IN THE SUPREME COURT OF FLORIDA

CASE NO. SC95370

BURLEY GILLIAM,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

AMENDED INITIAL BRIEF OF APPELLANT

DAN D. HALLENBERG
Assistant CCRC
Florida Bar No.0940615

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL- SOUTH
101 N.E. 3rd Avenue. Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

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

The following symbols will be used to designate references to the record in this appeal:

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

"PC-R" -- record on instant 3.850 appeal to this Court;

"PC-SR" -- supplemental record on instant 3.850 appeal to this Court;

"PC-SR2" -- separately bound transcripts of supplemental record on instant 3.850 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

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

STATEMENT OF FONT

This initial brief is written in Courier Font size twelve (12).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

STATEMENT OF THE CASE

Mr. Gilliam was charged by indictment returned on July 8, 1982, with first degree murder (Count I), sexual battery (Count II), and grand theft (Count III) (R. 1-3). After a trial in which he proceeded pro se with standby counsel, Mr. Gilliam was convicted of first degree murder and sexual battery, and the court imposed the jury-recommended sentence of death. On direct appeal, the Supreme Court of Florida reversed the judgment and sentence and remanded for a new trial. Gilliam v. State, 514 So. 2d 1098 (Fla. 1987).

Mr. Gilliam's second trial by jury commenced on June 6, 1988. At trial, Mr. Gilliam relied on the defense of insanity due to the fact that he was suffering an epileptic “psychomotor” seizure at the time of the homicide. Although he recalled leaving the strip club with a stripper who had propositioned him, he remembered little else due to the seizure (R 1929-34). The defense’s expert, Dr. Stillman, testified that persons experiencing psychomotor seizures are capable of engaging in violent, goal-directed behavior of which they are not consciously aware (R. 1994-1999, 2132). Dr. Stillman believed that, due to Mr. Gilliam's epileptic condition at the time of the homicide, he was not capable of telling the difference between right and wrong and did not know the nature and consequences of his actions (R. 2002). The State countered with expert testimony suggesting that, while Mr.Gilliam may have had a seizure disorder, he could not

have killed the victim while experiencing a seizure (R 2225-2369).

The jury found him guilty as charged on June 17, 1988 (R. 4, 394-396). The penalty phase proceedings were held on June 20, 1988. Defense counsel called no witnesses to testify at the penalty phase (R. 2661). The jury recommended to impose the death penalty (R. 336). At the sentencing hearing held on August 16, 1988, defense counsel called seven (7) witnesses, two experts and five family members (R 2846-2926). The court sentenced Gilliam to death on Count I and imposed a consecutive term of life imprisonment as to Count II. (R. 491-503).

On direct appeal, the Florida Supreme Court affirmed the convictions. Gilliam v. State, 582 So. 2d 610 (Fla. 1991). The Court also affirmed the sentence of death but vacated the consecutive life sentence for sexual battery and remanded the case with an order for the lower court to imposed a concurrent life sentence. (Id.) No writ of certiorari was filed with the Supreme Court of the United States.

Mr. Gilliam subsequently filed with the lower court a Rule 3.850 motion to vacate his judgment and sentence in which he asserted twenty-three (23) claims for relief (PC-SR 152-314). In an order issued on October 13, 1995, the court denied Mr. Gilliam’s claim that he has been denied access to public records claim (PC-SR 333-37). Also in the order, the court summarily denied all but a portion of one of the remaining of Mr. Gilliam's claims (Id.). With respect to Mr. Gilliam's claims that the state

failed to disclose Brady material, the court concluded that Mr. Gilliam "failed to show that he did not possess this information nor how it could have brought about a different result at trial" (PC-SR 335).

Mr. Gilliam claimed that defense counsel was ineffective during the guilt-innocence phase of the trial in numerous respects, including defense counsel's decision to have Mr. Gilliam testify regarding the facts surrounding a prior rape conviction (PC-SR 190). Defense counsel announced in opening statement that Mr. Gilliam had a conviction from Texas for "statutory rape" (R. 1150-1). Defense counsel subsequently called Mr. Gilliam to testify and questioned him about this "statutory rape" conviction (R. 1919-20). In rebuttal, the State presented evidence that the victim in the Texas case was choked which resulted in bruises on her neck and a black eye (R. 2427). The State took advantage of this devastating evidence to argue not only that Mr. Gilliam had lied on the stand about the nature of the prior conviction, but also to suggest that the prior conviction evidenced a pattern of similar criminal behavior (R. 1940-1, 1945-6, 2772-3). The State also used the prior conviction as an aggravating circumstance (prior violent felony)(R. 2674). The lower court summarily denied this claim on the basis that the decision to present this evidence on the part of defense counsel was a "strategic call" which did not fall below acceptable professional standards (PC-SR 336).

As for Mr. Gilliam's claim that defense counsel failed to adequately investigate, develop and present available evidence to support a voluntary intoxication defense (PC-SR 195-7), the court summarily denied the claim as being without merit, noting merely that "there was evidence adduced at trial as to voluntary intoxication" (PC-SR. 336).

The court summarily denied the remaining claims on the basis that the claims were procedurally barred because they could have been raised on direct appeal (PC-SR. 337). Included in these claims was the claim that Mr. Gilliam was denied competent mental health assistance. Mr. Gilliam specifically asserted in this claim that the mental health expert that defense counsel did retained was not competent (PC-SR. 311-12), that defense failed to investigate and discover evidence of Mr. Gilliam's mental health history, and failed to present mitigation evidence to the judge and jury (PC-SR. 311).

As to Mr. Gilliam's claim that he was denied effective assistance of counsel at the penalty phase proceedings, the lower court granted Mr. Gilliam an evidentiary hearing on the singular sub-issue of defense counsel's failure to call at the penalty phase the same seven (7) witnesses who defense counsel later called to testify at the sentencing hearing (PC-SR. 336); (PC-R. Vol.10, 76-79).

Defense counsel testified at the evidentiary hearing that the reason he did not call any witnesses at the penalty phase was because, as the lower court concluded, "In [defense counsel's]

opinion it would have proved futile to do so" (PC-SR. 364). The court further found,

> [Defense counsel] obviously felt that under the circumstances to do so would have been fruitless. His feeling was that this evidence might be better received by the sentencing Judge in light of the fact that this jury had just heard a great deal [of] evidence against Mr. Gilliam and determined him to be guilty of first-degree murder.

(PC-SR. 365). The court concluded defense counsel was not ineffective for not calling the witnesses at the penalty phase proceedings.

In a related issue, Mr. Gilliam also alleged that defense counsel had failed to investigate and present mitigation evidence in addition to the evidence presented at the guilt-innocence and penalty phase proceedings. As a result, he was unable to present readily available mitigation to the penalty phase jury (PC-SR. 204). It became apparent at the scheduled evidentiary hearing that there was some confusion as to exactly on which issues the court had granted an evidentiary hearing (PC-R. Vol.10, 73-79). At the time of the scheduled hearing, the court clarified that it was only granting an evidentiary hearing on the narrow issue of defense counsel's failure to call at the penalty phase the same witnesses counsel later called at the sentencing hearing (PC-R. Vol.10, 76).

In light of this clarification, the court refused to allow post-conviction counsel to call at the evidentiary hearing two expert witnesses, Dr. Eisenstein, Ph.D. and Dr. Burglass, M.D. (neither testified at the sentencing hearing)(PC-R. Vol.10, 76-

9). However, the court did permit post-conviction counsel to proffer this evidence in support of Mr. Gilliam's claim that defense counsel failed to investigate, discover and present evidence of Mr. Gilliam's drug dependency and mental health (PC-R. Vol.10, 83-5).

According to these proffers, Dr. Eisenstein would have testified that Mr. Gilliam suffers from organic brain damage and a whole host of other psychological problems and that, as a child, Mr. Gilliam suffered from horrific physical abuse, abandonment, and poverty to the point of starvation (PC-SR. 378-80). He also would have testified that as an adult Mr. Gilliam suffered from an extensive history of drug and alcohol abuse up to the time of his arrest in 1982 (Id.)(PC-R. Vol.10, 85). Finally, Dr. Eisenstein would have testified that due to Mr. Gilliam's organic brain damage and history of emotional and psychological problems, that at the time of the crime, Mr. Gilliam was under the influence of extreme mental or emotional disturbance and his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired (Id.).

Dr. Burglass would have testified that, at the time Mr. Gilliam was arrested in 1982, he addicted to "Speed", cocaine, alcohol and marijuana and that he began drinking and smoking marijuana in his teens (PC-SR. 378-80)(PC-R. Vol.10, 83-4). In his adult life (beginning in 1977) and up to the time of his arrest, Mr. Gilliam abused Speed (PC-SR. 378-80). In the

beginning Mr. Gilliam would pop pills (Biphetamine 120)(PC-SR. 378-80). Later, Mr. Gilliam smoked biphetamine and methamphetamine (PC-SR. 378-80). Mr. Gilliam would also mix cocaine and speed together and use a syringe to “shoot-up” the drugs in his arm (PC-SR. 378-80). Sometimes Mr. Gilliam would snort the cocaine by itself (PC-SR. 378-80).

During this period in Mr. Gilliam's life, he would drink beer and Jack Daniels while high off of cocaine and speed. Family members and friends reported seeing Mr. Gilliam drinking and drugging for three or four days without sleep. Mr. Gilliam would also shoot-up a mixture of cocaine and heroin (PC-SR. 378-80).

Also according to the proffer of Dr. Burglass' testimony, Mr. Gilliam maintained his drug addiction by using an assortment of psycho-stimulants, hypnotics and hallucinogens: Quaaludes, Mushrooms, Acid, Black Marleys and other drugs (PC-SR. 378-80). This hard drug use increased in intensity from 1977 to the date of Mr. Gilliam's arrest in 1982 (PC-SR. 378-80). Both Dr. Eisenstein and Dr. Burglass were available to testify at Mr. Gilliam's trial (PC-SR. 378-80).

In its order denying Mr. Gilliam's claim of ineffective assistance at the penalty phase, the court explained that it did not permit the testimony of Dr. Eisenstein and Dr. Burglass because:

> [I]t was previously determined that the only evidence which could be presented at the evidentiary hearing would be that pertaining

> to trial counsel's failure to present witnesses before the "recommending jury"

and because these experts:

> had absolutely nothing to do with the first trial, but rather were people who Mr. Gilliam felt might be in a position to offer mitigation for him at the present time. In other words, the defense made no showing whatsoever that these witnesses, were available at the sentencing phase proceeding, or that trial counsel . . . even knew of their existence.

(PC-SR. 365-366). After a long delay, the lower court denied Mr. Gilliam's motion for rehearing and Mr. Gilliam timely filed a notice of appeal (PC-SR. 367-372; PC-R. 558-61). This appeal follows.

SUMMARY OF ARGUMENT

1. The lower court erred by summarily denying many of Mr. Gilliam's claims. These claims included claims that defense counsel was ineffective for failing to investigate, discover and properly present available mitigation evidence and evidence of voluntary intoxication. Mr. Gilliam also claimed that counsel was ineffective for "opening the door" during the guilt-innocence phase of the trial to prejudicial circumstances alleged regarding a prior rape conviction. Other claims included defense counsel’s failure to argue the aggravating and mitigating circumstances at issue in the penalty phase and failure to investigate mitigation and employ a competent mental health expert. Mr. Gilliam also claimed that he was denied the use of material exculpatory evidence due to either state misconduct or ineffective assistance of counsel. The motion, files and records in the case do not

conclusively show that he is entitled to no relief on these and other claims.

2. Defense counsel was ineffective at the penalty phase when counsel failed to present certain mitigation evidence and evidence challenging the heinous, atrocious or cruel aggravating circumstance that counsel later presented at the sentencing hearing. Defense counsel's reasoning for not presenting this critical evidence to the jury was that defense counsel believed that no matter what evidence he presented to the jury, the jury was going to come back with a death recommendation. He therefore "gave up" on the penalty phase. This does not constitute acceptable trial strategy because such a tactic is necessarily premised on the incorrect belief that the jury's recommendation had no influence whatsoever on the court. Under Florida's death penalty scheme, the jury is a co-sentencer and the trial court must give "great weight" to the jury's recommendation. Counsel did not know or understand the significance of the jury's recommendation in terms of its legal effect ("great weight") on the court's ultimate decision.

3. The lower court erred in summarily denying Mr. Gilliam's claim that defense counsel failed to investigate and present additional mitigation evidence. Mr. Gilliam showed that he had experts who would have been available at trial to testify that at the time of the offense, Mr. Gilliam suffered organic brain damage and other psychological problems and was dependent on speed, cocaine, alcohol and marijuana. These experts also would

have testified that Mr. Gilliam had suffered from physical abuse, abandonment, and poverty to the point of starvation.

4. The lower court erred in summarily denying Mr. Gilliam's claim that defense counsel was ineffective for opening the door to alleged factual circumstances of a prior rape conviction. Defense counsel "opened the door" to the Texas rape conviction by announcing in opening sttaement that the conviction was for "statutory rape" and then having Mr. Gilliam so testify. Defense counsel's deficient performance permitted the State to present to the jury during the guilt-innocence phase evidence that Mr. Gilliam violently raped a fifteen year-old girl in 1969. The State effectively used this evidence as impeachment evidence, as improper "Williams" rule evidence, and to argue that Mr. Gilliam's epilepsy defense was a sham. But for defense counsel's decision to assert to the jury that the Texas rape conviction was merely the result of Mr. Gilliam's consensual sex with his minor girlfriend, the State could not have presented this highly prejudicial evidence. At trial, the State agreed that defense counsel should have known that the State had evidence alleging that the rape conviction was the result of a violent attack. Defense counsel admitted he knew nothing about a police report so indicating.

5. The lower court erred in summarily denying Mr. Gilliam's claim that defense counsel was ineffective by failing to argue the aggravating and mitigating circumstances at issue in the penalty phase. The crux of defense counsel's closing argument was

that the jury should determine the appropriate recommendation based on the jury's "personal, religious, and moral beliefs" and in considering how best its decision could protect society. Defense counsel failed to mention any of the specific statutory and non-statutory mitigation evidence that had come out at trial. Nor did counsel even mention the State's asserted aggravating circumstances and effectively conceeded them. Counsel's performance was deficient and prejudicial.

6. The lower court erred in summarily denying Mr. Gilliam's claim that defense counsel was ineffective by failing to investigate and discover evidence of voluntary intoxication.

7. The lower court erred in summarily denying Mr. Gilliam's claim that defense counsel was ineffective for failing to obtain a competent mental health expert to conduct a professional and competent mental health evaluation.

8. The lower court erred in summarily denying Mr. Gilliam's claim that he was denied the use of material exculpatory evidence through either state misconduct or defense counsel's ineffectiveness.

9. The lower court erred in summarily denying Mr. Gilliam's claim that defense counsel was ineffective for not requesting a jury instruction that epileptic seizures can negate specific intent.

10. Admission of improper hearsay evidence denied Mr. Gilliam's right to confront the evidence against him.

11. The penalty phase instructions improperly shifted the burden to Mr. Gilliam to prove that the sentence of death was inappropriate.

12. Mr. Gilliam's sentence rests upon an unconstitutional automatic aggravating circumstance.

13. The sentencing court's consideration of non-statutory aggravating circumstances violated Mr. Gilliam's rights under the Eighth and Fourteenth Amendments.

14. The lower court erred by summarily denying Mr. Gilliam's claim that, as a result of defense counsel's ineffectiveness, the court improperly used Mr. Gilliam's "statutory rape" conviction as a prior violent felony aggravating factor.

15. Mr. Gilliam's jury was repeatedly instructed by the court and the prosecutor that it's role was merely "advisory". The jury's sense of responsibility was unconstitutionally diminished by the misleading comments and instructions regarding the jury's role. Mr. Gilliam is entitled to a new penalty phase proceeding. Defense counsel without tactic or strategy failed to object to these repeated violations and thereby rendered prejudicially deficient performance.

16. The jury in Mr. Gilliam's penalty proceedings was erroneously instructed on the vote necessary to recommend a sentence of death or life. The lower court erroneously throughout the proceedings informed Mr. Gilliam's jury that, even to recommend a life sentence, its verdict had to be by a majority vote. Florida law is not that a majority vote is necessary for

the recommendation of a life sentence; rather, a six-six vote, in addition to a majority vote of seven-five or greater, is sufficient for the recommendation of life.

17. The judge refused to recognize mitigating circumstances that were present. Under the requirement that a capital sentencer fully consider and give effect to the mitigation, the sentencing court's refusal to consider the mitigating circumstances which were established was error.

18. The lower court erred by summarily denying Mr. Gilliam's claim that he was denied a fair trial as a result of the bailiff's improper and impartial conduct.

19. The lower court improperly instructed the jury on the prior violent felony and heinous, atrocious or cruel aggravating circumstance.

20. Mr. Gilliam was denied access to public records.

21. Mr. Gilliam's statement was obtained illegally in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

22. The warrantless seizure of physical evidence from the truck in Mr. Gilliam's possession and control and admission of the evidence at trial violated of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

ARGUMENT

ARGUMENT I

THE LOWER COURT ERRED IN SUMMARILY DENYING MANY MERITORIOUS CLAIMS.

Although the lower court granted an evidentiary hearing limited to a portion of Mr. Gilliam's penalty phase ineffective assistance of counsel claim, the court summarily denied the remainder of Mr. Gilliam's claims. The court erred. A Rule 3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1987); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986).

For example, where, as here, a Rule 3.850 litigant presents a well-pled claims contending that defense counsel failed to investigate and present mitigation evidence (See Argument II, III) and evidence of involuntary intoxication (See Argument VII), an evidentiary hearing is required.

Additionally, where, as here, a capital post-conviction Rule 3.850 litigant presents properly pled claims demonstrating that mental health evaluations conducted at the time of trial were professionally inadequate, and that a far more favorable result on mental health issues relating to sentencing would have resulted from the evaluations of mental health professionals who were provided with critically needed background information about the client (Argument VI), an evidentiary hearing and Rule 3.850 relief are appropriate. See State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987). Cf. Mason v. State,489 So. 2d 743 (Fla.

1986)(emphasizing importance of the source of the examining expert's information).

Further, where, as here, a Rule 3.850 litigant presents claims demonstrating a violation of Brady v. Maryland, 373 U.S. 83 (1963) (See Argument VIII), an evidentiary hearing is warranted. See e.g. Squire v.State, 513 So. 2d 138, 139 (Fla.1987). Numerous other of Mr. Gilliam's claims also required an evidentiary hearing because the files and records in this case do not conclusively rebut Mr. Gilliam's allegations. The trial court's denial in this case is contrary to law.

ARGUMENT II

DEFENSE COUNSEL WAS INEFFECTIVE AT THE PENALTY PHASE WHEN COUNSEL FAILED TO PRESENT CERTAIN MITIGATION EVIDENCE AND EVIDENCE CHALLENGING THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCE THAT COUNSEL LATER PRESENTED AT THE SENTENCING HEARING.

Defense counsel called no witnesses at the penalty phase (R. 2661). However, weeks later at the sentencing hearing before the trial court, defense counsel presented a wealth of significant mitigating evidence which Appellant's jury never heard.[1] At the sentencing hearing, defense counsel presented five family members and Dr. Syvil Marquit who testified about Appellant's tragic

[1]During the guilt-innocence phase of the trial, some mitigation evidence was presented. Several of Mr. Gilliam's family members testified that, as a child, Mr. Gilliam was physically abused by his father and stepfather (R. 1838, 1840, 1842, 1869, 1894). Evidence also was presented in the guilt-innocence phase that Mr. Gilliam had used drugs in the past and possibly was an alcoholic (R. 1974, 2001). Mr. Gilliam testified that he was drunk on the night in question (R. 1925, 1929, 1931).

childhood and adult life and the changes Appellant had made in recent years. Defense counsel also presented forensic pathologist Dr. Ronald Reeves, who testified concerning the alleged heinous, atrocious and cruel aggravating circumstances.

Dr. Marquit gave an overview Appellant's life, his upbringing, his life as an adult and his present mental and emotional state. Dr. Marquit testified that Appellant was mistreated by his father who was an alcoholic (R. 2846). He stated that Appellant's parents separated after Appellant's younger siblings were born and that Appellant's mother was emotionally unstable and incapable of raising and controlling her children (R. 2846). He stated that Appellant's mother had to work long hours which kept her out of the house for many hours throughout the day and, as a result, Appellant had received very little parenting. Appellant, being the oldest sibling, was left to take care the other children and consequently took the blame if anything went wrong (R. 2847). Appellant was a very sickly child and suffered from a variety of medical problems. Appellant suffered from several infectious diseases, heart murmur, and an early learning disability (R. 2848).

Appellant's 17-year-old nephew, Lloyd Franchese, testified that Appellant had helped him through a troublesome period after Lloyd's father was killed and Lloyd began to have trouble with his mother and wanted to drop out of school (R. 2878). Lloyd testified that Appellant's advice had turned his life around (R. 2880-81). The jury was never aware of the powerful and positive

influence that Appellant had upon his nephew and how this influence had made a great difference in this young man's life. Lloyd Franchese also testified that Appellant was like a father to him (R. 2880-82).

Appellant's sister, Erleni Salem, testified that their mother was not home "much of the time" to supervise her brother Burley Gilliam and the other children. She testified that their mother worked during the day and evenings and "partied the times she wasn't home" (R. 2886). Ms. Salem described how Appellant was the saving grace for her son Lloyd after her husband's death (R. 2888-89).

More compelling mitigation that the jury never heard was presented to the lower court when Appellant's sister, Cecil Faye Beagle, testified how Appellant had made a positive impact in her life. She described how Appellant had persuaded her to stop physically abusing her children (R. 2896-97). Ms. Beagle also testified that Appellant was a motivating force in her life. Appellant had convinced her that even though she was an adult, that it was not too late for her to learn how to read and write and this prompted her to start her own business (R. 2897-99). Further, Ms. Beagle testified that by utilizing Appellant's advice she was able to convince her son to go back to school after dropping out (R. 2899-2901).

Appellant's mother, Ludine Wilkins, testified concerning Burley Gilliam's health problems as a child, his poor school

performance and her inability to develop a close relationship to Appellant when he was a child (R. 2915-17).

Finally, Mrs. Cindy Gilliam described how she met and married Appellant while he was in prison and attested to the sensitive and compassionate man she met on death row (R. 2924-28).

Also at the sentencing hearing, defense counsel presented the testimony of Dr. Ronald Reeves, M.D., an expert in forensic pathology. Dr. Reeves testified that, based on his extensive review of the evidence, it was entirely possible that the victim was rendered unconscious before the injuries to her genital area were inflicted (R. 2825-26). According Dr. Reeves, the victim showed evidence of "severe trauma" of the head (R. 2799-2801). In Dr. Reeves' expert opinion, this head trauma could have rendered the victim unconscious (R. 2814, 2807). The medical examiner who had conducted the autopsy testified that she could not determine whether or not the victim was conscious when the injuries were inflicted (R. 1690). The jury had the benefit of neither Dr. Reeves' testimony, nor the additional substantial mitigation evidence when it recommended that Appellant be put to death.

At the evidentiary hearing, defense counsel explained why he failed to present this compelling evidence to the jury during the penalty phase. He testified that no matter what evidence he put before the jury, he felt the jury was not going to return a life recommendation (R. 70). Defense counsel testified that "in

essence [he] gave up on the jury"(Id.). He testified that the decision to present mitigation evidence only to the judge and not to the jury was not a "tactical decision," but "a desperate attempt to get a life recommendation" (R. 71). Defense counsel's decision not to present mitigating evidence to the jury was a not sound strategy and severely prejudiced Appellant. See Strickland v. Washington, 104 S. Ct. 2052 (1984).

Defense counsel testified to the following pertinent facts concerning his representation of Appellant during the penalty phase:

> Q [POST-CONVICTION COUNSEL] The question is, how did your trial strategy and what you attempted to do at trial impact on your decisions that you made during penalty phase?
>
> A [MR. KOCH] Okay. Well the rulings made by the Court in the first phase impacted the second phase, because what it did was in essence shrunk (sic) the entire defense. After making an opening statement, promising to show certain things to the jury, court rulings during the trial made it impossible for me to, from an evidentiary standpoint substantiate representations I had made in opening statement. As a result, Burley Gilliam was convicted. It was obvious to me in context of what occurred during the trial, and from my sense of the jury, that they were not highly to be (sic) receptive to mitigation evidence that we had for penalty phase. In other words, it was obvious to me at that point, at least I sensed, that the jury was likely to return a death recommendation.
>
> Q And so your sense was that no matter what you put before the jury, that they were not going to return a life recommendation?
>
> A Correct.

Q Was your sense of the jury, was your sense of the jury a tactical decision or was it a strategic decision?

A No, not really. In the context of what happened, I just in essence gave up on the jury, and again, there may, this is somewhat out of context because we don't have a two week trial and you don't have the sense of what the jury was non verbally conveying to me, but in essence, I gave up on the jury, in the sense that I didn't feel in light of what had gone on before that there was much likelihood that they would be receptive to mitigation testimony, and that they would probably return a death recommendation.

Q Why did you call Dr. Marquet, (phonetic) Dr. Reeves and the family members to testify in [front] of the court before sentencing?

A Well, in essence, I had this mitigation evidence. I felt that it was not going to be receptively interpreted by the jury. So I had to present it to someone. And obviously in this situation the judge was the last, in essence the last resource in an attempt to present mitigation on behalf of Burley Gilliam.

Q At one point the court asks you why you elected to put on so much evidence after the jury was discharged and you cited Cooper v. State. What did you mean when you were making that argument to the Court?

A Well, in essence the court has the ultimate decision on it the penalty to be imposed. So [whether] mitigation evidence was presented to a jury or not the ultimate decision was going to be made by the Court. So what I was asking the court was permission to present that mitigation to the Court directly.

Q So in essence you were trying to persuade the Court to sentence Mr. Gilliam to life?

A Yes.

> Q But when you were making that argument, did you offer that argument as a strategic reason why he didn't put on any evidence in front of the jury?
>
> A No, there was no tactical decision involved. I mean, I was in a situation where we had a conviction. We had a jury that was very hostile to Burley. We had mitigation. And this had to be presented to someone. So, in a sort of a desperate attempt to get a life recommendation, I presented this to the judge.

(R. 69-71).

Appellant was deprived of a reliable and meaningful penalty phase proceeding before the sentencing jury, "a co-sentencer." Johnson v. Singletary, 612 So. 2d 575, 576 (Fla. 1993). There was no reasonable strategy not to present the readily available mitigation to the jury.

Under Florida's death penalty scheme, the jury is a co-sentencer and the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life or death. See Espinosa v. Florida, 505 U.S. 1079, 1082 (1992); Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). "Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances." Espinosa, 505 U.S. at 1082. Furthermore, it must be presumed that the trial court followed the law and gave "great weight" to the jury's recommendation. See Id. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death must be so clear

and convincing that no reasonable person could differ. See Tedder v. State, 322 So. 2d 908 (Fla. 1975).

Here, defense counsel's decision not to present to the jury the mitigating evidence and Dr. Reeves' testimony challenging the heinous, atrocious and cruel aggravating circumstances was deficient performance. Defense counsel effectively "threw in the towel" with respect to the jury recommendation, a recommendation that the trial court by law necessarily had to give "great weight" in determining what sentence to impose. The jury's death recommendation gave the trial court no other choice but to sentence Appellant to death. Tedder. There was nothing to lose by presenting mitigation evidence to the jury. Defense counsel's decision to "give up" on the jury destroyed any reasonable possibility of Appellant receiving a life sentence.

Defense counsel's reasoning for not presenting this critical evidence to the jury was that defense counsel believed that no matter what evidence he presented to the jury, the jury was going to come back with a death recommendation. This does not constitute acceptable trial strategy because such a tactic is necessarily premised on the incorrect belief that the jury's recommendation had no influence whatsoever on the court. Counsel did not know or understand the significance of the jury's recommendation in terms of its legal effect ("great weight") on the court's ultimate decision.

Defense counsel had nothing to lose by presenting this available penalty phase evidence. In other words, there was no

strategic advantage not to present this evidence. To the contrary, by not presenting the evidence defense counsel had available, counsel, for no strategic reason, conceded a crucial part of the sentencing equation - the jury's recommendation that the trial judge must give great weight.

Defense counsel's decision to literally "give up" on the jury's recommendation by foregoing the presentation of substantial mitigation evidence and powerful evidence challenging the heinous, atrocious or cruel aggravator cannot be minimized on the ground that defense counsel later presented the evidence to the trial judge. If there is a reasonable basis in the record to support the jury's recommendation, an override is improper. See Ferry v. State, 507 So. 2d 1373 (Fla. 1987). Had the jury heard the evidence and recommended life, an override by the trial court would have been improper. The evidence would have constituted a reasonable basis to support a life recommendation from the jury and would have prevented a lawful override by the lower court.

Apparently, defense counsel did not know the law. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989), or on the failure to properly investigate and prepare. See Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc); Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989); Kimmelman v. Morrison, 477 U.S. 365, 384-88 (1986).

This Court must apply a reasonableness standard in evaluating whether Appellant's counsel was effective. Strickland

at 2064; Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991)("...counsel's performance must be evaluated for `reasonableness under prevailing professional norms'"). "[M]erely invoking the word strategy to explain errors [is] insufficient since..." decisions must be assessed for reasonableness. Horton at 1461. Case law rejects the notion that a "strategic" decision can be reasonable when the attorney failed to understand the legal consequences of his decisions. See Kimmelman v. Morrison, Chambers v. Armontrout, Nixon v. Newsome.

The prejudice to Appellant is overwhelming. The jury was never made aware of significant mitigation evidence. It is precisely the kind evidence presented at the sentencing hearing before the trial court that the United States Supreme Court had in mind when it wrote Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982). The Locket Court was concerned that unless the sentencer could consider "compassionate and mitigating factors stemming from the diverse frailties of humankind," capital defendants will be treated not as unique human beings, but 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). The evidence would have made a difference between life and death in Mr. Gilliam’s case.

Similarly, the fact that the jury never learned that, in Dr. Reeves' expert opinion, the victim suffered severe head trauma

and could have been unconscious at the time the other injuries were inflicted, prejudiced Appellant. Had the jury heard this evidence, there is a reasonable probability that it would have rejected the heinous, atrocious and cruel aggravator. Furthermore, during closing arguments in the penalty phase, the prosecutor argued that the victim had to have been conscious at the time the injuries were inflicted and that, moreover, defense counsel had presented no evidence to suggest otherwise:

> Now, I expect that defense counsel will try to argue before you that perhaps she was unconscious and therefore it was not heinous, atrocious or cruel. It is an interesting theory, Ladies and Gentleman. But, as everything else must be documented by evidence, so must that. And, there is the total absence of any evidence to suggest that.
>
> It is the job of a juror not to allow either counsel to urge speculation in those matters. And, His Honor has already instructed you that you must turn to the evidence in the case, upon which you reach a decision.
>
> When you look at the injuries of Joyce Marlow[e], when you consider the order and the nature in which they were inflicted, when you consider the fact that the defendant did not simply murder Joyce Marlowe, but, that he raped her and he raped her viciously, and, when you consider the fact that the last injury had to be the strangulation, then you realize that there is no way in which Joyce Marlow could possibly have been unconscious when those injuries were inflicted.

(R. 2679-80[2]). The prosecutor effectively pointed out to the jury that there had been presented no evidence that the victim could

[2] Original transcript pages 55 and 56, which correspond to trial record pages 2679 and 2680, are out of sequence with respect to the other original transcript pages.

have been unconscious. Yet, the prosecutor agreed that it was an "interesting theory" and never suggested that the HAC aggravator would still be applicable if she had been unconscious. See Herzog v. State, 429 So. 2d 1372, 1379-80 (Fla. 1983); see also Jackson v. State, 451 So. 2d 458 (Fla. 1984). The prosecutor's argument added more prejudice to defense counsel's failure to present to the jury Dr. Reeves compelling testimony.

Defense counsel failed to counter the State's case on this issue at the penalty phase. Even though defense counsel could have presented evidence to the contrary, the jury was given no reason to believe it possible that the victim was unconscious at the time that injuries were inflicted and, therefore, did not suffer. The jury could have used such evidence to conclude that the State had failed to establish the victim was conscious at the time the injuries were inflicted and, therefore, failed to conclude that the victim suffered. There is a reasonable probability that, had defense counsel presented this evidence to the jury, the outcome would have been different.

Since Appellant's penalty phase jury never heard this critical evidence challenging the heinous, atrocious and cruel aggravator, as well as the substantial additional mitigation evidence, an adversarial testing did not occur. Confidence in the jury's recommendation, and resulting sentence imposed by the court are undermined.

Upon showing deficient performance, "[t]he defendant must show that there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland at 2068 (Emphasis added). In other words, it is not necessary that Appellant show that the outcome of his guilt/innocence or sentencing phases would have been different; instead, he need only show that confidence in the outcome is undermined.

"In every case [this] [C]ourt should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." Strickland at 2069. That is, "an ineffectiveness claim...is an attack on the fundamental fairness of the proceeding whose result is challenged." Strickland at 2070. "[It]...is not to grade counsel's performance." Strickland at 2069.

"...[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceedings." Strickland at 2063 (Emphasis added). If no adversarial testing occurs, the proceedings are unfair as the result of ineffective assistance of counsel. With the wealth of significant sentencing evidence not presented to the jury, the confidence in the outcome has been undermined. Strickland at 2068.

Confidence in the outcome of Appellant's case is undermined as the result of compelling evidence not having been introduced at the penalty phase. An adversarial testing did not occur to insure a fundamentally fair outcome. Since an adversarial testing did not occur, this Court should find counsel was ineffective.

ARGUMENT III

THE LOWER COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM THAT DEFENSE COUNSEL FAILED TO INVESTIGATE AND PRESENT ADDITIONAL MITIGATION EVIDENCE.

Defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The Supreme Court has held that, in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976)(plurality opinion).

Although the lower court granted an evidentiary hearing on Appellant's claim that defense counsel was denied the effective assistance of counsel at the penalty phase of the trial, the lower court limited the hearing to the narrow issue of defense counsel's decision not to present at the penalty phase the specific witnesses he subsequently presented to the trial judge at the sentencing hearing (See Argument I). At the evidentiary hearing, the lower court refused to permit post-conviction counsel to call two mental health experts who would have

testified that they were available to testify at Appellant's trial and that, at the time of the offense, Appellant suffered organic brain damage and other psychological problems and was dependent on speed, cocaine, alcohol and marijuana. These experts also would have testified that Appellant had suffered from physical abuse, abandonment, and poverty to the point of starvation. The lower court erred in refusing to grant a hearing on defense counsel's failure to adequately investigate mitigation. A Rule 3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; e.g. Lemon v. State, 498 So. 2d 923 (Fla. 1987).

In Appellant's Rule 3.850 motion, he alleged that "defense counsel had failed to investigate and prepare for the penalty phase proceedings" and failed to "present [] readily available mitigation to the penalty phase jury":

> **A. TRIAL COUNSEL FAILED TO PRESENT MITIGATION WITNESSES TO THE JURY DURING THE PENALTY PHASE**
>
> 8. At the penalty phase before the jury, trial counsel failed to present any witnesses in Mr. Gilliam's behalf. Trial counsel relied solely on the defense closing argument in which he failed to specifically address aggravating and mitigating circumstances.[3] Trial counsel vaguely argued that the only consideration was the "protection of society" (R. 2690-95). However, counsel had failed to investigate and prepare for the penalty phase proceedings. As a result, he was unable to present the readily available mitigation to the penalty phase jury, the "cosentencer."

> Johnson v. Singletary, 612 So. 2d 575, 576 (Fla. 1993).
>
> 9. Three weeks after the jury's recommendation of death, trial counsel filed a motion for continuance of sentencing hearing in order to call family members and defense experts to testify before the trial court. Trial counsel explained his failure to present any penalty phase witnesses as an attempt to save the county money and that he had not determined who to call to testify during the penalty phase. Trial counsel further explained that at this late date in the sentencing process he was still undecided on who to testify on Mr. Gilliam's behalf.
>
> [3]Defense closing argument only covered six pages of trial transcript.

(PC-SR. 204)(Emphasis added).

Appellant further argued in his motion that defense counsel "failed [to] adequately investigate and present evidence of Appellant['s] long history of drug and alcohol abuse" (PC-SR. 222). He further asserted, "Because of counsel's failure to properly investigate and prepare for the penalty phase" counsel was deficient and prejudice resulted (PC-SR. 224). Post-conviction counsel reiterated this claim during argument at the Huff hearing: " . . . trial counsel failed to actively investigate and show evidence of Mr. Gilliam's long history of drug and child abuse" (PC-SR2. 154); ". . . Mr. Gilliam had a history of drug and alcohol abuse that was never put forward." (PC-SR2 Vol. ?, 168). Post-conviction counsel maintained:

> Because at an evidentiary hearing we may establish that there was more mitigation trial counsel would have put on from the various witnesses that he was ineffective for not properly investigating the case. He was ineffective for not giving proper information

> to the psychologists, the medical health experts they hired in this case. That he was ineffective for not looking into Mr. Gilliam's history of drug and alcohol abuse which was obvious within the record that Mr. Gilliam has a drug and alcohol problem.

(PC-SR2 170)(Emphasis added).

With the lower court's permission, post-conviction counsel filed a written proffer of the testimony of the two experts that the lower court refused to hear:

> 7. Mr. Gilliam submits the following factual proffer of evidence which would have supported Claim V in his amended motion for 3.850 relief:
>
> **THE PROFFER OF DR. HYMAN EISENSTEIN, PH.D**
>
> 8. Dr. Eisenstein would have testified that he is a psychologist and has extensive educational and practical experience in the field of neuropsychology. For other expert qualifications see Dr. Eisenstein's Curriculum Vitae at Appendix B.
>
> 9. Dr. Eisenstein would have testified that he was available to testify as an expert in neuropsychology at Mr. Gilliam's resentencing trial in 1988.
>
> 10. Dr. Eisenstein would have testified that he had examined, interviewed, and performed a battery of psychological tests for the purpose of determining statutory and non-statutory mitigation that may apply to Mr. Gilliam's capital case. He also interviewed family and friends of Mr. Gilliam's as well as reviewed background materials given to him by Mr. Gilliam's attorneys. See background materials proffered into evidence at Mr. Gilliam's August 28, 1996 evidentiary hearing.
>
> 11. Dr. Eisenstein would have testified that neuropsychological testing revealed that Mr. Gilliam suffers from organic brain damage. Mr. Gilliam also suffers from a whole host of other psychological problems.

As a child, Mr. Gilliam suffered from horrific physical abuse, abandonment, and poverty to the point of starvation. As an adult M. Gilliam suffered from an extensive history of drug and alcohol abuse up to the time of his arrest in 1982.

12. Dr. Eisenstein would have testified due to Mr. Gilliam's organic brain damage and history of emotional and psychological problems, that at the time of the crime, Mr. Gilliam was under the influence of extreme mental or emotional disturbance and his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired.

PROFFER OF DR. MILTON EARL BURGLASS, M.D.

13. Dr. Burglass would have testified that he is a psychiatrist and has an extensive educational and practical experience in the field of psychiatry and addictive medicine. Among numerous academic appointments, Dr. Burglass is a member of the Clinical and Research Faculty at the Zinberg Center for Addiction Studies. (For other expert qualifications see Dr. Burglass' Curriculum Vitae at Appendix C.)

14. Dr. Burglass would have testified that he was available to testify as an expert in addiction medicine at Mr. Gilliam's 1988 resentencing.

15. Dr. Burglass would have testified that he had interviewed Mr. Gilliam for the purpose of evaluating Mr. Gilliam's drug history and he examined background materials given to him by Mr. Gilliam's counsel.

16. Dr. Burglass would have testified that Mr. Gilliam has a floridly positive polydrug history. Based upon Mr. Gilliam's clinical history, at the time he was arrested in 1982, he unequivocally would have met the criteria for (1) Speed Dependence (2) Cocaine Dependence, (3) Alcohol Dependence, and (4) Marijuana Dependence as understood and defined by the American Society of Addiction Medicine, the American Psychiatric

> Association, Alcoholics Anonymous, and Narcotics Anonymous.
>
> 17. Dr. Burglass would have testified that Mr. Gilliam began drinking and smoking marijuana in his teens. In his adult life (beginning in 1977) and up to the time of his arrest, Mr. Gilliam abused Speed. In the beginning Mr. Gilliam would pop pills (Biphetamine 120). Later, Mr. Gilliam smoked biphetamine and methamphetamine. Mr. Gilliam would also mix cocaine and speed together and use a syringe to shoot-up the drugs in his arm. Sometimes Mr. Gilliam would snort the cocaine by itself.
>
> 18. During this period in Mr. Gilliam's life, he would drink beer and Jack Daniels while high off of cocaine and speed. Family members and friends reported seeing Mr. Gilliam drinking and drugging three or four days without sleep. Mr. Gilliam would also shoot-up a mixture of cocaine and heroin. This mixture is called Speedball.
>
> 19. Mr. Gilliam also maintained his drug addiction by using an assortment of psycho stimulants, hypnotics and hallucinogens: Quaaludes, Mushrooms, Acid, Black Marleys and other drugs. This hard drug use increased in intensity from 1977 to the date of Mr. Gilliam's arrest in 1982.

(PC-SR. 378-380). Although the defense had presented during the guilt-innocence phase some evidence suggesting Mr. Gilliam had a drug and alcohol problem (R. 1925, 1974, 2001), it is clear from the proffered testimony that much more substantial evidence existed that defense counsel failed to present. This evidence went towards establishing the extensive nature of Mr. Gilliam's substance abuse (the severity of which was not reached in the guilt-innocence phase testimony), both in the past and at the time of the offense.

The lower court's decision to deny an evidentiary hearing on this issue was erroneous. The lower court included in its written order denying the Rule 3.850 motion the court's reason for denying an evidentiary hearing on defense counsel's failure to effectively investigate and present evidence of mental health and drug abuse[3]:

> During the evidentiary hearing, defense counsel for Mr. Gilliam, attempted to call certain mitigation witness(sic) to testify before the Court. The Court did not allow these witnesses to testify for two reasons. First, it was previously determined that the only evidence which could be presented at the evidentiary hearing would be that pertaining to trial counsel's failure to present witnesses before the "recommending jury". This was made absolutely clear to the attorney's for both sides. Second, witnesses excluded at the evidentiary hearing, had absolutely nothing to do with the first trial, but rather were people who Mr. Gilliam felt might be in a position to offer mitigation for him at the present time. In other words, the defense made no showing

[3]Post-conviction counsel reasonably believed that, pursuant to the lower court's written order in which the court ruled that the files, records and pleadings did not demonstrate that an evidentiary hearing was not required on the issue of "Ineffective Assistance of Counsel During Penalty Phase" (PC-SR. 336), the court had granted an evidentiary hearing on the issue of defense counsel's failure to investigate, discover, and present mental health, background and drug dependency evidence. However, at the evidentiary hearing, the court clarified that, in its oral ruling of September 22, 1995 (PC-SR2, 199-208), it had limited the evidentiary hearing to the single issue of defense counsel's failure to call at the penalty phase the exact same witnesses who defense counsel later called to testify at the sentencing hearing. The court consequently refused to allow post-conviction counsel to present the testimony of Dr. Eisenstein and Dr. Burglass, witnesses who did not testify at the sentencing hearing. The court, therefore, effectively denied Appellant an evidentiary hearing on the issue of defense counsel's failure to investigate and discover mental health and drug dependency mitigation.

> whatsoever that these witnesses, were available at the sentencing phase proceeding, or that trial counsel . . . even knew of their existence.[footnote omitted] It was for these reasons that the Court did not allow these people to testify and that were not properly before the Court at this hearing.

(PC-SR. 365-366)(Emphasis added). The lower court misunderstood Appellant's claim as evidenced by the court's finding that Appellant sought to present the two experts at the evidentiary hearing merely to establish current available mitigation. As the proffers indicate, these experts would have testified to Appellant's mental condition and drug dependence at the time of the offense, as well as in the past (PC-R. Vol.10, 86)(PC-SR. 378-380). Further, contrary to the lower court's finding, Mr. Gilliam quite clearly claimed in his Rule 3.850 motion that this evidence was available:

> [C]ounsel failed to investigate and prepare for the penalty phase proceedings. As a result, he was unable to present the **readily available** mitigation evidence to the penalty phase jury . . . .

(PC-SR. 204). Moreover, the proffer explicitly states that both Dr. Eisenstein and Dr. Burglass would have testified that they were available to testify at Appellant's trial. (PC-SR. 378, 379).

The record does not conclusively show that Mr. Gilliam is entitled to no relief. Mr. Gilliam should have been afforded an evidentiary hearing on defense counsel's failure to investigate, discover and present available mitigation evidence.

ARGUMENT IV

THE LOWER COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR OPENING THE DOOR TO ALLEGED FACTUAL CIRCUMSTANCES OF PRIOR RAPE CONVICTION.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 668 (citation omitted). Strickland v. Washington requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice. In his Rule 3.850 motion, Mr. Gilliam pled each. Given a full and fair evidentiary hearing, he can prove each. He is entitled, at a minimum, to an adequate evidentiary hearing on these claims.

Each of the errors committed by Mr. Gilliam's counsel is sufficient, standing alone, to warrant Rule 3.850 relief. Each undermines confidence in the fundamental fairness of the guilt-innocence determination. The allegations are more than sufficient to warrant a Rule 3.850 evidentiary hearing. See O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Lemon v. State, 498 So. 2d 923 (Fla. 1987).

Mr. Gilliam asserted in his Rule 3.850 motion that defense counsel was ineffective when counsel "opened the door to the Texas rape conviction allowing the State to use the rape conviction as improper Williams rule evidence" (PC-SR. 190). Defense counsel's deficient performance permitted the State to

present to the jury during the guilt-innocence phase evidence that Mr. Gilliam violently raped a fifteen year-old girl in 1969.

During opening statement, defense counsel told the jury that Mr. Gilliam was convicted of "statutory rape" by having sex with his underage girlfriend and was sentenced to fifteen years in the Texas State Prison (R. 1150-51). Later, defense counsel placed Mr. Gilliam on the witness stand and allowed him to testify he had been convicted in Texas for "statutory rape" for having sex with his fifteen year-old girlfriend. (R. 1919-20). In rebuttal, the State called Detective Poe, formally of Dallas Police Department. Detective Poe testified that he investigated the Texas case and that the rape victim "had bruise marks on her neck and . . . a black eye" (R. 2427)(Emphasis added). Poe also indicated that Mr. Gilliam committed the rape in a field (R. 2428).

But for Mr. Gilliam's testimony that the Texas rape conviction was merely the result of consensual sex with his minor girlfriend, the State could not have presented to the jury during the guilt-innocence phase Detective Poe's testimony detailing the alleged violent nature of the Texas crime. The State took full advantage of this highly damaging evidence, evidence that, as a result of his deficient performance, defense counsel handed to the State on a silver platter.

Defense counsel's mistake not only exposed Mr. Gilliam to devastating impeachment, but also opened the door for the State utilize the evidence as improper "Williams Rule" evidence and

suggest that Mr. Gilliam must be guilty because he had committed a similar crime in the past. On cross-examination, the prosecutor asked Mr. Gilliam regarding the Texas conviction, "[I]sn't it true . . . you dragged her into a field, you choked her unconscious, you left her with a black eye and then you fled the scene?" (R. 1940) and "Do you remember leaving Vida Lester unconscious with choke marks to her neck and a black eye?" (R. 1941). This line of questioning continued:

> Q [Prosecutor]. Where did you go in August of 1976 when you were released from prison for the rape of Vide Lester?
>
> A [Mr. Gilliam]. You mean for the statutory?
>
> Q. For the incident in which Vida Lester was choked unconscious and suffered bruises, particularly in the area of her face, for which you did seven years, seven months and seven days.
>
> That incident Mr. Gilliam.

(R. 1945-6)(Emphasis added). The prosecutor's questions pointedly and deliberately directed the jury's attention to similarities between the facts of the Texas case as alleged by Detective Poe (the victim had allegedly been choked on her neck to the point of bruising, the incident occurred outdoors and Mr. Gilliam allegedly then fled) and the instant case (the victim was strangled, the incident occurred outdoors, and Mr. Gilliam allegedly fled the area). In closing arguments during the guilty-innocence phase, the prosecutor argued:

> Do you remember the opening statement in this case? Do you remember the characterization and the testimony of the defendant as it related to the issue that

> [defense counsel] most certainly had to concern himself with?
>
> Do you remember the testimony of Detective Poe? Do you remember the name Vida Lester? One very salient fact exists with respect to the commission of **these crimes**.
>
> The defendant tells you that he suffered a blow to the head. He claims it happened by several, 14 or 15 I believe, inmate guards -- the record suggests that he got into an argument with an inmate and got kicked. But accept whatever version you want, and that after that point in time he began to suffer seizures.
>
> Well, that was 1971, ladies and gentleman, and Vida Lester was sexually battered in 1969, January 7.
>
> The defendant tried to convince you that that was a consensual act.
>
> If you believe that, then you should probably consider all of his testimony as truthful.
>
> If you don't believe that, then the law as his Honor already instructed you will tell you that you must question all of his testimony. And all of his representations.

(R. 2772-3)(Emphasis added). The State was able to impeach Mr. Gilliam with Detective Poe's testimony and cast serious doubt over the entire defense by arguing to the jury that, while Mr. Gilliam is claiming epilepsy as an excuse this time, he did not have epilepsy when he committed a similar violent rape against Vida Lester in 1969. Therefore, the logic follows, his epilepsy defense must be a complete sham. But for defense counsel’s deficient performance, the State could not have made this argument.

Furthermore, at the penalty phase, the State was able to emphasize the alleged specifics of the Texas rape, specifics that the State would not have presented but for defense counsel's opening the door:

> [Prosecutor] But, this was not a consensual act on the part of the victim; quite the contrary, that this was the actions of the defendant who accosted a young girl at the age of 15, who took her into a field during which time she was choked and --
>
> [Defense Counsel]: Let me object, let me object.
>
> [Prosecutor] -- and suffered a black eye.

(R. 2674). The State would not have called Detective Poe to testify had defense counsel not opened the door during the guilt-innocence phase. The State contacted Detective Poe for rebuttal purposes only after Mr. Gilliam testified (R. 2396-2400). Therefore, defense counsel’s blunder further prejudiced Mr. Gilliam by giving the State more ammunition to use against him at the penalty phase.

The lower court summarily denied this claim, concluding that defense counsel's decision to assert that the Texas conviction was merely the result of consensual sex with a minor "was a strategic call . . . and was not a decision which fell below acceptable professional standards" (PC-SR 336). This was error. The record does not conclusively establish that Mr. Gilliam is not entitled to relief on this issue. The record does not at all support the finding that defense counsel's action constituted reasonable trial strategy.

At trial, defense counsel admitted he did not know about the report relied on by Detective Poe detailing the violent nature of the Texas rape (R. 2404-05). Yet, as the prosecution suggested, he should have known that there was evidence that the Texas prior was not a "statutory rape" case but, instead, a case of forceful, violent rape. When defense counsel argued that the State's evidence concerning the circumstances surrounding the prior conviction constituted a discovery violation, the prosecutor countered:

> [Prosecutor]: We would suggest to this Court that Defense counsel had to know that Mr. Gilliam's account of what happened in Texas was subject to dispute, and we point out the Defense counsel, in their case, has gone to Texas on certain occasions. The file in [the Texas case] is easily obtainable in Texas.
>
> . . . an attorney of [defense counsel's] competence would have r[e]viewed the file and we feel certain that he did, since, one, he knew that the State would be using this prior conviction as an aggravating circumstance during the penalty phase and therefore would obviously seek to find out any evidence to mitigate the effect of this evidence during the penalty phase.
>
> Secondly, if [defense counsel] was relying on Mr. Gilliam's statement to him that it was consensual sex, he surely would have felt a need to review this file to find out if there are any witnesses to confirm what Mr. Gilli[am] was saying.

(R. 2401-02). This is an accurate analysis by the prosecutor. The prosecutor noted that the State had in its possession since before the first trial the file of the Texas case and that "[e]verything in that file indicates that the defendant violently raped a 15-year-old who was a complete stranger to him" (R.

2393). The State had even used the prior conviction as a prior violent felony aggravator in Mr. Gilliam's first trial (R. 2394). According to the prosecution, the report detailing the allegations had been "in the custody of the Defense since the early stages of the first trial" (R. 2403). Defense counsel represented Mr. Gilliam for a time on this case prior to his first trial (R 2411).

Therefore, the State has already taken the position that defense counsel should have known that the State had evidence that the prior conviction arose out of a violent rape in which the victim was choked and bruised. Before telling the jury that the prior conviction was the result of nothing but consensual sex with a minor, defense counsel had the duty to investigate the circumstances surrounding the conviction. The record strongly indicates deficient performance. Nothing in the record supports the lower court's conclusion that this was reasonable trial strategy. Such a determination cannot be made absent a hearing on this issue.

Defense counsel's decision to affirmatively portray the conviction as simply the result of consensual sex with a fifteen year-old girlfriend was devastatingly prejudicial to Mr. Gilliam. The record does not conclusively establish that defense counsel's actions fell within the realm of acceptable trial strategy. As the prosecutor argued, defense counsel should have known that there existed evidence that it had been anything but consensual. If defense counsel failed to investigate and learn this

information, he was ineffective. It he knew of it but elected to present the "statutory rape" claim anyway, there is no apparent acceptable strategic advantage for doing so. If defense counsel had a strategy, sound or unsound, it is unknown. Only through an evidentiary hearing can this matter be determined.

ARGUMENT V

THE LOWER COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM THAT DEFENSE COUNSEL WAS INEFFECTIVE BY FAILING TO ARGUE THE AGGRAVATING AND MITIGATING CIRCUMSTANCES AT ISSUE IN THE PENALTY PHASE.

Mr. Gilliam asserted in his Rule 3.850 motion that defense counsel was ineffective for failing to argue the aggravating and mitigating circumstances that were at issue in Mr. Gilliam's case during closing arguments of the penalty phase (PC-SR 221-2). Defense counsel's closing argument is less than six pages long (R. 2690-95). He argued in effect argued merely that the jury should decide whether to recommend life or death based merely on their own moral and religious beliefs and based on what they thought best would protect society (R. 2690-95).

Defense counsel’s attempt to persuade the jury to recommend a life sentence was anemic at best (R. 2690-95). Defense counsel stressed to the jury that life without the possibility of parole for twenty-five (25) years meant that Appellant would be in prison for at least twenty five years and no less (R. 2691-92) and asked the jury to recommend the punishment the jury believed appropriate to protect society (R. 2693-94). Defense counsel

only tangentially referred to the guilt-innocence phase mitigation "testimony of some of Burley's family members . . ." (R. 2690).

Counsel did not review, or even summarize, the facts regarding Mr. Gilliam's tragic childhood. In fact, defense counsel literally down-played the factual and legal importance of the mitigation evidence and instead told the jury that, in deciding whether to recommend death or life in prison, the jury must focus on protecting society from Mr. Gilliam:

> . . .much of what we want to present to you was presented to you through the testimony of some of Burley's family members, who testified earlier.
>
> I guess under the law, those are mitigating circumstances, it gives you an idea to learn a little bit about Burley. But, at this juncture, having found him guilty of First Degree Murder, frankly, the responsibility you have is to determine what is necessary to protect all of us, that includes everyone here in this Courtroom.
>
> * * * *
>
> Your responsibility at this juncture is to protect all of us.

(R. 2690)(Emphasis added). Rather than arguing the specific mitigating circumstances reflected in the guilt-innocence phase testimony, defense counsel asked the jury to rely on their own "personal, religious, and moral beliefs" in deciding the appropriate penalty:

> Now, at this juncture there is probably nothing I could say to you that would influence how you think about [life in prison without the possibility of parole for 25

> years] as an appropriate penalty or how you feel about the death penalty. We discussed that quite extensively before any of you were selected. And; in the time that is allotted to us, it is inconceivable that anything I say will alter the views that you have brought into the Courtroom concerning the appropriate penalty.
>
> **I guess** that is where the mitigating circumstances **sort of come in**.
>
> * * * *
>
> He will effectively be removed from us. And, as the prosecutor has stated, he has earned that. How much farther you as a jury should go in terms of your recommendation, depends upon your personal, religious, and moral beliefs. And, I don't even begin to believe that this is the appropriate forum to discuss that aspect of it.

(R. 2692, 2693)(Emphasis added). The crux of defense counsel's closing argument was that the jury should determine the appropriate recommendation based on the jury's "personal, religious, and moral beliefs." In effect, defense counsel invited the jurors to completely abandon their lawful duty to make a recommendation whether Mr. Gilliam lives or dies based upon the law and the evidence and, instead, decide the issue based on the juror's personal feelings on the general application of the death penalty.

Not only did defense counsel fail to mention any of the specific non-statutory mitigation evidence that had come out in the guilt-innocence phase of the trial, he did not argue against, or, even mention the State's asserted aggravating circumstances. Nor did defense counsel argue the two statutory mitigators that Dr. Stillman had determined existed (R. 2002), even though

defense counsel asked for, and received, instructions on these statutory mitigators. (R. 2695).

The defense's expert, Dr. Stillman, testified that, in his opinion, due to Mr. Gilliam's epileptic condition at the time of the homicide, Mr. Gilliam was not capable of telling the difference between right and wrong and did not know the nature and consequences of his actions (R. 2002). Trial counsel failed to argue, or even mention this critical evidence during closing arguments.

Defense counsel also failed to challenge the presence of alleged aggravating factors. By his silence, defense counsel conceded the "in the course of a felony" and the "heinous, atrocious and cruel" aggravating factors. Counsel's deficiencies, especially when considered in light of the other instances of ineffectiveness and error, allowed the jury to conclude that Mr. Gilliam should be sentenced to death.

ARGUMENT VI

THE LOWER COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM THAT DEFENSE COUNSEL WAS INEFFECTIVE BY FAILING TO INVESTIGATE AND DISCOVER EVIDENCE OF VOLUNTARY INTOXICATION.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 668 (citation omitted). Strickland v. Washington requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice. In his Rule 3.850 motion, Mr. Gilliam pled each.

Given a full and fair evidentiary hearing, he can prove each. He is entitled, at a minimum, to an adequate evidentiary hearing on these claims.

Each of the errors committed by Mr. Gilliam's counsel is sufficient, standing alone, to warrant Rule 3.850 relief. Each undermines confidence in the fundamental fairness of the guilt-innocence determination. The allegations are more than sufficient to warrant a Rule 3.850 evidentiary hearing. See O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Lemon v. State, 498 So. 2d 923 (Fla. 1987).

The lower court summarily denied Mr. Gilliam's claim that defense counsel failed to investigate, develop and present the defense of voluntary intoxication and failed to present evidence of intoxication to rebut the aggravating circumstance of premeditation. Mr. Gilliam alleged that substantial and valuable lay testimony as to Mr. Gilliam's intoxication at the time of the homicide was available but that this evidence was not developed for the jury to consider, nor made available to Mr. Gilliam's mental health expert (See Argument VII) (PC-SR. 195-7). Mr. Gilliam is entitled to an evidentiary hearing to establish this claim.

Mr. Gilliam has an extensive history of drug and alcohol abuse. Counsel could have used this evidence in a number of significant ways both at trial and sentencing but instead counsel ignored this area. Counsel failed to fully develop the defense of voluntary intoxication and failed to present evidence of

intoxication to rebut the aggravating circumstance of premeditation.

Florida law on the voluntary intoxication defense is clear and long-standing, dating from the 19th century. See Garner v. State, 28 Fla. 113, 9 So. 35 (Fla. 1891). "Voluntary intoxication is a defense to the specific intent crimes of first-degree murder and robbery." Gardner v. State, 480 So. 2d 91, 92-93 (Fla. 1985)(citations omitted). Voluntary intoxication could have been employed as a defense to Mr. Gilliam's first-degree murder charge and could have rebutted the necessary element of premeditation. Use of the intoxication evidence and an appropriate mental health expert would have prevented a verdict of first-degree murder on the premeditated murder theory. Prejudice from counsel's failure is clear because Mr. Gilliam could not have formed specific intent for premeditated murder. See Bunney v. State, 603 So. 2d 1270 (Fla. 1992).

In Strickland v. Washington, 466 U.S. 688 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 668 (citation omitted). Strickland requires a defendant to establish unreasonable, deficient attorney performance, and prejudice resulting from that deficient performance.

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); see also Chambers v.

Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc)(ineffective assistance in failure to present theory of self-defense); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978). This error also violates defendant's right to present a meaningful defense.See Crane v. Kentucky, 476 U.S. 683 (1986). Failure to present a defense that could result in a conviction of a lesser charge can be ineffective and prejudicial. Chambers. Substantial and valuable lay testimony as to Mr. Gilliam's intoxication was available. This important evidence was not developed for the jury or for consideration by the mental health expert. Confidence is undermined in the outcome by counsel's deficient performance. As explained in Strickland v. Washington, 466 U.S. 668 (1984), a defendant need not show more likely than not, merely a reasonable probability. 466 U.S. at 6934. Mr. Gilliam should be granted an evidentiary hearing on this claim.

ARGUMENT VII

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. GILLIAM'S CLAIM THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBTAIN A COMPETENT MENTAL HEALTH EXPERT TO CONDUCT A PROFESSIONAL AND COMPETENT MENTAL HEALTH EVALUATION.

Mr. Gilliam asserted in his Rule 3.850 motion that defense counsel failed to obtain a competent mental health expert to conduct an appropriate examination and to assist in evaluation, preparation, and presentation of the defense. See Ake v. Oklahoma, 105 S. Ct. 1087 (1985). Appellant asserted in his motion:

> 9. Here, trial counsel never obtained a competent mental health expert where clearly Mr. Gilliam had a history of mental illness. Some of the information needed by a prospective expert was at the disposal of the trial attorney, yet he inexplicably failed to use it as mitigation. Most of the information, however, was never sought out by counsel. Because of counsel's lack of investigation and preparation, Mr. Gilliam was deprived of the full impact of substantial and compelling statutory and nonstatutory mitigating evidence. Undersigned counsel has obtained a competent mental health expert that has established that statutory mitigating factors apply in Mr. Gilliam's case.
>
> 10. Further, Dr. Stillman, the mental health expert utilized in the guilt/innocence phase of Mr. Gilliam's [trial] was not competent. Dr. Stillman had no experience in the field of epilepsy and his knowledge base consisted of reading a handful of articles on the subject. Also, Dr. Stillman overlooked Mr. Gilliam's mental state that rendered him incapable of premeditation.

(PC-SR. 311-12). Appellant also asserted that, as a result of defense counsel's failure to investigate and obtain competent mental health assistance, the confidence in the outcome was undermined and the results of the penalty phase rendered unreliable (PC-SR. 312). The State itself called into question the competency of Dr. Stillman's evaluation of Mr. Gilliam and his conclusions regarding Mr. Gilliam's mental health (R. 2525, 2527, 2530-1).

Where, as here, a capital post-conviction Rule 3.850 litigant presents properly pled claims demonstrating that mental health evaluations conducted at the time of trial were professionally inadequate, and that a far more favorable result

on mental health issues relating to competency or sentencing would have resulted from the evaluations of mental health professionals who were provided with critically needed background information about the client, an evidentiary hearing and Rule 3.850 relief are appropriate. See State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); cf. Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986).

The lower court denied this claim because, the court concluded, the matter should have been raised on direct appeal (PC-SR. 337; PC-SR2. 200). This was error. Quite plainly, this issue could not have been raised on direct appeal. See Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1982). Mr. Gilliam is entitled to an evidentiary hearing.

ARGUMENT VIII

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. GILLIAM'S CLAIM THAT HE WAS DENIED THE USE OF MATERIAL EXCULPATORY EVIDENCE THROUGH EITHER STATE MISCONDUCT OR DEFENSE COUNSEL'S INEFFECTIVENESS.

The lower court erred when it summarily denied this claim. A Rule 3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850;e.g. Lemon v. State, 498 So. 2d 923 Fla. 1987).

Where, as here, a Rule 3.850 litigant presents claims demonstrating a violation of Brady v. Maryland, 373 U.S. 83

(1963), an evidentiary hearing is warranted, as this Court has explained:

> We now have for review the denial of Squires' motion for post-conviction relief. . . . Since the court neither held an evidentiary hearing nor attached any portion of the record to the order of denial, our review is limited to determining whether the motion on its face conclusively shows that Squires is entitled to no relief. Fla.R.Crim.P. 3.850.
>
> * * * *
>
> Squires additionally alleges that certain exculpatory materials were withheld from him by the state in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and that he should have been granted an evidentiary hearing on this issue as well. Again, we agree. Upon remand to the trial court, the judge shall explore the allegations of Brady violations . . . .

Squires, 513 So. 2d 138, 139 (Fla. 1987). See also Gorham v. State, 521 So. 2d 1067 (Fla. 1988); Smith v. State, 461 So. 2d 1354 (Fla. 1985); Zeigler v. State, 452 So. 2d 537 (1984); Arango v. State, 437 So. 2d 1099 (Fla. 1983); Demps v. State, 416 So. 2d 808 (Fla. 1982). The files and records in this case do not conclusively rebut Appellant's allegations.

Exculpatory evidence withheld by the State violates due process. If the withheld information undermines confidence in the outcome, a new trial is required. See Kyles v. Whitley, 115 S. Ct. 1555 (1995).

The State's case against Appellant centered primarily on a felony-murder theory - that the victim was killed while Appellant committed sexual battery. Whether or not a sexual battery

occurred was therefore a material issue in the case. In its opening statement, the State attempted paint a picture of the victim as an innocent young person who would never engage in an act of prostitution regardless of the fact that she worked at a topless bar (R. 1126-28). The State then presented misleading testimony by Katherine Gorden that the victim was not the type of person who normally worked as a dancer at the club ("She was very--innocent type.")(R. 1460-61).

Despite this characterization of the victim by the State, Appellant asserted in his Rule 3.850 motion that the State had in its possession very damaging Metro-Dade Police reports in which it was reported that the victim's aunt, Irene Adams, told police that, two months before her death, the victim was living with a "pimp" and admitted to Adams that she was a prostitute (PC-SR. 177). Another Metro-Dade Police report indicate the victim had a prior arrest for prostitution in Atlanta (Id.).

The defense's theory at trial was that the victim was a prostitute who had propositioned Mr. Gilliam and that this is why the victim was with Appellant on the night she was killed. However, when the defense sought to introduce evidence that the victim was a prostitute and that the club where Appellant met the victim and where the victim worked had been closed because the club's dancers had been engaging in prostitution, the State objected and the trial court ruled the evidence inadmissible (R. 1515-23; 2217-21). This evidence would have corroborated Mr. Gilliam's testimony that he met the victim when she propositioned

him at the club and later asked him to leave the club with her (R. 1229-31).

The State subsequently argued to the jury that the defense's failure to present such evidence was significant (R. 2563). Thus, the State was allowed to keep from the jury relevant evidence corroborating Appellant's testimony and, at the same time, argue that since no evidence to corroborate Appellant's testimony was presented, no such evidence existed (R. 2558). The State further relied on its misconduct at the penalty phase in order to persuade the court and the jury that the murder was committed during the course of a sexual battery (R. 2676-77).

Appellant raised this issue via two separate claims in his Rule 3.850 motion, Claim III (in relation to the misconduct's affect on the guilt-innocence phase)(PC-SR. 174-86) and Claim XXII (in relation to the misconduct's affect on the penalty phase and sentencing)(PC-SR. 303-7). In its order denying this claim without an evidentiary hearing, the trial court concluded that Appellant "failed to show that he did not possess this information nor how it could have brought about a different result at trial" (PC-SR. 335). The lower court's decision to deny an evidentiary hearing is error. In his Rule 3.850 motion, Appellant plainly asserted that the State failed to disclose this evidence (PC-SR. 174, 178, 182, 184). Furthermore, the Rule 3.350 motion asserts that defense counsel did not otherwise possess this information. ("With the information available, defense counsel wanted to" present evidence that the club was closed for

specific acts of prostitution committed by dancers; (PC-SR. 179)(emphasis added); "Had the truth regarding the victim and the Orange Tree Lounge been made available to defense counsel and to the jury, there is more than a likelihood that Mr. Gilliam would not have been found guilty of first-degree murder and sentenced to die" (PC-SR. 185-6))

Even if the Rule 3.850 motion failed to allege that defense counsel did not otherwise possess this information, the trial court erred in denying an evidentiary hearing. This is so because Mr. Gilliam also claimed:

> To the extent that trial counsel was in possession of Metro-Dade police reports denoting the Joyce Marlow was a "proclaimed prostitute" and had been arrested for prostitution, the defense counsel was ineffective for failing to use the relevant materials to impeach witnesses and to corroborat[e] Mr. Gilliam's testimony.

(PC-SR. 199). The bottom line is that the motion plainly alleged that Mr. Gilliam was denied the use and benefit of the exculpatory evidence. Whether this was the result of State misconduct or ineffective assistance of counsel is a matter to be determined by the lower court after an evidentiary hearing.

As to prejudice, Appellant argued in his motion that the suppressed evidence could have been used to impeach Katherine Gorden and to corroborate Appellant's own testimony that the victim propositioned him at the bar and asked him to leave with her. Appellant was entitled to an evidentiary hearing on this issue.

The lower court summarily denied Claim XXII (relating to the misconduct's affect on the penalty phase and sentencing) because the court concluded the claim should have been raised on direct appeal: "[Claims] 7 through 23 those are matters that I can rule upon and I can deny the motion summarily. I think, I think they are matters that could and should have been raised on direct appeal." (PC-SR2. 200). This same ruling is reflected in the court's written order. (PC-SR. 337)[4] This was also error. There is absolutely no record reference to the State's Brady violation in the original trial record. Consequently, this claim could not have been raised on direct appeal. See Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1982). Mr. Gilliam is entitled to a hearing on this issue.

ARGUMENT IX

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. GILLIAM'S CLAIM THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT REQUESTING A JURY INSTRUCTION THAT EPILEPTIC SEIZURES CAN NEGATE SPECIFIC INTENT.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 668 (citation omitted). Strickland v. Washington requires a defendant to plead

[4]In an obvious scrivener's error, the section indicating which claims were denied because the claims should have been brought on direct appeal reads, "Claims VII-XIII" (PC-SR. 337). As the court indicated in its oral pronouncement, the claims the court denied in this ground were Claims VII through Claims XXIII.

and demonstrate: 1) unreasonable attorney performance, and 2) prejudice. In his Rule 3.850 motion, Mr. Gilliam pled each. Given a full and fair evidentiary hearing, he can prove each. He is entitled, at a minimum, to an adequate evidentiary hearing on these claims.

Each of the errors committed by Mr. Gilliam's counsel is sufficient, standing alone, to warrant Rule 3.850 relief. Each undermines confidence in the fundamental fairness of the guilt-innocence determination. The allegations are more than sufficient to warrant a Rule 3.850 evidentiary hearing. See O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Lemon v. State, 498 So. 2d 923 (Fla. 1987).

Defense counsel failed to request a jury instruction that Mr. Gilliam's epileptic condition surrounding the circumstances of the offense may negate the specific intent necessary for first-degree murder.

In Bunney v. State, 603 So.2d 1270 (Fla. 1992), the defendant wanted to "raise epilepsy as a defense to his ability to form the intent required to commit a first-degree felony murder and kidnapping outside the context of an insanity plea." The Florida Supreme Court held that while "evidence of diminished capacity is too potentially misleading to be permitted routinely in the guilt phase of criminal trials, evidence of 'intoxication, medication, epilepsy, infancy, or senility' is not." Id. at 1273.

At trial, defense counsel presented Mr. Gilliam's epileptic seizure as the basis of an insanity defense. However, defense

counsel failed to request jury instructions that Mr. Gilliam's epileptic condition surrounding the circumstances of the offense may negate the specific intent necessary for first-degree murder. Failure to seek proper jury instructions can be prejudicial deficient performance. See Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991); Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983). In Bunney, the Florida Supreme Court held medical condition of epilepsy was analogous to a voluntary intoxication defense:

> Although this Court did not expressly rule in Chestnut that evidence of any particular condition is admissible, it is beyond dispute that evidence of voluntary intoxication or use of medication is admissible to show lack of specific intent. See Gurganus v. State, 451 So.2d 817 (Fla. 1984). If evidence of these self-induced conditions is admissible, it stands to reason that evidence of certain commonly understood conditions that are beyond one's control, such as those noted in Chestnut (epilepsy, infancy, or senility), should also be admissible. In the present case, Bunney simply sought to show that he committed the crime during the course of a minor epileptic seizure. A jury is eminently qualified to consider this.

Bunney v. State, 603 So.2d at 1273 (Fla. 1992) (foot note omitted). When defense counsel raised evidence that Mr. Gilliam suffered an epileptic seizure at the time of the offense, the jury should have been instructed that this condition may negate specific intent crime. The Florida Supreme Court has held:

> A defendant has the right to a jury instruction on the law applicable to his theory of defense where any trial evidence supports that theory. Bryant v. State, 412 So. 2d 347 (Fla. 1982); Palmes v. State, 397 So. 2d 648 (Fla.), cert. denied, 454 U.S.

> 882, 102 S. Ct. 369, 70 L. Ed. 2d 195 (1981). Moreover, evidence elicited during the cross-examination of prosecution witnesses may provide sufficient evidence for a jury instruction on voluntary intoxication. Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA), review denied, 402 So. 2d 613 (Fla. 1981).

Gardner v. State, 480 So. 2d at 92-93. If Mr. Gilliam's counsel had performed his duty to Mr. Gilliam as reasonable counsel would have, Mr. Gilliam would not have been convicted of first-degree murder and would not have been sentenced to death.

ARGUMENT X

ADMISSION OF IMPROPER HEARSAY EVIDENCE DENIED MR. GILLIAM'S RIGHT TO CONFRONT THE EVIDENCE AGAINST HIM.

Mr. Gilliam asserted in his Rule 3.850 motion that defense counsel was ineffective for failing to properly object when Mr. Gilliam was denied his constitutional right to confront the evidence against him (PC-SR. 139-45). At the guilt-innocence phase of Mr. Gilliam's trial, the State offered the testimony of Detective Poe, formerly of the Dallas Police Department, in regard to Gilliam's 1969 rape conviction. During the course of his testimony the State solicited prejudicial hearsay statements from the victim of the Texas offense:

> [State] As a detective in that division, did you also investigate charges of sexual battery?
>
> [Det. Poe] Yes, ma'am.
>
> Q. in connection with that assignment, did you have occasion to come into contact with a young girl, age 15, by the name of Vida Lester?

A. Yes, ma'am, I did.

Q. Did that take place on the 7th day of January, 1969?

A. That is correct.

Q. Did you come into contact with her in the office of the Dallas Police Department?

A. Yes, ma'am.

Q. Was that in an interview room?

A. Yes, ma'am.

Q. Did you have an opportunity at that time to make an observation concerning the physical condition of the young girl, Vida Lester?

A. Yes, ma'am, I did.

Q. Would you please tell the members of the jury what if anything you noted unusual about her appearance when she appeared in your office.

A. She had some bruise marks on her neck and she had a black eye.

Q. Did there come a time when you went with Vida Lester to another location?

A. Yes, ma'am.

Q. What was that location?

A. I believe it was at 4818 Virginia Avenue.

Q. And what is located there?

A. It is an apartment house, two-story frame apartment house.

Q. No, did Vida Lester live there?

A. No, ma'am.

Q. Did you locate any property belonging to the young girl, Vida Lester, at that location?

A. Yes, ma'am.

* * * *

Q. Sir, did you go to the particular field location?

A. Yes, sir.

Q. In search of particular property?

A. Yes, ma'am.

Q. Would you tell the members of the jury what type of property you were looking for.

A. We were looking for a coin purse and a chain, which I believe it had a watch on it.

Q. I'm sorry. With a watch on it?

A. Yes, ma'am.

Q. And when you got there to the location that Vida Lester directed you to, did you find a chain with a watch and a coin purse?

A. Yes, ma'am.

Q. Did you take possession of the chain with the watch and the coin purse?

A. Yes, ma'am.

Q. And did you impound it as part of your investigation in this case?

A. Yes, ma'am.

(R. 2426-28).

The defense exposed this prejudicial hearsay on cross-examination, but the damage had already been done:

[Defense] Detective Poe, the chain and the watch and the purse, you were looking for it based upon what someone else told you; is that not correct?

[Det. Poe] What Vida Lester told us, sure.

Q. Sure.

A. Yes, sir.

Q. And you identified that as being hers because of the out of court statement of Vida Lester.

A. No, sir.

Q. Well, she told you that was her purse; right?

A. She was there with us and identified the purse.

Q. Exactly.

But for what Vida Lester told you, you would not be looking for the purse; would you?

A. No, sir.

Q. But for the statement of Vida Lester, you would not be looking for the chain and the watch. A. That is correct.

Q. With whom was Vida Lester's grandmother living at this time? Do you know?

A. No, sir, I don't.

Q. Do you have any first -- what injuries did you observe?

A. Some bruise marks on her neck and a black eye.

Q. Black eye and some bruise marks on her neck?

A. Yes, sir.

Q. Do you have any firsthand knowledge of how she sustained those injuries?

A. Just what she told us.

Q. Do you have any firsthand knowledge of how those were obtained other than what she told you?

A. No, sir.

Q. Did you question anyone living at the Vida Lester home concerning how she obtained those injuries?

A. No, sir.

(R. 2429-30).

Officer Poe's testimony concerning the hearsay statements of Vida Lester parallel those presented in Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). In Rhodes, the arresting officer on a prior conviction played an audiotape of the victim's statement against the defendant. The Supreme Court remanded the case, stating:

> Obviously Rhodes did not have the opportunity to confront and cross-examine this witness. By allowing the jury to hear the taped statement of the Nevada victim describing how the defendant tried to cut her throat with a knife and the emotional trauma suffered because of it, the trial court effectively denied Rhodes this fundamental right of confronting and cross-examining a witness against him. Under these circumstances if Rhodes wished to deny or explain this testimony, he was left with no choice but to take the witness stand himself.

Id. at 1204; see also Dragovich v. State, 492 So. 2d 350 (Fla. 1986).

Here, Detective Poe used the victim's prejudicial and irrelevant hearsay statements to testify that Mr. Gilliam forcefully raped her. Defense counsel was unable to cross-examine or confront the witness in any meaningful way. Though the statements were not tape recorded, the effect on the jury was the same. This was fundamental error.

> The sixth amendment right of an accused to confront the witnesses against him is a

> fundamental right which is made obligatory on the states by the due process of law clause of the fourteenth amendment to the United States Constitution. Pointer v. Texas, 380 U.S. 400 (1965). The primary interest secured by and the major reason underlying the confrontation clause, is the right of cross-examination. Pointer v. Texas. This right of confrontation protected by cross-examination is a right that has been applied to the sentencing process. Specht v. Patterson, 386 U.S. 605 (1967).

Engle v. State, 438 So. 2d 803, 814 (Fla. 1983). Such fundamental error cannot be harmless under Pointer v. Texas. The trial court erred in denying Mr. Gilliam an evidentiary hearing. Relief is warranted.

ARGUMENT XI

PENALTY PHASE INSTRUCTIONS IMPROPERLY SHIFTED THE BURDEN TO MR. GILLIAM TO PROVE THAT THE SENTENCE OF DEATH WAS INAPPROPRIATE.

A capital sentencing jury must be:

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

State v. Dixon, 283 So.2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase. The burden was shifted to Mr. Gilliam on the question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, violating Hitchcock v. Dugger, 481 U.S.

393, 107 S. Ct. 1821 (1987); and Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853 (1988).

Under Hitchcock, Florida juries must be instructed in accord with Eighth Amendment principles. Mr. Gilliam's sentence of death is neither "reliable" nor "individualized." This error undermines the reliability of the jury's sentencing determination and prevented the jury and the judge from assessing the full panoply of mitigation contained in the record.

In Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), a capital post-conviction action, the Florida Supreme Court addressed the question of whether the standard instruction employed shifted to the defendant the burden on the question of whether he should live or die. The Hamblen opinion reflects that these claims should be addressed on a case-by-case basis in capital post-conviction actions. Mr. Gilliam herein urges that the Court assess this significant issue in his case and, for the reasons set forth below, that the Court grant him the relief to which he is entitled. Defense counsel was ineffective for failing to raise a timely objection to the errors.

Mr. Gilliam was forced to prove that life was the appropriate sentence. The jury's and the judge's consideration of mitigating evidence was limited to mitigation "sufficient to outweigh" mitigation. In the lower court's opening remarks at the beginning of the penalty phase, the court instructed the jury that it was their job to determine if the mitigating circumstances outweighed the aggravating circumstances:

> The State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that this evidence when considered with the evidence that you have already heard, is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

(R. 2659). In the penalty phase instructions to the jury, the court reinforced this instruction:

> [H]owever it is your duty to follow the law that will be now given to you by the Court and render to the Court an advisory sentence, based on your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and <u>whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist</u>.

(R. 2699)(emphasis added). The court later repeated to the jury this erroneous standard:

> Should you find sufficient aggravating circumstances to exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(R. 2702-03). Although the lower court also instructed the jury that the State bears the burden to show that the aggravating factors outweigh the mitigating factors (R. 2700), this single sentence was insufficient to negate the effects of the other improper instructions.

The instructions violated Florida law and the Eighth and Fourteenth Amendments in two ways. First, the instructions shifted the burden of proof to Mr. Gilliam on the central

sentencing issue of whether he should live or die. Under Mullanay v. Wilbur, 421 U.S. 684 (1975), this unconstitutional burden shifting violated Mr. Gilliam's Due Process and Eighth Amendment rights. See also Sanstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). The jury was not instructed in conformity with the standard set forth in Dixon.

Second, by being told that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Cf. Mills v. Maryland, 108 S. Ct. 1860 (1988); Hitchcock. Thus, the jury was precluded from considering mitigating evidence, Hitchcock, and from evaluating the "totality of the circumstances" in considering the appropriate penalty. State v. Dixon, 283 So. 2d at 10. According to the instructions, jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered. The instructions given in Mr. Gilliam's case were improper.

Instructions that shift to the defendant the burden of proving that life is the appropriate sentence violate the principles of Mullaney, as well as the Eighth and Fourteenth Amendments. Mr. Gilliam is entitled to a new penalty phase

proceeding. Defense counsel's failure to object was deficient performance. But for counsel's deficient performance, there is a reasonable probability that the jury would have recommended life under State v. Dixon. Relief is proper.

ARGUMENT XII

MR. GILLIAM' SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE.

Under Florida law, capital sentences may reject or give little weight to any particular aggravating circumstance. A jury may return a binding life recommendation because the aggravators are insufficient. Hallman v. State, 560 So. 2d 233 (Fla. 1990). The sentencer's understanding and consideration of aggravating factors may lead to a life sentence.

Mr. Gilliam was convicted of one count of first degree murder and one count of sexual battery. The jury was instructed on the "felony murder" aggravating circumstance:

> The second aggravating factor, the crime for which the defendant is to be sentenced, was committed while he was engaged in the commission of sexual battery.

(R. 2702). The lower court subsequently found the existence of the "felony murder" aggravating factor (R. 496).

The jury's deliberation was tainted by this unconstitutional and vague aggravating circumstance. The use of the underlying felony as an aggravating factor rendered the aggravator ``illusory'' in violation of Stringer v. Black, 112 S.Ct. 1130 (1992). The jury was instructed regarding an automatic statutory aggravating circumstance, and Mr. Gilliam thus entered the

penalty phase already eligible for the death penalty, whereas other similarly (or worse) situated defendants would not. See Porter v. State, 564 So. 2d 1060 (Fla. 1990).

The death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for conviction. The prosecutor, in her closing argument, even told the jury that this aggravating circumstance automatically must be applied:

> So you when you found the defendant guilty of those two crimes, as charged, you, in essence, have already accepted the aggravating circumstances that I have just listed.

(R. 2677).

A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion.", Stringer v. Black, 112 S. Ct. 1130 (1992). The sentencer was entitled automatically to return a death sentence upon a finding of first degree felony murder. Every felony murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment. This is so because an automatic aggravating circumstance is created, one which does not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983), and one which therefore renders the sentencing process unconstitutionally unreliable. "Limiting the sentencer's discretion in imposing the death

penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988). Because Mr. Gilliam was convicted of felony murder, he then automatically faced statutory aggravation for felony murder. This aggravating factor was an "illusory circumstance" which "infected" the weighing process; the aggravator did not narrow and channel the sentencer's discretion as it simply repeated elements of the offense. Stringer, 112 S. Ct. at 1139. In fact, the Florida Supreme Court has held that the felony murder aggravating factor alone cannot support the death sentence. Rembert v. State, 445 So. 2d 337 (Fla. 1984). Yet the trial court neither instructed the jury an nor applied this limitation in imposing the death sentence. See Engbarg v. Meyer, 820 P.2d 70 (Wyo. 1991); Tennessee v. Middlebrooks, 840 S.W. 2d 317 (Tenn. 1992).

Compounding this error is the fact that the Florida Supreme Court has held that the "in the course of a felony" aggravating circumstance is not sufficient by itself to justify a death sentence in a felony-murder case. Rembert, 445 So. 2d at 340.(no way of distinguishing other felony murder cases in which defendants "receive a less severe sentence"); Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987)(“To hold, as argued by the State, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty").

Mr. Gilliam was denied a reliable and individualized capital sentencing determination, in violation of the Sixth, Eighth, and Fourteenth amendments. The error cannot be harmless in this case:

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer, 112 S. Ct. at 1137.

In Mr. Gilliam's case, both statutory and nonstatutory mitigating circumstances are set forth in the record. The trial court acknowledged the defendant's his good relationship with his family members, that he was subjected to physical abuse as a child and that he had come from a broken home (R.497). In addition to the nonstatutory mitigation mentioned by the trial court, Mr. Gilliam also presented: 1) he was addicted to alcohol and drugs; 2) that he was a changed man; 3) that he was a father to his siblings; 4) that he defended his mother and sister from the brutal attacks of his father; 5) that he was learning disabled; 6) that he suffered a brutal childhood; 7) that he was from an impoverished background (R. 2967-71). Each of these are mitigation under Florida law. Cooper v. Dugger, 526 So.2d 900 (Fla. 1988).

Mr. Gilliam was denied a reliable and individualized capital sentencing determination, in violation of the Sixth, Eighth, and

Fourteenth Amendments. The error cannot be harmless in this case.

In Mr. Gilliam's case, both statutory and nonstatutory mitigating circumstances are set forth in the record. Each of these factors are mitigation under Florida law. See, e.g., Cooper v. Dugger, 526 So.2d 900 (Fla. 1988). See also Hitchcock v. Dugger, 481 U.S. 393 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). Mr. Gilliam is entitled to a new penalty phase proceeding. To the extent that defense counsel failed to object, he rendered prejudicially deficient performance.

ARGUMENT XIII

THE SENTENCING COURT'S CONSIDERATION OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES VIOLATED MR. GILLIAM'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

During the penalty phase closing argument the State maintained that Mr. Gilliam posed a future danger to society:

> There are two options as they address the punishment of Burley Gilliam: one is obviously the death penalty and the other is obviously life in prison with a minimum mandatory of 25 years. Now, Ladies and Gentlemen, that may sound like a long time, But, I ask you to keep in mind that 19 years ago this defendant was sent to prison for the same crime in the absence, of course, of murder. That is a long time. And, he sits before you today, convicted of this very brutal rape and murder.
>
> There comes a time, unfortunately, in our society, when the only issue is simply not rehabilitation. When the only issue is simply not what do you do to try to change the ways of one who would not follow the rules. There is a risk in that factor. There

> is a decision to be made. However, it has been made once in his favor at a time in his life when he was 20 years old, and, could have been anything.

(R. 2687-88)(Emphasis added).

At the sentencing hearing, the State presented the Court with a letter from Mr. Gilliam's ex-wife stating that she was afraid that she and her son would be murdered if Gilliam was released (R. 488-90). The sentencing court stated that it would give this letter "equal weight" when considering it with another letter that Gilliam's ex-wife had written the prior year (R. 2954).

In addition, the State presented the Court with a hearsay report alleging that Mr. Gilliam had nearly choked his infant son (R. 474-482). The trial judge in sentencing Mr. Gilliam considered this non-statutory aggravating circumstance and relied upon it in his sentencing order:

> The Court specifically rejects as mitigation the defendant's assertion that he is a non-violent person and a loving parent to his son. To the contrary, the Court is convinced that the defendant is an extremely violent person, and that <u>his son has been a victim of his violence</u>.

(R. 497)(Emphasis added).

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

sentence that was based on an "unguided emotional response," a clear violation of Mr. Gilliam's constitutional rights. Penry v. Lynaugh, 108 S.Ct. 2934 (1989).

Similar prosecutorial arguments have been consistently condemned as improper by the Florida Supreme Court. In Taylor v. State, 583 So. 2d 323 (Fla. 1991) the Court maintained the state attorney's argument was improper because it urged consideration of factors outside the scope of the jury's deliberations.

The Florida Supreme Court held the same arguments to be improper in Jackson v. State, 522 So. 2d 802 (Fla. 1988) and Hudson v. State, 538 So. 2d 829 (Fla. 1989), saying the prosecutor overstepped the bounds of proper argument. Citing to Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985), the Court sent out the parameters of improper argument:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

See, 522 So. 2d at 809. Here, there is no question that State's argument was meant to evoke an emotional response from the jury. Clearly, confidence in the outcome of Mr. Gilliam's trial has been undermined when jurors are exposed to such emotional oratory.

The cumulative affect of this closing argument and improper evidence was to "improperly appeal to, the jury's passions and

prejudices." Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 647 (1974); See also, United States v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991). In Rosso v. State, 505 So. 2d 611 (Fla. 3rd DCA 1987), the court defined a proper closing argument:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may be reasonably drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Rosso, 505 So. 2d at 614. The prosecutor's argument went beyond a review of the evidence and permissible inferences. He intended his argument to overshadow any logical analysis of the evidence and to generate an emotional response, a clear violation of Penry v. Lynaugh, 109 S. Ct. 2934 (1989). He intended that Mr. Gilliam's jury consider factors outside the scope of the evidence.

The Florida courts have held that "a prosecutor's concern 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' While a prosecutor 'may strike hard blows, he is not at liberty to strike foul ones.'" Rosso, 505 So. 2d at 614. The Florida Supreme Court has called such improper

prosecutorial commentary "troublesome." Bertolotti v. State, 476 So. 2d 130, 132 (Fla. 1985).

Arguments such as those made by the prosecutor in Mr. Gilliam's penalty phase violate due process and the eighth amendment, and render a death sentence fundamentally unfair and unreliable. See Drake v. Kemp, 762 F.2d 1449, 1458-61 (11th Cir. 1985) (en banc); Potts v. Zant, 734 F.2d 526, 536 (11th Cir. 1984); Wilson v. Kemy, 777 F.2d 621 (11th Cir. 1985); Newlon v. Armontrout, 885 F.2d 1328, 1338 (8th Cir. 1989); Coleman v. Brown, 802 F.2d 1227, 1239 (10th Cir. 1986). Here, as in Potts, because of the improprieties evidenced by the prosecutor's argument, the jury "failed to give [its] decision the independent and unprejudicial consideration the law requires." Potts, 734 F.2d at 536. In the instant case, as in Wilson, the State's closing argument "tend(ed) to mislead the jury about the proper scope of its deliberations." Wilson, 777 F.2d at 626. In such. circumstances, “when core Eight Amendment concerns are substantially impinged upon . . . confidence in the jury's decision will be undermined." Id. at 627. Consideration of such errors in capital cases "must be guided by [a] concern for reliability." Id. The Florida Supreme Court had held that when improper conduct by the prosecutor "permeates" a case, as it has here, relief is proper. Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

For each of the reasons discussed above, the Court should vacate Mr. Gilliam's unconstitutional conviction and sentence of

death. To the extent defense counsel failed to raise this issue, he rendered deficient, prejudicial performance.

ARGUMENT XIV

THE IMPROPER USE OF "STATUTORY RAPE" AS A PRIOR VIOLENT FELONY AGGRAVATING FACTOR

Mr. Gilliam asserted in his Rule 3.850 motion that the prior Texas conviction for "rape" was actually a "statutory rape" conviction and, therefore, not a violent felony that supports the prior violent felony aggravating circumstance set forth in section 921.141(5)(b) of the Florida Statutes (PC-SR. 271). In light of this fact, Mr. Gilliam claimed that defense counsel was ineffective for either failing to object to the State using the prior Texas conviction to support the aggravating circumstance of prior violent felony or, in the alternative, for failing to investigate and discover that the prior conviction did not constitute a violent felony (PC-SR. 273).

The lower court denied an evidentiary hearing on this issue on the ground that the issue could have been raised on direct appeal (PC-SR. 337). The lower court erred when it summarily denied this claim. A Rule 3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; e.g. Lemon v. State, 498 So. 2d 923 (Fla. 1987).

During the penalty phase, the State introduced a certified copy of the Texas conviction (R. 2659-60). Defense counsel failed

to object (R. 2659). The trial judge also considered and relied upon this conviction as an aggravating factor as reflected in the sentencing order (R. 495-96).

Mr. Gilliam maintained the conviction arose out of an incident involving consensual sex with a minor (R. 1919-20). The certified conviction entered into evidence is silent on the matter, as it simply refers to a conviction for "rape" (R. 397-402). Aggravating circumstances specified in the statute are exclusive and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979).

> This court, in Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977) stated:
>
> > We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.
>
> Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition. Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Miller v. State, 373 So. 2d at 885; See also Riley v. State, 366 So. 2d 19 (Fla. 1979), and Robinson v. State, 520 So. 2d 1 (Fla. 1988).

Fla. Stat. sec. 921.141(5)(b) (1986) provided:

> 921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.--
>
> (5) AGGRAVATING CIRCUMSTANCES.-- Aggravating circumstances shall be limited to the following:
>
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(Emphasis added). Mr. Gilliam should have been granted an evidentiary hearing to establish that defense counsel was ineffective for not objecting to this aggravating circumstance or for failing to discover the prior conviction was for a non-violent felony.

ARGUMENT XV

THE CALDWELL CLAIM

Caldwell v. Mississippi, 472 U.S. 320 (1985), invokes the most essential and basic Eighth Amendment requirements of a death sentence -- that such a sentence be individualized (i.e., based on the character of the offender and circumstances of the offense), and that such a sentence be reliable. Caldwell, 472 U.S. at 329. Caldwell applies to Florida's capital sentencing procedure. Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc), cert. denied, 109 S. Ct. 1353 (1989).

The sentencing jury plays a critical role in Florida, and its recommendation is not a nullity which the trial judge may regard or disregard as he sees fit. To the contrary, the jury's recommendation is entitled to great weight, and is entitled to the court's deference when there exists any rational basis

supporting it. See Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). Thus any intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law.

Mr. Gilliam's jury was repeatedly instructed by the court and the prosecutor that it's role was merely "advisory". (See, e.g. R. 520, 529, 531, 969, 2647, 2648, 2658, 2699). However, because the sentencing judge must give great weight to the jury's recommendation, the jury is a sentencer. Espinosa v. State, 112 S. Ct. 2926 (1992). The jury "is a co-sentencer under Florida law." Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). Here, the jury's sense of responsibility was diminished by the misleading comments and instructions regarding the jury's role. The jury was not told it was a co-sentencer. This diminution of the jury's sense of responsibility violated the Eighth Amendment. Caldwell v. Mississippi, 472 U.S. 320 (1985). The State cannot show that the comments had "no effect" on the jury's deliberations. Caldwell, 472 U.S. at 340-41. Mr. Gilliam is entitled to a new penalty phase proceeding. Defense counsel without tactic or strategy failed to object to these repeated violations and thereby rendered prejudicially deficient performance.

ARGUMENT XVI

THE ERRONEOUS MAJORITY VOTE JURY INSTRUCTION CLAIM

The jury in Mr. Gilliam's penalty was erroneously instructed on the vote necessary to recommend a sentence of death or life. Florida law is not that a majority vote is necessary for the recommendation of a life sentence; rather, a six-six vote, in addition to a majority vote of seven-five or greater, is sufficient for the recommendation of life. Rose v. State, 425 So. 2d 521 (Fla. 1982). However, the lower court erroneously throughout the proceedings informed Mr. Gilliam's jury that, even to recommend a life sentence, its verdict had to be by a majority vote (R. 530, 969, 2704-05). While the judge did read at least part of the correct standard jury instruction which advises the jury that if six or more of their number recommends life, they have made a life recommendation (R. 2705), this brief statement of the law was rendered nugatory by the previous instruction that misled the jury, giving them the erroneous impression that they could not return a valid sentencing verdict if they were tied six to six.

These erroneous instructions are like the misleading information condemned by Caldwell v. Mississippi, 105 S. Ct. 2633 (1985) and Mann v. Dugger, 844 F.2d 1444 (11th Cir. 1988)(en banc), because they "create a misleading picture of the jury's role." Caldwell at 2646 (O'Connor, J., concurring). As in Caldwell, the instructions here fundamentally undermined the reliability of the sentencing determination, for they created the risk that the death sentence was imposed in spite of factors calling for a less severe punishment. Mr. Gilliam is entitled to

a new penalty phase proceeding. Defense counsel ineffectively failed to object.

ARGUMENT XVII

THE SENTENCING COURT'S FAILURE TO FIND MITIGATING CIRCUMSTANCES

A reviewing court should determine whether there is support for the original sentencing court's finding that certain mitigating circumstances are not present. Parker v. Dugger, 111 S. Ct. 731 (1991); Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). If that finding is clearly erroneous the defendant "is entitled to resentencing." Magwood, 791 F.2d at 1450.

At sentencing, Mr. Gilliam's trial judge found that Mr. Gilliam had not established that statutory mitigation was sufficiently proven (R. 496) notwithstanding the fact that Mr. Gilliam had presented mental health and family member testimony that established that statutory mitigation existed. Of this evidence, the family member testimony was uncontroverted.

The lower court acknowledged Mr. Gilliam’s his good relationship with his family members, that he was subjected to physical abuse as a child and that he had come from a broken home (R.497). In addition to the nonstatutory mitigation mentioned by the lower court, however, Mr. Gilliam also presented: 1) he was addicted to alcohol and drugs; 2) that he was a changed man; 3) that he was a father to his siblings; 4) that he defended his mother and sister from the brutal attacks of his father; 5) that he was learning disabled; 6) that he suffered a brutal childhood; 7) that he was from an impoverished background (R. 2967-71). Each

of these constitute mitigation under Florida law. Cooper v. Dugger, 526 So.2d 900 (Fla. 1988). The court, however, rejected this evidence as mitigation because he found that the defendant was an extremely violent person and that his son was a victim of violence (R. 497).

This finding did not constitute a basis for the trial court's rejection of this mitigating evidence. Each of these constitutes a mitigating factor. Cheshire v. State, 568 So. 2d 908 (Fla. 1990). The jury and judge were required to weigh and give effect to all of Mr. Gilliam's mitigation against the aggravating factors. Mr. Gilliam was deprived of the individualized sentencing required by the Eighth and Fourteenth Amendments and is entitled to a new sentencing hearing. Zant v. Stephens, 462 U.S. 862, 879-80 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

Here, the judge refused to recognize mitigating circumstances that were present. Under the requirement that a capital sentencer fully consider and give effect to the mitigation, Penry v. Lynaugh, 109 S. Ct. 2934 (1989), as well as under Eddings v. Oklahoma, 455 U.S. 104 (1982), the sentencing court's refusal to consider the mitigating circumstances which were established was error. The factors should now be recognized. Mr. Gilliam is entitled to relief.

ARGUMENT XVIII

THE LOWER COURT ERRED BY SUMMARILY DENYING MR. GILLIAM'S CLAIM THAT HE WAS DENIED A FAIR TRIAL AS A RESULT OF THE BAILIFF'S IMPROPER AND IMPARTIAL CONDUCT.

Mr. Gilliam alleged in his Rule 3.850 motion that the bailiff engaged in improper and impartial conduct with the jury that effectively denied him a fair trial (PC-SR. 297-299). The lower court erred when it denied an evidentiary hearing on this claim on the grounds that it should have been raised on direct appeal. See Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1982). Mr. Gilliam is entitled to an evidentiary hearing on this matter.

As set forth in his Rule 3.850 motion, throughout Mr. Gilliam's trial, the bailiff, Walter Leachy (Wally), personally entertained the jurors with "amusing stories." Juror Elizabeth Terracall wrote the trial judge thanking him for the enjoyable experience:

> P.S. I think Wally deserves a big pat on the back for always being in a good humor, for somehow managing to remain professionally aloof and simultaneously protective of us, and for sharing some very amusing stories to help us pass the time. He helped tremendously in creating a very positive experience out of one that could have become merely tedious and annoying. (R. 427).

In Rose v. State, 601 So. 2d 1181 (Fla. 1992), the Supreme Court of Florida reasoned:

> We are not concerned with whether an ex parte communication actually prejudices one party at the expense of the other. The most insidious result of ex parte communication is their affect on the appearance of the impartiality of the tribunal. The

> impartiality of the trial judge must be beyond question.

Rose, 601 So. 2d at 1183 (emphasis in original). The Supreme Court of the United States has also recognized the basic constitutional precept of a neutral, detached judiciary. Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). Due process guarantees the right to a neutral detached judiciary. Cary v. Piphus, 425 U.S. 247, 262 (1978).

In capital cases, judicial scrutiny must be more stringent than it is in non-capital cases. As the Supreme Court of the United States indicated in Beck v. Alabama, 447 U.S. 625 (1980), special procedural rules are mandated in death penalty cases in order to insure the reliability of the sentencing determination. "In 'capital' cases the finality of the sentence imposed warrants protection that may or may not be required in other cases." Ake v. Oklahoma, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring). Thus, in a capital case such as Mr. Gilliam's the Eighth Amendment imposes additional safeguards over and above those required by the Fourteenth Amendment.

On the face of the record, there is at least the appearance of impartiality. The bailiff's activities were improper, diminishing the jurors sense of responsibility and exposing the jury to information not subject to the adversarial process. An evidentiary hearing is warranted.

ARGUMENT XIX

THE LOWER COURT IMPROPERLY INSTRUCTED THE JURY ON THE PRIOR VIOLENT FELONY AND HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.

The lower court's instructions to the jury on the prior violent felony and the heinous, atrocious and cruel aggravators violated the Eighth and Fourteenth Amendments. Trial counsel was ineffective for not raising this issue below. (As to the felony-murder aggravator, see Argument XII.)

Under Florida law aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 528 (Fla. 1989). In fact, Mr. Gilliam's jury was so instructed. Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Unfortunately, Mr. Gilliam's jury received no instructions regarding the elements of, the aggravators.

Under Florida law, the sentencing jury may reject or give little weight to any particular aggravating circumstance. A binding life recommendation may be returned because the aggravators are insufficient. Hallman v. State, 560 So. 2d 223 (Fla. 1990). Thus, the jury's understanding and consideration of aggravating factors may lead to a life sentence. Yet, Mr. Gilliam's jury was not given adequate guidance as to what was necessary to establish the presence of an aggravator. This left

the jury with unbridled discretion. This violated the eighth amendment.

As to the prior violent felony aggravating factor submitted to the jury, the jury was simply told "[t]he defendant has been previously convicted of another offense, or of a felony involving the use of violence to some person. The crime of sexual battery is a felony involving the threat or use of violence to another person" (R. 2702). The standard instructions in effect at the time of the trial provided that the trial court could instruct the jury that specific offenses as a matter of law involve the use or threat of violence, but this instruction is limited to offenses "only when violence or a threat of violence is an essential element of the crime." Florida Standard Jury Instructions in Criminal Cases at 83 (2d ed. 1975). Attempted murder may be proven without proof that there was violence or the threat of violence. Section 782.04, Florida Statutes (1991). For instance, a person may approach an intended victim with or without a weapon but with intent to murder, but be interrupted when two of the intended victim's friends approach. See Farmer v. State, 315 So. 2d 225 (Fla. 2d DCA 1975). The same may be said of burglary with intent to commit battery.

The court's instruction in effect was a command that the jury must find the aggravating circumstance in the manner prescribed by the court and thus invaded the statutory province of the jury to recommend the sentence to the court. The instruction amounted, therefore, to a partial directed verdict of

guilt as to this aggravating circumstance. See United States v. Ragsdale, 438 F.2d 21 (5th Cir. 1971). The state's burden to prove this aggravator was eliminated, and the court substituted its factual finding of use or a threat of violence for the jury's recommendation.

Mr. Gilliam's jury did not receive an instruction regarding the limiting construction of this aggravating circumstance. Thus, the instruction on this aggravating circumstance "fail[ed] adequately to inform [Mr. Gilliam's] jur[y] what it must find to impose the death penalty." Maynard, 108 S. Ct. at 1858. See Espinosa.

The jury was simply told "the crime . . . was especially wicked, evil, atrocious, or cruel" (R. 2702) and "heinous, atrocious and cruel are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts . . . which is unnecessary torturous to the victim" (R. 2701). However, that trial court never instructed the jury that it is required to find that the defendant "intended" to inflict unnecessary torture to the victim. Stein v. State, 632 So. 2d 1361 (Fla. 1994).

In Stein, this Court struck a finding of heinous, atrocious or cruel because "no evidence was presented to demonstrate any intent on Steins' part to inflict a high degree of pain or to otherwise torture the victims." Thus, the narrowing construction of heinous, atrocious or cruel requires that the defendant intended "to inflict a high degree of pain or to otherwise

torture." This narrowing construction can be found repeatedly in this Court's opinions. Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993)("absent evidence that [the defendant] intended to cause the victims unnecessary and prolonged suffering we find that the trial judge erroneously found that the murders were heinous, atrocious or cruel"); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991)("A murder may fit this description if it exhibits a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another"); Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991)("where there is no evidence of knowledge of how the murder would be accomplished, we find that the heinous, atrocious, or cruel aggravating factor cannot be applied vicariously"); Chesire v. State, 568 So. 2d 908, 912 (Fla. 1990)("The factor of heinous, atrocious or cruel is proper only in torturous murders -- those that evidence extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another"); Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989)(victim died from "manual strangulation;" however "we decline to apply this aggravating factor in a situation in which the victim who was strangled, was semiconscious during the attack. Additionally, we find nothing about the commission of this capital felony 'to set the crime apart from the norm of capital felonies"'); Amoros v. State, 531 So. 2d 1256, 1260 (Fla. 1988)(The victim was shot three times as he tried to flee and found himself trapped at the back door, but

"[t]he[se] facts [did] not set this murder 'apart from the norm of capital felonies'"); Lewis v. State, 377 So. 2d 640, 646 (Fla. 1979)(victim shot several times in front of his children. Additional shots as victim tried to flee in an effort to save himself. But, "[i]t is apparent all killings are heinous. However, this aggravator concerns homicides which are unnecessarily torturous to the victims"). See also Scull v. State, 533 So. 2d 1137 (Fla. 1988)(heinous, atrocious or cruel was not established as to victim who died from blow to head by a baseball bat).

In Proffitt v. Florida, 428 U.S. 242 (1976), the Supreme Court approved the Florida Supreme Court's limiting construction of the "heinous, atrocious, or cruel" aggravating circumstance:

> [The Florida Supreme Court] has recognized that while it is arguable "that all killings are atrocious, . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." Tedder v. State, 322 So. 2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim.'' State v. Dixon, 283 So. 2d, at 9. See also Alford v. State, 307 So. 2d 433, 445 (1975); Halliwell v. State, (323 So. 2d 557], at 561 (Fla. 1975]. We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases.

Proffitt, 428 U.S. at 255-56 (footnote omitted)(emphasis added). The limitation approved in Proffitt was not utilized at any stage of the proceedings in Mr. Gilliam's case.

In Cartwright, the jury found the murder to be "especially heinous, atrocious, or cruel," Cartwright, 108 S. Ct. at 1856, and the state supreme court affirmed. Id. The United States Supreme Court affirmed the Tenth Circuit's grant of relief, explaining that this procedure did not comply with the fundamental eighth amendment principle requiring the limitation of capital sentences' discretion. The Supreme Court's eighth amendment analysis fully applies to Mr. Gilliam's case. The result here should be the same as Cartwright.

Similarly, in Shell v. Mississippi, 111 S. Ct. 313 (1990), the trial court had instructed the jury that it could consider whether the murder was "especially heinous, atrocious or cruel." It had further provided a limiting instruction:

> [T]he word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others.

Id. at 313. These definitions were in fact similar to those given to Mr. Gilliam's jury, yet the Supreme Court found them inadequate. The Court stated:

> obviously, a limiting instruction can be used to give content to a statutory factor that "is itself too vague to provide any guidance to the sentencer" only if the limiting instruction's own "definitions are constitutionally sufficient," that is, only if the limiting instruction itself "provide[s) some guidance to the sentencer." Walton v. Arizona, [], 110 S.Ct. 3047, 3057, [] (1990).

Shell, 111 S. Ct. at 314. The Court concluded, as it had in Cartwright, that the instructions left the aggravator unconstitutionally vague.

The United State Supreme Court held that an instruction identical to the one at issue here was insufficient under the eighth amendment. Shell must be applied to Mr. Gilliam's case and a resentencing ordered.

In Mr. Gilliam's case, the jury was never guided or channeled in its sentencing discretion. No constitutionally sufficient limiting construction, as construed in Dixon and approved in Proffitt, was ever applied to the "heinous, atrocious, or cruel" aggravating circumstance before this jury. Moreover, this aggravator only applies where evidence shows beyond a reasonable doubt that the defendant knew or intended the murder to be especially heinous, atrocious or cruel. Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991)(this "aggravating factor cannot be applied vicariously"); Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990)(heinous, atrocious or cruel aggravator does not apply when the crime was "not a crime that was meant to be deliberately and extraordinarily painful")(emphasis in original). in Mr. Gilliam's case, the jury did not receive an instruction regarding the limiting construction of this aggravating circumstance. The judge relied upon the jury's death recommendation; in fact, he gave it great weight. However. the jury's death recommendation was tainted by its consideration of this aggravator. As a result, the penalty phase instructions on

this aggravating circumstance "fail[ed] adequately to inform [Mr. Gilliam's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 108 S. Ct. at 1858. Accordingly, this instruction was erroneous and prejudicial to Mr. Gilliam.

The United States Supreme Court recently said, "there is no serious argument that [the language 'especially heinous, cruel or depraved'] is not facially vague." Richmond v. Lewis, 113 S. Ct. 528, 534 (1992). Clearly, Florida's statutory language ('especially heinous, atrocious, or cruel') is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments. Espinosa v. Florida, 112 S. Ct. 2926 (1992).

To allow the sentencer to consider an extra improper aggravating circumstance violates the Eighth and Fourteenth Amendments by allowing an extra “thumb" to be placed on the death side of the scale. Stringer, 112 S. Ct. at 1137. Without this prohibition against "doubling," the capital sentencing statute is facially vague and overbroad because it fails to adequately inform the sentencer how to determine what aggravators to weigh. Maynard, 486 U.S. at 362 (juries must be informed "what they must find"). Finally, the Florida Supreme Court has said that where an aggravator merely repeats an element of the crime of first degree murder the aggravator is facially vague and overbroad. Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990). This is because such an aggravator provides the sentencer "open-ended discretion." Maynard, 486 U.S. at 362. Since Mr. Gilliam's conviction could

rest on the felony murder rule, the "in the course of a felony" aggravating factor was facially vague and overbroad.

In Maynard v. Cartwright, the Supreme Court held "the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." 108 S. Ct. at 1858. There must be a "principled way to distinguish [the] case, in which the death penalty was imposed, from the many cases in which it was not." Id. at 1859. Although Cartwright was specifically concerned with Oklahoma's application of the "heinous, atrocious, or cruel" aggravator, the principles discussed in Cartwright are applicable to the other aggravators previously mentioned.

The failure to instruct an the limitations left the jury free to ignore the limitations, and left no principled way to distinguish Mr. Gilliam's case from a case in which the limitations were applied and death, as a result, was not imposed. A properly instructed jury would have had no more than two aggravating circumstances (and probably less) to weigh against the mitigation offered by the defense. Where improper aggravating circumstances are weighed by the jury, "the scale is more likely to tip in favor of a recommended sentence of death." Valle v. State, 502 So. 2d 1225 (Fla. 1987). The jury was left with open-ended discretion found to be invalid in Furman v. Georgia, 408 U.S. 238 (1972), and Maynard v. Cartwright. Since, the jury in Florida is a co-sentencer, prejudice is manifest. Espinosa.

Mr. Gilliam's jury was not adequately or accurately instructed. The jury was in fact misled by the instructions and the prosecutor's argument as to what was necessary to establish the presence of the aggravating circumstance and to support death. The jury was given no instruction limiting the construction placed upon "heinous, atrocious or cruel." In fact, the instruction given here contained even less guidance than the one given in Maynard v. Cartwright. Undeniably, the eighth amendment was violated.

In Mr. Gilliam's case, both statutory and nonstatutory mitigating circumstances are set forth in the record. The trial court acknowledged the defendant's his good relationship with his family members, that he was subjected to physical abuse as a child and that he had come from a broken home (R. 497). In addition to the nonstatutory mitigation mentioned by the trial court, Mr. Gilliam also presented: 1) he was addicted to alcohol and drugs; 2) that he was a changed ma n; 3) that he was a father to his siblings; 4) that he defended his mother and sister from the brutal attacks of his father; 5) that he was learning disabled; 6) that he suffered a brutal childhood; 7) that he was from an impoverished background (R. 2967-71). Each of these are mitigation under Florida law. Cooper v. Dugger, 526 So.2d 900 (Fla. 1988). Mr. Gilliam is entitled to a new penalty phase proceeding. Defense counsel was ineffective for not raising this issue below. An evidentiary hearing is required and relief proper.

ARGUMENT XX

MR.GILLIAM WAS DENIED ACCESS TO PUBLIC RECORDS.

Mr. Gilliam has been denied effective post-conviction legal representation because the Dade County Jail, the Metro-Dade Police Department and the Dade County State Attorney's Office have not provided complete public records in accordance with Chapter 119 of the Florida Statutes. See gen. Hoffman v. State, 613 So. 2d 405 (Fla. 1992). The lower court ruled following a hearing that all existing records had been provided. (PC-SR 333-34); (PC-SR2. 14-118); (PC-SR2. 119-45). He should be permitted to amend his Rule 3.850 motion once all public records are properly disclosed.

ARGUMENT XXI

MR. GILLIAM'S STATEMENT WAS OBTAINED ILLEGALLY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The lower court erred when it denied an evidentiary hearing on this claim (Rule 3.850 motion Claim XV) on the grounds that it should have been raised on direct appeal. See Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1982). Mr. Gilliam is entitled to an evidentiary hearing on this matter. The police extracted a statement from Mr. Gilliam in violation of the Fifth Amendment. Only when there has been a "knowing and intelligent" and voluntary waiver of that right, may a custodial interrogation be conducted in the absence of counsel. The determination of whether a voluntary, knowing and intelligent relinquishment has occurred

is a matter which depends in each case "upon the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

In Edwards v. Arizona, 451 U.S. 477 (1981), the Supreme Court enunciated the absolute right of an accused to have counsel present at any custodial interrogation, stating:

> [A] valid waiver of that right cannot be established by showing only that the accused responded to further police-initiated custodial interrogation . . . an accused having expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him.

Id. at 484. The police interrogation of Mr. Gilliam in the instant case was a direct violation of the Fifth Amendment and Edwards. Mr. Gilliam was interrogated while in custody in the Texas County jail. The detective came to the jail with an arrest warrant for the purpose of bringing him back to Florida.

Here, Detective Merritt, however, stated that he had talked to Burley Gilliam only because he had changed his mind about wanting an attorney right after he asked for his attorney. Even if the detective believed that Mr. Gilliam had changed his mind, he was only permitted to further question him in order to clarify his wishes. When a person expresses both a desire for counsel and desire to continue the interview without counsel, further inquiry is limited to clarifying the suspect's wishes.

The test of determining whether a defendant has voluntarily waived his right is whether under the totality of the

circumstances the confession was a product of mental or physical coercion or some other improper police procedure which caused it to be involuntary. Here Mr. Gilliam's medical condition must be taken into account. In the instant case, Mr. Gilliam had a severe mental condition which required constant dosages of medication. It was only after Mr. Gilliam made a statement that he was given the medication, and it was only as much as he needed to get him to Florida.

In this case, Burley Gilliam executed neither a written waiver nor a formal written statement; nor was he readvised of his rights. Indeed, Mr. Gilliam refused to give a formal statement in writing. The law in Texas where the statement was given is to the effect that oral statements are not admissible.

Thus, the interrogation of Burley Gilliam in the absence of counsel was in violation of his Fifth and Sixth Amendment rights as enforced by Miranda and Edwards. The record does not show that Mr. Gilliam knowingly, intelligently and voluntarily waived those rights. On these grounds, the statements should have been excluded at trial. The court's admission of his statement at trial constitutes reversible error, mandating a new trial. To the extent defense counsel did not properly raise this issue below, counsel was ineffective.

ARGUMENT XXII

THE WARRANTLESS SEIZURE OF PHYSICAL EVIDENCE FROM THE TRUCK IN MR. GILLIAM'S POSSESSION AND CONTROL AND ADMISSION OF THE EVIDENCE AT TRIAL VIOLATED OF THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The lower court erred when it denied an evidentiary hearing on this claim (Rule 3.850 motion Claim XVI) on the grounds that it should have been raised on direct appeal. See Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1982). Mr. Gilliam is entitled to an evidentiary hearing on this matter. In June of 1982, Burley Gilliam, as an employee of Jimmie Smith drove a truck to Florida for the purpose of picking up a shipment out of an Orlando terminal. When the police learned on June 9 that a truck had broken down in the area of the homicide, they were able to trace it to Cloverleaf Amoco Station. They also learned that at the time Gilliam took the truck there and left it to be repaired. He allegedly told the owner he would, be back the next morning to pick it up. The State then kept up a constant surveillance from 8:00 o'clock a.m. on the 9th until the morning of the 10th. When Burley Gilliam did not return, they concluded it had been abandoned. It was at this point that the State telephoned Tri State Motor Company for permission to search the vehicle.

Jeffrey Schwartz, a representative of Dade County, called Tri State Motor Company at 8:45 a.m. on June 10. He spoke with Walter Burch and requested authorization to search the vehicle. He told them that the driver was a suspect in a homicide. Burch, chief of security at Tri State, gave his consent and at 12:45 p.m. on June 10 a search was conducted. The following items were seized: a brown shoe, a white sock, hair samples and pieces of paper.

These items were seized in violation of Burley Gilliam's right as guaranteed by the search and seizure clause of the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution and Section 933.04, Florida Statutes. Mr. Gilliam has not been given a full and fair opportunity to be heard on this matter. The court's admission of this evidence at trial constitutes reversible error, mandating a new trial. To the extent defense counsel did not properly raise this issue below, counsel was ineffective.

CONCLUSION

Based upon the record and the arguments presented herein, Mr. Gilliam respectfully urges the Court to reverse the lower, order a full evidentiary hearing, and vacate his unconstitutional convictions and sentences.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 5, 2000.

DAN D. HALLENBERG
Florida Bar No. 0940615
Assistant CCRC-South

OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL - SOUTH
101 N.E. 3rd Ave. Ste. 400
Fort Lauderdale, FL 33301
(954) 713-1284
Counsel for Appellant

Copies furnished to: Fariba Komeily, Assistant Attorney General
444 Brickell Ave., Ste. 950, Miami, FL 33131-2407