IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,611

ELMER LEON CARROLL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal is from the denial of Elmer Carroll's motion for postconviction relief by Circuit Court Judge Belvin Perry, Jr., Ninth Judicial Circuit, Orange County, Florida, following an evidentiary hearing. This proceeding challenges both Mr. Carroll's conviction and his death sentence. References in this brief are as follows:

"R. __." The record on direct appeal to this Court.

"PC-R. __." The instant postconviction record on appeal.

"Supp. PC-R. __." Supplemental postconviction record.

"PC-T. __." Transcribed postconviction proceedings.

REQUEST FOR ORAL ARGUMENT

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

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PROCEDURAL HISTORY

Elmer Leon Carroll was indicted for one count of first degree felony murder and one count of sexual battery on a person less than twelve years of age on November 26, 1990, in Orange County, Florida. (R. 996-97.) The State's case is summarized in this Court's direct appeal opinion. Carroll v. State, 636 So. 2d 1316 (Fla. 1994). Trial followed and the jury convicted Mr. Carroll as charged on March 21, 1992. (R. 1281.) Penalty phase was conducted on April 13, 1992, during which the State presented additional evidence and Mr. Carroll's appointed counsel presented no witnesses and introduced a single exhibit, a police report handed to him by the assistant state attorney just before the close of penalty phase proceedings. (R. 883-964.) Following instructions and deliberations, the jury recommended that the sentence of death be imposed for the first degree felony murder of Christine McGowan. (R. 1277-80; 883-964.) The trial court sentenced Mr. Carroll to death, finding three aggravating circumstances and one nonstatutory mitigating circumstance. (R. 965-99.) Mr. Carroll appealed his convictions and sentence of death, which were affirmed. Carroll v. State, 636 So. 2d 1316 (Fla. 1994).

Mr. Carroll sought postconviction relief by filing a Florida Rule of Criminal Procedure 3.850 motion on February 1, 1996. (PC-R. 450-571.) An amended motion was filed January 31, 1997 (PC-696-832), and the State was ordered to respond by February 28, 1997. The State requested an extension of time, (PC-R. 835-37),

which the circuit court denied on March 7, 1997. (PC-R. 846-50.) The State's response was not filed until April 7, 1997. (PC-R. 915-55.) On April 8, 1997, the trial court held a Huff hearing, (Supp. PC-R. 1-94), and entered an order striking the State's written response as untimely; denying Mr. Carroll relief on some claims; and granting an evidentiary hearing on Mr. Carroll's claims alleging ineffective assistance of counsel during both guilt phase and penalty phase. (PC-R. 979-81.) An evidentiary hearing was held on August 4-5. 1997. On October 1, 1997, Capital Collateral Regional Counsel Greg Smith requested an extension of time in which to submit written closing arguments, as the break-up of CCR and concomitant departure of Mr. Carroll's lead attorney left Mr. Carroll without counsel qualified to take over the case. (PC-T. 436-44.) The circuit court denied this request on the same day, although it permitted the State to submit its written final argument. (PC-R. 1115-16.) On October 20, 1998, the circuit court entered its order denying Mr. Carroll relief on all claims. (PC-R. 1157-85.)

STATEMENT OF FACTS

I. BACKGROUND AND FORMATIVE YEARS OF ELMER CARROLL

Elmer Carroll is a borderline mentally retarded man with a long history of mental illness. He has brain damage and learning disabilities. (PC-T. 229-33.) His IQ of 81 makes him intellectually equivalent to an eleven-year-old child. (PC-T. 229.) The youngest of nine children fathered by a succession of men, Elmer grew up in stark poverty as his migrant worker parents

drifted in search of farm labor. Elmer's natural father, Henry Carroll, was a violent and sadistic man who once chopped a puppy into pieces while his children watched. (PC-T. 187, Affidavit of Edward Couch.) Elmer's mother Lona suffered from severe mental illness. Often the children would find her in a trance-like state, sitting for hours without speaking. (PC-T. 185.) Sometimes she would deliberately ram her head into walls. (Affidavit of Barbara Snead.)

Both of Elmer's parents were alcoholics. His mother was a particularly heavy drinker, and moonshine fueled her frequent fits of rage against her children. (Affidavit of Shirley Griffin.) Elmer's brother still bears scars on his face from being tossed into a wood stove by his mother at age six. Elmer himself endured beatings with a hickory stick which would not cease until his mother tired or he passed out. (PC-T. 304.) Elmer's niece Shirley often witnessed these beatings. On several occasions when Elmer was knocked unconscious, Shirley feared he was dead. (Affidavit of Shirley Griffin.)

When Elmer was three, his parents gave him liquor because they found it entertaining to watch him fall down or get sick. (PC-T. 279.) By the time he was six, Elmer was an alcoholic. At age twelve, a neighbor named Joe Mays began taking Elmer out to movies on Friday nights. Mays would get Elmer drunk and force him to perform oral sex, sometimes urinating in the boy's face. (PC-T. 281-84, 305.) This abuse continued for a year until Mays was eventually arrested and prosecuted. (PC-T. 281-84.) Elmer

never received any counseling, and dropped out of school in the seventh grade. (PC-T. 283-84.) In addition to drinking, at this time he began using narcotics. (Affidavit of Nellie Sue Smith.)

As Elmer entered adolescence his mental health deteriorated and his abuse of drugs and alcohol worsened. He began having alcohol-induced blackouts and hallucinatory episodes after drinking. (PC-T. 296-97, Affidavit of Nellie Sue Smith.) Elmer's nephew recalls an incident where young Elmer beat a hole in the ground with his fists and claimed to be killing demons. (PC-T. 297.) Elmer also experienced feelings of paranoia, frequently getting into bar room brawls because he feared people were talking about him. (Affidavit of Nellie Sue Smith.)

In the weeks preceding his arrest on October 30, 1990, Elmer's behavior continued to attract attention. Margaret Powell, director of the halfway house where Elmer was living at the time, testified at trial that Elmer "got to where he wouldn't smile, looked real depressed and sometimes I'd see him walk by my office window, he'd be talking to himself." (R. 625.) Mrs. Powell tried several times to persuade Elmer to seek mental health counseling: "I told him that he was going to need more help than what I could give him." (R. 626.) She grew so concerned that she even set up a counseling appointment for Elmer, but he refused. He insisted he didn't need help. (R. 626.)

On the night of October 29, 1990--hours before the death of Christine McGowan--a cocktail waitress at the Buckeye Inn noticed

a disheveled man at the bar talking to his jacket. (R. 634-35.) This man was Elmer Carroll. (R. 634.) The waitress testified at trial that Elmer "stated that Jessie [Elmer's sister] hadn't won yet and that he was going to burn in hell, stating things about Satan and the devil wasn't a myth or object, several things like that." (R. 635.) She watched as Elmer walked to the back of the bar and began talking to a mirror. (R. 635-36.) He also went into the men's room and came out crying, with tissue in his hands. (R. 636.)

After drinking a few beers at the Buckeye Inn, Elmer wandered down the street and into the Old 49'er Club, a tavern about a block away. (R. 639-40.) Judy Arnold was tending bar that night. (R. 639.) She recalled Elmer playing some songs on the juke box and then begin speaking to the juke box:

> You couldn't understand what he was saying. He was mumbling, you know, then he walked around, he looked at the pictures on the wall and just stared at them. And he turned around and laugh (sic), then he looked at us. He says, I guess you all think I'm crazy and I just laughed at him, tried to ignore him because he was acting weird.

(R. 641.) Mrs. Arnold also remembered Elmer speaking to his jacket: "He had this big brown jacket on and he had it pulled open like this. He was talking into his coat . . . . I heard him say something about demons and devils." (R. 641.)

The following morning, wildlife officer Carl Young was driving on State Road 520 when he spotted Elmer walking with his head down along the roadside. (R. 366-67.) A short time later, after realizing that Elmer was suspected in a homicide, Officer

Young swung his patrol car around and sped to catch up with Elmer. (R. 370, 374-75.) Dust and grass sprayed into the air as Officer Young drove his car up right behind Elmer, but Elmer didn't even turn around. (R. 375.) Apparently unaware of Officer Young's presence, Elmer just kept walking. (R. 370.) "When he didn't turn around to see what was going on, it kind of spooked me," Young testified. (R. 370.)

When Elmer was placed under arrest, according to Deputy Mark McDaniel, "His only reaction was almost no reaction." (R. 344.) Elmer just had "a blank stare." (R. 347, 352.)

James Taylor, Elmer's court-appointed lawyer, recalled the first time he saw Elmer: "I thought Elmer Carroll was insane. I happened to be in court when he made his first court appearance with the public defender. I had looked at him then, and I thought this guy was nuts." (PC-T. 135.) When Mr. Taylor took over the case, he found Elmer to be "a nice, courteous person that couldn't give me any help..." (PC-T. 136.) "I felt like I was talking to an empty suit," he stated. (PC-T. 150-51.) Elmer's behavior troubled his attorney throughout the trial. After the State rested its penalty phase case, Mr. Taylor chose not to put Elmer on the stand. He explained to the judge, "I don't think he's in my opinion capable of testifying. I have no idea what he's going to say. He could say one thing. He could say the other; too dangerous." (R. 912.) Elmer even told his lawyer that one of the State's witnesses wasn't who he claimed to be, (R. 913), and that the state attorney was instructing people

to tell lies. (R. 913.) At the sentencing hearing, Elmer's lawyer advised the court that his client's sanity was in question and requested that sentencing be delayed until Elmer was evaluated by a mental health expert. (R. 966-68.) The court denied this request. (R. 968.)

Since his incarceration in 1992, Elmer has been diagnosed as psychotic, suffering from paranoid schizophrenia. (PC-T. 240-41.) He has consistently been medicated with an array of antipsychotic drugs, neurotropic medication, tranquilizers, and antidepressants. (PC-T. 325.) He passes his days writing letters to his attorneys in which he complains of nurses spitting in his medicine and conspiracies among the prison staff.

II. Elmer Carroll's insanity and incompetency to proceed

On November 1, 1990, within forty-eight hours of Mr. Carroll's arrest, Gainesville psychologist Elizabeth McMahon traveled to the Orange County Correctional Facility to evaluate Mr. Carroll at the request of the public defender then assigned to the case. For three hours Dr. McMahon attempted to conduct a psychological evaluation of Mr. Carroll, but found that he was paranoid and untestable. (PC-T. 315.) As she recounted at the evidentiary hearing, "[Mr. Carroll] would say from time to time, 'The voices don't want me to answer you;' or 'The voices are telling me you should leave,' or . . . 'They'll hurt me if I talk to you.'" (PC-T. 316.) Dr. McMahon determined that Mr. Carroll was psychotic and indicated that he would have to be medicated before an examination could be conducted. (PC-T. 316-17, 320.)

At the evidentiary hearing, Dr. McMahon testified that she was confident Mr. Carroll's psychosis was genuine. (PC-T. 317.) Dr. McMahon explained that people who try to malinger do so by imitating the stereotyped images of the mentally ill that are commonly portrayed on television, for instance. (PC-T. 317.) In contrast, Mr. Carroll "behaved in a way that was internally consistent for somebody who is psychotic." (PC-T. 317.) She stated that in order to effectively malinger, someone would "[h]ave to be intelligent, have to be aware of what, how psychosis manifests and then be able to carry that out, carry that out consistently without slips." (PC-T. 318.) "And in my clinical opinion, he was not capable of having either studied that to that extent or have been able to maintain that consistently for a three-hour period of time." (PC-T. 317.)

After interviewing Mr. Carroll, Dr. McMahon returned to Gainesville and phoned Mr. Carroll's attorney.[1] (PC-T. 319.) She told him that Mr. Carroll was psychotic and untestable, and that once he was medicated she would be "happy to do the psychological evaluation."[2] (PC-T. 319.) She expected to be contacted in order to perform an evaluation, but no one ever got in touch with her. (PC-T. 319-20.) At the evidentiary hearing, she testified, "I was never contacted. In fact, I contacted them

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[1]At this time, Mr. Carroll was represented by Assistant Public Defender David Fussell.

2At the evidentiary hearing, Dr. McMahon testified that she would have administered the same battery of tests that Dr. Crown did at the request of Mr. Carroll's postconviction counsel, in addition to a full psychological exam. (PC-T. 331.) Dr. Crown's testing revealed that Mr. Carroll suffers from brain damage. (PC-T. 233.)

and to find out what was going on, or whatever . . . . And I was not contacted until whenever Mr. Taylor called me for, to testify [shortly before trial]." (PC-T. 320.) (When she finally was contacted, Mr. Taylor did not provide her with any records: "I didn't even have discovery," she testified. (PC-T. 321.))

Days after Dr. McMahon's contact with Elmer Carroll, the trial court appointed three experts to determine Mr. Carroll's competency to proceed. Two out of the three doctors concluded that Mr. Carroll was incompetent. (R. 1042, 1043-47, 1075-78.)

Dr. Kirkland examined Mr. Carroll on November 6, 1990 and found him "not competent to stand trial, especially on a charge of murder." (R. 1042.) Dr. Kirkland recommended that Mr. Carroll be sent to a state hospital facility for further evaluation and treatment. (R. 1042.)

Dr. Benson examined Mr. Carroll on December 11, 1990 and also concluded that Mr. Carroll was incompetent. (R. 1043-47). During this examination Mr. Carroll stated that he heard voices, and told Dr. Benson, "I see things, people. They try to make me believe they're somebody else." (R. 1044.) Mr. Carroll went on to say that the jail staff poisons his food; that he sometimes sees messages on television directed only at him; that people follow him and talk about him on the streets; that he communicates directly with God; and that he has the power to read minds and to heal people. (R. 1045.) Dr. Benson diagnosed Mr. Carroll with schizophrenia and noted in his report, "I do not believe [Mr. Carroll] is malingering. He is too regressed, too

disorganized, and almost certainly is hallucinatory and delusional." (R. 1046.)

Dr. Erlich examined Mr. Carroll on December 7, 1990. (R. 1075-78.) At the interview Mr. Carroll remarked, "There's stuff on my cell that looks like blood . . . The windows are smeared with stuff. It's like they're trying to make me believe things that are not true." (R. 1076.) Dr. Erlich observed that "Cognition is bizarre and hard to test. Insight and judgement (sic) are poor," (R. 1077), but concluded that Mr. Carroll was competent to proceed. (Id.)

Ten months later, the court appointed two additional experts and ordered the three experts initially appointed to reevaluate him.[3] Mr. Carroll's attorney filed an objection to the appointment of additional experts as contrary to Fla. R. Crim. P. 3.210(b). Before any of these doctors had examined Mr. Carroll, the court proceeded to set the case for trial. (R. 1054.)

Dr. Benson, upon reexamining Mr. Carroll in October 1991, reaffirmed his opinion that Mr. Carroll was incompetent. (R. 1062-65.) Doctors Danziger and Gutman, the two experts appointed in 1991, both found Mr. Carroll competent to proceed. Each expressed some reservations about his conclusions, however. Dr. Danziger cautioned that "I feel that the defendant does meet competency criteria at this point, ***but without medication that status could possibly worsen in the foreseeable future***." (R. 1071.)(emphasis added) Dr. Danziger also concluded that Mr. Carroll was ***psychotic at the time of the offense and unable to distinguish right from wrong***. (R. 1066-72.) Dr. Gutman predicted that representing Mr. Carroll would be "laborious for defense counsel," although he was hopeful Mr. Carroll would "participate grudgingly in his own defense." (R. 1061.) Dr. Kirkland, who saw Mr. Carroll for a second time on October 10, 1991, decided Mr. Carroll was competent to proceed. (R. 1073-74.)

At the evidentiary hearing, counsel for Mr. Carroll presented the testimony of Doctors Danziger and Gutman. After reviewing the records provided to them by collateral counsel (consisting of school records, medical records, DOC records, and family histories), both doctors testified that they would reconsider their original opinions regarding Mr. Carroll's competency at the time of trial. (PC-T. 403, 393, 375-82.) Furthermore, ***both doctors testified that at least two statutory mitigators applied to Mr. Carroll.*** (PC-T. 381-82, 398.)

3However, Dr. Erlich did not conduct a second evaluation of Mr. Carroll.

Dr. Gutman's opinion at the time of trial was that Mr. Carroll was malingering. (PC-T. 387.) At the evidentiary hearing, however, Dr. Gutman testified that "I tend to feel now . . . that he may not have been malingering and only gave that appearance." (PC-T. 403.) He explained that Mr. Carroll has a "malingering-like persona" which gives the impression of malingering even though his illness is genuine. (PC-T. 394.) Dr. Gutman also stated that, "In view of the overall picture presented [in the records] and what I had learned before and what I saw of this man, I feel that an organic diagnosis would be appropriate, meaning brain tissue injury and dysfunction." (PC-T. 393.)

Although the records provided to Doctors Gutman and Danziger by collateral counsel included DOC records postdating Mr. Carroll's trial, the doctors were able to separate out these records and offer their opinions based solely on records in existence at the time of trial. Relying only on records which were available in 1992 (i.e., the school records and affidavits from family members), Dr. Gutman stated, "My current diagnosis would be mental disorder with mood, memory, personality change and cognitive decline associated with alcohol deterioration and influence on the brain." (PC-T. 391.) Dr. Gutman noted that the records which were available in 1992 contained information about alcohol abuse by Mr. Carroll's mother; the possibility that Mr. Carroll suffers from Fetal Alcohol Syndrome; Mr. Carroll huffing gasoline and glue and drinking at an early age; and psychological testing conducted during Mr. Carroll's childhood which showed an IQ of around 80. (PC-T. 392.) Dr. Gutman testified that, ***had he had exposure to these records***, they would have confirmed that Mr. Carroll had evidence of a psychotic illness around the time of the offense and that the psychosis had developed. (PC-T. 392.) Dr. Gutman continued:

> [T]he confirmation of information from family members as to early influences of, or influence of alcohol would have pointed to at least an organic diagnosis . . . . So, that would have probably been the biggest mitigating circumstance. The organic diagnosis underlying would have been certainly important and would go on to explain what others have found postconviction.

(PC-T. 400.) Although Dr. Gutman did not rely on the postconviction DOC records in reaching his diagnosis, he pointed out that the DOC records were consistent with his present diagnosis of Mr. Carroll. (PC-T. 411.) In other words, the DOC records fit in with the larger pattern of Mr. Carroll's behavior as reflected in records from Mr. Carroll's childhood up to the time of trial. As Dr. Gutman stated, "I believe this [mental illness] is life-long." (PC-T. 412.)

Dr. McMahon, too, testified that Mr. Carroll's mental illness spanned his entire life. (PC-T. 328-29.) She testified as follows:

> Q ***...[W]ould it be possible for someone like Mr. Carroll to be faking this illness all this time?***
>
> A ***No.***
>
> Q All these years?
>
> A No.
>
> Q ***Would it be, is this the kind of mental illness, the kind of symptoms you have, you think just came up overnight?***
>
> A ***No, absolutely not.*** As Dr. Crown mentioned, certainly his psychological profile and that on testing, as well, how he just appears interacting with him is certainly, the neuropsychological testing, he has what we call diffuse bilateral cortical deficits.
>
> As Dr. Crown said, this is not a function of a specific head injury where you're okay one day and not okay the next because somebody whopped you over the head, or you had a stroke last night and are so paralyzed on one side this morning, or any of that kind of things. Those are not what's called specific times of injuries, this is nonspecific, bilateral and diffuse.

(PC-T. 328-29.)(emphasis added) She also noted that testing conducted during Mr. Carroll's childhood yielded the same results as testing conducted today, thus refuting the assertion that Mr. Carroll decided recently to feign mental illness. Counsel questioned Dr. McMahon:

> Q: ...[W]ould Mr. Carroll have suffered from this prior to being incarcerated?
>
> A: Oh, yes, yeah. In his testing prior to anything. ***I mean we're not talking about malingering when he's 12 or 13 years old in school. Back then his test scores are the same.*** He still can't read, can't do arithmetic; still having, he's very slow.

(PC-T. 329-30.)(emphasis added)

Dr. Jethro Toomer, a clinical and forensic psychologist, evaluated Mr. Carroll on January 25, 1996. Dr. Toomer administered the Bender-Gestalt design, the MMPI, and the Carlson Psychological Survey. (PC-T. 352.) The Bender-Gestalt Design indicated brain damage with organicity, which was confirmed by a subsequent neuropsychological exam. (PC-T. 354.)

Dr. Toomer also analyzed Mr. Carroll's psychological records from 1980 forward and plotted the data on a timeline. Dr. Toomer found that Mr. Carroll's diagnostic history varied along a continuum:

> At various times . . . [Mr. Carroll] has manifested overt psychotic behavior characterized by responding to internal stimuli, auditory responses, hallucinations. At other times he manifested what we refer to as symptomatology indicative of severe personality disturbance where there has been a disturbance affect, or feeling; impaired emotional reactions and responses, poor impulse control, and the like.

(PC-T. 358.) Dr. Toomer testified that various factors account for the inconsistency of symptomatology he found in Elmer's case, including drug and alcohol abuse, medication withdrawal, brain damage, and real or imagined stress. (PC-T. 374.)

Dr. Toomer testified that the State's reliance upon Mr. Carroll's inconsistent symptomatology as evidence of malingering was misguided: "It's not inconsistency of symptomatology that usually indicates malingering, but rather exaggeration of the symptomatology." (PC-T. 365.) "[People] who attempt to malinger tend to present a layperson's notions of symptomatology in exaggerated form, and they tend to have difficulty maintaining that particular orientation over time." (PC-T. 365.) In Mr. Carroll's case, Dr. Toomer found nothing which suggested Mr. Carroll was malingering at the time of the offense or trial. (PC-T. 358). He stated further that, "[Mr. Carroll's] entire history was inconsistent with a conclusion that he was malingering." (PC-T. 359.) Dr. Toomer elaborated:

> When individuals encounter early-on trauma and neurons deprivation and other forms of impairment such as have been described here in terms of abuse, family dysfunction, being observers of abuse, what have you, what you tend to get is what is often referred to in psychology as development psychopathology. What that means is that you have individuals who develop chronologically but because of the early onset trauma are unable to develop emotionally in terms of their other functioning.
>
> So the kinds of behavior that are required in order to function and adapt appropriately are not there, things such as self concept, delayed gratification, emotional modulation, impulse control, all of those kinds of factors--projection of consequences. Those factors remain at a very impoverished level when the individual develops psychologically. ***As a result what you get is kind of an unevenness of manifestation of symptomatology.***
>
> Oftentimes you get the whole process of the drug abuse, other kinds of maladaptive behavior. And the symptomatology that is manifested tends to be manifested along a wide range of, of a continuum, depending on what precipitating factors there are. ***At one point you'll have an individual who manifests severe personality disturbance in terms of impulse control, and what have you; at other times you'll have the individual in response to unanticipated stress sometimes have a complete break. Because we're talking now a continuum between personality disorder and psychosis,*** you'll get more severe forms of mental disturbance.

(PC-T. 372-73.)(emphasis added) With respect to Mr. Carroll's mental status at the time of the offense, Dr. Toomer opined that, "based on the severity, the chronicity, and characteristic unpredictability inherent in

his behavioral manifestation that ***he was not able to appreciate the criminality of his conduct, and he suffered from severe mental or emotional disturbance***." (PC-T. 359-60.)

Dr. Toomer's conclusions were corroborated by the findings of Dr. Barry Crown, a psychologist specializing in clinical and forensic psychology and neuropsychology who evaluated Mr. Carroll in January and July 1997. Dr. Crown conducted a standard neuropsychological evaluation to determine Mr. Carroll's brain functioning, i.e., how he processes information and solves problems, the quality of his memory and concentration, and the level of his basic intellectual and cognitive ability. (PC-T. 225.) Dr. Crown determined that Mr. Carroll was not malingering: "There was a great deal of internal consistency among the tests . . . . The research literature demonstrates that even a skilled professional, meaning someone with a Ph.D in psychology, would find it difficult to consistently fake a battery of tests." (PC-T. 228.) Importantly, Dr. Crown was able to correlate the results he obtained with results from tests Mr. Carroll had taken as a school boy. (PC-T. 229.) He found that Mr. Carroll's performance on these tests was consistent over a twenty-seven year period. (PC-T. 239.)

Dr. Crown also reviewed the reports of the experts who evaluated Mr. Carroll at the time of trial, and concluded that, "based on the historical context of these materials, it would rule out malingering as an issue." (PC-T. 240.) Specifically, Dr. Crown stated that the pattern of test results obtained by Dr. Kirkland (in 1990), was "very similar" to the pattern he found (in 1997). (PC-T. 267.) He observed that, since Mr. Carroll's confinement, the Department of Corrections "has been treating him for a mental disorder . . . labeled as psychosis n.o.s., not otherwise specified, which is a garden-variety diagnosis for someone who has a major mental disorder." (PC-T. 240.) Dr. Crown also noted that DOC has been treating Mr. Carroll with antipsychotic medications such as Navane. (PC-T. 240.)

Dr. Crown measured Mr. Carroll's full scale IQ at 81, which places Mr. Carroll at the borderline range for mental retardation. (PC-T. 229.) Mr. Carroll's reading ability is at the second grade level; his spelling is at the third grade level; and his simple arithmetic is at the fifth grade level. (PC-T. 232.) Dr. Crown compared Mr. Carroll's attentional capacity (i.e., ability to function when there are distractions) to that of someone about eighty years old suffering from the beginning of a degenerative process. (PC-T. 231.) He testified that Mr. Carroll has brain damage, (PC-T. 233), and added, "There is a great deal of distractibility, a diminished, very poor intellectual processing ability, in addition to general processing deficits that are consistent with a life-long series of problems." (PC-T. 232.)

Dr. Crown compared the results from the tests he administered to Mr. Carroll with results from testing conducted in 1968, when Mr. Carroll was twelve. He found that the data matched almost exactly. (PC-T. 237.) As a student at Clermont Elementary School, Mr. Carroll was given the Weschler Intelligence Scale for Children. (PC-T. 237.) This test yielded a full-scale IQ for Mr. Carroll of 80; Dr. Crown's test indicated an IQ of 81. (PC-T. 229, 237.) As Dr. Crown testified, "It's highly unlikely that someone could fake that number on a deliberate basis beginning when they were twelve years old." (PC-T. 237.) He further noted that when Mr. Carroll was thirteen, the tests were repeated and Mr. Carroll's full-scale IQ was measured at 80 again. (PC-T. 238.) In 1990, another test produced a verbal IQ of only 58. (PC-T. 238.) According to Dr. Crown, this low score indicates that Mr. Carroll was ***psychotic at the time of this test***: "If someone is psychotic the thinking is, of course, going to be disordered and disorganized and going to produce scores below what the possible expectancy levels might be. So it's highly likely that someone that is in the midst of a psychotic episode is going to produce low scores." (PC-T. 238.)

Dr. Crown reported that the type of brain dysfunction he found in Mr. Carroll does not occur overnight:

> This represents a cluster of problems that have multiple causative factors, beginning with problems in utero, moving to neonatal/perinatal problems, the effects of trauma and the effects of substance abuse, particularly before the adolescent years . . . . ***There's nothing that indicates this is, is new. And the consistency of some of the scores on the early testing certainly suggest that this is something that, in effect, is very old, something that has been with him throughout his life span***."

(PC-T. 247.)(emphasis added) Dr. Crown testified that both statutory mental health mitigators applied to Mr. Carroll. (PC-T. 248-49.)

III. Trial

At his trial, Mr. Carroll was represented by James Taylor, a court-appointed lawyer who had never handled a penalty phase before. (PC-T. 107.) A few weeks before Mr. Carroll's trial, Mr. Taylor advised the court, "I am not prepared . . . I am a sole practitioner . . . . This case requires probably two lawyers. They have got two lawyers. I can't--I can't do it." (R. 63-64.) Whatever doubts he may have harbored about handling the case, Mr. Taylor did not ask that co-counsel be appointed.

Though he knew of his duty to investigate, (PC-T. 118), Mr. Taylor did not hire an investigator. (PC-T. 109.) Though DNA evidence linked his client to the crime scene, he did not obtain a DNA expert. (PC-T. 155-56.) Though he believed Elmer Carroll was insane, (PC-T. 135), he did not obtain a confidential mental health expert. He did not obtain any of Mr. Carroll's school records or records of psychological testing conducted during Mr. Carroll's childhood. (PC-T. 116.) He did not contact any of the mental health experts who had previously interviewed Mr. Carroll (to determine competency) in order to arrange for follow-up evaluations (PC-T. 110). He never arranged for Mr. Carroll to be tested for brain damage, conceding at the evidentiary hearing that, "If that's a mistake, then it's mine." (PC-T. 115-16.) He did not contact any family members of Mr. Carroll nor did he contact anyone who was acquainted with Mr. Carroll during Mr. Carroll's formative years. (PC-T. 117, 120.)

At the penalty phase, Mr. Taylor put on no witnesses at all, despite having over three weeks between the guilty verdict (March 21, 1992) and the penalty phase (April 13, 1992) within which to discover mitigation. "I had no one I could call that I thought would be persuasive," he later testified. (PC-T. 149-50.) He introduced only one exhibit, a police report dating from 1969 which referred to sexual abuse suffered by Mr. Carroll as a child. This document was handed to Mr. Taylor by the state attorney during a bench conference, and Mr. Taylor was reluctant to introduce it until he realized what it was. (R. 883-964.) In his closing argument (which takes up only five pages of transcript, R. 947-52), Mr. Taylor told the jury, "I'm not going to show you photographs or present any other type of testimony. You've heard the evidence." (R. 947-48.) He scarcely mentioned any of the mental health testimony, instead arguing that "the [offense] in and of itself" demonstrated his client's mental illness. (PC-T. 949.) He made only passing reference to the police report disclosed by the State: "It would seem to me that this document here that says he was sexually molested as a young man maybe could add something to the reason that he acted the way that he did that night." (R. 951.) Mr. Taylor concluded his argument by apologizing for not having more to say: "There is a lot of things that could be said I suppose during this proceeding." (R. 951.)

Mr. Taylor never asked mental health experts to evaluate Mr. Carroll for purposes of mitigation. (PC-T. 118.) He presented no mental health evidence at penalty phase. (R. 883-964.) At the evidentiary hearing Mr. Taylor defended his decision, stating, "I had no one I could call that I thought would be persuasive." (PC-T. 149-50.) ***However, Dr. Danziger, Dr. Gutman, and Dr. McMahon all testified at the evidentiary hearing that they had been willing to testify at penalty phase that statutory mitigators applied to Mr. Carroll.*** (PC-T. 381-82, 398-99). Dr. Danziger testified as follows:

> Q You said Mr. Taylor never contacted you to evaluate Mr. Carroll for statutory mitigators, and he never asked you to specifically testify to that? He did not call you during the penalty phase of the trial, did he?
>
> A Correct.
>
> Q And were he to have asked you to evaluate Mr. Carroll specifically for those mitigating circumstances, or statutory mitigating circumstances, would you have been agreeable to doing so?
>
> A Yes.
>
> Q And if he had called you at the penalty phase to testify regarding the statutory mitigation, would you have been able for, or would you have, you have testified in fact Mr. Carroll met requirements for the statutory mitigators that the murder was committed while Mr. Carroll was under the influence of extreme mental or emotional disturbance?
>
> A Yes, I, I would have testified.
>
> Q Would you also have testified to the statutory mitigator of Mr. Carroll's capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law as substantially impaired?
>
> A Yes.

(PC-T. 381-82.) Dr. Gutman also stated that he would have testified at penalty phase:

> Q As to the statutory mitigator, factor of the capacity of the defendant to appreciate the criminality, the one we just discussed, what would your opinion have been?
>
> A That he would have met the mitigating circumstances, statutory mitigating circumstances, ***if I had ever been asked***.
>
> Q If you had been asked to render an opinion on whether the defendant was under the influence of extreme mental or, mental or emotional disturbance, would you have been, been able to give an opinion on that?
>
> A Yes.
>
> Q What would your opinion have been?
>
> A That he was.
>
> Q If you had been asked to testify to this, to the existence of statutory mitigating circumstances, would you have?
>
> A Yes.
>
> Q Were you ever asked to do so?
>
> A Not that I recall.

(PC-T. 398.)(emphasis added) Dr. McMahon also was willing to testify at penalty phase:

> Q If you had been called upon to testify at the penalty phase based on the, based on what you did, would you have been able to address the statutory mitigating factor Mr. Carroll suffered from extreme mental or emotional disturbance?
>
> A Yes . . .
>
> Q Would you have been able to testify that the capacity of Mr. Carroll to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired at that time?
>
> A Yes.

(PC-T. 332-33.) Mr. Taylor testified that he didn't call any experts at penalty phase because he believed their testimony at guilt phase was sufficient. (PC-T. 115, 119.) Consequently, ***the jury was never told how the mental health testimony offered during guilt phase related to the statutory mitigating circumstances.*** At the sentencing hearing, the State took advantage of this fact in arguing to the court that no statutory mitigators existed:

> THE STATE: I would comment, also, that ***the defense chose not to present any additional psychiatric testimony during the penalty phase. So no psychiatrist has directly addressed himself to the issue of the statutory mitigating circumstances***.

> I would submit at this time, based on the evidence presented during guilt phase in this case, that there is no sufficient evidence to reasonably convince the Court of the existence of the statutory mitigating circumstances.

(R. 971.)(emphasis added) The trial court apparently agreed with the State's argument, finding no statutory mitigators. (R. 1284-1290.)

In his closing argument, Mr. Taylor told the jury, "I'm not going to stand up here for two hours and go over the testimony of all the witnesses . . . I'm not going to stand up here and jump up on the table and try to change twelve collective minds as to how you recall the evidence presented in this case." (R. 829.) With respect to Dr. Hegert, the medical examiner whose testimony was crucial in linking Mr. Carroll to the crime scene, Mr. Taylor told the jury, "I'm not going to sit up here and question his opinion." (R. 835.)

At the evidentiary hearing, Mr. Taylor blamed his lack of preparation on the fact that no one provided him with information:

> Q Did you present the case at trial and penalty phase you wanted to present in this case?
>
> A No.
>
> Q Why not?
>
> A Well, I wanted more information in the penalty phase, I wanted to do something in the penalty phase rather than rely on what had been presented in the guilt phase. I wanted more information, I wanted more to work with. I didn't have it.
>
> Q Why was that, sir?
>
> A ***Because the information was not provided to me***. And I couldn't, could not ascertain whether there was any information out there that would have been helpful, or not.

(PC-T. 134.)(emphasis added) He elaborated: "There was nothing that I was given by anybody that had something to do with psychological problems in the past. I mean I would have liked to know whether or not he had a brain injury, or testimony about a plate in the, in his head, or anything like that." (PC-T. 139.) With respect to school records and information from Mr. Carroll's relatives, Mr. Taylor stated, "I would have like to have had a lot of things and more knowledge of what happened in his past, which I did not have." (PC-T. 116.) "I was limited, I had no further information from anybody or any source or my client. There's not a family member that called me..." (PC-T. 116.)

Mr. Taylor admitted that information from family members (such as Mr. Carroll's history of mental illness and abuse suffered by him as a child) would have been relevant for penalty phase. (PC-T. 119-20.) However, he complained that Mr. Carroll's relatives never got in touch with him: "I certainly wish they would have contacted me. You know, normally when somebody is charged with something like this family members, the phone is always ringing because the family members are so concerned about it . . . [S]ome family members drive you nuts calling. That wasn't the case here." (PC-T. 120.) And with respect to past acquaintances of Mr. Carroll, Mr. Taylor stated that "no one came forward." (PC-T. 139.)

Mr. Taylor also expressed frustration at his client's inability to assist in his defense:

> [Mr. Carroll] was a nice, courteous person that couldn't give me help about his background, whether he had, had any, he had any family members that cared anything about him, anybody to contact. . . . As far as his mental background was concerned or what happened that night, ***I couldn't get anything out of him***."

(PC-T. 136.)(emphasis added) At the hearing, counsel questioned Mr. Taylor:

> Q To what extent, if any did [Mr. Carroll] participate in his own defense and preparation of the defense case in chief in this case?
>
> A Very little.
>
> Q What was your communication with him like? Was he able to respond to your questions appropriately?

A Yeah, he was able to respond but he just was uninformative. He didn't know, or he didn't remember, or he had no knowledge of that.

Q He told you he had no recollection of committing this offense?

A That's correct.

Q He told you he had no recollection of his life history?

A Well, he knew where he had been, he'd been in jail before and what he'd, he'd done . . . . But as far as Elmer helping me out by saying look, you need to contact Aunt Sally, or my mother, or anyone else that was alive, there was nothing. I got, I got no information, had nowhere to go.

(PC-T. 137-38.) Mr. Taylor testified that the reason Mr. Carroll was unable to assist him was because Mr. Carroll was incompetent. (PC-T. 150-51.) Mr. Taylor clarified: "...I thought Elmer was really suffering from some type of mental problems. ***I thought he was insane. And no, he was not able to assist me. Even though some psychiatrists said he was able to assist me, he didn't give me any assistance***." (PC-T. 151.)(emphasis added) "I felt like I was talking to an empty suit." (PC-T. 151.)

SUMMARY OF THE ARGUMENT

Elmer Carroll should not have been tried for capital murder, as he was incompetent during all stages of his trial. He was incompetent and unable to knowingly, voluntarily, and intelligently waive his right to testify or present evidence during the penalty phase proceeding. His lawyer's ineffective assistance deprived experts, the jury, and the sentencing court of vital information necessary for a reliable competency and sentencing determination. Evidence of incompetency discovered and presented in postconviction requires a new trial.

Further, much of the same evidence proving incompetency establishes that Elmer Carroll's trial attorney was ineffective in presenting his primary defense of insanity. Had the truth regarding Elmer Carroll been adequately presented to the jury and judge, a verdict of Not Guilty by Reason of Insanity would have inevitably followed and Mr. Carroll would now be where he belongs: in a mental health facility receiving lifelong treatment. Additionally, trial counsel failed to competently explore and present evidence that Mr. Carroll may not have acted alone in the offenses, but, rather, may have been influenced or assisted by a sane, competent accomplice; failed to effectively challenge the DNA evidence introduced against Mr. Carroll; and utterly failed to effectively impeach and limit the prejudicial impact of the medical examiner's testimony, which featured numerous gruesome and inflammatory photographic slides serving no evidentiary purpose outweighing prejudicial impact. Counsel did not prevent the trial court from abandoning its role and allowed the State witness to dictate admission of improper evidence designed solely to inflame the passions of the jury.

Perhaps most egregious was trial counsel's ineffectiveness during the penalty phase of the capital trial. Counsel knew he was representing an incompetent individual who was insane at the time of the offenses. He believed Mr. Carroll to be insane at the time of sentencing. Nevertheless, he allowed the State to portray Mr. Carroll as a subhuman monster and a cold-blooded child molester/killer who stalked the night. Counsel utterly failed to investigate Mr. Carroll's background. Even while acknowledging that he was overwhelmed by the case and co-counsel was needed, counsel never asked the trial court for assistance. Despite realizing his heightened burden to investigate mitigation on behalf of his mentally ill client, Mr. Taylor never requested the services of a professional investigator. Nor did he engage mental health experts for purposes of establishing powerful statutory mental health mitigation.

An adequate mitigation investigation would have both strengthened Mr. Carroll's incompetency and insanity claims during pre-trial and guilt phases of trial and established that Elmer Carroll was ***not*** a monster, but an unwanted, unloved child who was brutally physically, sexually, and emotionally abused in his

youth and who, as an adult, existed in the fog and confusion of brain damage, mental illness, and addiction to substances. An adequate investigation would have refuted the State's primary strategy in the face of such a mentally ill defendant: label him a malingerer. The evidence below overwhelmingly establishes that Elmer Carroll was not, is not, and has never been a malingerer. Instead, he has consistently tested out low I.Q. and mentally ill. He could neither appreciate the criminality of his actions nor conform his conduct to the requirements of the law. He suffered from a severe emotional or mental disturbance at the time of the offenses as well. Numerous additional mitigating circumstances existed, but were not presented.

Trial counsel abandoned his client during penalty phase and functioned as an adjunct prosecutor, informing the sentencing court that no one had anything good or mitigating to say about Elmer Carroll. This alone requires a new penalty phase.

Trial counsel "waived" Mr. Carroll's fundamental constitutional rights under both our state and federal constitutions to testify and contest the State's evidence by presenting his own mitigation evidence during the penalty phase. This was done despite counsel's good faith knowledge and belief that Mr. Carroll was incompetent to waive such rights.

Mr. Carroll was denied a full and fair hearing due to the erroneous summary denial of claims and also because the trial court erred in excluding evidence. The trial court denied Mr. Carroll the right to submit written closing arguments despite being without counsel due to legislative destruction of the former Office of Capital Collateral Counsel.

The trial court misapprehended the law in summarily denying claims, apparently believing it was limited to hearing claims with an ineffective assistance of counsel component. The trial court excluded from consideration all ineffectiveness claims premised upon failure to object. This was error, particularly regarding Claim XV (improper penalty phase closing argument by State), where consideration of this claim was vital to conducting a cumulative analysis of Mr. Carroll's claims. No cumulative analysis was conducted.

Mr. Carroll is entitled to a new trial.

ARGUMENT I

MR. CARROLL IS NOT GUILTY OF THESE OFFENSES BY REASON OF HIS INSANITY. THE TRIAL COURT ERRED IN REJECTING MR. CARROLL'S CLAIM THAT, DUE TO TRIAL COUNSEL'S INEFFECTIVENESS, THE INSANITY DEFENSE WAS NOT PROPERLY PRESENTED.

Brain damaged, psychotic, alcoholic, and borderline retarded, Elmer Carroll is a far cry from the "Boogie Man" that the State described him as at trial. (R. 947.) Simply stated, Elmer Carroll has suffered from brain damage and mental illness his entire life. "There's nothing that indicates that this is . . . new," Dr. Crown testified at the evidentiary hearing, "and the consistency of some of the scores on the early testing certainly suggest that this is something that, in effect, is very old, something that has been with [Mr. Carroll] throughout his life span." (PC-T. 247.) In fact, the origins of Mr. Carroll's mental problems likely extend back to the womb. Evidence introduced at the hearing established that Mr. Carroll's mother drank heavily during her pregnancy, indicating the likelihood of Fetal Alcohol Syndrome. (PC-T. 245.) In addition, the mental illness of numerous family members points to a genetic disorder. These problems were compounded by brutal physical abuse and sexual abuse suffered by Mr. Carroll as a child, as well as by chronic alcoholism and drug use. As Dr. Crown testified, "This [mental disorder] represents a cluster of problems that have multiple causative factors, beginning with problems in utero, moving to neonatal/perinatal problems, [and] the effects of trauma and the effects of substance abuse, particularly before the adolescent years." (PC-T. 247.)

Several experts testified to the lifelong duration of Mr. Carroll's mental illness, including Dr. Gutman (PC-T. 412), Dr. McMahon (PC-T. 328-29), and Dr. Crown (PC-T. 232, 239, 247.) Significantly, Mr.

Carroll's performance on psychological tests has been consistent throughout his life, "down to the pattern of the scores themselves," according to Dr. McMahon. (PC-T. 324.) Dr. Crown made the same observation, finding that the results of the tests he administered to Mr. Carroll were almost identical with results from testing conducted in 1968. (PC-T. 237.) Dr. Crown also noted that the pattern of test results he obtained was "very similar" to that found by Dr. Kirkland seven years earlier. (PC-T. 267.)

The brain damage and psychological problems identified in Mr. Carroll's childhood continue today. Every one of the experts who testified at the hearing agreed that Mr. Carroll is presently psychotic. Moreover, even the Department of Corrections concurs in this diagnosis, for Mr. Carroll was diagnosed with schizophrenia and put on a drug regimen as soon as he was incarcerated. At various times, he has been medicated with Navane, Loxitane, Stelazine, Pamelor, Visteral, Asendin, Cogenton, and Donegral. (PC-T. 325, 327). Volumes of DOC psychiatric records also attest to the persistence of Mr. Carroll's mental illness.

It strains reason, therefore, to suggest that Mr. Carroll was sane at the time of the offense, while conceding (as one must) that he suffered from a severe, chronic mental disorder both before and after the offense. Common sense dictates that Mr. Carroll was insane at the time of the offense. And in fact numerous experts expressed this very opinion: Dr. Danziger (concluded that Mr. Carroll was psychotic at the time of the offense and was unable to distinguish right from wrong, R. 1066-72), Dr. Benson (testified that Mr. Carroll was actively psychotic at the time of the offense and did not know what he was doing or its consequences, R. 759), Dr. Crown (testified that Mr. Carroll was psychotic in 1990, PC-T. 238, and that Mr. Carroll's dysfunctions existed at the time of the offense, PC-T. 248-49), Dr. McMahon (testified that Mr. Carroll was psychotic within 48 hours of the offense, PC-T. 316-17), and Dr. Gutman (testified that Mr. Carroll had a psychotic illness on or around the time of the offense and that the psychosis had developed, PC-T. 392.).

Mr. Carroll's behavior as observed by lay witnesses roughly contemporaneous with the offense also indicates that he was insane. Several people who saw him shortly before the offense testified that he was talking to his jacket, mumbling about demons, and staring into space. The officers who arrested Mr. Carroll also remarked on Mr. Carroll's odd demeanor. When Officer McDaniel swerved off the highway and brought his patrol car up right behind Mr. Carroll, Mr. Carroll continued to walk away, apparently oblivious. And when Dr. McMahon interviewed Mr. Carroll a mere 48 hours after his arrest, she found him so psychotic that she was unable to perform an evaluation.

In the face of overwhelming evidence of Mr. Carroll's insanity, the State resorted to the facile argument that, because Mr. Carroll was not visibly a raving lunatic, he must be sane. The State told the jury in closing: "[Y]ou've not seen the defendant hearing voices. The defendant has sat in this courtroom and conducted himself as any other person and listened intently to the testimony." (R. 816.)[4] The State

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[4]Dr. McMahon testified at the evidentiary hearing that introduction into a structured environment can actually ameliorate psychotic symptoms:

> Q So, doctor, it's your testimony that the pressure of incarceration and an impending criminal trial for first degree murder would not cause someone to exhibit symptoms of mental illness?
> A Strange as it may seem, no. It's

belittled the psychiatric testimony, referring to it as "psycho-babble", and argued to the jury that Mr. Carroll was simply faking his symptoms: "Blank stares doesn't mean you're insane." (R. 848.)5

Competent, substantial evidence presented at the hearing established that, at the time of the offense, Mr. Carroll was "laboring under such a defect of reason, from disease of the mind, as to not know the nature and quality of his act, or as not to know that what he was doing was wrong." Copeland v. State, 41 Fla. 370, 26 So. 319 (Fla. 1902). Lay witness testimony, extensive records, and the unrefuted testimony of five mental health experts (including three experts who had contact with Mr. Carroll shortly after the offense) points to Mr. Carroll's insanity. The court erred in denying Mr. Carroll relief on this claim. Mr. Carroll's trial counsel was ineffective in presenting the insanity defense, and Mr. Carroll is entitled to relief on this claim regardless of the quality of counsel's assistance. To the extent that the court did not grant Mr. Carroll a hearing on this claim, the court committed error. To the extent that a hearing was granted, Mr. Carroll's insanity at the time of the offense has been established by competent and substantial evidence, and in the interest of justice this Court must grant Mr. Carroll a new trial.

ARGUMENT II

MR. CARROLL WAS INCOMPETENT DURING HIS CAPITAL PRETRIAL, TRIAL, AND SENTENCING PROCEEDINGS, IN VIOLATION OF THE UNITED STATES AND FLORIDA CONSTITUTIONS AND HIS FUNDAMENTAL DUE PROCESS RIGHT NOT TO BE TRIED WHILE INCOMPETENT. DUE TO TRIAL COUNSEL'S INEFFECTIVENESS, MR. CARROLL'S INCOMPETENCE WAS NEVER MADE APPARENT TO THE COURT.

For the same reasons stated in Argument I above, it is apparent that Mr. Carroll was incompetent at the time of his trial. It has long been the rule in Florida that:

> A person accused of an offense or a violation of probation or community control who is mentally incompetent to proceed at any material stage of a criminal proceeding shall not be proceeded against while he is incompetent.

Fla. R. Crim. P. Rule 3.210 (a). The conviction of an incompetent defendant denies him the due process of law guaranteed in the Fourteenth Amendment. See James v. Singletary, 957 F.2d 1562, 1573 (11th Cir. 1992); Pate v. Robinson, 383 U.S. 375 (1966).

The James Court reiterated that

> [a] defendant is considered competent to stand trial if "he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and [if] he has ***a rational as well as factual understanding of the proceedings against him.***"

James, 957 F.2d at 1574 (quoting Dusky v. United States, 362 U.S. 402 (1960))(emphasis added); See also, Hill v. State, 473 So. 2d 1253 (Fla. 1985). The evidence overwhelmingly indicates that Mr. Carroll possessed neither a factual nor rational understanding of the proceedings against him at the time of his trial and penalty phase. It is equally obvious that Mr. Carroll did not possess a sufficient present

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> oftentimes first of all not seen as pressure, and certainly not in the same way as it would be to us.
>
> So these folks, ***what we find is they frequently compensate, they look better.***

(PC-T. 334.)(emphasis added)

[5]"[T]he existence of even a severe psychiatric defect is not always apparent to laymen. One need not be catatonic, raving or frothing." Bouchillon v. Collins, 907 F.2d 589, 593-94 (5th Cir. 1990) (citations omitted).

ability to assist in his own defense. He remained bewildered and uncommunicative throughout the entire trial.

Though Mr. Carroll was afforded a competency hearing in November 1991, the trial court was predisposed to put Mr. Carroll on trial regardless of the hearing's outcome. Although two out of three experts judged Mr. Carroll to be incompetent in December 1990, the trial court was evidently dissatisfied with this result and in 1991 appointed two more experts to evaluate Mr. Carroll. Before any of the experts had an opportunity to see Mr. Carroll, Judge Perry proceeded to set the case for trial. (R. 1054.)

This Court has stated that "due process envisions a court that 'hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties,'" Jones v. State, 740 So. 2d 520, 523 (Fla. 1999) (quoting Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990)). But in the instant case this ideal was forgotten. Elmer Carroll's competency hearing was little more than a pantomime, as the court was already prepared to find Mr. Carroll competent before the hearing even got underway. As soon as the last witness was excused, Judge Perry told the attorneys, "I'll try [Mr. Carroll] this month if you all are ready to proceed . . . You just let me know when you want to proceed, I'll proceed." (R. 1393.)

To the extent that the court did not grant Mr. Carroll a hearing on this claim, the court committed error. To the extent that a hearing was granted, Mr. Carroll's incompetence to be proceed at the time of his trial has been established by competent and substantial evidence.

A. MR. CARROLL WAS INCOMPETENT AT ALL STAGES OF THE PROCEEDINGS.

Abundant psychiatric testimony before, during, and since trial establishes that Mr. Carroll was incompetent at the time of his trial. Dr. McMahon was the first mental health professional to examine Mr. Carroll after his arrest, and found him so psychotic that she could not even evaluate him. (PC-T. 315.) Days after Dr. McMahon's contact with Elmer Carroll, the trial court appointed three experts to determine Mr. Carroll's competency to proceed. Two out of the three doctors concluded that Mr. Carroll was incompetent. (R. 1042, 1043-47, 1075-78.)

Dr. Kirkland examined Mr. Carroll on November 6, 1990 and found him "not competent to stand trial, especially on a charge of murder." (R. 1042.) Dr. Kirkland recommended that Mr. Carroll be sent to a state hospital facility for further evaluation and treatment. (R. 1042.)

Dr. Benson examined Mr. Carroll on December 11, 1990 and also concluded that Mr. Carroll was incompetent. (R. 1043-47). During this examination Mr. Carroll stated that he heard voices, and told Dr. Benson, "I see things, people. They try to make me believe they're somebody else." (R. 1044.) Mr. Carroll went on to say that the jail staff poisons his food; that he sometimes sees messages on television directed only at him; that people follow him and talk about him on the streets; that he communicates directly with God; and that he has the power to read minds and to heal people. (R. 1045.) Dr. Benson diagnosed Mr. Carroll with schizophrenia and noted in his report, "I do not believe [Mr. Carroll] is malingering. He is too regressed, too disorganized, and almost certainly is hallucinatory and delusional." (R. 1046.)

Dr. Erlich examined Mr. Carroll on December 7, 1990. (R. 1075-78.) At the interview Mr. Carroll remarked, "There's stuff on my cell that looks like blood . . . The windows are smeared with stuff. It's like they're trying to make me believe things that are not true." (R. 1076.) Dr. Erlich observed that "Cognition is bizarre and hard to test. Insight and judgement (sic) are poor." (R. 1077.)

Ten months later, the court appointed two additional experts and ordered the three experts initially appointed to reevaluate him.5 Mr. Carroll's attorney filed an objection to the appointment of additional experts as contrary to Fla. R. Crim. P. 3.210(b). The court was so eager to put Mr. Carroll on trial that Judge Perry set the trial date before any of these doctors had an opportunity to examine Mr. Carroll (R. 1054.)

Mr. Carroll's competency hearing was held on November 15, 1991. (R. 1337-95.) At this hearing, even the State expressed misgivings about Mr. Carroll's competency to proceed: "I have a feeling that immediately prior to the trial of this case . . . we'll probably have to have the doctors take another look at Mr. Carroll to make sure." (R. 1393.)

Dr. Benson, upon reexamining Mr. Carroll in October 1991, reaffirmed his opinion that Mr. Carroll was incompetent. (R. 1062-65.) Although Doctors Danziger and Gutman, the two experts appointed in 1991, both found Mr. Carroll competent to proceed, each expressed reservations about his conclusions. Dr. Danziger cautioned that "I feel that the defendant does meet competency criteria at this point, ***but without medication that status could possibly worsen in the foreseeable future***." (R. 1071.)(emphasis added) Dr. Danziger also concluded that Mr. Carroll was psychotic at the time of the offense and unable to distinguish right from wrong. (R. 1066-72.) Dr. Gutman predicted that representing Mr. Carroll would be "***laborious for defense counsel***," although he was hopeful Mr. Carroll would "***participate grudgingly*** in his own defense." (R. 1061.)(emphasis added)

At the evidentiary hearing, counsel for Mr. Carroll presented the testimony of Doctors Danziger and Gutman. After reviewing the records provided to them by collateral counsel (consisting of school records, medical records, DOC records, and family histories), both doctors testified that they would reconsider their original opinions regarding Mr. Carroll's competency at the time of trial. (PC-T. 403, 393, 375-82.) Mr. Carroll's trial attorney was ineffective by failing to discover and provide this critical information to the appointed competency experts. Mr. Taylor's constitutionally deficient performance at this pre-trial stage prejudiced Mr. Carroll by depriving him of a constitutionally reliable competency determination.

To the extent that defense counsel failed to apprise the court and the experts that Mr. Carroll was incapable of assisting in his defense due to incompetence, defense counsel rendered ineffective assistance. Hull v. Freeman, 932 F.2d 159 (3d. Cir. 1991).

B. MR. CARROLL'S WAIVER OF HIS RIGHT TO TESTIFY AND HIS RIGHT TO CALL WITNESSES TO PRESENT EVIDENCE IN MITIGATION WAS NOT KNOWING, VOLUNTARY, AND INTELLIGENT.

After the State rested at penalty phase, Mr. Carroll's attorney announced to the court that he did not intend to present any mitigating evidence. The following bench conference took place:

> MR. TAYLOR: I discussed this with Mr. Carroll. I don't think he's in my opinion capable of testifying. I have no idea what he's going to say. He could say one thing. He could say the other; too dangerous . . .
>
> THE COURT: Okay, Mr. Carroll feels comfortable with that?
>
> MR. TAYLOR: ***He said, you're the lawyer, judge. He doesn't think [State's witness] Don Williams is the same guy. He doesn't. He's over there pulling my coat saying, who is this person? That's not Don Williams. He wants to know, he thinks [Assistant State Attorney Robin Wilkinson] is telling people to tell lies, okay.***

(R. 912.)(emphasis added) At the evidentiary hearing, Mr. Taylor was questioned about his decision to present no witnesses during penalty phase:

> Q Was that decision made after conferring with your client?

5However, Dr. Erlich did not conduct a second evaluation of Mr. Carroll.

A Yes.

Q And he agreed with that decision, didn't he?

A ***He didn't really agree, he just didn't do much.***

(PC-T. 150.)(emphasis added)

To waive any right guaranteed by the United States Constitution the defendant must be able to make a "knowing and intelligent" waiver of these rights. Mincey v. Arizona, 437 U.S. 385 (1978); Miranda v. Arizona, 384 U.S. 436 (1966). The rights to testify and to call witnesses are fundamental rights under both our state and federal constitutions. See, e.g., Deaton v. Dugger, 635 So. 2d 4, 8 (Fla. 1993). Accordingly, this Court has held that, "in determining the validity of any waiver of those rights to present mitigating evidence, ***clearly, the record must support a finding that such a waiver was knowingly, voluntarily, and intelligently made.***" Deaton v. Dugger, 635 So. 2d 4, 8 (Fla. 1993)(emphasis added). It is obvious from the record that Mr. Carroll lacked the ability to make a knowing, voluntary, and intelligent waiver of his right to present evidence in mitigation. This is so for two reasons: 1) his mental illness rendered him incompetent to make such a waiver, and 2) his trial counsel's total failure to investigate mitigation meant any waiver could not be knowing or intelligent (See Argument III, infra).

ARGUMENT III

THE TRIAL COURT ERRED IN DENYING MR. CARROLL'S INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL CLAIM. MR. CARROLL HAS BEEN DENIED A FULL ADVERSARIAL TESTING AND HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW.

At this juncture, Elmer Carroll's capital case stands for the proposition that one may be convicted of capital murder and summarily sentenced to death despite overwhelming evidence of insanity, incompetency, and powerful statutory mental health mitigation. To allow Mr. Carroll's death sentence to stand is to ignore constitutional law and conclude that the circumstances of a capital offense ***alone***--regardless of mitigation--require a sentence of death.

Unless a sentencer can consider "compassionate and mitigating factors stemming from the diverse frailties of humankind," a capital defendant will be treated not as a unique human being, but rather as a "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). This is exactly what happened to Elmer Carroll. Compelling evidence demonstrating and explaining his human frailties was never disclosed to the jury.

A. DEFICIENT PERFORMANCE OF COUNSEL

Mr. Carroll's case is about a court-appointed lawyer whose apathy toward his client pervaded the trial and culminated in a jury recommendation of death. Mr. Taylor cross-examined witnesses and made objections, but effectively did ***no*** investigation or preparation of his penalty phase case. Although his client's mental illness was obviously central to the entire defense (the main defense at guilt phase was insanity, PC-T. 109), ***Mr. Taylor did not procure a single confidential mental health expert***. Though he expressed doubts about his ability to handle the case, (R. 63-64), Mr. Taylor did not ask that co-counsel be appointed. Though he knew of his duty to investigate, (PC-T. 118), Mr. Taylor did not hire an investigator. (PC-T. 109.) Though he believed Elmer Carroll was insane, (PC-T. 135), he never arranged for an expert to evaluate his client's mental health. He did not obtain any of Mr. Carroll's school records or records of psychological testing conducted during Mr. Carroll's childhood. (PC-T. 116.) He did not contact any of the mental health experts who had previously interviewed Mr. Carroll (to determine competency) in order to arrange for follow-up evaluations (PC-T. 110). He never arranged for Mr. Carroll to be tested for brain damage, conceding at the evidentiary hearing that, "If that's a mistake, then it's mine." (PC-T. 115-16.)

He did not contact any of Mr. Carroll's relatives or anyone acquainted with Mr. Carroll during Mr. Carroll's formative years. (PC-T. 117, 120.)

Mr. Carroll effectively had ***no*** penalty phase at all. His attorney did not call a single witness. Even worse, his lawyer actually stated to the court that "There's nobody who wants to say anything about Elmer." (R. 918.) At the evidentiary hearing Mr. Taylor defended his decision, stating, "I had no one I could call that I thought would be persuasive." (PC-T. 149-50.) However, five family members testified at the evidentiary hearing that they would have testified at trial had they been asked (PC-T. 190, 217, 284, 306). In addition, Dr. Danziger, Dr. Gutman, and Dr. McMahon all testified at the evidentiary hearing that they had been willing to testify at penalty phase that statutory mitigators applied to Mr. Carroll; quite simply, they were never asked. (PC-T. 381-82, 398-99.) Mr. Taylor introduced only one exhibit at penalty phase, a police report dating from 1969 which referred to sexual abuse suffered by Mr. Carroll as a child. This document was handed to Mr. Taylor by the state attorney during a bench conference, and Mr. Taylor was actually reluctant to introduce it until he realized what it was.6 (R. 914-15.) In his closing argument (comprising only five pages of transcript, R. 947-52), Mr. Taylor told the jury, "I'm not going to show you photographs or present any other type of testimony. You've heard the evidence." (R. 947-48.) He scarcely mentioned any of the mental health testimony from the guilt phase, instead arguing that "the [offense] in and of itself" demonstrated his client's mental illness. (PC-T. 949.) He made only passing reference to the police report disclosed by the State. (R. 951.) Mr. Taylor concluded his argument by apologizing for not having more to say: "There is a lot of things that could be said I suppose during this proceeding." (R. 951.)

In short, Mr. Taylor did nothing to persuade the jury that his client's life should be spared. Such passiveness is plainly incompatible with the guarantees of due process and effective assistance of counsel embodied in our state and federal constitutions:

> It should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness.

Blake v. Kemp, 758 F. 2d 523, 533 (11th Cir. 1985), cert. denied, 474 U.S. 998 (1985). Trial counsel is under a duty to independently investigate, evaluate, and present all statutory and nonstatutory mitigation in a capital case. Rose v. State, 675 So. 2d 567, 570-72 (Fla. 1996); Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993); Stevens v. State, 552 So. 2d 1082, 1087-88 (Fla. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988); Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994). Failure to investigate available mitigation constitutes deficient performance. Rose, 675 So. 2d at 570-72; Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993); Heiney, 620 So. 2d at 173; Phillips v. State, 608 So. 2d 778, 782-83 (Fla. 1992); Mitchell v. State, 595 So. 2d 938 (Fla. 1992); Lara v. State, 581 So. 2d 1288 (Fla. 1991); Stevens, 552 So. 2d 1082, 1087-88 (Fla. 1989); Bassett v. State, 541 So. 2d 596 (Fla. 1989).

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[6]Despite having three weeks between the guilty verdict (March 21, 1992) and the penalty phase (April 13, 1992) in which to discover mitigation, Mr. Taylor came to the penalty phase empty-handed. Had the State not disclosed the police report (after waiting until the eleventh hour to do so), Mr. Carroll would have had no mitigation evidence whatsoever.

Although five of Mr. Carroll's relatives and three mental health experts were available and willing to testify at penalty phase, Mr. Taylor either did not contact them or did not ask that they testify.[7] Failure to present available mental health mitigating evidence constitutes ineffective assistance. Middleton v. Dugger, 849 F. 2d 491, 493-95 (11th Cir. 1988). Mr. Taylor's lack of effort to secure any mitigation evidence constitutes the very kind of ineffective assistance condemned in Harris v. Dugger, where the court observed, "[P]rior to the day of sentencing, neither lawyer had investigated Harris' family, scholastic, military and employment background, leading to their total--and admitted--ignorance about the type of mitigating evidence available to them." 874 F. 2d 756, 763 (11th Cir. 1989), cert. denied, 493 U.S. 1011 (1989). Mr. Carroll's death sentence was the direct result of his attorney's inexcusable neglect. His attorney's superficial effort and belief that the information should be supplied to him, rather than discovered by him, amounted to no investigation for constitutional purposes.

When questioned about his non-effort in Mr. Carroll's case, Mr. Taylor blamed everyone but himself. He complained that information was not provided to him. (PC-T. 134, 139.) He grumbled that Mr. Carroll's relatives never contacted him. (PC-T. 117, 120.) He fretted that no one came forward from Mr. Carroll's past. (PC-T. 138-39.) Indeed, a review of the record leaves one to ponder which is more remarkable: Mr. Taylor's complete lack of effort on behalf of his client, or his astonishment that no one beat a path to his door to offer help.

Mr. Taylor also pointed to his client's mental incompetence as an excuse for his shortcomings.[8] He stated several times during the evidentiary hearing that Mr. Carroll had been uncommunicative and unable to assist him. (PC-T. 136-38, 151.) While this is certainly true, Mr. Taylor cannot excuse his ineffectiveness by blaming his client's mental illness. An attorney's duty to render effective assistance of counsel does not depend on his client's ability to assist him. Strickland v. Washington, 468 U.S. 668 (1984). To the contrary, Mr. Carroll's mental illness bestowed on Mr. Taylor a ***heightened responsibility*** to protect his client's interests: "An attorney has expanded duties when representing a client whose condition prevents him from exercising proper judgment." Thompson v. Wainwright, 787 F. 2d 1447, 1451 (11th Cir. 1986)(citation omitted), cert. denied, 481 U.S. 1042 (1987). In Blanco v. Singletary, the Eleventh Circuit emphasized the increased responsibility of trial counsel when the client has a mental infirmity. Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991). Like Elmer Carroll, the defendant in Blanco was described as uncommunicative and exhibiting strange behavior:

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[7]In his order denying Mr. Carroll postconviction relief, Judge Perry found that "[i]t would have been difficult, if not impossible at the time of trial to locate family members who were scattered to the winds and who had no contact with Defendant for years prior to this crime." (PC-T. 1163.) This assertion flies in the face of the evidence adduced at the hearing, at which Mr. Carroll's relatives testified that they were living in fairly close proximity to Orange County at the time of trial (some less than an hour's drive away) and that they maintained addresses and telephone service in their own names. (PC-T. 201, 217, 284.)

[8]Mr. Taylor overlooks the fact that had he properly investigated the case--perhaps with the assistance of co-counsel and/or an investigator--Mr. Carroll's incompetency would have been established and he would not have been forced to try a capital case under such unacceptable circumstances.

> During the precise period when Blanco's lawyers finally got around to preparing his penalty phase case, Blanco was noticeably morose and irrational. ***Counsel therefore had a greater obligation to investigate and analyze available mitigation evidence.***

Id. at 1502 (emphasis added).

No matter the degree to which Mr. Carroll was uncommunicative or unable to assist his lawyer, Mr. Taylor had a duty to independently investigate and present to his client the results of his investigation and his view of the merits of alternative courses of action.[9] Tafero v. Wainwright, 796 F.2d 1314, 1320 (11th Cir. 1986); Eutzy v. Dugger, 746 F. Supp. 1492, 1499 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. 1990); Koon v. Dugger, 619 So. 2d 246 (Fla. 1993). Although a client's wishes or directions may limit the scope of an attorney's investigation,[10] even this will not excuse the failure to conduct ***any*** investigation of a defendant's background for potential mitigating evidence. See, Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986); 1986); Thomas v. Kemp, 796 F.2d 1322 (11th Cir.), cert. denied, 479 U.S. 996 (1986); Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), cert. denied, 461 U.S. 910 (1983). So crucial is this aspect of an attorney's duties that even a defendant's desire not to present mitigation evidence[11] does not terminate the lawyer's responsibilities during the sentencing phase of a death penalty trial. Blanco v. Singletary, 943 F.2d 1477, 1502 (11th Cir. 1991); Deaton v. Dugger, 635 So. 2d 4, 7-9 (Fla. 1994).

Mr. Carroll was prejudiced not only by Mr. Taylor's inaction, but also by Mr. Taylor's affirmative representations to the court that no mitigation evidence existed. When the trial court questioned Mr. Taylor about his intention not to present mitigating evidence, Mr. Taylor assured the court that "[t]here's nobody who wants to say anything about Elmer." (R. 918.) The court was left to conclude (erroneously) that none of Mr. Carroll's family or friends were willing to testify on his behalf and there was no other available mitigating evidence. "[A] vital difference exists between not producing any mitigating evidence and emphasizing to the ultimate sentencer that the defendant is a bad person or that there is no mitigating evidence." Douglas v. Wainwright, 714 F. 2d 1532, 1557 (11th Cir. 1983), vacated, 468 U.S. 1206 (1984), adhered to on remand, 739 F. 2d 531 (11th Cir. 1984), cert. denied, 469 U.S. 1208 (1985). The prejudicial effect of Mr. Taylor's remarks cannot be overstated. On similar facts, the court in Blanco v. Singletary found that "it would have been nearly impossible for the trial court not to have considered the lack of witnesses adversely to Blanco." 943 F. 2d at 1505.

B. SUBSTANTIAL MITIGATION EVIDENCE WAS AVAILABLE TO TRIAL COUNSEL AND SHOULD HAVE BEEN PRESENTED AT PENALTY PHASE.

It is unrefuted, as the State presented no evidence to the contrary, that substantial statutory and nonstatutory mitigating evidence was available to trial counsel at the time of trial. Extensively presented in the Statement of Facts, these factors may be summarized as follows:

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[9]To the extent that Mr. Carroll's incompetency would have made it futile for Mr. Taylor to discuss with him the results of his investigation and alternative courses of action, Mr. Taylor was under a continuing duty to notify the court of his client's incompetency.

[10]There is no evidence that Mr. Carroll limited his lawyer's investigation except to the extent he was incompetent and ***unable*** to provide information.

[11]There is no evidence that Mr. Carroll desired no mitigation. Rather, the record shows that he was incapable of waiving mitigation. See Argument II-B, supra

Statutory Mitigation: ***Five mental health experts testified at the evidentiary hearing that two statutory mitigators applied to Mr. Carroll.*** (PC-T. 248-49, 332-33, 359-60, 381-82, 398.) After extensive psychological and neuropsychological testing, it was determined that Mr. Carroll suffers from organic brain damage (PC-T. 233), is borderline mentally retarded (PC-T. 229), has a psychotic illness (PC-T. 238-39, 248-49, 316-17, 392, R. 759, R. 1066-72), has learning disabilities (PC-T. 230-32), and lacks mental flexibility, (PC-T. 230), with contributing factors of Fetal Alcohol Syndrome, a long history of alcohol and drug abuse (beginning at age 3), severe physical abuse and sexual abuse suffered as a child, blows to the head, and possible genetically conditioned mental illness. ***Doctors Danziger, Gutman, McMahon, Crown, and Toomer all agreed that Mr. Carroll (1) lacked the capacity to appreciate the criminality of his conduct, and that (2) he acted under the influence of extreme mental or emotional disturbance.*** (Id.) Their testimony is unrefuted, as the State called no expert witnesses at the hearing.12

Three of the experts who testified at the hearing (Dr. Danziger, Dr. Gutman, and Dr. McMahon) interviewed Mr. Carroll prior to trial, and all three would have testified at penalty phase that two powerful statutory mitigators applied to Mr. Carroll. (PC-T. 381-82, 398, 332-33.) Had they testified, a reasonable probability exists that the court would have weighed the aggravating and mitigating circumstances differently. Indeed, there are many cases in which this Court has reduced a death sentence or remanded for a new sentencing proceeding where the trial court erred in not finding or considering one or both of the statutory mental health mitigators. See, e.g., Almeida v. State, ___ So. 2d ___, 24 FLW S336 (Fla. July 8, 1999); Hawk v. State, 718 So. 2d 159 (Fla. 1998); Spencer v. State, 645 So. 2d 377 (Fla. 1994); Morgan v. State, 639 So. 2d 6 (Fla. 1994); Knowles v. State; 632 So. 2d 62 (Fla. 1993); Santos v. State, 629 So. 2d 838 (Fla. 1994); Campbell v. State, 571 So. 2d 415 (Fla. 1990); Nibert v. State, 574 So. 2d 1059 (Fla. 1990); Buford v. State, 570 So. 2d 923 (Fla. 1990); Brown v. State, 526 So. 2d 903 (Fla. 1988); Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Fead v. State, 512 So. 2d 176 (Fla. 1987); Ross v. State, 474 So. 2d 1170 (Fla. 1985); Mines v. State, 390 So. 2d 332 (Fla. 1980); Kampff v. State, 371 So. 2d 1007 (Fla. 1979); Huckaby v. State, 343 So. 2d 29 (Fla. 1977).

Nonstatutory Mitigation: The following nonstatutory mitigating circumstances available to penalty phase counsel, but neither discovered through investigation nor presented to the sentencing jury and court, have been accepted as mitigating in other cases:

Low intelligence: Dr. Crown measured Mr. Carroll's full scale IQ at 81, which places Mr. Carroll at the borderline range for mental retardation. (PC-T. 229.) Mr. Carroll's reading ability is at the second grade level; his spelling is at the third grade level; and his simple arithmetic is at the fifth grade level. (PC-T. 232.) Dr. Crown compared Mr. Carroll's attentional capacity (i.e., ability to function when there are distractions) to that of someone about eighty years old suffering from the beginning of a degenerative process. (PC-T. 231.) He testified that Mr. Carroll has brain damage, (PC-T. 233), and added, "There is a great deal of distractibility, a diminished, very poor intellectual processing ability, in addition to general processing deficits that are consistent with a life-long series of problems." (PC-T. 232.)

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[12]In fact, the only witness called by the State was a deputy sheriff who had witnessed Mr. Carroll playing tic-tac-toe with an investigator from the Office of the Capital Collateral Counsel. (PC-T. 423.) Apparently the State theorized that Mr. Carroll's ability to play tic-tac-toe revealed a diabolical mind capable of deceiving five mental health experts as to his sanity.

Dr. Crown compared the results from the tests he administered to Mr. Carroll with results from testing conducted in 1968, when Mr. Carroll was twelve. He found that the data matched almost exactly. (PC-T. 237.) As a student at Clermont Elementary School, Mr. Carroll was given the Weschler Intelligence Scale for Children. (PC-T. 237.) This test yielded a full-scale IQ for Mr. Carroll of 80; Dr. Crown's test indicated an IQ of 81. (PC-T. 229, 237.) He further noted that when Mr. Carroll was thirteen, the tests were repeated and Mr. Carroll's full-scale IQ was measured at 80 again. (PC-T. 238.) In 1990, another test produced a verbal IQ of only 58. (PC-T. 238.)

Low intelligence is recognized as a mitigating circumstance. See, Henyard v. State, 689 So. 2d 239, 244 (Fla. 1997)(trial court found low intelligence and emotional deficits to be mitigating); Sinclair v. State, 657 So. 2d 1138, 1142 (Fla. 1995)(trial court found "dull normal intelligence" in mitigation); Larkins v. State, 655 So. 2d 95, 100-101 (Fla. 1995)(this Court recognized "poor reader"; "difficulty in school"; "dropped out of school at the fifth or sixth grade"; and "functions at the lower 20% of the population in intelligence" mitigating; remand for resentencing by trial court upon finding that mitigation in record was inconsistent with trial court's finding of no nonstatutory mitigation); Thompson v. State, 648 So. 2d 692, 697 (this Court, in explaining its approach to Penry v. Lynaugh, 492 U.S. 302 (1989), stated that it has "elected to follow the approach of the United States Supreme Court and ***treat low intelligence as a significant mitigating factor with the lower scores indicating the greater mitigating influence***.")(emphasis added); Brown v. State, 526 So. 2d 903, 907-908 (Fla.), cert. denied, 488 U.S. 944 (1988)(defendant's IQ of 70-75, classified as borderline defective or "just above the level for mild mental retardation" was part of the "ample evidence mitigating against death").

Child abuse: Numerous lay witnesses testified to the brutal abuse inflicted on Mr. Carroll during his childhood and adolescence. Mr. Carroll was raised in an atmosphere of violence, poverty, and alcoholism. His father hacked a live puppy into pieces in front of his own children, and his mother would club him until he lost consciousness. (PC-T. 187, 304, Affidavit of Edward Couch, Affidavit of Shirley Griffin.) He was given alcohol by his parents beginning at the age of three, and became so dependent on alcohol that as a teenager he began having alcohol-induced blackouts and hallucinatory episodes after his drinking binges. (PC-T. 296-97, Affidavit of Nellie Sue Smith.) As a twelve-year-old, he was sexually abused in the most degrading ways imaginable, forced to have sex with an older man who would sometimes urinate in his face. (PC-T. 281-84, 305.)

Child abuse is recognized as a mitigating circumstance. See, Jackson v. State, 704 So. 2d 500, 506-507 (Fla. 1998)(trial court failed to adequately address nonstatutory mitigating circumstances, including defendant's difficult childhood that included sexual assault); Chandler v. State, 702 So. 2d 186, 200 (Fla. 1997)(trial court found that it is a mitigating factor that defendant had a deprived childhood or suffered abuse as a child); Boyett v. State, 688 So. 2d 308, 310 (Fla. 1997)(traumatic family life and history of sexual abuse among nonstatutory mitigating circumstances supporting life sentence recommendation); Strausser v. State, 682 So. 2d 539, 540 at n. 3, 542 (Fla. 1996)(trial court found nonstatutory mitigation in that defendant was severely abused as a child; jury override reversed where substantial mitigation, including expert testimony that Strausser had been physically and sexually abused by his stepfather as a young child, supported jury recommendation); Campbell v. State, 571 So. 2d 415 (Fla. 1990)(abused or deprived childhood).

History of alcohol and substance abuse: Evidence presented at the hearing established that Mr. Carroll was given alcohol by his parents beginning at the age of three. He became so dependent on alcohol that as a teenager he experienced alcohol-induced blackouts and hallucinatory episodes after his drinking binges. (PC-T. 296-97, Affidavit of Nellie Sue Smith.) Before dropping out of school in the seventh grade,

he began using drugs. (Affidavit of Nellie Sue Smith.) During his youth Mr. Carroll also huffed gasoline and other inhalants. (PC-T. 392.) At the evidentiary hearing several experts testified that Mr. Carroll's chronic alcoholism and history of drug abuse contributed to his deteriorated mental condition. (PC-T. 247, 374, 391, 400, 412.)

History of alcohol and substance abuse is recognized as a mitigating circumstance. See, Mahn v. State, 714 So. 2d 391 (Fla. 1998)(extensive history of alcohol and substance abuse); Morgan v. State, 639 So. 2d 6, 14 (Fla. 1994)(defendant sniffing gasoline for many years and on the day of the offense established as nonstatutory mitigating circumstances); Knowles v. State, 632 So. 2d 62 (Fla. 1994)(neurologically impaired substance and solvent abuser established statutory mitigation on facts of case); Clark v. State, 609 So. 2d 513, 516 (Fla. 1992)(extensive history of substance abuse constituted strong nonstatutory mitigation).

Fetal Alcohol Syndrome: Both Dr. Gutman and Dr. Crown testified that Mr. Carroll meets all the criteria for a diagnosis of Fetal Alcohol Syndrome. (PC-T. 245. 392.) Among the materials reviewed by Dr. Gutman were affidavits of family members documenting the alcohol abuse of Mr. Carroll's mother during her pregnancy; school records and records of psychological testing conducted during Mr. Carroll's childhood which indicated he was borderline mentally retarded; and lay testimony which indicated that Mr. Carroll has a long history of behavioral problems.

Fetal Alcohol Syndrome is recognized as a mitigating circumstance. See, Hunter v. State, 660 So. 2d 244, 254 (Fla. 1995)(trial court found Fetal Alcohol Syndrome as a nonstatutory mitigating circumstance).

Head injury: Neuropsychological testing revealed that Mr. Carroll suffers from brain damage. Dr. Crown testified that Mr. Carroll's brain dysfunction has multiple origins beginning in the prenatal stage and continuing through childhood and adolescence. (PC-T. 247.) As a child, Mr. Carroll was often beaten by his mother with a hickory stick, sometimes to the point of unconsciousness. (PC-T. 304, Affidavit of Shirley Griffin.) He also was involved in several barroom fights and at one point sustained a significant head injury. (PC-T. 227.)

Head injury is an accepted mitigating circumstance. See, Johnson v. Singletary, 612 So. 2d 575, 577-581 (Fla. 1993)(J. Kogan specially concurring)(chronic and long standing brain damage, along with other substantial mitigation, procedurally barred from consideration); Foster V. State, 679 So. 2d 747 (Fla. 1996)(organic brain damage); Hall v. State, 541 So. 2d 1125 (Fla. 1989)(same); Waterhouse v. State, 522 So. 2d 341 (Fla. 1988)(same).

Growing up impoverished: The youngest of nine children fathered by a succession of men, Elmer grew up in utter poverty as his migrant worker parents drifted in search of work. Eventually his family settled in Clermont, Florida, where both his parents worked in orange groves, picking fruit from early morning until night. (PC-T. Affidavit of Barbara Snead, Affidavit of Nellie Smith.) As a young boy, Mr. Carroll depended on his older sister Nellie to cook his meals and take him to school. Id.

Growing up impoverished is recognized as a mitigating circumstance. See, Foster v. State, 614 So. 2d 455, 461 (Fla. 1993)(trial court gave special instruction to jury allowing the consideration of any factor in mitigation and specifically including poverty); Maxwell v. State, 603 So. 2d 490, 492 (Fla. 1992)("disadvantaged youth" found mitigating); Meeks v. Dugger, 576 So. 2d 713, 716 (Fla. 1991)(this court included "background of poverty and deprivation" and "severe emotional problems as a result of his deprived childhood" in the category of "substantial nonstatutory mitigating evidence"); Brown v. State, supra (this Court specifically held the trial court erred in rejecting "disadvantaged childhood, his abusive parents, and his lack of education and training" as mitigating).

Emotional abuse: Mr. Carroll's mother was an alcoholic and a severely mentally ill woman whose attitude toward her children alternated between indifference and malice. When she wasn't ignoring her children, she would beat them brutally. As the youngest child, Mr. Carroll was especially vulnerable to his mother's tirades. Her behavior was unpredictable. When Mr. Carroll was only a few years old, his mother would tell him that he was possessed with demons, and even performed bizarre exorcism rituals on the boy. (Affidavit of Shirley Griffin.) Apart from his mother's erratic behavior, Mr. Carroll was also subjected to the psychological torment that accompanied the horrific physical and sexual abuse he suffered as a child.

Emotional abuse is an accepted mitigating circumstance. See, Pomeranz v. State, 703 So. 2d 465, 472 (Fla. 1997)(emotional abuse as a child one of a number of factors supporting a life sentence recommendation); Hunter v. State, 660 So. 2d 244, 254 (Fla. 1995)(trial court considered emotional abuse and neglect as a nonstatutory mitigator); Turner v. State, 645 So. 2d 444, 448 (Fla. 1994)(defendant raised in an emotionally and mentally unstable home).

C. TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT AVAILABLE MITIGATING EVIDENCE CONSTITUTES DEFICIENT PERFORMANCE.

It is well established that when trial counsel is on notice that his or her client may have a mitigating mental health problem, reasonably effective representation requires counsel to investigate and present independent medical mental health mitigation during the penalty phase of a capital trial. See,e.g., Rose v. State, 675 So. 2d 567, 572-573 (Fla. 1996); State v. Lara, 581 So. 2d 1288, 1290 (Fla. 1991); State v. Michael, 530 So. 2d 929, 930 (Fla. 1988); O'Callaghan v. State, 461 So. 2d 1354, 1355-1356 (Fla. 1984); Perri v. State, 441 So. 2d 606, 609 (Fla. 1983). See also, Baxter v. Thomas, 45 F.3d 1501, 1513 (11th Cir. 1995); Stephens v. Kemp, 846 F.2d 642, 653 (11th Cir. 1988); Thompson v. Wainwright, 787 F.2d 1447, 1450-1451 (11th Cir. 1986); Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981); United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974).

Additionally, counsel is under a duty to independently investigate, evaluate, and present all statutory and nonstatutory mitigation in a capital case. Rose v. State, supra; Heiny v. State, 620 So. 2d 171, 173 (Fla. 1993); Stevens v. State, 552 So. 2d 1082, 1087-1088 (Fla. 1989); State v. Michael, supra; Porter v. Singletary, 14 F.3d 554, 557 (11th Cir), cert. denied, ___ U.S. ___, 115 S.Ct. 589 (1994). Failure to investigate available mitigation constitutes deficient performance. Rose v. State, supra; Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Deaton v. Dugger, supra; Heiny v. State, supra; Phillips v. State, 608 So. 2d 778 (Fla. 1992); Mitchell v. State, 595 So. 2d 938 (Fla. 1992); State v. Lara, supra; Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Bassett v. State, 541 So. 2d 596 (Fla. 1989).

The deficiency analysis reveals that penalty phase counsel conducted what amounted to no investigation, presented no penalty phase witnesses, made a generic closing argument comprising only five (5) transcript pages, and totally ignored any argument regarding the applicability of mitigators or the inapplicability of aggravators. Any attempt to ascribe a tactical motive to counsel's omissions is completely implausible: "Caselaw rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." Horton v. Zant, 941 F. 2d 1449, 1462 (11th Cir. 1991); See also Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993)("Heiney's lawyer in this case did not make decisions regarding mitigation for tactical reasons. Heiney's lawyer did not even know that mitigating evidence existed."); Harris v. Dugger, 874 F. 2d 756, 763 (11th Cir. 1989)(tactical decisions must flow from an informed judgment).

In contrast to the penalty phase, during the postconviction evidentiary hearing Mr. Carroll presented evidence of readily available mental health expert testimony that would have supported the finding of two (2) statutory mitigating factors and aided in defeating the most emotional of statutory aggravating

factors (heinous, atrocious, and cruel). Further, documentary and lay witness testimony was readily available to establish many nonstatutory mitigating factors.

Deficient performance of trial counsel under Strickland v. Washington, supra, and this Court's precedent has been established: the above identified acts or omissions of penalty phase counsel were deficient; they were outside the wide range of professionally competent assistance. See, Baxter v. Thomas, supra.

D. THE DEFICIENT PERFORMANCE OF PENALTY PHASE COUNSEL PREJUDICED MR. CARROLL.

Mr. Taylor's deficient performance as an attorney prejudiced Mr. Carroll under Strickland v. Washington, which requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694 (1984).8 Confidence in the outcome is undermined when the court is unable "to gauge the effect" of counsel's omissions. State v. Michael, 530 So. 2d at 930. Prejudice is established when trial counsel's deficient performance deprives the defendant of a "reliable penalty phase proceeding." Deaton v. Dugger, supra. Mr. Carroll was not provided with a reliable penalty phase proceeding due to his trial counsel's inexperience and apathy evidenced by counsel's failure to perform background investigation; failure to engage a mental health expert to explore statutory mental health mitigation; failure to contact any relatives or acquaintances of Mr. Carroll; and omissions regarding improper prosecutorial comments and improper jury instructions.

The overwhelming mitigation developed and presented by postconviction counsel could not and should not have been ignored had it been presented to the sentencing judge and jury. If it had been, this Court would surely have considered the extensive mitigating evidence under established precedent and remanded for imposition of a life sentence. Prejudice is established under such circumstances. See, Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995)(prejudice established by presenting of "substantial mitigating evidence" in postconviction); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992)(prejudice established by "strong mental mitigation" which was "essentially unrebutted" in postconviction); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991)(prejudice established by evidence of statutory mitigating factors and abusive childhood); Bassett v. State, 541 So. 2d 596, 597 (Fla. 1989)("this additional mitigating evidence does raise a reasonable probability that the jury recommendation would have been different").9

In Penry v. Lynaugh, the U.S. Supreme Court reaffirmed the principle that "punishment should be directly related to the personal culpability of the criminal defendant," in capital cases. Penry v. Lynaugh, 492 U.S. 302, 304 (1989). "Rather than creating a risk of unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned moral response to the defendant's background, character, and crime.'" Id. at 327. Trial counsel's ineffectiveness prevented the jury from making this "reasoned moral response," and Mr. Carroll was prejudiced as a result.

ARGUMENT IV

8A defendant is not required to show counsel's deficient performance "[m]ore likely than not altered the outcome in the case." Strickland, 466 U.S. at 693.

9Prejudice was found in these cases despite the existence of numerous aggravating circumstances. See, Hildwin (four aggravating circumstances); Phillips (same); Mitchell (three aggravating circumstances); Lara (same); Bassett (same).

THE TRIAL COURT ERRED IN DENYING MR. CARROLL'S INEFFECTIVE ASSISTANCE OF GUILT PHASE COUNSEL CLAIMS. MR. CARROLL HAS BEEN DENIED A FULL ADVERSARIAL TESTING IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW.

Only weeks before Mr. Carroll's trial, Mr. Taylor informed the court, "I am not prepared . . . I am a sole practitioner . . . This case requires probably two lawyers. They have got two lawyers. I can't--I can't do it." (R. 63-64.) This statement foreshadowed Mr. Taylor's approach to the entire case: do nothing and make excuses. Mr. Taylor sought no assistance in the form of either co-counsel or experts; made no discernible effort on his own to conduct an investigation; and allowed key evidence to come before the jury unimpeached.

When asked to explain why he didn't do more, Mr. Taylor said he was outnumbered: "I'm one man. If I would have had twelve lawyers working for me at the time, we would have done a lot more." (PC-T. 140-41.) But if it ever occurred to Mr. Taylor that help was needed, he did nothing to obtain it. He did not ask that co-counsel be appointed. Nor did he hire an investigator. (PC-T. 109.)

A. MR. CARROLL'S INSANITY DEFENSE WAS NOT EFFECTIVELY PRESENTED AND WAS ACTUALLY HARMED BY HIS ATTORNEY'S INEFFECTIVE ASSISTANCE.

The failure of Mr. Carroll's insanity defense is directly attributable to his lawyer's ineffectiveness. In this regard counsel's errors are twofold: 1) he did virtually nothing to affirmatively present the insanity defense; and 2) he allowed the State to present damaging testimony from experts who based their opinions on incomplete information--***experts who now say they would have testified differently had Mr. Taylor provided them with the records gathered by postconviction counsel.***

With respect to affirmative presentation of the insanity defense, Mr. Taylor did practically nothing, relying primarily on the testimony of court-appointed experts (some of whom had spent no more than an hour with Elmer Carroll, R. 510). Incredibly, Mr. Taylor never procured a confidential mental health expert. He did not even contact Dr. McMahon, the psychologist originally retained by the public defender's office who was ready and willing to evaluate Mr. Carroll, until the eve of trial. (PC-T. 110, 320-21.) By that time it was too late for her to evaluate Mr. Carroll, and in any case Mr. Taylor never provided her with any background information--not even discovery. (PC-T. 320-21.)

Even more egregious than counsel's failure to affirmatively present the insanity defense were his omissions in connection with undercutting the State's case. By virtue of his failure to provide the experts with crucial records and background information, Mr. Taylor enabled the State to portray Mr. Carroll as a malingerer and a calculating killer. Had these experts had the benefit of information gathered by postconviction counsel, they would have not only altered their testimony but actually testified favorably to the defense. For example, at trial the testimony of Dr. Gutman was perhaps most devastating to the defense. Dr. Gutman testified that Mr. Carroll was malingering and had a history of malingering, (R. 510-511); estimated that Mr. Carroll's IQ was actually around 105-110, in the high average range, (R. 512); and suggested that Mr. Carroll's inability to recall having committed the offense was merely a ruse to avoid culpability (R. 518.) The State drew on Dr. Gutman's testimony to argue forcefully in closing that Mr. Carroll was a sane and deliberate killer who feigned mental illness as a way of escaping criminal liability. (R. 816-28, 846-55.)

However, after reviewing records provided to him by postconviction counsel (consisting of school records and affidavits from family members), Dr. Gutman reversed himself:

> ***Had I had exposure to [these records]*** prior, or after my evaluation, prior to writing a second letter to Judge Miller, ***that would confirm that [Mr. Carroll] had evidence of a psychotic illness on, on or around the time of the alleged offense and that psychosis had developed.***

(PC-T. 392.)(emphasis added) Dr. Gutman also testified that, had he been privy to this information at the time of trial--***information which was then available***--his opinion would have been that both statutory mental health mitigators applied to Mr. Carroll. (PC-T. 394-98.) He continued: "I tend to feel now . . . that [Mr. Carroll] may not have been malingering and only gave that appearance." (PC-T. 403.) "My current diagnosis would be mental disorder with mood, memory, personality change and cognitive decline associated with alcohol deterioration and influence on the brain." (PC-T. 391.) Dr. Gutman added that if neuropsychological testing had been done on Mr. Carroll at the time of trial, "[i]t would have crystallized and locked in the organic diagnosis, as would other tests that might have been done, and MRI, a specscan or a petscan." (PC-T. 394.)10 Clearly, had Dr. Gutman had access to the information obtained postconviction (but which was available at the time of trial), his testimony would have aided the defense and deprived the State of its argument that Mr. Carroll was a calculating killer who feigned mental illness to avoid responsibility.

Mr. Taylor's errors in connection with presenting the insanity defense are so egregious that they demand the trial court's judgment be vacated. It is beyond question that Mr. Taylor's performance constitutes ineffective assistance of counsel pursuant to Strickland v. Washington, 466 U.S. 688 (1984). An effective attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F. 2d 636, 637 (5th Cir. 1970). "[I]n a capital case the attorney's duty to investigate all possible lines of defense is strictly observed." Coleman v. Brown, 802 F.2d 1227, 1233 (10th Cir. 1986); See also, Davis v. Alabama, 569 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 466 U.S. 903 (1980) ("An attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense.").

B. TRIAL COUNSEL'S FAILURE TO OBTAIN A CONFIDENTIAL DNA EXPERT CONSTITUTES INEFFECTIVE ASSISTANCE.

Although DNA evidence was crucial to the State's case, Mr. Taylor did not obtain a confidential DNA expert. (PC-T. 155-56.) While he did at one point ask the court for additional time and funding for a DNA expert, Mr. Taylor admitted that he "did not pursue it diligently." (PC-T. 155.) He explained, "I did that for record purposes. I did not get in a fight with the court, or demanding I needed more money because I really didn't, I didn't want it." (Id.) Mr. Taylor's failure to procure a DNA expert constitutes ineffective assistance. Counsel are ineffective if they fail to petition the court to appoint experts necessary to present a defense. Hooper v. Garraghty, 845 F. 2d 471, 474-75 (4th Cir. 1988), cert. denied 488 U.S. 843 (1988); See also, Husske v. Commonwealth, 448 S.E. 2d 331 (Va. Ct. App. 1994)(indigent defendant entitled to assistance of DNA expert at state expense); Little v. Armontrout, 835 F. 2d 1240, 1243 (8th Cir. 1987), cert. denied 487 U.S. 1210 (1988)(due process requires that an indigent defendant be provided with an expert in any field so long as there are important scientific issues in the case and the expert would provide assistance to the defense).

C. TRIAL COUNSEL'S FAILURE TO IMPEACH THE TESTIMONY OF THE MEDICAL EXPERT CONSTITUTES INEFFECTIVE ASSISTANCE.

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[10]Recall that Dr. McMahon was prepared to do a neuropsychological exam of Mr. Carroll at the time of trial, but Mr. Taylor neglected to contact her. At the evidentiary hearing Mr. Taylor testified, "If that's a mistake, then it's mine." (PC-T. 115-116.)

With respect to Dr. Hegert, the medical examiner whose testimony was crucial in linking Mr. Carroll to the crime scene, Mr. Taylor told the jury, "I'm not going to sit up here and question his opinion." (R. 835.) Not only did Mr. Taylor not question Dr. Hegert's opinion, he acquiesced in the court's decision to admit any photograph into evidence that would aid Dr. Hegert's testimony (according to Dr. Hegert himself), regardless of prejudicial effect. (R. 389-97.) As defense counsel, it was Mr. Taylor's duty to protect his client's rights by reminding the court that the admissibility of photographic evidence is not gauged solely by its purported helpfulness to a State witness. Rather, its relevance and probative value must be weighed against the danger of unfair prejudice to the accused. Fla. R. Evid. 90.401-90.403 (1992). This is especially critical in a capital case, where the photographic evidence will likely impact the jury's sentencing determination on an emotional level. As Dr. Hegert was a State witness, he was naturally inclined to say that ***all*** of the photographs offered by the State would aid his testimony. For the court to thus defer to Dr. Hegert's opinion on the admissibility of evidence was an abdication of judicial responsibility which should have been rectified by defense counsel. Mr. Taylor's failure to impeach Dr. Hegert, a key witness for the State, constitutes ineffective assistance of counsel. See Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1983), after remand, 799 F.2d 1442 (11th Cir. 1986); see also LaTulip v. State, 645 So. 2d 552 (Fla. 2d DCA 1994); Porter v. State, 626 So. 2d 268 (Fla. 2d DCA 1993); Richardson v. State, 617 So. 2d 801 (Fla. 2d DCA 1993); Williams v. State, 673 So. 2d 960 (Fla. 1st DCA 1996).

Mr. Taylor's passiveness in regard to Dr. Hegert's testimony characterized his handling of the entire guilt phase. In his closing argument, Mr. Taylor told the jury, "I'm not going to stand up here for two hours and go over the testimony of all the witnesses . . . I'm not going to stand up here and jump up on the table and try to change twelve collective minds as to how you recall the evidence presented in this case." (R. 829.) True to his word, Mr. Taylor did not change any minds, and his client's conviction was the unfortunate result.

D. MR. CARROLL WAS PREJUDICED BY THE CUMULATIVE EFFECT OF TRIAL COUNSEL'S ERRORS AT THE GUILT/INNOCENCE PHASE.

Mr. Taylor's deficient performance as an attorney prejudiced Mr. Carroll under Strickland v. Washington, which requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694 (1984). Due to his attorney's errors, Mr. Carroll's insanity defense was presented without the benefit of his own expert; the State was allowed to present expert testimony devastating to Mr. Carroll's insanity defense--even though these same experts now say they would have testified favorably had trial counsel provided them with available background information; the State's DNA evidence went unrebutted; and key witnesses were unimpeached. The cumulative effect of Mr. Taylor's errors at the guilt/innocence phase rendered Mr. Carroll's trial fundamentally unfair. Kyles v. Whitley, 514 So.2d 419 (1995); State v. Gunsby, 670 So.2d 920 (1996). Under these circumstances it was error for the lower court to deny Mr. Carroll relief on his claim alleging ineffective assistance of counsel at guilt/innocence phase.

ARGUMENT V

MR. CARROLL WAS DENIED A FULL AND FAIR EVIDENTIARY HEARING AND THEREBY DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS AND CORRESPONDING FLORIDA LAW.

Post conviction litigation is governed by principles of due process. Teffeteller v. Dugger, 676 So. 2d 369 (Fla. 1996); Holland v. State, 503 So. 2d 1250 (Fla. 1987). These constitutional principles guarantee Mr. Carroll a right to present a full and fair defense. See Lewis v. State 591 So. 2d 922, 925

(Fla. 1991); Roberts v. State, 510 So. 2d 885, 892 (Fla. 1987). But from pretrial proceedings up through the evidentiary hearing, the trial court has consistently ignored due process in an attempt to dispose of Mr. Carroll's case with as much haste as possible.11

At the evidentiary hearing, collateral counsel sought to introduce handwritten notes from a notebook prepared by Detectives John Latrelle and Diane Payne during the investigation of Christine McGowan's death. Portions of these notes were written by Detective Latrelle and other portions by Detective Payne. Although Det. Latrelle testified that he had been partners with Det. Payne for over six years and that he recognized her handwriting, (PC-T. 165, 167, 168, 169), the court sustained the State's objection as to authenticity because Det. Payne was not present to personally testify to the notes' authenticity. (PC-T. 172, 174.) This was contrary to Fla. R. Evid. 90.903 (1997), which states that "[t]he testimony of a subscribing witness is not necessary to authenticate a writing unless the statute requiring attestation requires it." The court also prohibited collateral counsel from questioning Det. Latrelle about those portions of the notes not in his handwriting. (PC-T. 175.) Those portions referred to police having been summoned to the Rank home two weeks previously; to a recent rape which had occurred on the same street; and to a report that Rank harassed his stepdaughter. (PC-T. 173-76.) Because of the court's erroneous ruling, collateral counsel was prevented from fully questioning Det. Latrelle regarding this material which had been withheld from trial counsel in violation of Brady v. Maryland.

Shortly after the evidentiary hearing concluded, Mr. Carroll's lead attorney resigned in the wake of the break-up of the Office of the Capital Collateral Representative. Left without an attorney qualified to take over Mr. Carroll's case, Capital Collateral Counsel Greg Smith requested an extension of time in which to submit written closing arguments. The circuit court denied this request on October 1, 1997, but permitted the State to submit its written closing argument. (PC-T. 436-44, PC-R. 1115-16.) Accordingly, Mr. Carroll has been denied his State guaranteed right to effective representation in capital postconviction by the denial of adequate counsel. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988); Peede v. State, ___ So. 2d ___, 24 Fla. L. Weekly S391 (Fla. 1999).

ARGUMENT VI

THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. CARROLL'S MERITORIOUS CLAIMS. AS A RESULT, MR. CARROLL HAS BEEN DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW.

The lower court erroneously denied Mr. Carroll an evidentiary hearing on several claims. In fact, a cursory review of the court's order setting the evidentiary hearing, (PC-T. 979-81), and the order denying relief following the hearing, (PC-T. 1157-85) indicates that the court may have believed that only claims alleging ineffective assistance of counsel were cognizable in capital postconviction proceedings. Mr. Carroll was entitled to an evidentiary hearing on each claim unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 734, 735-37 (Fla. 1986); O'Callaghan v. State,

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[11]Recall that although Mr. Carroll was afforded a competency hearing in November 1991, the trial court was predisposed to put Mr. Carroll on trial regardless of the hearing's outcome. While two out of three experts judged Mr. Carroll to be incompetent in December 1990, the trial court was evidently dissatisfied with this result and in 1991 appointed two more experts to evaluate Mr. Carroll. Before any of the experts had an opportunity to see Mr. Carroll, Judge Perry proceeded to set the case for trial.

461 So. 2d 1354 (Fla. 1984); Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986). In the recent case of Mordenti v. State, Justices Wells and Pariente advocate granting an evidentiary hearing on initial motions which "assert ineffective assistance of counsel, Brady, or other newly discovered evidence claims, or other legally cognizable claims which allege an ultimate factual basis." 711 So. 2d 30, 32 (Fla. 1998)(Wells, J., concurring). Further, a court must "attach to its order the portion or portions of the record conclusively showing that a hearing is not required." Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990). The files and records in this case do not conclusively rebut Mr. Carroll's allegations and the lower court failed to attach anything from the record or files demonstrating that Mr. Carroll is not entitled to relief.

A. THE LOWER COURT ERRED IN SUMMARILY DENYING MR. CARROLL'S CLAIM THAT HE IS BEING DENIED HIS RIGHT TO EFFECTIVE REPRESENTATION DUE TO UNDERFUNDING AND UNDERSTAFFING OF THE OFFICE OF THE CAPITAL COLLATERAL COUNSEL.

In all criminal proceedings, and most particularly in the defense of capital cases, attorneys, investigators, adequate time to devote to investigation and legal research, and sufficient funding to support the effort are required to effectively represent an accused or convicted person. Unfortunately, Mr. Carroll has, through no fault attributable to him, been denied this effort and has therefore been precluded from proving his innocence of the convictions and/or sentences in this cause. During the critical investigative phases of the postconviction process, the former CCR was underfunded, understaffed, and over-worked to the point that effective legal representation was denied Mr. Carroll due to State action. Undersigned counsel has had inadequate time to remedy these past wrongs thrust upon Mr. Carroll.

Effective legal representation has also been denied Mr. Carroll because public records from the various agencies were not provided to Mr. Carroll's counsel, or if received, were incomplete in violation of Florida Statute, Chapter 119.

Pursuant to Florida Statutes (1997) section 27.001, the Office of the Capital Collateral Counsel-Northern Region is responsible for representing Mr. Carroll in his application for post conviction relief. Mr. Carroll is guaranteed effective representation during his post conviction proceedings. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988); Peede v. State, ___ So. 2d ___, 24 Fla. L. Weekly S391 (Fla. 1999). Effective postconviction representation entails review of the entire record and an assessment of whether the trial was fair and whether trial counsel competently performed his/her duties under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

In reviewing and investigating these issues, counsel often requires the assistance of various forensic experts, including mental health professionals, social work experts, cultural anthropology experts, DNA professionals, fingerprint/blood spatter/ballistics experts and other potential experts. Funds for hiring experts has been inadequate for Mr. Carroll's case.

The cumulative effects of years of underfunding, the one year rule for filing Motions to Vacate, procedural changes in obtaining all necessary public records, the dismantlement of CCR and the creation of the Regional Counsels, continued underfunding even into the next fiscal year, and confusing legislative changes have rendered the delivery of capital postconviction legal services a haphazard and ineffective process which violates Mr. Carroll's rights to substantive and procedural due process of law.

During Mr. Carroll's representation by the former CCR, the funding crisis was aggravated by both the continuous warrant statute and the costs of certified mailing and the time limitations contained in Rule 3.852. Tolling by this Court necessarily occurred on a regular basis due to the lack of funding for the increased expenditures occasioned by State action.

On April 24, 1997, then CCR Michael Minerva withdrew authorization to incur any expenses on Mr. Carroll's case and all others because budgetary projections indicated that CCR, contrary to state law, would run a deficit.

In Mr. Carroll's case, lead counsel resigned following the break-up of CCR shortly after Mr. Carroll's evidentiary hearing. Left without an attorney qualified to take over Mr. Carroll's case, the Office of the Capital Collateral Counsel requested an extension of time in which to submit written closing arguments. The circuit court denied this request on October 1, 1997. (PC-T. 436-44, PC-R. 1115-16.) Mr. Carroll has been denied his State guaranteed right to effective representation in capital postconviction by the denial of adequate counsel. Spalding; Peede, supra.

Additionally, passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) with its opt-in provisions reveals the intent of the federal government in securing full and fair hearings for state capital postconviction litigants. The AEDPA presupposes adequate resources, effective assistance of postconviction counsel, compliance with all principles of due process of law and a resulting full and fair hearing in state court. Mr. Carroll has been continuously denied the rights presupposed by the AEDPA. To require Mr. Carroll to plead and present his claims in the absence of full investigation due to lack of resources and effective assistance of postconviction counsel is to deny him due process of law and jeopardize federal review of his claims denied in state court, particularly if the State of Florida prevails in its assertion that Florida qualifies as an opt-in state under the AEDPA.

B. THE LOWER COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM THAT HE WAS DENIED A FULL ADVERSARIAL TESTING AND DEPRIVED OF HIS RIGHT TO DUE PROCESS BECAUSE THE STATE WITHHELD MATERIAL, EXCULPATORY EVIDENCE, AND/OR PRESENTED MISLEADING EVIDENCE.

Early stages of the investigation into Christine McGowan's death focused on Robert Rank, Christine McGowan's stepfather, as a possible suspect. Mr. Rank was present in the house during the time Christine McGowan was raped and murdered, but testified that he had not heard or seen anything prior to finding his stepdaughter's body. (R. 310, 312.) No signs of forced entry into the home were found.

At the evidentiary hearing, postconviction counsel introduced copies of handwritten notes prepared during the investigation of Mr. Carroll's case by Detectives James Latrelle and Diane Payne of the Orange County Sheriff's Department. (Defense Exhibits 1 and 2, and Defense Exhibits for Identification C and D.) These notes contained information that the victim's family suspected Robert Rank of involvement in the murder; that Robert Rank physically abused his stepdaughter; that another rape had recently occurred in the neighborhood; and that Robert Rank was rumored to have smoked crack cocaine with Mr. Carroll. This information was not provided to Mr. Carroll's attorney at the time of his capital trial.

Brady v. Maryland requires disclosure of evidence which impeaches the State's case or which may exculpate the accused "where the evidence is material to either guilt or punishment." The State's failure to disclose evidence concerning other suspects renders a trial fundamentally unfair. Brady v. Maryland, 373 U.S. 83 (1963); United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985); Kyles v. Whitley, 115 S. Ct. 1555 (1995).

Materiality is established and reversal is required once the reviewing court concludes that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 680 (1985). To determine materiality, undisclosed evidence must be considered "collectively, not item-by-item." Kyles v. Whitley, 115 S. Ct. 1555 (1995). Such evidence must be disclosed regardless of a request by the defense, and the State has a duty to evaluate the point at which the evidence collectively reaches the level of materiality. Bagley, at 682; Kyles, 11. However, the defendant does not have the burden to show the

nondisclosure "[m]ore likely than not altered the outcome in the case." Strickland v. Washington, 466 U.S. 668, 693 (1984). The Supreme Court specifically rejected that standard in favor of a showing of a reasonable probability. A reasonable probability is one that undermines confidence in the outcome. Such a probability undeniably exists here.

In denying Mr. Carroll a hearing on this Brady claim, the court relied on this Court's holding in Roberts v. State that "[t]here is no Brady violation where alleged exculpatory evidence is equally accessible to the defense and the prosecution." 568 So. 2d 1255, 1260 (Fla. 1990). The court ruled that there was no Brady violation because "[Mr. Carroll] knew or should have known whether he was acquainted with Robert Rank, took drugs with Robert Rank and whether there were witnesses to these events." (PC-R. 1174.) The court's reasoning is flawed for two reasons: 1) Mr. Carroll was incompetent and therefore unable to provide his attorney with information helpful to his defense (See Argument II, supra); and 2) Even if Mr. Carroll had been capable of disclosing to his attorney that he was acquainted with Robert Rank, he obviously ***could not have been aware of the other information*** contained in the detectives' notes (i.e., that the victim's family suspected Robert Rank of involvement in the murder; that Rank was known to abuse his stepdaughter; and that another rape had recently occurred in the vicinity of the Ranks' home). For both of these reasons, the information contained in the detectives' notes was not equally accessible to both the defense and the prosecution. The court's reliance on Roberts is, therefore, misplaced. The trial court erred in denying a hearing on this Brady claim, as the records and files do not conclusively refute Mr. Carroll's allegations.

Had the detectives' notes been disclosed to Mr. Carroll's attorney at trial, a reasonable probability exists that the result of the proceeding would have been different. United States v. Bagley, 473 U.S. at 680. Mr. Carroll's trial attorney testified at the evidentiary hearing that he would have used the information in the notes at both guilt phase and penalty phase. (PC-T. 146-48.) The State's withholding of this evidence clearly constitutes a Brady violation which had the effect of denying Mr. Carroll a full adversarial testing.

C. THE LOWER COURT ERRED IN RULING THAT SEVERAL CLAIMS WERE PROCEDURALLY BARRED OR WERE MERITLESS.

Several of Mr. Carroll's claims alleged ineffective assistance of counsel, but the lower court ruled they were procedurally barred or meritless and that Mr. Carroll could not use his 3.850 motion to relitigate issues (PC-R. 1167, 1176-79, 1181-82; Claims IV, X, XII, XIII, XV, XVII, XVIII). Moreover, in its summary denial of Claim XV the trial court noted that no objection was raised at trial, but ruled that this Claim should have been raised on direct appeal and was now procedurally barred. (PC-R. 1179). The court's reasoning is circular; if counsel failed to object at trial, then clearly the issue could ***not*** have been raised on direct appeal absent fundamental constitutional error.

Ineffective assistance of counsel claims are properly raised under Rule 3.850. Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987). The Sixth Amendment requires that criminal defendants be provided effective representation. See Strickland, 466 U.S. at 668. Counsel "has a duty to bring such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 688. The only way a criminal defendant can assert his rights is through counsel, therefore, counsel must know the law, make proper objections, assure that jury instructions are correct, examine witnesses adequately, present evidence, and file motions raising relevant issues. Ineffective assistance of counsel claims based upon trial counsel's failure to object do not frustrate the preservation of error rule because a defendant claiming ineffective assistance must satisfy the standards articulated in Strickland. Kimmelman v. Morrison, 477 U.S. 365, 373-75 (1986); Hardman v. State, 584 So. 2d 649 (Fla 1st DCA 1991); Menendez v.

State, 562 So. 2d 858 (Fla. 1st DCA 1990). An ineffectiveness claim based on counsel's failure to timely raise an issue is a distinct Sixth Amendment claim with a "separate identit[y]" and "reflect[s] different constitutional values" from the underlying claim that counsel failed to preserve. Kimmelman, 477 U.S. at 375. It was error for the lower court to rule that Claims IV, X XII, XIII, XV, XVII, and XVIII were procedurally barred. The lower court erred in its summary denial of these claims.

D. THE LOWER COURT ERRED IN DENYING MR. CARROLL A HEARING ON HIS CLAIM ALLEGING THAT HE WAS DEPRIVED OF HIS RIGHT TO A COMPETENT MENTAL HEALTH EXPERT PURSUANT TO AKE V. OKLAHOMA.

Claim IX alleged, inter alia, that the mental health experts who evaluated Mr. Carroll failed to render professionally competent mental health assistance pursuant to Ake v. Oklahoma, 470 U.S. 68, 83 (1985). The lower court limited the hearing on this Claim to Mr. Carroll's allegation that trial counsel was ineffective in failing to provide background materials to the mental health experts and otherwise assist them. The court summarily denied Mr. Carroll a hearing on the Ake issue. The court's order devotes only two sentences to this Claim and betrays a complete misunderstanding of the basis for the Claim. (PC-R. 1175.) The court either forgets about the Ake claim, or else confuses Mr. Carroll's allegation of ineffective mental health assistance (pertaining to both guilt phase ***and*** penalty phase) with his allegations of ineffective assistance of counsel (pertaining to penalty phase only):

> [Claim IX] is essentially the same allegation as raised by Defendant in Claim III [pertaining to penalty phase ineffective assistance of counsel] above. For the reasons discussed in Claim III, this claim is without merit and therefore denied.

(PC-R. 1175.) Claim III (ineffective assistance of counsel at penalty phase) is clearly ***not*** the same allegation as that contained in Claim IX (denial of competent psychiatric assistance and evaluation during pre-trial, guilt phase, ***and*** penalty phase). It was error for the court to deny Mr. Carroll a hearing on his Ake claim. This Court has stated that a defendant's claim alleging denial of his right to competent psychiatric assistance "***necessarily overlaps*** . . . the claim that his counsel was ineffective in failing to investigate and introduce evidence in mitigation and ***should also be considered at the evidentiary hearing.***" Ragsdale v. State, 720 So. 2d 203, 208-209 (Fla. 1998)(emphasis added). Mr. Carroll should have been granted a hearing on his Ake claim, as the records in the case do not conclusively show that he is entitled to no relief.

E. THE LOWER COURT ERRED BY NOT CONSIDERING THE CUMULATIVE EFFECT OF THE ERRORS WHICH OCCURRED THROUGHOUT THE PROCEEDINGS IN THIS CASE.

The court's order is replete with instances where the court fails to consider the cumulative effect of errors that occurred in Mr. Carroll's case. With respect to Claim VI (alleging, inter alia, that counsel was ineffective for failing to challenge DNA evidence), the court stated that "[t]here was more than enough evidence, even without the DNA results, to convict [Mr. Carroll]." (PC-R. 1173.) In summarily denying a hearing on Claim X (alleging admission of irrelevant and prejudicial photographs), the court stated that "those eight photographs alone did not and could not have caused the jurors to return a guilty verdict." (PC-R. 1176.) In summarily denying a hearing on Claim XV (alleging improper and inflammatory prosecutorial argument), the court stated that "there is no possibility that this single statement affected the jury's recommendation of death." (PC-R. 1179.)

It is well-settled that courts must consider the cumulative effect of errors in evaluating whether or not a defendant is entitled to postconviction relief. Kyles v. Whitley, 514 So.2d 419 (1995); State v. Gunsby, 670 So.2d 920 (1996). The lower court erred by analyzing the errors in Mr. Carroll's case in piecemeal fashion. When viewed collectively, the various errors mandate that Mr. Carroll be granted relief.

CONCLUSION

Based upon the foregoing argument and citation to authority, this Court must conclude that Mr. Carroll was - at a minimum - incompetent during his capital trial and remand for a new trial only after a reliable determination that Mr. Carroll has been restored to competency. Mr. Carroll was denied effective assistance of counsel throughout his capital trial and should be granted a new trial on this basis as well. Further, Mr. Carroll's penalty phase is patently unreliable and must be set aside.

I HEREBY CERTIFY that a true copy of the foregoing Initial

Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on January 10, 2000.

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