bad he had to repeat the eighth grade. Even though

his grades were dismal, David's excellent abilities in football were becoming his only successes. He dreamed of playing in the National Football League and, according to the coaches, he had the natural ability to do it.

In high school, his grades continued to spiral downward. David was finally enrolled in a Chapter I program which was for students with learning disabilities. This program was reserved for students who had scored at the third grade level or lower in reading and math. David qualified for this program, but continued to excel in sports.

David was academically disadvantaged although he tried hard. He didn't have the ability to process academic information, to infer from it. When you'd tell him something or give him directions, you'd have to repeat it. This problem wasn't as obvious in his siblings, but it was significant in him.

For extra money during school, David began working at Church's Chicken. His supervisor in Perrine described David as a good, dependable worker. The supervisor in Coconut Grove said David was an excellent worker, dependable, with no absenteeism, and that David was being considered for management training.

However, it was at Church's Chicken where David was introduced to marijuana and alcohol, quickly moving into almost daily use. The manager at Church's Chicken once brought in Budweiser for the staff to celebrate a good day of sales. Afterwards, the manager took David to his house and they continued

drinking.

When David first began drinking he drank a couple of nights a week, 2 or 3 beers at a time, but within a month he'd moved up to a six pack every night. Within a month after he began drinking, he had graduated to liquor, drinking any kind he could get his hands on.

David's use of alcohol and drugs soon had a direct effect in his school performance. David was suspended from school for ten days on January 12, 1982, for possession of marijuana. A little over a month later David was administratively transferred to MacArthur South Senior High (an alternative school) because of possession of mood modifiers on school property and academic deficiency. This was the death knell for David's football dreams.

The transfer from South Dade High ended any possibility of playing football. MacArthur South had no football team and no scouts would come there to see him play. David was devastated. He'd dreamed about playing for the NFL, like an older friend of his from the neighborhood. It seemed everything started going wrong then. At MacArthur South drugs freely available everywhere. David, upset by the shattering of his dreams, gave up completely. He started snorting cocaine. He, like any other substance abuser, rationalized his drug use by thinking he could manage it.

Because of the strict religious rules in his family, David hid his drug use from all but his drug buddies. The family didn't

even know he smoked cigarettes. At MacArthur South, he rarely had to pay for drugs because other guys would share their drugs with him.

David would with drink with friends together, usually liquor, and he noticed how quickly David would get drunk. They also smoked marijuana.

David had been dating a girl he had met in junior high. In 1982, David and Mildred Caldwell became parents with the birth of their daughter, Lajeana. David tried to slow down a little bit, and not do as many drugs.

David continued work at Church's while going to school, but the long hours caused him to fall asleep in class after working until two in the morning. David felt like he was getting beat down, that the stress was so high. The only thing that kept him going was taking care of his family and the dream of someday playing in the NFL.

In 1982, family members saw a change in David. He was starting to hang out with a different crowd of people. They told him not to get involved with Melvin Nairn because he was known to be heavy in drugs and had been to jail. His family told David not to hang with Nairn because he himself had been friends with Nairn and knew the crimes in which he was involved.

During this period, David's drug and alcohol use increased. Every weekend night and the majority of weeknights, David would meet up with friends in the park around 10:00 p.m. Some of these

nights were spent in the local park, listening to a disc jockey or just hanging out drinking and doing drugs. Some evenings, David and his friends would ride around town, stopping at local hangouts or parties of friends. Around age 18 or 19, he was in a bar when a fight broke out between two other people. Though he wasn't involved in the dispute, his head was split open with a bottle and required six stitches. Some parties were so outrageous that David and his friends would rent a hotel room to party in and take the mirrors off the wall to snort their cocaine. One thing was always the same. There was always alcohol, marijuana and cocaine available.

On August 6, 1983, David Cook and Mildred Caldwell married. Mildred and the baby moved in with David at his parents' house. David and Mildred and their daughter all lived in one bedroom in the house. A year later, Mildred and David had a second child, David, Jr.

The jury never heard of his learning disability, his childhood poverty, his frequent severe childhood beatings, the trauma of the death of his sister, the overt racism he encountered, his drug and alcohol abuse

Because of counsels' failure to properly investigate and prepare for the penalty phase, Mr. Cook received inadequate assistance. Cunningham v. Zant, 928 F.2d 1006, 1017 (11th Cir. 1991). The resulting prejudice is clear -- "[b]y failing to provide such evidence to the jury, though readily available, trial

counsel's deficient performance prejudiced . . . [Mr. Cook's] ability to receive an individualized sentence." Id. at 1019 (citations omitted).

3. Failure to object to unconstitutional instructions

Counsel also failed to know the law and register objections to violations of Mr. Cook's rights. Failing to object to the unconstitutionally vague jury instructions on aggravating circumstances was deficient performance. Further, defense counsel failed to object or argue that the underlying felony of robbery was an automatic aggravating circumstance that unconstitutionally qualified Mr. Cook for the death penalty without any additional aggravating circumstances. This was deficient performance.

C. INEFFECTIVENESS AT RESENTRENCING

Mr. Cook's resentencing counsel was ineffective, and an evidentiary hearing is warranted on his ineffectiveness. On direct appeal, this Court affirmed Mr. Cook's convictions, but remanded to the trial court for resentencing on the sentence of death. Cook v. State, 542 So. 2d 964 (Fla. 1989). The case was sent back to the trial court to consider the sentence because two aggravating circumstances had been erroneously considered by the sentencer. Id., at 971. Resentencing was held on February 5, 1990 before Judge Carney only (Supp.R.22). Mr. Cook's jury never knew that two aggravating circumstances were not to be considered. No witnesses were presented by either side. Without objection,

the trial court attempted to salvage its prior finding of death based on a plethora of improper non-statutory aggravating factors (Supp.R.19,22). The trial court imposed a sentence of death ore tenus after hearing argument by both counsel (Supp.R.22). The court stated, "The sentence will remain the same." No other findings were made on the record. Two months later, the trial court, through ex parte communications with the state, realized that he was required under the law to issue written findings simultaneously with his oral pronouncement of sentence. Without Mr. Cook's presence, the court attempted to correct its mistake by imposing a death sentence again with written findings which consisted of statements that were not pronounced to Mr. Cook on Feb. 5, 1990 (Supp.R. 1-4).⁶ Defense counsel did not object to the per se reversible error that had occurred and went further to waive Mr. Cook's presence at this second resentencing without Mr. Cook's permission.

Under Strickland, 466 U.S. 668 (1984), the United States

⁶Even after the sentencing order was prepared it still contained error. The sentencing order was post-dated to Feb. 5, 1990. It included a notification of the right to appeal to Mr. Cook that was never pronounced in his presence at the Feb. 5th hearing. The judge erroneously failed to consider non-statutory mitigating factors that the state had conceded existed.

The judge also used Mr. Cook's non-statutory mitigating factor of his drug addiction as a non-statutory aggravating factor against the no significant history of prior criminal activity factor that the state conceded existed. Defense counsel was ineffective for failing to object to the order.

Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted).

Mr. Cook's court-appointed counsel failed in his duty. If resentencing counsel had acted effectively he would have objected to the trial court's error and requesting a mistrial based on Grossman v. State, 525 So. 2d 833 (1988) and Fla. Stat. section 921.141. The court's error was reversible error warranting imposition of a life sentence. Counsel's ignorance of this basic law was ineffective representation.

To further confuse the ill-fated resentencing, defense counsel waived the appearance of his client at the second resentencing without prior approval from Mr. Cook. To say that this was a critical stage of the proceedings against him is an understatement. Mr. Cook was involuntarily absent from a critical stage of the proceedings which resulted in his conviction and sentence of death. Mr. Cook never validly waived his right to be present. However, during his involuntary absence, important matters were attended to, discussed and resolved. In fact, contrary to the Fifth, Sixth, Eighth, and Fourteenth Amendments, Mr. Cook was not present at his resentencing. Defense counsel should have objected and presented the issue but ineffectively did not. This was deficient performance that prejudiced Mr. Cook. Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991). No tactical motive can be ascribed to an attorney whose omissions are

based on ignorance, Harrison, 880 F. 2d at 1284. Mr. Cook's sentence of death is the resulting prejudice. But for counsel's errors, there is more than a reasonable probability of a different outcome; there is a certainty.

D. THE AKE CLAIM

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 Mr. Cook's case, counsel failed to provide his client with "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake, 105 S. Ct. at 1096 (1985). Mr. Cook's trial attorney requested the services of a mental health expert on the very day the penalty phase was to begin (Supplemental R. 5). The psychologist based her evaluation on a brief meeting with Mr. Cook on the morning that she testified (R. 1069). The psychiatrist did not speak with any family members or friends, or review any background records on Mr. Cook. Furthermore, the expert selected by counsel was a clinical psychologist rather than a specialist in substance abuse or addiction. Counsel's failure to investigate his client's

substance abuse, his failure to search for a specialist expert in the field, and his failure to prepare the psychologist, the expert failed to discover the full extent of Mr. Cook's drug and alcohol addiction, his history, and his intoxication at the time of the offense.

Both the expert and trial counsel have a duty to perform an adequate background investigation. When such an investigation is not conducted, due process is violated. The judge and jury are deprived of the facts which are necessary to make a reasoned finding. Information which was needed in order to render a professionally competent evaluation was not investigated. Mr. Cook's judge and jury were not able to "make a sensible and educated determination about the mental condition of the defendant at the time of the offense." Ake, 105 S. Ct. at 1095.

A wealth of compelling mitigation was never presented to the jury charged with the responsibility of whether Mr. Cook would live or die. Important, necessary, and truthful information was withheld from the jury, and this deprivation violated Mr. Cook's constitutional rights. See Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

There was considerable evidence of Mr. Cook's intoxication at the time of the offense which would have been relevant both at the guilt/innocence and penalty phases of the trial.

Mr. Cook suffered from an addiction to drugs and alcohol

which went largely undiscovered and unrepresented due to the ineffective investigation and performance of his trial counsel and psychological expert. Counsel now has discovered evidence which was readily available to trial counsel in 1986. His failure to discover these facts was deficient performance.

In discussing the statutory mental health mitigating factors, this Court recognized that:

A defendant may be legally answerable for his actions and legally sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state.

Perri v. State, 441 So. 2d 606, 609 (Fla. 1983). The prejudice inherent in counsel's deficient performance is obvious. The available evidence of intoxication at the time of the offense and evidence of Mr. Cook's drug addiction could, separately or in combination with his other mental health problems, have established statutory mitigating factors. Armed with evidence that counsel could have discovered, a mental health expert could have conclusively established statutory mitigation and would have presented substantial nonstatutory mental health mitigating evidence. Counsel's failure to present evidence of intoxication at the time of the offense was deficient performance and clearly prejudicial. See Bunney v. State, 603 So. 2d 1270 (Fla. 1992). This evidence would have made a difference.

In the trial court's order denying post conviction relief, the Court stated that the record "factually refutes this Claim" because two doctors examined Mr. Cook and counsel was "unable to present a unified picture of mental disturbance and drug abuse because defendant's history did not support it." PCR.194). Contrary to the Court's interpretation, these facts support Mr. Cook's claim instead of refuting it. Mr. Cook was examined by doctors⁷ who had no independent background information. In fact, one doctor only examined Mr. Cook on the morning she was to testify in court. Clearly, trial counsel had no concept of what

⁷The record is not clear as to who hired the doctors or whether they were hired solely for competency. However, it is clear that Mr. Cook was not subjected to neuropsychological testing.

an adequate mental health evaluation consisted of. In fact, counsel only requested a mental health expert after guilt phase had concluded. Mr. Carter did no background investigation -- therefore the "defendant's history" could not have supported any testimony because it had not been done. The trial interpretation of the record is therefore simply wrong.

The prejudice to Mr. Cook resulting from the expert's deficient performance is clear. Confidence is undermined in the outcome. Mr. Cook's sentence of death should not be permitted to stand under the Sixth, Eighth, and Fourteenth amendments. Rule 3.850 relief must be granted and a resentencing ordered.

E. THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY

Melvin Nairn was a codefendant of Mr. Cook. Nairn pled guilty to second degree murder for his involvement in the incident. From prison, Nairn wrote an undated letter to his trial court and counsel offering further assistance in exchange for personal favors. Nairn was listed as a witness for the State but was called at trial by the defense.

Defense counsel was not supplied with a copy of this letter, which was material and exculpatory to Mr. Cook. The State withheld material and exculpatory evidence from defense counsel thereby depriving Mr. Cook of his rights under the Fifth, Sixth, and Eighth Amendments in violation of Brady v Maryland, 373 U.S. 83 (1963), Napue v Illinois, 360 U. S 264 (1959), and Giglio v United States, 405 U.S. 150 (1979).

To the extent that trial counsel may have been aware of this exculpatory and impeachment material and failed to utilize such information, counsel rendered ineffective assistance.

This Court cannot refuse to allow counsel to pursue Chapter 119 then reject Mr. Cook's claims for being incomplete and

"facially insufficient." This claim cannot be fully pled until all documents requested by Mr. Cook pursuant to Chapter 119 have been received. Mr. Cook is entitled to an evidentiary hearing on his claim, because the records and files do not conclusively show that he is entitled to no relief.

ARGUMENT III

THE TRIAL COURT WAS BIASED AND ERRED BY FAILING TO PREPARE A WRITTEN ORDER ON RESENTENCING, AND BY FAILING TO RECUSE HIMSELF FOLLOWING MR. COOK'S MOTION TO DISQUALIFY HIM

A. JUDICIAL BIAS DURING TRIAL AND RESENTENCING

Judge Thomas M. Carney presided over the jury trial of this capital case and ultimately imposed the initial sentence of death.

On remand by the Florida Supreme Court for reconsideration of the death sentence following the striking of two aggravating circumstances,⁸ Judge Carney presided over the resentencing proceedings.

The law is well-established that a fundamental tenet of due process is a fair and impartial tribunal. Marshall v. Jerrico, 446 U.S. 238 (1980); In re Murchison, 349 U.S. 133 (1955) Absent a fair tribunal there is no full and fair hearing. Suarez v. Dugger, 527 So. 2d 191, 192 (Fla. 1988) dictates that even the appearance of bias is sufficient to warrant reversal. Mr. Cook

⁸ The heinous, atrocious, or cruel, and the cold, calculated and premeditated aggravating circumstances.

was not afforded due process because his trial court was not an impartial tribunal. Mr. Cook was denied his rights to due process by virtue of Judge Carney's obvious prejudice against him, which manifested itself throughout the trial and resentencing. To the extent that trial counsel and resentencing counsel failed to object to this evident bias and prejudice, Mr. Cook received ineffective assistance.

Judge Carney's bias and predetermination of the case was obvious even before the jury was sworn. During jury selection, the court rehabilitated two jurors whose command of the English language was clearly insufficient to enable them to understand the proceedings. This put defense counsel in the position of using peremptory challenges on these jurors who should have been challenged for cause. This demonstration of judicial bias is a consistent theme throughout the trial. The record is replete with instances in which the Court abused its discretion.

Judge Carney's pattern and practice of bias against Mr. Cook extended to Mr. Cook's resentencing proceedings. The case was sent back to the trial court to consider the sentence because two aggravating circumstances had been erroneously considered by the jury. Judge Carney attempted to salvage his prior finding of death based on a plethora of improper non-statutory aggravating factors (Supp.R.19,22). The trial court imposed a sentence of death ore tenus after hearing argument by both counsel (Supp. R.22). The court stated, "The sentence will remain the same." No

other findings were made on the record. No objection was made by counsel. It was only after a period of two months had elapsed that Judge Carney realized that he was required under the law to issue written findings simultaneously with his oral pronouncement of sentence. In a second hearing, held without the presence of Mr. Cook, Judge Carney announced:

We had a hearing and I imposed the same sentence that was imposed before. What I did not do at that hearing, because I didn't really think I was required to do it, was enter another written sentencing order.

I have since been persuaded that another written order is necessary. To that end I have prepared one and have given copies to Mr. Waksman and to Mr. Cook's attorney. (Supp. R. 26)(emphasis added).

This language suggests that Judge Carney would do anything to prevent the possibility of Mr Cook getting a life sentence even despite the judge's per se reversible error. His bias and prejudice against Mr. Cook was so pervasive that he was willing to engage in improper ex parte contact with the State in a botched attempt to correct his mistake. The second resentencing hearing consisted of statements that were not pronounced to Mr. Cook on Feb. 5, 1990 (Supplemental RS. 1-4).⁹

⁹Because of the allegation of Judge Carney's ex parte communication with the prosecutor in this case, Judge Carney has made himself a material witness in this cause. As such, he should have recused himself from presiding over Mr. Cook's postconviction proceedings. The fact that he did not lends yet further credence to Mr. Cook's fear that Judge Carney's

The above described evidence of the judge's bias at trial and resentencing impels Mr. Cook to reasonably question the court's impartiality. "In the case of a first-degree murder trial, where the trial judge will determine whether the defendant is to be sentenced to death, the reviewing court should be especially sensitive to the basis for the fear, as the defendant's life is literally at stake, and the judge's sentencing decision is in fact a life or death matter." Chastine v. Broome, 629 So. 2d 293, 294 (Fla. 4th DCA 1993)(quoting Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983)).

Not surprisingly, the evidentiary value of the defense case evaporates when the judge prosecutes the State's case and rehabilitates the state's case adversely to Mr. Cook's position. The court's action was improper. Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991). Trial counsel was constrained by the court from presenting evidence and accepted the court's interference without objecting. Counsel was therefore ineffective. Blanco v. Singletary., 943 F.2d 1477 (11th Cir. 1991).

The sheer number of rulings, based solely on bias against Mr. Cook is extraordinary. As a result, Mr. Cook was denied even the showing of a fair and impartial tribunal. Relief must be granted.

B. FAILURE TO PREPARE A WRITTEN ORDER AT RESENTENCING

Sentencing was conducted on Feb. 5, 1990, but not until

bias and prejudice against him prevented Mr. Cook from receiving a fair hearing.

March 30, 1990 did the court enter an order imposing the death penalty with findings of fact (R. 26). This was clearly not a contemporaneous independent weighing by the court of the applicable statutory and constitutional standards as Florida law requires. In addition, it was evident from the Court's comments that the State Attorney had engaged in ex parte communications with the judge to get him to correct his error. Failure to raise an objection or argue this issue on appeal is deficient performance.

Written findings of fact in support of a death sentence are required. Fla. Stat. section 921.141; see also Van Royal v. State, 497 So. 2d 625 (Fla. 1986). Florida law requires the sentencing court to state specific reasons for the imposition of the death penalty. The sentencing court failed to properly state its reasons justifying the death sentence on the record. Grossman v. State, 525 So. 2d 833 (1988); Patterson v. State, 513 So. 2d 1257 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986); State v. Dixon, 283 So. 2d 1 (Fla. 1973).

Judge Carney clearly did not afford the capital defendant an individualized capital sentencing determination. He received neither a reasoned nor an independent sentencing determination. In this case, the trial judge did not prepare findings until well after notice of appeal had been filed. In fact, the court didn't realize that it needed to make written findings until the state notified him through ex parte communications nearly two months

later that he needed to make written findings. Then, the court exacerbated the error by not preparing its own findings, instead relying on the state to prepare them. It is obvious that the court made an error which he tried to remedy on March 30, 1990.

Without Mr. Cook present, the court attempted to resentence him and adopt the written findings well after the oral pronouncement.

Defense counsel then inexplicably failed to object to the error and expressly waived Mr. Cook's presence without his permission.

This was clearly not a "meaningful weighing" as required by Florida law. This Court has strictly enforced the written findings requirement mandated by the legislature, Rhodes v. State,

547 So. 2d 1201, (Fla. 1989), and has held that a death sentence may not stand when "the judge did not recite the findings on which the death sentences based into the record." Van Royal, 497

So. 2d at 628. The imposition of such a sentence is contrary to the "mandatory statutory requirement that death sentences be supported by specific findings of fact." Id. The written

findings assure that this integral part of capital sentencing, the weighing of aggravating and mitigating factors, is well reasoned. Here, the record shows no such specific findings of

fact that indicate that the trial court made a well reasoned decision as to why Mr. Cook should die by electrocution.

The trial court denied Mr. Cook's right to an individualized and reliable sentencing determination by failing to conduct the contemporaneous independent weighing which the law requires. It

never made findings of fact to support the sentence at all until months later when it "memorialized" its decision through a writing that was not "timely filed" so as to show the "sentence was based on a well-reasoned application of the aggravating and mitigating factors" (See Rhodes, supra).

Rule 3.850 relief and an evidentiary hearing are appropriate.

C.. JUDICIAL BIAS DURING POST CONVICTION PROCEEDINGS

Following receipt of the trial Court's order summarily denying Mr. Cook Rule 3.850 relief, Mr. Cook, through his lead counsel, Terri Backhus, filed a motion to disqualify the trial court, Judge Thomas M. Carney.(PCR.297-311) The basis for the motion was a portion of Judge Carney's order denying Mr. Cook Rule 3.850 relief, in which he referred to Mr. Cook's efforts to obtain public records as "nothing more than a sham . . . just another tool to delay resolution." (PCR.292) . Judge Carney further asserted that counsel's "failure" to pursue public records issues constitutes a waiver. Without considering any evidence as to whether Mr. Cook had pursued public records, and completely without regard for the motion to compel production of public records before him, Judge Carney found that:

Counsel's failure to notify the Court at the appropriate time of the fact that another attorney would be attending the status conference¹⁰ is a waiver of the right to argue

¹⁰ Judge Carney's own reference to the November 21, 1996 hearing as a status conference gives further

the merits, if not openly contemptuous. As will appear below, perhaps her failure to appear was very much to do with having nothing to say that hasn't been said before or that has been waived.

(PCR.292)

Judge Carney's order clearly established that his bias and prejudice against both Mr. Cook and his lead counsel, who had never even appeared before him, in this or any other case. This bias and prejudice toward counsel is of such a severe magnitude that Judge Carney punished Mr. Cook by summarily denying his Rule 3.850 motion. Judge Carney should have recused himself. Mr. Cook demonstrated a more than a reasonable fear that, due to the Court's prejudice against him and his counsel, that he could not receive a fair and impartial postconviction hearing before Judge Carney.

Judge Carney only held one hearing in Mr. Cook's case - the status hearing at which he summarily denied Mr. Cook's Rule 3.850 motion. Therefore, the public records claim raised by Mr. Cook could not be a "sham" as Judge Carney opined. Despite the fact that Mr. Cook had filed a motion to compel production of public records pursuant to Chapter 119 et seq. Fla. Stat., Judge Carney refused to set a hearing or hear evidence on it. Judge Carney's assertion that Mr. Cook's Chapter 119 was "another tool to delay

credence to Argument 1 supra - that counsel was not given notice for any purported Huff hearing. See Argument 1 supra.

resolution" is based on neither fact nor law.

Furthermore, Judge Carney casually disregarded the provisions of Fla, R. Crim. P., 3.852 which would have allowed Mr. Cook to pursue additional public records requests in the Eleventh Judicial Circuit. The rule was promulgated by this Court on October 31, 1996, and made transitional provisions for cases such as Mr. Cook's in which public records litigation had already been commenced. Under the new rule, the trial court now had jurisdiction to hear public records claims involving state agencies hitherto outside the immediate jurisdiction of the trial court which had not previously been litigated through civil suits against the agencies. As counsel for Mr. Cook notified the trial court at the November 21, 1996 status conference, in Mr. Cook's case, there were several such agencies to whom Mr. Cook had made public records requests, but who had not been listed in the April 7, 1996 motion to compel, because in April, 1996 they did not fall within the trial court's jurisdiction. There was no way that the claims involving these agencies could have been brought to Judge Carney's attention any earlier. The new rule made it clear that Mr. Cook could no longer instigate civil suits against these agencies in their own jurisdictions, yet Judge Carney cut off Mr. Cook's ability to obtain the records through the henceforwardly proper route, leaving Mr. Cook without a forum to litigate his legitimate public records claims. See Argument IV infra.

Judge Carney simply had no basis on which to make such

findings because it took no evidence to support it. He simply adopted the arguments of the State wholesale. By labeling the public records claim raised by Mr. Cook as a "sham" and calling his counsel "contemptuous", Judge Carney established his inability to render an impartial decision in this case. Judge Carney dealt with his allegation that counsel was contemptuous by denying Mr. Cook any hearing on his motion. This clearly demonstrated Judge Carney's bias against Mr. Cook and his inability to render an impartial decision in this case.

Judge Carney similarly had no legal or factual authority for labelling counsel "contemptuous". Rachel Day, a member of Mr. Cook's legal team, properly appeared regarding Mr. Cook's case. Ms. Backhus' conduct in having another attorney appear at a hearing is proper and commonly done in Dade County. Indeed, the practice of having second chair attorneys appear at routine hearings such as this status hearing is a practice designed inter alia to avoid the delay that Judge Carney complained so vehemently of. In this case, Ms. Backhus was not only in the process of opening up the then new CCR office in Tampa, which she was to head, but also working on a case under active execution warrant. Had she been on notice that the court had intended the hearing to be anything other than a routine status conference, she would undoubtedly have informed the court of her conflict and requested a continuance. Judge Carney's conduct clearly demonstrated a deep bias against Mr. Cook.

The trial court demonstrated a bias not only against Mr. Cook, but also to his collateral counsel. "Bias or prejudice against a litigant's attorney is grounds for disqualification where the prejudice is of such a degree that it adversely affects the client." Town Center of Islamorada v. Overby, 592 So. 2d 774, 775 (Fla. 3d DCA 1992). As the Fourth District Court of Appeals has explained:

Though a client and his counsel are separate entities, they share a common bond forged by the attorney-client relationship and tempered in the rigors of litigation. Most clients find the courtroom to be an unfamiliar and, in some instances, uncomfortable atmosphere and so it is not unusual that they entrust themselves into their counsel's care and view their interests as one. Thus, it is understandable that a client would become concerned and fearful upon learning that the trial judge has an antipathy toward his lawyer.

Hayslip v. Douglas, 400 So. 2d 553, 557 (Fla. 4th DCA 1981).

Mr. Cook had and has a reasonable fear that he will not receive the benefit of a neutral and impartial judge due to the court's accusations that his attorneys have made "sham" claims, as a "toll to avoid resolution" and are "openly contemptuous". (Order at 1). Because the court's ruling "was both derogatory of the attorney[s] and tended to undermine the presentation of a client's case," Lamendola v. Grossman, 439 So. 2d 960, 961 (Fla. 3d DCA 1983), the court has displayed an obvious prejudice and an inability to provide Mr. Cook with a fair and impartial hearing.

Not only did the trial court fail to recuse himself on Mr. Cook's motion to disqualify him, but he failed to make any ruling at all on it. He then went ahead to deny Mr. Cook's motion for rehearing. This failure serves both to compound and to provide further evidence of the trial court's bias and prejudice against Mr. Cook and his counsel, and his disregard for the law the rules of criminal procedure and judicial administration. A party may present a motion to disqualify at any point in the proceedings as long as there remains some action for the judge to take. If the

motion is legally sufficient "the judge shall proceed no further." Lake v. Edwards, 501 So. 2d 759, 760 (Fla. 5th DCA 1987). Rule 2.160 of the Rules of Judicial Administration similarly provides that "[i]f the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action." Rule 2.160(f). Judge Carney failed to hold a hearing on the motion to disqualify him, failed to rule on it and then proceeded further to deny Mr. Cook's motion for rehearing.

Mr. Cook is entitled to a full and fair Rule 3.850 hearing. Judge Carney's casual disregard for Florida law and procedure deprives Mr. Cook of due process, and it provides further fear about his ability to be fair and impartial.

Because an evidentiary hearing is warranted in this case, on remand, Mr. Cook requests that this case be assigned to another judge in the Eleventh Judicial Circuit by random selection

ARGUMENT IV

THE PUBLIC RECORDS ISSUE

Mr. Cook filed his Rule 3.850 motion on January 9, 1993 (PCR.100-157), and supplemented it on October 6, 1993 (PCR.200-242). The original pleading outlined Mr. Cook's difficulty in pleading his claims because of the State's failure to comply with Chapter 119 public records requests. On April 7, 1996 he filed a motion to compel production of public records, in order to litigate these matters. However, the trial court precluded Mr. Cook from pursuing his public records by his summary denial of Mr. Cook's Rule 3.850 motion. (PCR.292-296). In his order Judge Carney characterized Mr. Cook's attempts to obtain public records as:

[N]othing more than sham. It is just another tool to delay resolution. Failure to pursue this issue is considered by the Court as waiver.

(PCR.292)

Judge Carney was seemingly oblivious to the fact that counsel for Mr. Cook had in good faith pursued the public records he sought by filing the April 7, 1996 motion to compel. There was no rule of criminal procedure or anything else requiring Mr. Cook to set the hearing on the motion. The status hearing was scheduled for August and then reset for November 1996. Any delay in the setting of the motion for hearing can more aptly be characterized as being the fault of the State and/or the trial court himself, and as such cannot constitute waiver by Mr. Cook.

In addition to his refusal to hear Mr. Cook's pending April 7, 1996, motion to compel, the trial court also blatantly ignored the provisions of the then new Fla. R. Crim. P. 3.852., promulgated by this Court on October 31, 1996. Under the dictates of the new rule, defense counsel were allowed thirty (30) days in which to review cases, such as that of Mr. Cook, where public records issues may have existed, to decide a course of action in properly litigating these claims under the new rule. ¹¹ See Rule 3.852(d)(2)(A); 3.852(d)(2)(D); 3.852(f)(2);3.852(i)(2) (1996). As counsel for Mr. Cook notified the trial court at the November 21, 1996 status conference, in Mr. Cook's case, there were certain agencies to whom Mr. Cook had made public records requests, but who had not been listed in the April 7, 1996 motion to compel,

¹¹In an Order dated November 26, 1996, this Court tolled the time period for compliance with the relevant portions of the rule.

because at that time they fell outside the trial court's jurisdiction. Under the new rule, public records claims involving such agencies could now be heard by the trial court. Rule 3.852 made specific and unequivocal provision for transitional arrangements for cases such as Mr. Cook's, in which public records litigation had already commenced. Mr. Cook was clearly entitled to file an additional motion to compel as well as to have his existing motion heard.

Mr. Cook, as a capital post conviction defendant, was entitled to Chapter 119 disclosure.. State v. Kokal; 562So. 2d 464 (Fla.1991); Hoffman v. State, 613 So. 2d1026 (Fla. 1992), Mendyk v. State 592 So. 2d 1076. Judge Carney's failure to hear the motion to compel and dismissal of Mr. Cook's public records claims as "sham" denied him this right.

Furthermore, this Court has extended the time period for filing Rule 3.850 motions where public records have not been properly disclosed. Jennings v. State, 583 So. 2d 316 (Fla. 1991); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991). In these cases, sixty (60) days was afforded to litigants to amend Rule 3.850 motions in light of newly disclosed Chapter 119 materials. Mr. Cook should, likewise, have been be given an extension of time and allowed to amend once the requested records had been disclosed. In addition, this Court has consistently remanded cases back to circuit courts and extended the time period for filing Rule 3.850 motions where public records have not been

properly disclosed. Ventura v. State, 672 So. 2d 479 (Fla. 1996); Jennings v. State, 583 So. 2d 316 (Fla. 1991); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Provenzano v. Dugger, 561 So. 2d 54 (Fla. 1990). In these cases, additional time was afforded to litigants to amend Rule 3.850 motions with new claims in light of newly disclosed Chapter 119 materials.

The trial court's failure to allow Mr. Cook to obtain the public records he sought, and to amend his rule 3.850 motion made it impossible for him to fully plead and raise any violations that may become apparent from the records he seeks. AS this Court noted in Mordenti v. State, 711 So. 2d 30 (Fla. 1998), [c]ontrary to the trial court's findings in the order denying postconviction relief, public records requests are cognizable in a rule 3.850 motion." They are not a "sham", nor are they a "tool to delay resolution". This matter must be remanded to permit Mr. Cook an opportunity to pursue the public records to which he is entitled, and aford hi reasonable time thereafter to amend his Rule 3.850 motion.

ARGUMENT V

MR. COOK HAS NOT BEEN PROVIDED ACCESS TO TRIAL COUNSEL'S FILES

On December 4, 1992, collateral counsel contacted the office of the trial attorney in order to obtain the trial attorney's file. At that time, trial counsel stated his belief that the file was stored in the Homestead area and was destroyed by Hurricane

Andrew. On December 10, 1992, counsel made a second request for the file in writing, or in the alternative, a letter from trial counsel confirming the location of the storage and the destruction of the file. However, neither the file nor a letter confirming the destruction were ever provided to collateral counsel.

Under Section 27.51(5)(a), Fla. Sta., 1995, Mr. Cook is entitled to have the original file forwarded to his counsel once direct appeal is final. These files belong to Mr. Cook and should be turned over to counsel. See Kight v. Dugger, 574 So. 2d 1066 (Fla. 1991).

In order to provide effective assistance, collateral counsel must have access to this file in order to determine whether Mr. Cook had an adversarial testing at both phases of his capital trial.

ARGUMENT VI

THE PROSECUTOR'S INFLAMMATORY AND IMPROPER COMMENTS AND ARGUMENTS RENDERED MR. COOK'S DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE

At the guilt phase of Mr. Cook's trial, the prosecutor injected improper, and inflammatory matters into the proceedings when he argued that it would make his job "easier" if the jury would find Mr. Cook guilty of first degree murder (R. 931). Over defense objection, the trial court denied Mr. Cook's motion for mistrial (R. 931). No curative instruction was given to the jury.

Through his argument, the prosecutor urged consideration of improper matters into the proceedings and deprived Mr. Cook of Due

Process. The prosecutor's argument was so unfairly prejudicial that a mistrial was the only proper remedy. Garron v. State, 528 So. 2d 353 (Fla. 1988).

The prosecutor engaged in improper and inflammatory argument during Mr. Cook's penalty phase. The State implied that the law demanded the death penalty (R. 1132). The State compared the treatment and trial that Mr. Cook was receiving be imposed with the deaths of the two decedents. Furthermore, it incited the jury to consider Mr. Cook's cocaine habit as a non statutory aggravating circumstance. To the extent that trial counsel failed to object to this cynical misconduct, Mr. Cook was denied the effective assistance of counsel. The cumulative effect of this error on the jury's verdict, and hence the court's death sentence cannot be harmless.

The prosecutor distorted Mr. Cook's trial and sentencing with improper commentary, thus destroying any chance of a fair guilt determination. This argument was intended only to inflame the jury into thinking they would not be supporting law enforcement in their community if they did not vote guilty. The remarks were of the type that this Court has found provoke "an unguided emotional response," a clear violation of Mr. Cook's constitutional rights. Penry v. Lynaugh, 108 S. Ct. 2934 (1989). Relief is proper.

ARGUMENT VII

MR. COOK WAS DENIED A PROPER DIRECT APPEAL FROM HIS JUDGMENT OF CONVICTION AND SENTENCE OF DEATH DUE TO OMISSIONS IN THE RECORD.

The due process constitutional right to receive trial transcripts for use at the appellate level was acknowledged by the Supreme Court in Griffin v. Illinois, 351 U.S. 12 (1955) (Petitioner needs a transcript "to get adequate appellate review of . . . alleged trial errors.") Without recourse to a complete and accurate transcript, appellate counsel was precluded from discovering substantial errors which occurred during the trial, and he was thereby rendered ineffective. In Mr. Cook's case, portions of the record, including the record of the entire sentencing hearing,

are missing.

Mr. Cook's appellate counsel for his initial trial and resentencing had not represented him at trial, and were unfamiliar with his case. The need for an accurate transcript in Mr. Cook's case was more than usually critical, in that the ultimate appellate counsel was not the attorney originally appointed by the trial court. (The trial court had originally appointed Eric Hendon as Special Assistant Public Defender to represent Mr. Cook at his capital appeal. However, this Court determined that Mr. Hendon's initial brief on behalf of Mr. Cook was totally inadequate and constituted on its face ineffective assistance of appellate counsel, and ordered the chief Judge of the Eleventh Judicial Circuit to appoint another appellate counsel for Mr. Cook.) It is within this context that the importance of a complete and accurate transcript of the proceedings became all the more critical: "the fact that his [petitioner's] new appellate counsel is foreclosed from examining for possible error a substantial and crucial portion of the trial renders illusory his right to appeal." United States v. Selva, 559 F.2d 1303, 1305 (5th Cir. 1977).

The record in this case is incomplete, inaccurate, and unreliable. Confidence in the record is undermined. An evidentiary hearing is warranted.

ARGUMENT VIII

TRIAL COUNSEL FAILED TO OBJECT TO

CONSTITUTIONAL ERROR

A. MAJORITY VERDICT INSTRUCTION

The trial judge gave this erroneous instruction during the course of his sentencing instructions:

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 would be reached by a single ballot on each case.

(R. 1153). However, the judge did read at least part of the correct standard jury instruction, that part which advises the jury that if six or more of their number recommends life, they have made a life recommendation (R. 1154). This brief statement of the law was negated by the previous instruction that misled the jury, giving them the erroneous impression that they could not return a valid sentencing verdict if they were tied six to six. It is quite possible that jurors so instructed could be and were swayed by their mistaken belief that a tied jury was a hung jury, and hence changed their votes from life to death to avoid this eventuality. The correct statement of the law contained in the single passage read from the standard jury instructions was rendered nugatory by the previous misinstruction and misinformation. Incorrect and misleading statements of the law regarding the responsibilities of capital sentencing juries

irrevocably reduces the reliability of the sentencing determination.

Trial counsel failed to attack these erroneous instructions. Counsel's performance was deficient. The operation of these erroneous instructions thus violated the Eighth and Fourteenth Amendments, for they created the substantial risk that the death sentence was imposed in spite of factors calling for less severe punishment. Relief is proper.

B. BURDEN SHIFTING

The State must prove that aggravating circumstances outweigh the mitigation. State v. Dixon, 283 So.3d 1(Fla. 1973), cert denied 416 U.S. 943(1974) This standard was not applied to Mr. Cook's capital sentencing phase and counsel failed to object to the court and prosecutor , improperly shifting to Mr, cook the burden of proving whether he should live or die, Mullaney v. Wilbur, 4211 U.S. 684 (1975). Relief is warranted.

C. THE CALDWELL CLAIM

Mr. Cook's jury was repeatedly instructed by the court and the prosecutor that it's role was merely "advisory" (R.404, 966), in violation of law. Not only did defense counsel not object to this erroneous instruction, he repeated it (R. 1023). However, because great weight is given the jury's recommendation the jury is a sentencer. Espinosa v. Florida, 112 S. Ct. 2926 (1992). Here the jury's sense of responsibility would have been diminished

by the misleading comments and instructions regarding the jury's role. This diminution of the jury's sense of responsibility violated the Eighth Amendment. Caldwell v. Mississippi, 472 U.S. 320 (1985). Throughout the proceedings in Mr. Cook's case, the Court and the prosecutor frequently made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase. As to sentencing, however, they were told that they merely recommended a sentence to the judge, their recommendation was only advisory, and that the judge alone had the responsibility to determine the sentence to be imposed for first degree murder. The Court repeatedly informed the jurors that the Court had the responsibility for deciding what punishment shall be imposed. Counsel objected to instruction or argument that diluted the jury's sense of responsibility (R. 2979)

D. IMPROPER DOUBLING OF AGGRAVATING CIRCUMSTANCES

The jury in Mr. Cook's case was instructed on both the aggravating factors of in the commission of a burglary and the crime was committed for financial gain (R. 1150). This Court has clearly stated that it is impermissible to find both the aggravating circumstance of in the course of a burglary and for the purpose of financial gain when the circumstances supporting the two are the same. Richardson v. State, 437 So. 2d 1091 (Fla. 1983). While the trial court in his sentencing order specifically noted that these two factors could not be doubled (R. 227). The

judge thus has recognized that both of these aggravators cannot be applied as against Mr. Cook. Yet, the jury, a sentencer, was allowed to rely upon both of these aggravating factors in reaching a recommendation for death.

E. AUTOMATIC AGGRAVATING CIRCUMSTANCES

Mr. Cook was convicted of two counts of first degree murder, with attempted robbery and burglary being the underlying felonies.

The jury was instructed on the "felony murder" aggravating circumstance:

Two. The death occurred as a consequence of or while the Defendant was engaged in the commission of or an attempt to commit robbery or burglary.

(R. 978). The trial court subsequently found the existence of the "felony murder" aggravating factor. (R. 226).

The jury's deliberation was obviously tainted by the unconstitutional and vague instruction. See Sochor v. Florida, 112 S. Ct. 2114 (1992). The use of the underlying felonies as an aggravating factor rendered the aggravator "illusory" in violation of Stringer v. Black, 112 S.Ct. 1130 (1992). The jury was instructed regarding an automatic statutory aggravating circumstance, and Mr. Cook thus entered the penalty phase already eligible for the death penalty, whereas other similarly (or worse) situated petitioners would not.

The death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating

circumstance -- the very felony murder finding that formed the basis for conviction. The prosecutor, in his closing argument, even told the jury that this the aggravating circumstance must be automatically applied:

One of the things that the law wants you to look for is whether or not when this homicide was committed it was committed during the commission of another felony. I am going to start with number two, during the commission of another felony. On Friday a jury told us that the felony of burglary was being committed while these people died.

And that's a factor of law I want you to take into account.

(R. 3176) (emphasis added).

Trial counsel's failure to object, which is a cognizable claim in Rule 3.850 proceedings, see e.g. Davis v. State, 648 So. 2d 1249 (Fla.4th DCA 1995) constituted ineffective assistance and an evidentiary hearing is warranted as no tactical motive existed for failing to object.

F. UNCONSTITUTIONALLY VAGUE STATUTORY LANGUAGE

The jury was instructed on six aggravating factors. The six aggravators were:

The defendant had been previously convicted of another capital offense or felony involving the use of threat of violence to some person; the crimes for which the defendant is to be sentenced was committed while he was engaged in the commission of or attempt to commit the crime of burglary; the crime with which the defendant is to be sentenced -- or the crimes was committed for the purpose of avoiding or preventing a lawful arrest or effecting an

escape from custody; the crimes for which the defendant is to be sentence were especially wicked, evil, atrocious or cruel; the crime for which the defendant is to be sentenced for were committed in a cold, calculated, premeditated manner, without any pretense of moral or legal justification.

(R. 1150). The trial court determined that five of these aggravating factors applied in this case (R. 224-34). Upon direct review, this Court determined that two of the aggravating factors, the heinous, atrocious, or cruel,, and the cold, calculated and premeditated aggravating circumstances were not supported by the evidence. Cook v. State, 542 So. 2d 964, 970 (Fla. 1989). Yet, the jury was erroneously instructed to consider these aggravating factors. Under Stringer v. Black, 112 S. Ct. 1130 (1992), this Court erred in not ordering a new jury sentencing.

The jury instructions failed to give the jury meaningful guidance as to what was necessary to find these aggravating factors present.

At the time of Mr. Cook's sentencing and resentencing, the language of the Florida Statute, Fla. Stat. section 121.141(5)(h), (i)(1981). which defined the cold, calculated and premeditated and the heinous, atrocious, or cruel aggravating circumstances was facially vague and overbroad. Godfrey v. Georgia, 446 U.S. 420 (1980); Richmond v. Lewis, 113 S.Ct. 528, 534 (1992). To the extent that Mr. Cook's counsel at trial and resentencing failed to object, Mr. Cook did not receive effective assistance of counsel. Starr v. Lockhart, 23 F.3d 1280 (8th Cir. 1994); Strickland v. Washington, 486 U.S. 668 (1984) An evidentiary hearing is required.

ARGUMENT IX

THE JUDGE IMPROPERLY CONSIDERED NON STATUTORY AGGRAVATING CIRCUMSTANCES

The trial judge in sentencing Mr. Cook considered non-statutory aggravating circumstances and relied upon them in his

order. The judge relied upon facts that the victim was smaller in size than Mr. Cook as an additional aggravator (R. 227, 228). As is made plain in the transcript of the resentencing hearing, clearly the judge also considered Mr. Cook's cocaine habit as an aggravating circumstance. In addition, the court was presented with improper victim impact material in the form of an emotional letter from the decedents' three children attached to the presentence report. The letter notes their parent's religious activities and exhorting the Court to impose the death penalty. It is unclear whether the judge considered yet further non-statutory factors as aggravating because the record of sentencing hearing has not been found or provided to collateral counsel.

The judge's consideration of improper and unconstitutional non-statutory aggravating factors starkly violated the Eighth Amendment, and prevented the constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S.Ct. 1130 (1992); Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988).

As a result, these impermissible aggravating factors evoked a sentence that was based on an "unguided emotional response," a clear violation of Mr. Cook's constitutional rights. Penry v. Lynaugh, 108 S.Ct. 2934 (1989). Relief is proper.

ARGUMENT X

THE TRIAL COURT REFUSED TO FIND AND WEIGH MITIGATION PRESENTED AT THE PENALTY PHASE

At the sentencing phase of his capital trial, Mr. Cook presented evidence that he did not have a significant history of violent conduct (R. 1025, 1028, 1032, 1037, 1049, 1053, 1061, 1066); that he was a religious man (R. 1057-58); that he loved his family (R. 1025); that he was not a leader (R. 1028, 1032, 1037, 1055); that he had a drinking problem (R. 1031); that he was slow in school (R. 1033); that he was emotionally still a child (R. 1036); that he had a substance abuse problem (R. 1038, 1070-73, 862-63); that he was a good candidate for rehabilitation (R. 1040, 1047, 1054, 1058-59, 1063, 1067); that he was respectful to others (R. 1044); that he was a good employee (R. 1049); and that he was a good husband and father (R. 1025, 1062). The evidence was uncontradicted and unimpeached.

. Each of these constitutes a mitigating factor. Cheshire v. State, 568 So. 2d 908 (Fla. 1990). The jury and judge were required to weigh the same against the aggravating factors. According to his sentencing order the judge did not weigh this mitigation (R. 232; Supplemental RS. 1-3). Mr. Cook was deprived of the individualized sentencing required by the Eighth and Fourteenth Amendments and is entitled to a new sentencing hearing. Zant v. Stephens, 462 U.S. 862, 879-80 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). Sentencing judges are required to specifically address nonstatutory mitigation presented and/or argued by the defense. Campbell v. State, 571 So. 2d 415 (Fla. 1990). The

failure to give meaningful consideration and effect to the evidence in mitigation requires reversal of a death sentence. Penry v. Lynaugh, 109 S. Ct. 2934 (1989). Relief should ensue.

ARGUMENT XI

THE PECUNIARY GAIN AGGRAVATING CIRCUMSTANCE WAS IMPROPERLY APPLIED

The jury in Mr. Cook's case was instructed that they could find as an aggravating factor that the murder was committed for the purpose of financial gain (R. 1150). This Court has repeatedly held that in order for this aggravator to be applicable, it must be shown to exist beyond a reasonable doubt. Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988); Peek v. State, 395 So. 2d 492, 499 (Fla. 1980); Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987). This aggravating factor is not supported by the evidence because the killings occurred during flight and were not a step in furtherance of the sought-after gain. See Rogers; Simmons v. State, 419 So. 2d 316 (Fla. 1982).

The jury relied upon an improper aggravating factor in arriving at the recommendation of death. The trial court also found the existence of this aggravating factor which was not supported by the facts. Likewise, the language of this aggravator is vague and overbroad. The error is not harmless. A new sentencing before a jury is proper.

ARGUMENT XII

ABSENCE FROM CRITICAL STAGES OF THE

PROCEEDINGS

Mr. Cook was absent from the critical stages of his capital resentencing, during which the judge simply read the sentencing order. Indeed, resentencing counsel waived Mr. Cook's presence, without his knowledge or consent, to Mr. Cook's substantial prejudice Mr. Cook's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution were denied.

The accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings. Faretta v. California, 422 U.S. 806, 819, n.15, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975). A capital defendant is entitled to be present at all critical stages of judicial proceedings. This right is guaranteed by the federal constitution, see, e.g., Drope v. Missouri, 420 U.S. 162 (1975); Illinois v. Allen, 397 U.S. 337 (1970); and Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), by Florida constitutional and statutory standards, Francis v. State, 413 So. 2d 1175 (Fla. 1982), and by Rule 3.180 of the Florida Rules of Criminal Procedure. See also Coney v. State, 653 So. 2d 1009 (Fla. 1995).

A capital defendant has "the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence." Francis, 413 So. 2d at 1177. This right derives in part from the confrontation clause of the

sixth amendment and the due process clause of the fourteenth amendment. Proffitt, 685 F.2d at 1256. Mr. Cook was denied this right. Relief is warranted.

ARGUMENT XIII

THE RULE PROHIBITING MR. COOK FROM INTERVIEWING JURORS IS UNCONSTITUTIONAL

Florida Rule of Professional Responsibility 4-3.5(d)(4) provides that a lawyer shall not initiate communications or cause another to initiate communication with any juror regarding the trial. This stricture impinges upon Mr. Cook's right to free association and free speech. This rule is a prior restraint.

This prohibition restricts Mr. Cook's access to the courts and ability to allege and litigate constitutional claims which may very well ensure he is not executed based on an unconstitutional verdict of guilt and/or sentence of death. See Powell v. Allstate Insurance Co, 652 So. 2d354 (Fla. 1995). It is imperative that post conviction counsel be permitted to interview jurors to discover if overt acts of misconduct impinging upon the defendant's constitutional rights took place in the jury room. This Court must grant relief or rule that this Rule is unconstitutional.

ARGUMENT XIV

JUROR MISCONDUCT OCCURRED

The jury at Mr. Cook's capital trial was explicitly instructed that they should follow the law and only base their

sentencing decision on the evidence. However the jury flagrantly disregarded this instruction in its deliberations, to Mr. Cook's substantial prejudice.

The jury were instructed on a total of six (6) aggravating circumstances and seven (7) statutory mitigating circumstances, in addition to being told that they could consider any other non statutory mitigating circumstance. Yet, the time between their departure from the courtroom and their return with a verdict was twenty (20) minutes, barely a minute for each instructed circumstance, notwithstanding time to vote and complete the form.

Either the jury failed to adhere to the court's admonishments not to form an opinion as to sentence until after all the evidence was heard, or they failed to adequately consider the mitigating circumstances on which they were instructed. This error is not harmless.

ARGUMENT XV

THE GRUESOME PHOTOGRAPHS CLAIM

The prosecution was permitted to introduce into evidence numerous gruesome photographs that were inflammatory, cumulative, and prejudicial, and admitted solely to inflame the passion of the jurors based on impermissible factors. Numerous photographs of the deceased's body taken at the scene of the crime and during the autopsy were introduced into evidence.

The admission of these photographs allowed the state free

rein in inflaming the passions of the jury. The probative value of these photographs was not only outweighed by their prejudice, but these photographs were cumulative to each other. Their graphic content was further emphasized through the testimony of witnesses and stressed by the state in closing argument.

The prejudicial effect of the photographs undermined the reliability of Mr. Cook's conviction and death sentence. The photographs themselves did not independently establish any material part of the state's case nor were they necessary to corroborate a disputed fact. The trial court's error in admitting these photographs cannot be considered harmless beyond a reasonable doubt. Chapman v. California, 87 S. Ct. 824 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

ARGUMENT XVI

MR. COOK IS INNOCENT OF THE DEATH PENALTY

Where a person is sentenced to death and can show innocence of the death penalty, he is entitled to relief for constitutional errors which resulted in a sentence of death. Sawyer v. Whitley, 112 S. Ct. 2514 (1992). The Florida Supreme Court has recognized that innocence is a claim that can be presented in a motion pursuant to Rule 3.850. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993); Jones v. State, 591 So. 2d 911 (Fla. 1991). This Court has recognized that innocence of the death penalty constitutes grounds for Rule 3.850 relief. Scott (Abron) v.

Dugger, 604 So. 2d 465 (Fla. 1992).

Innocence of the death penalty is shown by demonstrating insufficient aggravating circumstances so as to render the individual ineligible for death under Florida law. In this case, at resentencing the trial court relied upon two aggravating circumstances to support his death sentence: (1) that the homicide was committed during the course of a robbery or burglary, and (2) the prior conviction of a violent felony. As noted elsewhere in this brief, however, the "during a the course of a burglary" constitutes an unconstitutional automatic aggravating circumstance, and the previous commission of a violent felony was tainted by an unconstitutionally vague jury instruction. Relief is warranted.

ARGUMENT XVII

THE CUMULATIVE ERROR CLAIM

Mr. Cook did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991). It failed because the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive.

The flaws in the system which sentenced Mr. Cook to death are many. They have been pointed out throughout not only this brief,

but also in Mr. Cook's direct appeal; and while there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence - - safeguards which are required by the Constitution. These errors cannot be harmless. The results of the trial and sentencing are not reliable. Rule 3.850 relief must issue.

ARGUMENT XVIII

MR. COOK'S RIGHT TO REMAIN SILENT WAS VIOLATED

Mr. Cook's statements were obtained by use of threats, promises, and misleading information contrary to state and federal constitutional guarantees.

Mr. Cook's rights were violated when the police, in order to obtain a statement, exploited Mr. Cook's mental disabilities stemming from intoxication at the time of his arrest, his long standing substance abuse and his inability to make a knowing and voluntary waiver of his rights. These factors contributed to Mr. Cook's inability to knowingly, intelligently, and voluntarily waive any constitutional rights. Yet this information was not presented at Mr. Cook's capital trial, to his substantial prejudice. Had this information been presented, the statements would have been suppressed.

At the time that he gave his statement, David Cook was

suffering from a chronic substance abuse disorder which rendered him incompetent to process information in a normal and logical sequence. His mental incapacity was aggravated by drug ingestion. His statement to law enforcement officers was a product of an unknowing and involuntary surrender of his Miranda rights; David's purported waiver of his rights was not a "knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742 (1970).

ARGUMENT XIX

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL

Florida's death penalty statute is unconstitutional on its fact and as it applies to Mr. Cook. Execution by electrocution constitutes cruel and unusual punishment under the Florida and United States Constitutions. Mr. Cook hereby preserves all arguments as to the constitutionality of the death penalty, given this Court's precedents.

ARGUMENT XX

THE HARMLESS ERROR ANALYSIS ARGUMENT

This Court determined that the aggravating factors of heinous, atrocious or cruel and avoiding arrest were not applicable to the murder for which Mr. Cook was sentenced to death. Cook v. State, 542 So. 2d 964, 970 (Fla. 1989). This

Court was unable to determine that this error was harmless, and remanded to the trial court to resentence Mr. Cook without the benefit of the jury. Id. at 971. This Court did not consider the effect of this error on the jury. Such an analysis failed to conform with the Eighth Amendment. See Sochor v. Florida, 112 S.Ct. 2114, 2122 ("...a jury is unlikely to disregard a theory flawed in law...") If there is a reasonable possibility that the constitutional error might have contributed to the jury's recommendation, the error is not harmless beyond a reasonable doubt and Mr. Cook is entitled to relief. **CONCLUSIONS AND RELIEF**

SOUGHT

Based upon the foregoing and the record, Mr. Cook respectfully urges this Court to reverse the lower court order, remand the case to another judge by random selection, grant a hearing on Mr. Cook's public records claims, grant an evidentiary hearing and grant such other relief as the Court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing memorandum of law has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 29, 1999.

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