

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

COMBINED REPLY BRIEF OF APPELLANT
AND REPLY TO RESPONSE TO PETITION
FOR WRIT OF HABEAS CORPUS

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SUMMARY OF ARGUMENT

Brain damaged, schizophrenic, and borderline retarded, Elmer Carroll has established that but for his trial counsel's unreasonable failure to safeguard his constitutional rights to necessary expert assistance and an individualized sentencing based on accurate information, there is a reasonable probability that (1) he was tried and/or sentenced while incompetent and (2) without the required hearing on his competency; (3) he was wrongly convicted based on inaccurate testimony that his insanity defense must fail because he was only feigning mental illness; (4) his death sentence is unreliable because of inaccurate and misleading testimony, and trial counsel's failure to reasonably advocate for a sentence less than death. The trial court refused to allow a retrospective hearing on Mr. Carroll's competency to stand trial, although one was required. Nothing in the State's Answer Brief casts doubt on these claims. As the lower court did, the State relies on incorrect legal standards for ineffectiveness, expert assistance, mitigation, and post-conviction hearings. By skewing the facts Appellee vainly attempts to create the appearance of solidity in a case shot through with constitutional error.

ARGUMENT I

THE CONVICTION OF ELMER CARROLL FOR FIRST DEGREE MURDER IS UNRELIABLE: BUT FOR TRIAL COUNSEL'S UNREASONABLE OMISSIONS THERE IS A REASONABLE PROBABILITY THAT ELMER CARROLL WAS TRIED WHILE INCOMPETENT, DENIED A HEARING ON HIS COMPETENCY PRIOR TO THE SENTENCING TRIAL, AND CONVICTED OF A CRIME FOR WHICH HE IS NOT GUILTY BY REASON OF INSANITY

A dark comedy of constitutional errors produced Elmer Carroll's conviction for first degree murder. The hour and a half devoted by the parties and the trial court to Mr. Carroll's competency to proceed as of November 15, 1991 (*see* Supp. R. 1339; 1394), four months before the trial and five months before the death-penalty trial, consisted mostly of inaccurate and incomplete diagnoses that were withdrawn or proven false in post-conviction. The State does not dispute that its main witness during the competency hearing and trial, Dr. E. Michael Gutman, repudiated his opinion that Mr. Carroll was feigning mental illness. One question then is what would it have meant to the trial court had Dr. Gutman correctly informed the court that Mr. Carroll is borderline retarded, suffers from brain damage and a major mental illness, and is NOT malingering. As the State concedes, trial counsel proceeded to trial raising two defenses requiring expert evidence and assistance—insanity and unreliable DNA evidence—without obtaining or consulting a single defense expert on either subject. So the next question is whether it was reasonable for counsel to ignore Mr.

Carroll's due process right to expert assistance. It wasn't. The incontrovertible result of trial counsel's conceded failure to obtain expert assistance and Mr. Carroll's mental health history, was that the jury's assessment of the insanity defense rested on the now repudiated testimony of the State's leading expert that Mr. Carroll was only feigning mental illness. At a minimum, Dr. Gutman, as well as every other expert to have testified, would have informed the jury that Mr. Carroll suffered from multiple disorders and deficiencies that, at a minimum, substantially impaired his ability to appreciate the criminality of his conduct and conform to the requirements of the law. These same errors undermine confidence in the penalty phase and are compounded by trial counsel's failure to inform the court that Mr. Carroll was unable to assist the defense, and counsel's failure to meaningfully argue for a sentence less than death.

A. Elmer Carroll Was Tried and Sentenced to Death While Incompetent and/or Without Constitutionally Required Inquiries into his Competence

- 1. The questions whether Mr. Carroll was competent throughout his trial and capital sentencing, whether he received all constitutionally required inquiries into his competence, and whether he is innocent by reason of insanity are properly before the Court*

Although ignored by the State in its Answer Brief, the question whether Mr. Carroll's right not to be tried while incompetent was violated, either because the trial court failed to "jealously guard[]" it by invoking adequate procedural safeguards, *Pate*

v. Robinson, 383 U.S. 375, 385 (1966), or because trial counsel unreasonably failed to invoke them, has been held to be a proper claim for post-conviction relief. *Jones v. State*, 740 So. 2d 520 (Fla. 1999) (granting new trial where trial court delayed in holding retrospective competency hearing); *Hill v. State*, 473 So.2d 1253 (Fla. 1985) (granting new trial because post-conviction record contained reasonable grounds to require that trial court should have held a hearing on defendant’s competence to stand trial). There is no merit to the State’s claim that these issues are, or could be, procedurally barred.¹

“[T]he Due Process Clause affords an incompetent defendant the right not to be tried.” *Medina v. California*, 505 U.S. 437, 442 (1992). A state’s “failure to observe procedures adequate to protect a defendant’s right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial.” *Drope v. Missouri*, 420 U.S. 162, 172 (1975). Other than the state of Florida in this case, “[n]o one questions the fundamental right that petitioner invokes.” *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996). “Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to

¹ In this argument and § II.A, *infra*, Mr. Carroll responds to the State’s Response to Petition for Writ of Habeas Corpus at 22-23; 29.

cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.” *Ibid.*, quoting *Riggins v. Nevada*, 504 U.S. 127, 139-40 (1992) (Kennedy, J., concurring), citing *Drope v. Missouri*, 420 U.S. 162, 171-172 (1975). “Indeed, the right not to stand trial while incompetent is sufficiently important to merit protection *even if the defendant has failed to make a timely request for a competency determination.*” *Cooper*, 517 U.S. at 354 n.4 (emphasis added), citing *Pate v. Robinson*, 383 U.S. 375, 384 (1966) (“it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently ‘waive’ his right to have the court determine his capacity to stand trial”); see *Medina v. California*, 505 U.S. 437, 450 (1992) (“The rule announced in *Pate* was driven by our concern that it is impossible to say whether a defendant whose competence is in doubt has made a knowing and intelligent waiver of his right to a competency hearing”). See also, *United States v. Klat*, 156 F.3d 1258, 1263 (3rd Cir. 1998).

2. *A hearing inquiring into Mr. Carroll's competence was required prior to the penalty phase and in the post-conviction court below*

It was error for the trial court not to conduct a hearing on Mr. Carroll's competence to stand trial. At a minimum, the expert opinions adduced at the evidentiary hearing raise sufficient grounds to require that this Court remand the case to the trial court for the two-part inquiry required under *Mason v. State*, 489 So.2d 734

(Fla. 1986). All the State can say against the need for a hearing on this issue, is its usual misrepresentation of the legal standard.² Because the files and records do not conclusively show that Mr. Carroll is entitled to no relief, a hearing on his competence is required. *Jones v. State*, 478 So.2d 346 (Fla. 1985) (remanding for evidentiary hearing on post-conviction claim that death-sentenced person was tried while incompetent). At a minimum, a hearing is required to determine whether a retrospective competency determination is feasible. *Mason, supra*.

Information constituting reasonable grounds to believe Mr. Carroll may not have been able rationally to understand and assist in his defense to the State's case for death was before the trial court prior to the penalty phase. The trial court had an obligation to stop the proceedings once trial counsel informed the court that Mr. Carroll was not able to testify in his own defense. *Pate*, 383 U.S. at 386; *Hill*, 473 So.2d at 1257. Alternatively, to the extent the State argues there was an insufficient basis for the trial court to have held a hearing, or that Mr. Carroll's right to a hearing

² The State argues that "a defendant must present 'apparently substantial meritorious claims' in order to warrant a hearing." Ans. Brief at 94, *quoting State v. Barber*, 301 So.2d 7, 10 (Fla. 1974). Of course, this Court amended rule 3.850 in 1977 to require a hearing on all post-conviction motions unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." *The Florida Bar: Amendments to Florida Rules of Criminal Procedure*, 343 So.2d 1247, 1264 (Fla. 1977). That remains the standard today. *Valle v. State*, 705 So.2d 1331, 1333 (Fla. 1997).

was waived when trial counsel failed to request an inquiry (Ans. Brief at 51, n.18), those conditions were created by counsel's unreasonable failure to investigate Mr. Carroll's mental health, to obtain necessary and constitutionally required expert assistance, and to specifically invoke Mr. Carroll's right to a hearing. Whether viewed from the perspective of the trial record or the post-conviction record, Mr. Carroll has presented reasonable grounds to believe that he may not have been competent at sentencing. A hearing is required.

Prior to trial, Dr. Danziger put the court on notice that although he believed Mr. Carroll was competent then—in November 1991 (Supp. R. 1368)—“I feel that the defendant does meet criteria [for competence] *at this point, but without medication that status could worsen in the foreseeable future.*” R. 1071 (emphasis added). Shortly after Dr. Danziger's testimony, at the conclusion of the competence hearing, the assistant state attorney told the trial court he believed “that immediately prior to the trial of this case . . . we'll probably have to have the doctors take another look at Mr. Carroll.” Supp. R. 1393. Nearly four months later, after the State rested in the penalty phase, trial counsel informed the court that Mr. Carroll was not “capable of testifying,” that he was delusional, believing a state witness was not who he appeared to be, and that the assistant state attorney was instructing people to lie. R. 912. These circumstances constitute reasonable grounds to believe Mr. Carroll may not have been

competent, making a hearing necessary. *Drope v. Missouri*, 420 U.S. 162, 177-78 (1975); *Hill v. State*, 473 So.2d 1253 (Fla. 1985); *Scott v. State*, 420 So.2d 595 (Fla. 1982); *Jones v. State*, 362 So. 2d 1334 (Fla. 1978).

But for trial counsel’s Sixth-Amendment violating failure to obtain appropriate assistance from Dr. McMahon (which constitutes an independent due process violation), and counsel’s unreasonable failure to investigate Mr. Carroll’s mental health history, additional information would have been before the court. Those facts are discussed in the following section.

B. Trial Counsel’s Unreasonable Acts and Omissions Render the Outcome in this Case Unreliable

1. *Trial counsel’s performance was constitutionally deficient; counsel’s failure to investigate and obtain appropriate mental health assistance was unreasonable under the circumstances of this case*

Although ignored in the State’s brief, when assessing whether Mr. Carroll’s trial counsel provided constitutionally sufficient representation, this “court should keep in mind that counsel’s function . . . is to make the adversarial testing process work in the particular case.” *Strickland v. Washington*, 466 U.S. 668, 689-90 (1984). This Court must review counsel’s performance under “an *objective* standard of

reasonableness.”³ *Id.*, 466 U.S. 688. Prior to trial, there were grave concerns about Mr. Carroll’s competence. The first psychologist to see Mr. Carroll following his arrest, Dr. Elizabeth McMahon, found him so floridly psychotic that psychological tests could not be given. She believed full psychological and neuropsychological testing identical to that done in post-conviction was necessary prior to a competency hearing, prior to trying the insanity defense, and prior to a determination of whether death would be an appropriate sentence (PC-T 320), but trial counsel failed to return her telephone call seeking to reschedule the evaluation. PC-T 321.

As discussed *infra*, trial counsel’s failure to obtain the expert assistance of Dr. McMahon prior to the competency hearing was unreasonable. *Williams v. Taylor*, 120 S.Ct. 1495, 1502 (2000) (“counsel’s failure to contact a potentially persuasive character witness [a “respected CPA”] was . . . not a conscious strategic choice, but simply a failure to return that witness’ phone call offering his service”). Her evaluation and investigation of Mr. Carroll’s mental health history were necessary to correct the opinion that Mr. Carroll was malingering—now proven to be erroneous—as

³ The State asks this Court to apply a subjective test for deficient performance which is contrary to *Strickland*. Ans. Brief at 60. The Supreme Court recently held that a test which hypothesizes some reasonable actor agreeing with the conduct challenged by a petitioner would misleadingly “transform [an objective] inquiry into a subjective one.” *Williams v. Taylor*, 120 S. Ct. 1495, 1521-22 (2000).

she pointed out herself: “If the questions [sic] going to be is this man competent . . . then testing [and a full psychological evaluation] is what we do.” PC-T 320. Appellee misstates the governing legal rule when it says calling Dr. McMahon to testify to sanity at the time of the offense resolves the issue of whether not allowing her to evaluate Mr. Carroll, test him for intelligence and neurological damage, and investigate his history, and failing to use her to establish incompetence to proceed, were reasonable. “[C]ounsel has a duty to make a reasonable investigation or to make a reasonable decision that makes a particular investigation *unnecessary*.” *Strickland*, 466 U.S. at 691 (emphasis added). Counsel had no strategy that made an evaluation of and investigation into Mr. Carroll’s mental health problems unnecessary. Trial counsel testified to the following explanation for his failure to do these things: “And if that’s a mistake, then it’s mine.” PC-T 115-116.

The second doctor to see Mr. Carroll, court-appointed psychiatrist Robert Kirkland, not only determined that Mr. Carroll was incompetent, but that he needed immediate hospitalization in the “intensive psychiatric unit at Florida Hospital . . . [for] several days.” (Supp. R. 1358). Contrary to Appellee’s truncated version of what followed, assessments of Mr. Carroll’s competency were tenuous, and, in at least one critical respect, inaccurate. As required by Florida Rule of Criminal Procedure 3.210, the trial court had appointed three psychiatrists to evaluate Mr. Carroll to

determine his competency to proceed. R. 1048-51. Two out of three doctors, Dr. Kirkland and Dr. Benson, found Mr. Carroll incompetent.⁴ Dr. Kirkland then had Mr. Carroll hospitalized. *Following this treatment*, the trial court sought better odds than a losing two out of three and appointed two additional doctors to evaluate Mr. Carroll.⁵ Only after the deck was stacked against him and Mr. Carroll was treated and released into the structured environment of the jail—where he *remained under Dr. Kirkland's care and supervision* (Supp. R. 1360-61)—did three of the four experts who testified at the extremely brief competency hearing find that Mr. Carroll was *then* competent to stand trial.

Under the circumstances of this case, trial counsel had an obligation, at a minimum, to conduct an independent investigation into his client's mental condition,

⁴ Dr. Lawrence Ehrlich was the only expert to opine that Mr. Carroll was competent. Dr. Ehrlich *did not testify* at the competence hearing, however, a fact not mentioned by Appellee. According to the prosecutor, Dr. Ehrlich refused to honor the State's subpoena because he was dissatisfied with the fee the State was willing to pay. Supp. R. 1387-88. Equally important, according to the prosecutor, Dr. Ehrlich's ability to render a reliable opinion regarding Mr. Carroll's present competency was doubtful because Dr. Ehrlich saw Mr. Carroll only briefly and more than a year before the competency hearing, in December 1990. Supp. R. 1389-90. Dr. Danziger, one of the State's other experts at the hearing, testified that although Mr. Carroll was then competent, continued competency would *require* that he be medicated and closely monitored. Supp. R. 1386; R. 1071.

⁵ Drs. Kirkland and Benson had already provided the court with detailed reports and neither expressed any concerns with their ability to evaluate and diagnose Mr. Carroll. R. 1073-74 & 1062-65.

including his medical and educational records. ABA Guideline for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1.2.C.

Appellee ignores the most critical change in the evidence between the competency hearing and the post-conviction evidentiary hearing. ***The State's chief witness against Mr. Carroll has dramatically changed his testimony.*** Dr. Gutman testified at the competency hearing that Mr. Carroll did not suffer from any major mental illness, that he was intelligent, and that he was feigning mental illness to avoid trial. As Dr. Gutman himself explained in his post-conviction testimony, *none of that was correct!* The sole reason for this inaccurate and damaging information being before the court was trial counsel's unreasonable failure to investigate and obtain expert assistance.

Had trial counsel investigated Mr. Carroll's background as he was obligated to do under clearly established professional norms, Dr. Gutman would have known that IQ testing administered when Mr. Carroll was 12 years old showed his IQ to be 79. Had trial counsel obtained Dr. McMahon for the expert assistance Mr. Carroll was constitutionally entitled to, *Ake v. Oklahoma*, 470 U.S. 68 (1985), she would have performed the intelligence and neuropsychological testing that Dr. Crown administered and Dr. Gutman would have reached the inescapable conclusion that Mr. Carroll's deficiencies and mental illness are real, his symptoms genuine, and

sufficiently severe to leave him “substantially impaired.” PC-T 395, 398.

Finally, had trial counsel returned Dr. McMahon’s telephone call, or called her to testify at the competency hearing, she would have provided invaluable testimony.

Dr. McMahon would have told the court when she saw Mr. Carroll on November 1, 1990, he was not able to understand what was going on or to assist in his defense. Dr.

McMahon

found Mr. Carroll to be extremely disorganized. I found it very, very hard to even keep him engaged with me. He was constantly responding to internal stimuli; at least in my clinical opinion what was going on, he was responding to voices other than mine. He was responding or being, experiencing what we call intrusive thoughts; which a particular word he’d go on, off on some kind of association; that he was off on some other track other than what I was trying to get him to do. There was a period of time he, it was hard to get him to answer, respond to me; he was paranoid. PC-T 315.

Trial counsel had no reasonable basis for keeping this highly probative information from the court.

Nor did trial counsel have any reason for withholding from the court prior to the penalty phase that Mr. Carroll was *unable* to rationally assist in the discovery and presentation of mitigating evidence. “[A]n *expressed* doubt,” about a defendant’s competence “by one with ‘the closest contact with the defendant’ is unquestionably a factor which should be considered,” before a defendant is allowed to proceed. *Scott*

v. State, 420 So.2d 595, 597 (Fla. 1982), quoting *Drope v. Missouri*, 420 U.S. 162, 177-78 n.13 (1975). Yet, trial counsel failed to inform the court that although Mr. Carroll was “nice, courteous,” and attempted to be helpful, Mr. Taylor “couldn’t get anything out of him.” PC-T 136. ***Mr. Carroll was not able to recall relevant events*** (PC-T 137-38), and trial counsel continued to think his client was incompetent after the initial competence hearing. “I felt like I was talking to an empty suit.” PC-T 150-51.

Additionally, trial counsel misled the trial court when he said that Mr. Carroll did not wish to present mitigating evidence, while knowing Mr. Carroll “***couldn’t*** give me any help.” PC_T 136 (emphasis added).

2. *Trial counsel’s failure to obtain Dr. McMahon’s services was objectively unreasonable and deprived Mr. Carroll the tools necessary to mount an insanity defense and correct the erroneous opinion of the State’s experts*

Due to trial counsel’s unreasonable failure to return Dr. McMahon’s telephone call trying to arrange an evaluation, Mr. Carroll was denied “the raw materials necessary to the building of an effective defense.” *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). The State attempts to excuse trial counsel’s inexplicable and negligent (i.e., not strategic) omission with the self-contradicting argument that trial counsel “utilized Doctors Benson, Danziger, and McMahon,” and that he “made a tactical decision to rely upon the court appointed experts.” Ans. Brief at 77-78. As a purely factual

matter, Appellee's claim is refuted by the portion of counsel's guilt-phase closing argument quoted in Appellee's Brief. Viewed in context, trial counsel was attempting to convince the jury that *in addition to* Dr. McMahon, "I *also* offered the testimony of some court appointed psychiatrists" R. 838 (emphasis added), *quoted in* Ans. Brief at 78. Counsel's argument actually illustrates how under-utilized Dr. McMahon was; Mr. Taylor was fumbling to put a band-aid on the gaping wound he opened when he presented the jury with a defense expert whom he had prevented from doing what she deemed professionally necessary, and who thus had nothing to say for the defense.

The Supreme Court has recognized that in cases like Mr. Carroll's where experts differ as to diagnosis and legal sanity, "the testimony of psychiatrists can be crucial and *a virtual necessity if an insanity plea is to have any chance of success.*" *Ake*, 470 U.S. at 82 (internal quotation marks omitted). "[W]ithout the assistance of a psychiatrist (1) to conduct a professional examination on issues relevant to the defense, (2) to help determine whether the insanity defense is viable, (3) to present testimony, and (4) to assist in preparing the cross-examination of a State's psychiatric witness, the risk of an inaccurate resolution of sanity issues is extremely high." *Ibid.* "In the instant case, it is undisputed that [Mr. Carroll] had a right—indeed a constitutionally protected right," *Williams*, 120 S. Ct. at 1513—to expert mental health assistance in *preparation and presentation* of his insanity defense, his case for

incompetence to stand trial, and to rebut the State's evidence in aggravation and to establish mitigating circumstances. *Ake*, 470 U.S. at 70; *Tuggle v. Netherland*, 526 U.S. 10 (1995)(per curiam); *Hoskins v. State*, 702 So. 2d 202 (Fla. 1997). The failure of trial counsel to safeguard that right, which by definition is "necessary to the building of a defense," *Ake, supra*, constitutes deficient performance. *Williams, supra*. The State merely attempts to mischaracterize this patent constitutional violation as a claim that trial counsel should have obtained "additional defense experts." Ans. Brief at 77.

Dr. McMahon testified that it was necessary "to conduct a professional examination [of Mr. Carroll] on issues relevant to the defense," *Ake*, 470 U.S. at 82, and specified what in this case would constitute an appropriate evaluation. PC-T at 320 ("If the questions going to be is this man competent, if there were any issues as to his mental status at the time of the offense, if there was any issues to the mitigation of any kind of sentencing, then testing is what we do."). But trial counsel never returned her telephone calls offering to complete the examination cut short by Mr. Carroll's extremely psychotic condition shortly after his arrest. PC-T 319-320. The failure of an attorney to obtain the testimony of a professional witness solely because the lawyer failed to return the witness' telephone call is professionally unreasonable under *Strickland*. *Williams*, 120 S. Ct. at 1502. Had counsel telephoned her, Dr.

McMahon would have conducted the same intelligence and neuropsychological tests that Dr. Crown administered, and reached the same conclusions. PC-T 328-333. Thus, Dr. McMahon would have found that Mr. Carroll is borderline mentally retarded and has been since childhood (PC-T 229, 237-40),⁶ that he suffers from longstanding brain damage spanning both hemispheres and impairing his reasoning (PC-T 233, 247),⁷ and that he suffers from genuine psychiatric conditions that substantially impair his ability to appreciate reality; he is psychotic. PC-T 238-242; 249

Dr. McMahon was available “to assist in preparing the cross-examination of [the] State’s psychiatric witness[es].” *Ake*, 470 U.S. at 82. Had she done so, the testimony of the State’s mental health experts, Dr. Gutman and Dr. Kirkland, would have been reversed or undermined. But trial counsel inexplicably failed to contact her until immediately before she was called to testify. PC-T 320. “If that’s a mistake,” trial counsel admits, “then its mine.” PC-T 116. Although she did “present testimony,” *Ake*, 470 U.S. at 82, as the State points out, trial counsel’s unreasonable failure even to provide her with the discovery *that the State’s experts relied upon*, she

⁶ This finding dramatically reversed Dr. Gutman’s opinion given at trial that Mr. Carroll was intelligent enough to effectively feign mental illness and to malingering an intelligence test.

⁷ This fact caused Dr. Gutman to reject his opinion that Mr. Carroll suffered no mental illness of organic origin.

was not able to express an opinion about Mr. Carroll’s sanity at the time of the offense. R. 650; PC-T 321, 322, 339. Because trial counsel unreasonably failed in his duty to investigate the available insanity defense as he was required to do, *Strickland*, 466 U.S. at 691, Dr. McMahon could not perform the constitutionally mandated role of “organizing [Mr. Carroll’s] mental history, examining results and behavior, and other information, interpreting it in light of [her] expertise, and then laying out [her] investigative and analytical process to the jury.” *Ake*, 470 U.S. at 81.

The result, as predicted by the Court in *Ake*, was a complete breakdown of the adversary process and an inaccurate assessment of Mr. Carroll’s competence to stand trial, whether he remained competent, whether reasonable grounds existed prior to or during the penalty phase to require further inquiry into Mr. Carroll’s competence, and, in particular, there was no reliable adversarial testing of the insanity defense.

3. *There is a reasonable probability that but for trial counsel’s unreasonable omissions Mr. Carroll would have been found incompetent to proceed, a hearing on his competence was constitutionally required, and he would have been found not guilty by reason of his insanity*
 - a. The governing legal standard

Under the extraordinary circumstances of this case prejudice is a foregone conclusion. “Prejudice in these circumstances is so likely,” given counsel’s failure to investigate or obtain expert assistance in presenting the insanity defense, that “prejudice is presumed.” *Strickland*, 466 U.S. at 692. Should this Court engage in a probabilistic prejudice analysis under *Strickland*, 466 U.S. at 693-94, it must proceed from the premise that “the risk of an inaccurate resolution of sanity issues is extremely high,” *Ake*, 470 U.S. at 82, due to the absence of necessary expert assistance and counsel’s failure to obtain essential mental health records. With respect to Mr. Carroll’s competence to stand trial the problem is only greater because no inquiry was made into Mr. Carroll’s competence prior to or during the penalty phase although experts had informed the court that Mr. Carroll would likely decompensate and trial counsel informed the court that his client was not able to testify in support of a sentence less than death. The State can only hope to overcome Mr. Carroll’s demonstration of prejudice by misrepresenting the governing legal standard. Thus, the State argues that the “prejudice prong [of *Strickland v. Washington*, 466 U.S. 668 (1984),] is not established merely by showing that the outcome of the proceeding would have been different” Ans. Brief at 45.

Mr. Carroll is entitled to relief if there is a reasonable probability that the outcome in this case would have been different. *Strickland*, 466 U.S. at 694.

Because the right Mr. Carroll asserts is so fundamental that a fair trial cannot be obtained in its absence, *Strickland*, 466 U.S. at 696, he need not show that the result more likely than not would have been different. *Id.*, 466 U.S. 693; *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).⁸ His burden of persuasion is less than a preponderance of the evidence. *Williams v. Taylor*, 120 S.Ct. at 1519. Put differently, because Mr. Carroll has shown that the favorable evidence that he has an IQ of 80, diffuse bilateral organic brain damage, a mood disorder, paranoia, and schizophrenia “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict,” *Kyles*, 514 U.S. at 435, when compared to the erroneous opinion of trial experts that Mr. Carroll is intelligent and was feigning mental illness, he is entitled to relief.

- b. A reasonable probability exists that Mr. Carroll was tried while incompetent and/or without a constitutionally required inquiry into his continuing competence

Had trial counsel conducted the requisite investigation into Mr. Carroll’s background, mental health history and status, the State’s expert would not have testified that Mr. Carroll was an intelligent malingerer, but that he has suffered from

⁸ The *Kyles* Court explained that the materiality test of *United States v. Bagley*, 473 U.S. 667 (1985), is the same as, and was borrowed from, the prejudice standard of *Strickland*. *Kyles*, 514 U.S. at 434.

diffuse organic brain damage, borderline mental retardation, and mental illnesses that began “in utero.” PC-T 392 (testimony of State’s principle competence expert Dr. Gutman). As in *Hill v. State*, 473 So.2d 1253 (Fla. 1985), a psychological and neuropsychological evaluation of Mr. Carroll was recommended, in this case by Dr. McMahon, “but, for some unexplained reason, this was not done.” *Hill*, 473 So.2d at 1255.

To the extent an insufficient basis existed in the trial record at the time of the penalty phase to require judicial inquiry into Mr. Carroll’s competence to proceed, as the State suggests (Ans. Brief at 48-49; 51, n.18),⁹ Mr. Carroll has demonstrated that such insufficiency is attributable to trial counsel’s unreasonable omissions. Trial counsel informed the court that he believed Mr. Carroll was not able to testify on his own behalf. At the post-conviction evidentiary hearing, trial counsel explained that he also knew that Mr. Carroll was unable to recall key events and provide him with necessary information. PC-T 136-38; 151.

The State’s repeated contention that concerns about whether Mr. Carroll was

⁹ The State’s argument that Mr. Carroll must point to some irrational conduct during the trial in order to establish his entitlement to a hearing is without merit. “While [Mr. Carroll’s] demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue.” *Pate, supra*, 383 U.S. at 385 (noting “mental alertness and understanding displayed in Robinson’s ‘colloquies’ with the trial judge).

incompetent are unfounded because he did not act up in court, or because police officers testified that they were able to communicate with him, are without merit.¹⁰ In *Hill*, this Court addressed and rejected the identical argument that “the testimony of the investigating police officers that they had no problem communicating with Hill and the prison psychologists’s report sufficiently rebut the evidence presented by the defense witnesses and the contention that Hill was entitled to a hearing on his competence to stand trial.” *Hill*, 473 So.2d at 1259. The State asks this Court to do

¹⁰ To the extent the State maintains that Mr. Carroll is not mentally ill, and is only feigning illness, that argument was rejected by the State’s own trial expert, Dr. Gutman. Independent of the medical opinions of Drs. Benson, Danziger, Toomer, Crown, Gutman, and McMahon that Mr. Carroll’s brain damage, borderline mental retardation, and psychiatric disorder are genuine, logic and common sense dispel any notions of malingering. Consider the implications of accepting the State’s argument. Mr. Carroll not only began feigning his mental problems at age 12, but has remained so good at it that he can get the same IQ score again more than 20 years later. Somehow this mentally retarded man with a seventh grade education knows enough about neuropsychology to manipulate the outcome of an entire battery of scientifically validated tests designed, administered, and interpreted by experts who must and have excluded malingering in order to reach their diagnoses. The final implication of the State’s argument is that psychiatrists at Union Correctional Institution are either incompetent, malicious, or both because from the time Mr. Carroll was admitted to the institution they have been treating him with medications that are only approved for use on psychotic persons. Is the State admitting to the obvious Eighth Amendment and due process violations that would necessarily be proved if Mr. Carroll were being treated this way? Regardless, this Court should rely on the recognition by the Supreme Court (and centuries of jurists before them) “that it is unusual for even the most artful malingerer to feign incompetence successfully for a period of time while under professional care.” *Cooper, supra*, 517 U.S. at 365. This would have to be the most artful performance ever.

what the trial court in *Hill* did wrong: consider the matter of whether Mr. Carroll was constitutionally entitled to a hearing on his continued competence is left to the discretion of the trial attorney and could therefore be waived by him. *Hill*, 473 So.2d at 1259.

Representations by the defense trial team that a defendant is unable to assist in the preparation of the defense, in this case the defense to the State's case for death, are sufficient to require a halt to the proceedings and an inquiry into the defendant's continued competence. *Drope, supra*, 420 U.S. at 178-79; *Hill*, 473 So.2d at 1255 (defense trial investigator testified in post-conviction that he was unable to extract sufficient information from defendant). Under this Court's cases applying Florida Rule of Criminal Procedure 3.210, a hearing was (or at least would have been) required. *Scott v. State*, 420 So.2d 595, 597 (Fla. 1982) (remanding for new trial where court failed to stop proceedings and conduct competence hearing based on counsel's representations that he could not communicate with defendant); *Hill v. State*, 473 So.2d 1253, 1259 (Fla. 1985) (post-conviction evidence showed defendant had been diagnosed with seizure disorder, mental retardation, had an inability to relate facts and exhibit proper courtroom behavior). Appellate counsel's failure to raise this issue of fundamental error constitutes ineffective assistance of counsel.

- c. A reasonable probability exists that the jury would have accepted Mr. Carroll's insanity

defense had trial counsel's unreasonable omissions not led to the introduction of misleading evidence

It is difficult to understate the extent to which the accurate information adduced at the evidentiary hearing can "reasonably be taken to put the whole case in such a different light." *Kyles*, 514 U.S. at 435. Anticipating the defense's insanity case, the State included in its case in chief Dr. Gutman testifying that Mr. Carroll "was malingering which was acting in a fraudulent way to present himself in a sicker fashion that was actually the case." R. 510. Dr. Gutman told the jury that Mr. Carroll was "savvy" and had an awareness indicating a high IQ. R. 512.

We now know, based on the accurate information derived from the testing and psychological evaluations performed by Drs. Crown and Toomer, and confirmed by later-arrived at diagnoses of Florida Department of Corrections psychologists and psychiatrists, that Mr. Carroll is psychotic, paranoid, borderline mentally retarded, and suffers from diffuse organic brain damage. To say that the case for Mr. Carroll's insanity at the time of the offense now appears in a different light would be something of an understatement. This Court can have no confidence in a jury verdict based on unquestionably inaccurate information.

Although the State goes on at some length to argue that evidence indicating Mr. Carroll left the victim's home in her stepfather's truck (i.e., another suspect's truck),

this forecloses the possibility of an insanity defense. Ans. Brief at 40-41. ***This argument was rejected by the State's own expert at trial!*** The State asked Dr. Gutman whether “the fact that a person had left the area of a crime and had taken flight, would that lead you to form an opinion as to whether or not that person would know the difference between right and wrong?” R. 516. Dr. Gutman’s answer:

Not necessarily. It certainly points to the fact that there was some effort to avoid detection, **but there are psychotic, irrational, bizarre people who would be regarded as not knowing right from wrong who would still flee, so fleeing in and of itself does not necessarily indicate knowing right from wrong.** *Ibid.*

The Supreme Court has similarly recognized that “a finding of insanity . . . has no necessary relationship to the elements of a crime.” *Medina v. California*, 505 U.S. 437, 448 (1992).

The evidence omitted from the jury’s consideration due to trial counsel’s unreasonable failure to prepare the insanity defense confirms what defense experts testified to at trial and negates the State’s malingering theory. As confirmed by DOC experts, Mr. Carroll’s psychosis is genuine; as Dr. Gutman explained, his organic deficits began in utero. Under these circumstances there is a reasonable probability that Mr. Carroll would have been found not guilty by reason of insanity.

ARGUMENT II

THE RESULTS OF THIS PENALTY TRIAL ARE UNRELIABLE:

DUE TO TRIAL COUNSEL'S UNREASONABLE OMISSIONS, MR. CARROLL'S DEATH SENTENCE RESTS ON MATERIALLY INACCURATE AND PREJUDICIAL INFORMATION; THE SENTENCERS WERE NOT INFORMED THAT EVERY MENTAL HEALTH EXPERT TO CONSIDER MITIGATION CONCLUDED HE MEETS THE CRITERIA FOR BOTH STATUTORY MENTAL HEALTH MITIGATING CIRCUMSTANCES AND NUMEROUS OTHER MITIGATING CIRCUMSTANCES

At the evidentiary hearing, Mr. Carroll demonstrated that but for trial counsel's unreasonable and totally unexplained failure to inform mental health experts that Mr. Carroll had a well-documented, lifelong history of serious mental illness, abuse, neglect, and is borderline mentally retarded, each expert considering and evaluating would have testified to the existence of the two statutory mental health mitigators. A myriad of other mitigating circumstances would have been proven as well.¹¹ If this "favorable evidence could reasonably be taken to put the whole case in such a *different light* as to undermine confidence in the verdict," Mr. Carroll is entitled to relief. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Nowhere is the stark difference between the prejudicial expert opinions that Mr. Carroll was feigning mental illness,

¹¹ In this case, trial counsel "failed to introduce evidence that [Mr. Carroll] was 'borderline mentally retarded' and did not advance beyond the s[eventh] grade in school." *Williams v. Taylor, supra*, 120 S.Ct. at 1514. Trial counsel also unreasonably failed to present that available "graphic description of [Mr. Carroll's] childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' [which] might well have influenced the jury's appraisal of his moral culpability." *Id.*, 120 S. Ct. at 1515.

and the experts' uniform repudiation of that opinion at the evidentiary hearing, more evident than in the State's answer brief.

A. Trial Counsel's Failure Diligently to Investigate Mr. Carroll's Background and Obtain Necessary Expert Assistance to Which Mr. Carroll was Constitutionally Entitled was Objectively Unreasonable

1. Trial counsel's failure to obtain the assistance of an independent mental health expert was unreasonable under the circumstances

As demonstrated in the preceding section, Mr. Carroll was denied his due process right to the assistance of an independent mental health expert in preparing his sentencing case because trial counsel simply failed to return Dr. McMahon's telephone call seeking to schedule an examination of Mr. Carroll. PC-T 320-21. Failing to obtain favorable evidence from a professional (or lay) witness because counsel failed to contact the witness is deficient performance. *Williams v. Taylor*, 120 S. Ct. at 1502 ("counsel's failure to contact a potentially persuasive character witness [a 'respected CPA'] was . . . not a conscious strategic choice, but simply a failure to return that witness' phone call offering his service"); *Blanco v. Singletary*, 943 F.2d 1477, 1489-90 (11th Cir. 1991) (trial counsel were ineffective for failing to accept or return telephone calls of family members offering favorable evidence). In this case, as in *Williams*, trial counsel unreasonably failed to elicit testimony from a State's expert who would have testified—contrary to his guilt-phase testimony that Mr. Carroll

was an intelligent, “fraudulent” malingerer—that Mr. Carroll was substantially impaired by mental illness and met the criteria for two statutory mitigating circumstances. *Williams*, 120 S. Ct. at 1501, 1514 (counsel were ineffective for failing to present evidence that the state’s future dangerousness expert would have testified that the petitioner among those least likely to commit future acts of violence). There is no question that Mr. Carroll had a constitutionally protected right to expert mental health assistance in challenging the State’s case in aggravation and establishing the existence of mitigating circumstances. *Ake, supra*; *Tuggle v. Netherland*, 516 U.S. 10 (1995) (per curiam); *Hoskins v. State*, 702 So.2d 202 (Fla. 1997).

Dr. McMahan was appointed by the trial court to act as a defense expert. She testified at the evidentiary hearing that in order to determine whether mitigating circumstances existed, she needed to administer neuropsychological and psychological tests to Mr. Carroll. PC-T 320. When she was unable to administer those tests to Mr. Carroll, because he was too floridly psychotic to be tested (PC-T 315-16), she notified trial counsel that she would need to see Mr. Carroll again. When trial counsel did not contact her, she called him. PC-T 320. She was given no additional information and trial counsel never arranged for her to evaluate Mr. Carroll. This was deficient performance.

Counsel had no strategic or other reason for failing to allow Dr. McMahan to

perform her constitutionally mandated role in ensuring that Mr. Carroll received a fair capital sentencing. “And if that’s a mistake,” he said, “then it’s mine.” PC-T 115-16.

The State attempts to explain away counsel’s unreasonable omission by quoting a portion of the *prosecutor’s* argument at a bench trial, and attributing the prosecutor’s thoughts to defense counsel. Ans. Brief at 61-63. This argument is of no moment. Of course, the arguments of a prosecutor are not evidence of anything, particularly not the unstated reasoning of defense counsel.

Portions of trial counsel’s post-conviction testimony credited and quoted by the trial court specifically refute the State’s argument that trial counsel thought it was strategically preferable to rely solely on the guilt-phase experts. Mr. Taylor testified that he “wanted to do something in the penalty phase *rather than rely on what had been presented in the guilt phase.*” PC-T 134 (emphasis added). At best, the record discloses that counsel made inconsistent statements about what he would have done. But that gets us off the point. In order for trial counsel’s actual conduct to have been reasonable, it had to be based on a reasonable investigation or otherwise informed, *see Strickland*, 466 U.S. at 691; trial counsel had to know what his options were. He did not. Because Mr. Taylor failed to return Dr. McMahon’s phone call trying to arrange a time for her to evaluate and test Mr. Carroll (and thereby denied Mr. Carroll the expert assistance to which he was constitutionally entitled), and because Mr. Taylor

did not obtain necessary background materials Dr. McMahon would have requested and relied upon (which independent of its usefulness to Dr. McMahon and the other experts deprived Mr. Carroll of the individualized sentencing determination to which he had a constitutional right), trial counsel did not know that even the State's expert, who previously said Mr. Carroll was malingering, would have testified that both statutory mental health mitigators applied to him. That is deficient performance. *Williams*, 120 S. Ct. at 1514 (counsel were ineffective for allowing expert to testify that petitioner would be a future danger where expert would have testified to opposite). Additional non-statutory mental health mitigators related to his low intelligence, substance abuse, history of sexual abuse as a child, and other neglect also applied.

The trial court correctly found what Mr. Taylor's strategy was: "Clearly, trial counsel was focused on Defendant's mental state and any mitigating evidence which might have arose from that state." PC-T 1164; *see also* R. 913 (trial counsel testified that the "mitigators, the way I see it, deal with his mental condition").¹² To the extent

¹² Of course, this was a gross error of law which led to the non-presentation of voluminous, readily available evidence that Mr. Carroll was neglected and abused physically, psychologically, and sexually as a child. It is beyond dispute that an omission by trial counsel which is predicated on a misunderstanding of the law constitutes deficient performance. *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986).

trial counsel failed to recognize that evidence of Mr. Carroll's abusive and neglectful childhood were mitigating, that legal error constitutes deficient performance. *See Williams*, 120 S. Ct. at 1504 (counsel were ineffective for failing to recognize legal entitlement to mitigating evidence related to client's abusive upbringing).

Additionally, it is contradictory for the State to argue that in retrospect trial counsel had some kind of peculiarly effective strategy in mind for a plain, unexplained omission when at trial the State *successfully argued* that because guilt-phase experts' testimony "didn't directly address [the statutory mental health mitigators]" (Ans. Brief at 62), the evidence did not support them.¹³ *Trial counsel's post-conviction testimony confirms that he never asked the experts to consider the mitigating circumstances even before the trial.* PC-T 116. At trial, counsel allowed the prosecutor to mislead the jury by arguing at the conclusion of the penalty phase that Mr. Carroll had to meet the standard for insanity at the time of the offense in order to establish the existence of the

¹³ It would violate Mr. Carroll's due process rights and *Strickland* for this Court to evaluate Mr. Carroll's Sixth Amendment claim by assuming, as the lower court did, that trial counsel's failure to have the experts speak to the mitigating circumstances was effective where the State successfully argued at trial that it was not. Just as "appellate courts are not free to revise the basis on which a defendant is convicted," *Dunn v. United States*, 442 U.S. 100, 107 (1979), the trial court in this case could not refuse to find mental health mitigation at the time of sentencing then purport to refute a determination of prejudice because the evidence supporting those circumstances was already before the sentencers. *Id.*; *cf. Chiarella v. United States*, 445 U.S. 222 (1980). Additionally, *Strickland* "requires that every effort be made to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689.

“substantial impairment” mitigating circumstance.¹⁴ R. 941-44. This point is further supported by the fact that despite evidence in the record that would have supported statutory mitigating circumstances (although it was contradicted by Dr. Gutman’s erroneous opinion that Mr. Carroll was malingering), the court found no mitigators had been established. R. 965-999.

Finally, even if trial counsel (a) made a conscious decision, and (b) that decision was tactical, *and* (c) reasonable, as required under *Strickland* and *Williams*, trial counsel’s implementation of this conjectured strategy was unreasonable because (1) as the prosecutor’s comments confirm, counsel never explained to the jury how the experts’ testimony related to the elements of the mitigating circumstances, (2) counsel never asked the experts themselves whether their testimony supported the mitigating circumstances or in what respects it might not, and (3) counsel allowed his argument to be countered by the misleading statements of the prosecutor. A strategy for convincing someone of some particular fact can hardly be considered reasonable,

¹⁴ Since the substantial impairment mitigating circumstance does not require this degree of proof, the State’s argument before this Court quoting the prosecutor’s closing argument that Mr. Carroll cannot establish prejudice is misplaced. Ans. Brief at 74. If anything, the State has merely pointed this Court to another reason why Mr. Carroll’s death sentence is unreliable: the jury was misinformed about the legal standard without an objection from trial counsel. *See Griffin v. United States*, 502 U.S. 46, 59 (1991) (“When . . . jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error”).

much less effective, if the convincee is not told what the convincer is driving at.¹⁵

2. *Wanting and Wishing for Mitigating Evidence to Walk Through the Door is not Conducting a Reasonable Investigation*

It is beyond dispute that trial counsel had an “obligation to conduct a thorough investigation of the defendant’s background.” *Williams*, 120 S. Ct. 1495, 1515 (2000); *id.* 120 S. Ct. at 1524 (O’Connor, J., concurring) (finding deficient performance in “counsel’s failure to conduct the *requisite, diligent investigation* into his client’s troubling background and unique personal circumstances”) (emphasis added). It is equally clear that trial counsel conducted no such investigation. Although the State contends that trial counsel “conducted the investigation he desired” (Ans. Brief at 54), the question is an objective, not a subjective one, which asks whether counsel “ma[de] the adversarial testing process work in the particular case.” *Strickland*, 466 U.S. at 689-90.

From the portions of the testimony quoted by the trial court it is clear that trial counsel’s desired investigation involved sitting in his office wishing Mr. Carroll’s

¹⁵ When assessing whether Mr. Taylor made the adversarial sentencing proceeding work in this case, *Strickland, supra*, the Court must consider whether the jury understood that it must be “considering, *as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Lockett*, 438 U.S. 586, 604 (1978)(emphasis in original).

family members, former teachers, and others who had mitigating evidence to present would simply call him on the phone. Trial counsel testified that he “*wanted* more information, I wanted more to work with.” PC-T 134. “[I] certainly *wish* [Elmer’s family] would have contacted me,” he whined. PC-T 120. Trial counsel complained, “There’s not a family member that *called me*, that I recall that, anybody, no one. It was like a dead-end street.” PC-T 117. Merely waiting for witnesses to present themselves is neither thorough nor diligent, and is below objective standards. *See Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991).

In Mr. Carroll’s case, “counsel’s failure to conduct the *requisite, diligent* investigation into his client’s troubling background and unique personal circumstances manifest itself in counsel’s generic, unapologetic closing argument, which provided the jury with no reasons to spare [Mr. Carroll’s] life.” *Williams*, 120 S. Ct. at 1524-25 (O’Connor, J., concurring). Counsel went beyond saying nothing. Mr. Taylor wrongly told the sentencing court, “There’s nobody who wants to say anything about Elmer.” R. 918. Falsely painting ones client in a negative light to a capital decision-maker is deficient performance.

The State makes two weak arguments to excuse counsel’s unreasonable and unprofessional omissions. First, the State argues that these witnesses were not available to trial counsel; that it took years of effort for post-conviction counsel to find

and present Mr. Carroll's family members. Ans. Brief at 54. There is no evidentiary support for this in the record. In fact, it distorts the record by (1) implying that trial counsel looked for these witnesses when he testified that he did not, and (2) misrepresenting the time and resources available to trial and post-conviction counsel respectively.

This Court's focus must be on trial counsel's actions and decisions at the time of trial and the reasons underlying them. *Strickland*, 466 U.S. at 689. The portions of trial counsel's testimony that were credited by the trial court make clear that trial counsel inferred that no witnesses were available to testify because he sat by his telephone and no one called him. PC-T 120. "[C]ounsel has a duty to make a reasonable investigation or to make a reasonable decision that makes a particular investigation is unnecessary." *Strickland*, 466 U.S. at 691. Deciding not to look for evidence in support of a sentence less than death because none came looking for you is not reasonable, and certainly could not make the "requisite, diligent investigation" into Mr. Carroll's background unnecessary. *Williams*, 120 S. Ct. at 1513.

The State also argues that trial counsel did not fail to conduct a reasonable investigation because the family members who would have testified to Mr. Carroll's

horrific upbringing of neglect, abuse, and rape were not available to trial counsel.¹⁶

Of course, trial counsel did not look for any witnesses, although he apparently listened for them, so it is difficult, at best, to say what was reasonably available to Mr. Taylor had he risen from his chair.¹⁷

In a last ditch effort to make trial counsel's passive approach to trial preparation

¹⁶ The record refutes the State's claims. Edward Couch, Mr. Carroll's stepbrother, testified that he lived in Dade City, Florida at the time of trial and had been there, receiving mail in his name for four years preceding the trial. PC-T 201. Nellie Smith, the sister who raised Mr. Carroll, lived in Dade City at the same address where post-conviction counsel found her, one hour away from the courthouse. PC-T 283-84. These witnesses testified that they would have informed the jury that Mr. Carroll's parents were abusive alcoholics who severely neglected Elmer, beat him and each other, and got Elmer drunk to the point where he passed out when he was three and four years old. PC-T 275-79.

¹⁷ The State overlooks the fact that *trial counsel had more time to find and talk to Mr. Carroll's family than post-conviction counsel had*. Mr. Carroll was arrested on October 30, 1990. Defense counsel from the public defender's office began investigating the case within 24 hours by securing the assistance of Dr. McMahon. The penalty trial took place during a very brief portion of April 13, 1992, *eighteen months later*. As the State repeatedly notes, substitute counsel, Mr. Taylor, felt he was not hampered in any way by inadequate funding, resources, or investigative assistance. PC-T 133-34; Ans. Brief at 54. In contrast, Mr. Carroll's post-conviction counsel were assigned his case on March 1, 1995. *See Carroll v. State*, No. 79,829 (Fla. Dec. 5, 1994) (unpublished order granting motion for extension of time to designate counsel). Mr. Carroll's rule 3.850 motion was filed on February 1, 1996, *eleven months* after counsel were appointed. Mr. Carroll's post-conviction counsel, moreover, were not as well heeled as Mr. Taylor. In fact, the office representing Mr. Carroll was abolished and ran out of funds between the filing of his amended motion and the evidentiary hearing. Yet, counsel were easily able to find and present Mr. Carroll's family who, it is undisputed, lived within an hour of Orlando. PC-T 201; 284.

appear reasonable, the State fabricates from *post-conviction* evidence unknown to trial counsel a reason for not investigating Mr. Carroll's background. Ans. Brief at 63-64, 68. This argument is logically and legally specious. First, the Supreme Court has held that a "failure to introduce . . . comparatively voluminous amount of evidence that . . . speak[s] in [a defendant's] favor" will not be excused because the investigation into that evidence would have brought to light evidence of other offenses. *Williams*, 120 S. Ct. at 1514. The rule is particularly applicable in this case because *evidence that Mr. Carroll had committed past offenses was already before the jury*. R. 726 (cross-examination testimony of Dr. Danziger regarding prior offenses).

Second, even assuming *arguendo* that trial counsel was aware that Dr. Danziger reviewed evidence of prior misconduct by Mr. Carroll, since trial counsel never spoke to anyone from his client's family, he could not have known what damaging information they may have possessed. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. It is contradictory for the State to argue that these witnesses were not reasonably available

to trial counsel,¹⁸ and that the information they possessed constituted a reasonable basis for counsel's failure to contact them.

Finally, the State's argument is refuted by trial counsel's testimony at the evidentiary hearing. Trial counsel explicitly stated his (strategic) reason for not presenting additional evidence in the penalty phase: "I had no one I could call that I thought would be persuasive." As previously demonstrated, counsel "had no one" because (1) he failed to arrange for Dr. McMahon to test and evaluate Mr. Carroll ("And if that's a mistake, then it's mine," PC-T 116); 118 (counsel never asked the experts to consider mitigating circumstances), and (2) he sat around waiting for witnesses to contact him rather than hiring an investigator (PC-T 109) or looking for them himself. PC-T 116-117; 120.

3. *Trial counsel unreasonably and wrongly allowed the trial court to believe Mr. Carroll had waived or was capable of knowingly, intelligently, and voluntarily waiving his right to testify and present mitigating evidence*

This argument has been addressed in section I, *supra*. The State's response is that Mr. Carroll waived this claim. Ans. Brief at 52. For the reasons previously stated, neither Supreme Court precedent, nor this Court's case reaching the merits of

¹⁸ If these witnesses were unavailable and, as trial counsel testified, Mr. Carroll was unable to give him even the names of witnesses, how could "Mr. Taylor ha[ve] every reason to believe that appellant's family members would not provide favorable testimony"? Ans. Brief at 56. The State's argument is disingenuous.

incompetence claims (both substantive and procedural) bars consideration of this issue. To the extent the State argues that appellate counsel should have raised the issue, that argument is addressed in Mr. Carroll's Petition for Writ of Habeas Corpus.

Additionally, Mr. Taylor's testimony at the evidentiary hearing reveals that counsel withheld from the trial court information that contradicted his statement that Mr. Carroll did not want mitigating evidence to be presented. Mr. Taylor testified that his client "*didn't really agree,*" with counsel's passivity, "he just didn't do much." PC-T 150. Yet, counsel withheld this information from the trial court. Had this information been disclosed, it, standing alone or in conjunction with other evidence that Mr. Carroll's competence to proceed was likely to wane (recall Dr. Danziger's report informing the court that Mr. Carroll would need to be medicated if his competence was to be sustained), would have (1) negated a knowing, intelligent and voluntary waiver of Mr. Carroll's right to testify, *see Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996), and (2) established reasonable grounds to believe Mr. Carroll was not presently competent, requiring that the proceedings halt and that a hearing be held. *Drope, supra*. This was unreasonably deficient performance.

B. There is a Reasonable Probability that Mr. Carroll would have Received a Sentence Less than Death

1. *The inaccurate and damaging testimony that Mr. Carroll was malingering prejudiced Mr. Carroll and renders his death sentence unreliable*

But for trial counsel’s unreasonable failure to investigate Mr. Carroll’s horrific childhood and mental health history, and his failure to obtain the evaluation and testing Dr. McMahon deemed necessary, the jury would have heard the unanimous opinion of experts that Mr. Carroll meets the criteria for both statutory mental health mitigating circumstances. Borderline retarded, brain-damaged over both hemispheres, paranoid, and schizophrenic, Mr. Carroll was “under the influence of extreme mental or emotional disturbance.” Fla. Stat. § 921.142(7)(c) (1993). These deficiencies and illnesses “substantially impaired” his “capacity . . . to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.” Fla. Stat. § 921.142(7)(e) (1993). The contrast between this accurate assessment of Mr. Carroll’s culpability and the inaccurate opinion presented at trial (that Mr. Carroll was an intelligent malingerer) places “the whole case in such a different light as to undermine confidence in the verdict.” *Kyles v. Whitley, supra*. Mr. Carroll is entitled to relief.

The State attempts to diminish the significance of this profound evidence of prejudice by arguing that it amounts to very little because (a) experts testified that Mr. Carroll was mentally ill (Ans. Brief at 70), and (b) there was still “sufficient evidence” to make Mr. Carroll eligible for the death penalty. Ans. Brief at 67. The State misses a crucial point: Dr. Gutman’s erroneous opinion that Mr. Carroll was intelligent and

did not suffer from any mental illness gave the jury a materially inaccurate picture of Mr. Carroll.

“The Due Process Clause does not allow the execution of a person ‘on the basis of information which he had no opportunity to deny or explain.’” *Simmons v. South Carolina*, 512 U.S. 154, 161 (1994), *quoting Gardner v. Florida*, 430 U.S. 349, 362 (1977). In this case, due solely to trial counsel’s unreasonable omissions, the jury was left with the “grievous misperception,” *ibid.*, that Mr. Carroll was not mentally ill, but, as the trial judge put it in his sentencing order, was “acting in a fraudulent way to present himself in a sicker fashion than actually was the case.”

The State’s second argument—that there was a sufficient basis in the record for finding aggravating circumstances notwithstanding the fact that experts testified to Mr. Carroll’s mental illness—is foreclosed by well-settled Sixth and Eighth Amendment principles. Courts have long recognized that consideration of “the fullest information possible concerning the defendant’s life and characteristics is highly relevant--*if not essential*--to the selection of an appropriate sentence.” *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (internal quotation marks and citation omitted) (emphasis in original). Thus, when assessing whether Mr. Carroll was prejudiced, this Court must take into consideration all the evidence, both that presented at trial and in postconviction. *Williams*, 120 S. Ct. at 1513.

Under the reasonable-probability standard for prejudice, Mr. Carroll is entitled to relief even if there remains sufficient evidence to make him death-eligible, which there is not. *See Kyles*, 514 U.S. at 434-35. More specifically, Mr. Carroll can and has established his entitlement to relief notwithstanding proof of aggravating circumstances. While the evidence omitted by trial counsel’s unreasonable failings “may not have overcome a finding of [aggravating circumstances], the graphic description of [Mr. Carroll’s] childhood, filled with abuse and privation, or the reality that he was ‘borderline mentally retarded,’ might well have influenced the jury’s appraisal of his moral culpability.” *Williams*, 120 S. Ct. at 1514.

CONCLUSION

For the foregoing reasons, and those stated in Mr. Carroll’s Initial Brief and Petition for Writ of Habeas Corpus, the judgments of conviction and sentence of death should be vacated and the case remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Combined Reply Brief and Reply to Response to Petition for Writ of Habeas Corpus is being by U.S. Mail, first class postage prepaid to Scott A. Browne, Assistant Attorney General, Westwood Center, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607-2366, this 3rd day of August, 2000.

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