

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC96641
Lower Tribunal No. 96-12224-C

CHARLIE THOMPSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT FOR HILLSBOROUGH COUNTY,
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Mr. Thompson's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied all claims and denied an evidentiary hearing on all claims. The following symbols will be used to designate references to the record in the instant case:

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

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

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

"T." -- transcript of hearings held.

REQUEST FOR ORAL ARGUMENT

Mr. Thompson 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 present the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved. Mr. Thompson through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

Mr. Thompson was originally charged by indictment on September 17, 1986, and on January 14, 1987, the grand jury amended to first-degree murder (2 counts) by shooting with a firearm and/or stabbing with a knife or other sharp instrument (R. 24).

After a jury trial, Mr. Thompson was found guilty of Counts I, II, III and IV on March 16, 1987 (OR. 1064). On March 16, 1987, the jury rendered an advisory verdict of death by a vote of 9-3 (OR. 1064).

On April 6, 1987, the trial court sentenced Mr. Thompson to death for Counts I and II and imposed life sentences for Counts III and IV (OR. 1265-1266).

On July 20, 1989, the Florida Supreme Court reversed and remanded for a new trial. Thompson v. State, 548 So.2d 198 (Fla. 1989). The Court reversed on two issues: 1. Prosecution's unlawful use of peremptory challenges to exclude blacks from the jury; and 2. Constitutional error based on the admission of the defendant's confession.

On remand, a jury again found Thompson guilty and recommended death by a vote of 7-5 on both murder counts. The trial court imposed two death sentences and two consecutive life sentences for the kidnaping (R. 8-9).

On January, 30, 1992, the Florida Supreme Court again reversed and remanded for a new trial. Thompson v. State, 548 So.2d 198 (Fla. 1989). The Court held that the police must communicate to the accused, the right to consult with an attorney, without cost, before being questioned. At a Motion to Suppress hearing held in connection with the second trial, Detective Childers testified that his testimony at the first trial was in error, and that he did not inform Mr, Thompson that he had the right to an attorney at no cost (R. 32).

On October 8, 1992, after the third jury trial, Mr. Thompson was found guilty of Counts I, II, III and IV. (R. 158-160; T. 438-439). On October 9, 1992, the jury recommended death by a vote of 7-5 (R. 168; T. 575).

The trial court found six aggravating factors: prior felony conviction; murder committed while engaged in a kidnaping; murder committed to avoid arrest; murder committed for pecuniary gain; murder especially heinous, atrocious, or cruel; and murder committed in a cold, calculated, and premeditated manner. The court also found that evidence failed to establish extreme mental or emotional disturbance and substantially impaired capacity, but did give some weight to non-statutory mitigating factors including chronic mental illness, moderate disturbance, symptoms of mental illness, family background, and mental retardation.

On December 28, 1992, Mr. Thompson was sentenced to death for the murders of William Swack and Nancy Walker and consecutive life sentences on each kidnaping. (R. 226).

The Circuit Court of the Thirteenth Judicial Circuit, the Honorable Diana Allen, entered the judgments of conviction and sentence under consideration.

On November 23, 1994, the Florida Supreme Court affirmed Mr. Thompson's convictions and sentences on direct appeal. Thompson v. State, 648 So.2d 692 (Fla. 1994), cert. denied, 115 S. Ct. 2283 (1995).

On April 7, 1999, Mr. Thompson filed a motion to vacate judgments of conviction and sentence asserting that his conviction and sentence of death were obtained in violation of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution.

The post-conviction motion was summarily denied without an evidentiary hearing by order of the Honorable Judge Diana Allen dated the 18th of August, 1999. This is an appeal from the summary denial of that motion for the reasons set forth below.

SUMMARY OF ARGUMENT

1. Mr. Thompson was denied due process, effective assistance of counsel, and equal protection under the law by the following failures of both the lower court and counsel. The lower court failed to provide an evidentiary hearing on the ineffective assistance of counsel claims based upon counsel's failure to investigate and prepare the case, failure to adequately question jurors about their views on credibility of witnesses, mental health mitigation, mental health experts, and to remove biased jurors and preserve the issue for appeal, failure to present and cross-examine witnesses, failure to object to State interference and Brady violations, failure to make objections during the guilt and penalty phases of trial, failure to provide mental health experts with background information for evaluation of mitigation and intoxication factors, and failure to meet with the defendant prior to commencement of penalty phase.

2. The trial court erred failing to conduct an evidentiary hearing on the claim of counsel's failure to obtain a mental health expert to conduct a professional and appropriate evaluation of Mr. Thompson and an individualized sentencing.

3. Mr. Thompson's jury was given instructions which shifted the burden to Mr. Thompson to prove that death was not the proper sentence, and the judge used the same improper standard to sentence him to death.

4. Mr. Thompson's guilt and penalty phase proceedings were replete with procedural and substantive errors which when considered as a whole deprived him of a fair and impartial trial and sentencing.

5. The capital sentencing statute of Florida is unconstitutional on its face and as applied since it fails to prevent the arbitrary and capricious imposition of the death penalty and violates cruel and unusual punishment prohibitions.

6. The jury and the judge at Mr. Thompson's sentencing improperly considered non-statutory aggravating factors.

7. Mr. Thompson's jury was given jury instructions which unconstitutionally diluted their sense of responsibility for sentencing.

8. The Florida statutes used in Mr. Thompson's sentencing regarding aggravating factors is facially vague, overbroad, and does not provide for adequate narrowing instructions to the jury.

9. Mr. Thompson's sentence rests upon an unconstitutional automatic aggravating circumstance.

10. The Death Penalty Reform Act is unconstitutional on its face and as applied, and denies Mr. Thompson due process and violates the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment to the United States Constitution.

ARGUMENT I

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. THOMPSON'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS WITHOUT AN EVIDENTIARY HEARING.

Mr. Thompson was deprived of his right to a reliable trial and individual sentencing proceeding, and he was further denied the effective assistance of counsel during his guilt and penalty phases of trial, in violation of his rights to due process and equal protection under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as his rights under the corresponding provisions of the Florida Constitution.¹

In its order, the lower court denied these claims without granting an evidentiary hearing (PC-R 131-166). Mr. Thompson asserts that the lower court erred in failing to grant an evidentiary hearing and in summarily denying the ineffective assistance of counsel claims alleged in the 3.850 motion.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland requires a defendant to plead and demonstrate (1) unreasonable attorney

¹This argument was raised in Claim I of Mr. Thompson's motion to vacate.

performance, and (2) prejudice. In his 3.850 motion, Mr. Thompson had pled both.

Likewise, defense counsel must also discharge significant responsibilities at the sentencing phase of a capital trial. The United States 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).

No tactical motive can be ascribed to an attorney whose omissions are based on the failure to properly investigate or prepare, Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991). Mr. Thompson's sentence of death is the resulting prejudice. It cannot be said that there is no reasonable probability that the results of the guilt/innocence or sentencing phase of the trial would have been different if the evidence had been presented to the court and the jury.

Counsel's highest duty is the duty to investigate and prepare. Where, as here, counsel unreasonably fails to investigate and prepare, the defendant is denied a fair adversarial testing process and the results are rendered unreliable. Counsel here did not meet these standards. See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 384-88 (1986)

(failure to request discovery based on mistaken belief state obliged to hand over evidence); Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991)(failure to conduct pretrial investigation was deficient performance); Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc) (failure to interview potential self-defense witness was ineffective assistance); Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989)(failure to have obtained transcript witness's testimony at co-defendant's trial was ineffective assistance); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses).

"In a capital case the attorney's duty to investigate all possible lines of defense is strictly observed." Coleman v. Brown, 802 F.2d 1227 (11th Cir. 1986). Mr. Thompson's counsel failed in this duty. No tactical motive can be ascribed to an attorney whose omissions are based on the failure to properly investigate and prepare. See Kimmelman v. Morrison, Chambers v. Armontrout, Nixon v. Newsome. Mr. Thompson's capital conviction and sentence of death are the resulting prejudice. But for counsel's errors, there is a reasonable probability of a different outcome.

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in

other portions of the trial. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 626 F.2d 903, 906 (5th Cir. 1981)(counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d at 994("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"); Strickland v. Washington; Kimmelman v. Morrison.

The Eighth Amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. Beck v. Alabama, 477 U.S. 625 (1980). The United States Supreme Court noted, in the context of ineffective assistance of counsel, that the correct focus is on the fundamental fairness of the proceeding:

A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court 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 v. Washington, 466 U.S. 668, 696 (1984) (emphasis added). The evidence presented in these claims demonstrates that the results of Mr. Thompson's trial and penalty phase are unreliable.

A proper review of the ineffective assistance of counsel claims would necessarily require an evidentiary hearing to determine the reasons that counsel failed to call witnesses and completely investigate the case as set forth in subparagraphs A through H that follow. The failure to conduct an evidentiary hearing was error by the lower court.

Further, the record does not support the lower court's finding that the allegations in the 3.850 Motion to Vacate are not supported by any factual allegations in the motion. The motion makes allegations concerning failure of defense counsel to investigate and prepare (PC-R. 102). A post-conviction movant is entitled to an evidentiary hearing unless the motion and the record conclusively show that he is entitled to no relief. A movant's allegations must be accepted as true except to the extent that they are conclusively rebutted by the record. (see Valle v. State, 705 So.2d 1331 (Fla. 1997); LeCroy v. Dugger, 727

So.2d 236 (Fla. 1998); Meeks v. State, 382 So.2d 672 (Fla. 1980); Gaskin v. State, 737 So.2d 509 (Fla. 1999).

An evidentiary resolution of the ineffectiveness claims would have been proper, as the files and records in this case did not show that Mr. Thompson was "conclusively" entitled to "no relief".

A. COUNSEL WAS INEFFECTIVE FOR FAILURE TO ADEQUATELY QUESTION POTENTIAL JURORS ABOUT THEIR VIEWS ON THE CREDIBILITY OF WITNESSES, THEIR VIEWS ON MENTAL HEALTH MITIGATION AND MENTAL HEALTH EXPERTS, AND COUNSEL ALSO FAILED TO DISCOVER AND REMOVE BIASED JURORS, AND TO PRESERVE THE ISSUE FOR APPEAL.

Trial counsel performed only a perfunctory voir dire (R. 19-64). He failed to adequately inquire about possible racial prejudice, despite the fact that Mr. Thompson, an African-American, was accused of murdering a white woman and man. Counsel did make an inquiry of the panel about the fact that both counsel were black and that race had nothing to do with the case, however he failed to adequately inquire about the impact from an individual perspective with each of the prospective jurors (R. 41,42). He did not make an adequate individual voir dire inquiry to determine whether race would have some impact given the nature of the crime.

RACIAL INQUIRY

The court in its order found that because counsel asked a general question regarding race and pointed out to the

prospective jurors that both he and his client were black, that this was adequate (PC-R. 132). The court erred in ruling that this did not show deficient conduct because if counsel had pursued this area of inquiry, on an individual basis, he may have learned of some bias that would have disqualified one of the jurors. Further, even though there were black jurors ultimately seated on the panel, it does not cure his failure to ensure a racially unbiased panel. This is a question regarding counsel's performance that would have been resolved with an evidentiary hearing.

WITNESS CREDIBILITY

Mr. Thompson's trial counsel failed to question jurors about their beliefs regarding witnesses' credibility, including the police, and failed to adequately question them about their views on the death penalty.

The court addressed the issue of failing to question jurors about their beliefs regarding witness credibility by alluding to a generic commentary by counsel while admitting that he did not address police officers' credibility (R. Vol I 43-45).

Further, the court determined the issue of the death penalty inquiry in the same fashion by citing portions of the trial record (PC-R. 136-139). However, an evidentiary hearing on these issues was required to obtain evidence of counsel's reasons for not adequately questioning jurors in those areas.

MENTAL HEALTH QUESTIONS

In addition, counsel failed to question jurors about their opinions concerning mental health experts and mental health mitigation as it related to both the guilt or penalty phase (R. 19-64).

The court in it's order denying the relief requested admits that counsel did not question jurors about their opinions concerning mental health experts and mitigation, but declares that the deficient performance did not result in prejudice (PC-R. 140). How the court can determine that there was no prejudice to the defendant is uncanny given the verdict and sentence.

Without an evidentiary hearing it is not possible to make that determination. For instance, if one or more jurors harbored opinions that these types of experts or this type of mitigation was not a basis for consideration, they could have influenced or tainted the remainder of the panel.

In it's order, the court after acknowledging that counsel failed to make any inquiry into these areas, assumes that even if counsel were deficient it would not have resulted in prejudice (PC-R. 140). This area of inquiry was extremely critical for mitigation purposes. How the court determined that the failure was not prejudicial remains a mystery without conducting an evidentiary hearing. Jurors' beliefs about mental health and

experts who testify about it are pivotal in ensuring that the defendant receives a fair and impartial trial and sentencing.

FUNDAMENTAL ERROR REGARDING JURORS

Mr. Thompson's trial counsel allowed a prejudiced juror to remain on the jury panel. When jurors were questioned about whether they would insist on Mr. Thompson taking the stand, at least two jurors replied that they could not follow the law even if the judge instructed them that they could not infer anything from the fact that Mr. Thompson did not take the stand (R. 37-39).²

Potential juror Leonora Wolcott stated she believed that an innocent defendant would speak out, and if Mr. Thompson remained silent, she would have difficulty believing his innocence (R. 37). Both potential jurors Cheri Russel and Wolcott insisted that they would not be able to follow the judge's instructions as to Mr. Thompson's right to remain silent. (R. 37-39).

However, counsel failed to request a strike for cause on these two jurors. He should have requested additional peremptory challenges if needed or at a minimum interposed an objection to preserve the issue for appeal. Ultimately, Ms. Wolcott did serve as a juror in this case (R. 60). The resulting prejudice was a conviction and the 7-5 vote for death.

²Potential juror Cheri Russel said that she would penalize Mr. Thompson for remaining silent; if it were her, she would be fighting for her life (R. 37).

The court finds in it's order that the failure of counsel to remove juror Leonora Wolcott was not prejudicial because the Supreme Court found that the evidence was more than sufficient to support the convictions (PC-R. 141). The defendant's claim is not based upon sufficiency of evidence. The issue is whether that juror was tainted herself and whether she tainted the panel regarding the defendant's right to remain silent. The fact that the Florida Supreme Court affirmed the conviction has no relevance, and it is not a legal reason for denying the claim.

The court erred and violated the defendant's right to due process, and the Fifth Amendment by allowing a juror to remain on the panel without removing her for cause, especially when her opinion about the defendant's right not to testify and remain silent was so blatantly in contravention of constitutional law. The court should have exercised its power and excluded this juror with or without the aid of counsel. Moreover, the court should have granted an evidentiary hearing on this issue of ineffectiveness since it had ramifications both as to the guilt and penalty phases of the trial. The trial court violated Florida law by not stating a reason for the denial of the claim, and she failed to attach the proper portions of the record that showed the defendant was not entitled to relief.

B. COUNSEL WAS INEFFECTIVE FOR FAILURE TO ADEQUATELY INVESTIGATE AND ARGUE THE CASE DURING THE GUILT PHASE.

Trial counsel failed to adequately investigate and argue the case by not utilizing potential alibi witnesses. Mr. Johnson was aware of two alibi witnesses who may have provided a viable defense for Mr. Thompson. They would have been able to verify that Mr. Thompson did not have the opportunity to be at the crime scene when the crime occurred. Although Mr. Thompson apprised trial counsel of Eddie Houser, an acquaintance with whom he attended a barbecue on the day of the crime, and Lonnie White, a person who gave him a ride prior to 10:00 a.m. on the day of the murders, counsel failed to investigate or contact them for possible use at the trial. These witnesses have since died, but were available at that time. It shows that counsel did not adequately investigate the case. Even though counsel filed a Notice of Alibi, he never listed these two individuals as potential alibi witnesses (R. 51-52).

ALIBI WITNESSES

The court states that counsel's failure to call alibi witnesses to testify as to defendant's whereabouts from 10:00a.m. to 1:30p.m. did not result in prejudice, but assuming it was deficient performance it nevertheless was not prejudicial (PC-R. 143). Without an evidentiary hearing on this claim, it is not possible for the court to make this determination. Since the claim was not conclusively rebutted by the record, the court had a legal duty to conduct an evidentiary hearing.

CRIME SCENE

Trial counsel also failed to investigate and argue the integrity of the crime scene. The investigating officers failed to properly secure the area immediately after the crime. This resulted in many individuals -- not limited to investigators -- freely wandering through the crime scene.

Furthermore, there was testimony referring to a group of individuals, milling about the crime scene (R. 97-98). Apparently, they had approached and observed the crime scene prior to police notification and arrival, and they may have even been eyewitnesses to the crime itself. However, these individuals left and were never contacted by the police nor defense counsel to make an effort to determine what they may have observed or overheard.

Trial counsel also never conducted an independent forensic evaluation of the crime scene. This was especially important since tangible evidence from the crime scene such as DNA, fingerprints or shoe imprints might have been attributable to someone other than Mr. Thompson.

Police reports indicated that a bag of clothing was discovered within the crime scene area, but it was readily dismissed after the police questioned just one witness. The clothes were never inspected, inventoried, or checked for fingerprints or DNA. To the extent that these garments could

have provided exculpatory evidence, Brady was violated or counsel was certainly ineffective for failing to check out this information.

The court again makes a finding that the deficient performance did not result in prejudice (PC-R. 143,144). An evidentiary hearing should have been held to make that finding.

DEFENDANT' S RETARDATION

Trial counsel failed to investigate and argue the consequences of Mr. Thompson's mental retardation as it affected his ability to stand trial, and his mental state at the time of the offense both for the guilt and penalty phase. Just prior to trial, a competency hearing was held to determine Mr. Thompson's competency to stand trial. The court found him to be competent (R. 674-692, 727-773).

Moreover, when the Court asked for case law on the issue of mental retardation, and its effect on competency, only the State provided the Court with law (R. 771). However, defense counsel, although having knowledge of Mr. Thompson's mental retardation, failed to research or address the court as to the significance that retardation may have had on his competency to stand trial. This was a critical issue since during his first trial, Mr. Thompson had acted out and refused to attend his sentencing phase, all of which counsel knew or should have known.

Mr. Thompson's prior behavior indicated his competency and

should have been a major issue throughout the trial.³

Failure to accomplish any of the foregoing evidentiary matters cannot possibly be construed as a tactic or strategy. The failure to pursue these matters, which may have resulted in Mr. Thompson being acquitted, charges reduced or dismissed, is ineffectiveness on the part of defense counsel.

The trial court should have granted an evidentiary hearing on these issues, however, the court again admits that it was deficient performance but did not result in prejudice without providing any explanations (PC-R. 142-145). The failure to present to the jury adequate mental health information was highly prejudicial to the defendant.

C. COUNSEL FAILED TO EFFECTIVELY PRESENT AND CROSS-EXAMINE WITNESSES.

Counsel failed to adequately cross-examine the medical examiner and argue the validity of forensic evidence obtained from the autopsy. Additionally, counsel failed to attack the demonstrative evidence from the crime scene. After a review of the crime scene and autopsy photographs, defense counsel should have independently investigated the nature and cause of death.

The medical examiner's theory, based on the position of the knife wounds, suggested a struggle between Mr. Swack and his

³Mr. Alldredge, the public defender for Mr. Thompson's first trial, testified at the pretrial hearing that Mr. Thompson was unruly, speaking out, and refused to attend the penalty phase at the first trial in 1987 (R. 763-767).

attacker. However, trial counsel never presented alternative theories of how these wounds could have occurred.⁴ Counsel failed to obtain the services of an independent forensic pathologist who could have determined the validity of the State's theory regarding a struggle. The victim's autopsy reports would have shown the true extent of the wounds that were inflicted.

It could have been established that Dr. Diggs' testimony on this point was greatly exaggerated, and that the wounds were not received during a struggle; the reports would have further strengthened Mr. Thompson's contention that there was no credible evidence of intent or premeditation for these acts. Independent evidence could have been used to impeach the testimony of Dr. Diggs, the medical examiner.

Counsel should also have obtained witnesses who would have testified to the unsavory condition of the crime scene area, specifically, the contamination of both high drug traffic and prostitution. These factors could arguably have contributed to the contamination of the crime scene and the movement of the bodies. Perhaps other suspects could have been developed. Had evidence of the bodies being moved have been presented, the jury and judge may have discounted the "struggle" argument, and

⁴One crime scene photo shows two small wounds on the male victim's neck which look just as consistent with a scrape or bite as with a stab wound.

its impact on the aggravating factors of HAC and CCP, which were ultimately used to sentence Mr. Thompson to death.

FAILURE TO CROSS-EXAMINE AND PRESENT EVIDENCE

The court again uses a sufficiency of evidence argument to determine that there was not any prejudice (PC-R. 145,146). However, the claim relates to ineffectiveness of counsel and his failure to cross-examine these witnesses and to have independent experts provide alternatives to the jury which could have rendered the evidence insufficient and caused the outcome to be different. This issue should have been determined by an evidentiary hearing.

Trial counsel also failed to cross-examine and argue against the validity of the State's theory that the victims were forced to disrobe and the female victim was then ordered to dress. The State based this argument on the fact that leaves were found in the victim's undergarments. However, trial counsel made no attempt to offer an independent theory of how this debris could have been present. This was particularly important since there were discrepancies in testimony as to how the bodies were found and in what position.

The police photographs indicate that at least the female victim was laying on her back for a long time after she died given the blood pooling that is shown by the photographs. However, according to the police and eyewitnesses' testimony, she

was found in a different position. Further, Dr. Diggs' theory of the female victim's position when she was murdered was totally speculative.

There could have been other theories as to why the bodies were in the positions that they were found.⁵ An independent forensic examination should have been conducted and used to impeach the testimony of the investigating officers and Dr. Diggs regarding the adequacy of the police investigation and the doctor's autopsy and conclusions.

The court bolsters its ruling by stating that the evidence was more than sufficient to support conviction. The court then assumes deficient performance, but finds it was not prejudicial. The issue here again is not sufficiency of the evidence, but how did counsel's failure cause the jury to convict. The only way to ensure that this was not prejudicial would have been to conduct an evidentiary hearing.

FAILURE TO PRESENT EVIDENCE OF DRUGS AND ALCOHOL

Trial counsel failed to investigate and understand the nature and effect of the drugs that Mr. Thompson was on at the time of the offense. He also failed to present any testimony regarding the toxicological or pharmacological overall effect of

⁵For example, they might have been in the midst of an extramarital affair, having previously undressed, when their attacker came upon them. Coupled with the fact that there was an unknown male Caucasian pubic hair discovered in the female victim's underwear, this theory may have been plausible.

crack cocaine -- in conjunction with other drugs and alcohol that Mr. Thompson had consumed. Further, counsel failed to investigate the effects of crack cocaine on a person who had been evaluated as mentally retarded.

Admittedly, the theory of defense in the guilt phase was that Mr. Thompson did not commit the crime. However, penalty phase counsel failed to present complete evidence to the jury of Mr. Thompson's chronic alcohol and drug abuse, and he failed to present witnesses to testify as to the effects of the abuse. This would have had an impact on the jury whose vote was close already by 7-5.

The court restates its position in finding that assuming counsel was deficient there was no prejudice (PC-R. 149). Given the close vote for death it cannot be said that the failure to present such evidence may not have changed the outcome. The trial court should have held an evidentiary hearing to make that determination.

D. COUNSEL WAS INEFFECTIVE FOR FAILURE TO OBJECT TO STATE INTERFERENCE WITH EVIDENCE.

At the time of trial, the State was aware that Mr. Herman Smith was the individual who matched the description given by the bartender at Clementi's lounge. Mr. Smith, and not Mr. Thompson, just after the crime was attempting to cash the check signed by Mr. Swack. The State had access to Mr. Smith's fingerprints, yet never compared them to those retrieved from the scene of the

crime. Moreover, the State failed to disclose this suspect's fingerprints, or their knowledge that he was a suspect in this crime, to the defense. This action by the State prevented the defense from possibly demonstrating Mr. Thompson's innocence.

The State also had reason to believe that Debra Swack's ex-husband had a possible motive for the crimes, but they did not reveal this to the defense or pursue the matter. The State had access to his fingerprints, yet never compared them to the evidence retrieved from the scene of the crime. In fact, it appears that they made no attempts to investigate this individual at all. The State thus prevented the defense from demonstrating Mr. Thompson's innocence. To the extent that defense counsel knew or should have known of this evidence, and made no attempt to contact these persons or object, and file the appropriate motions for discovery violations, it was deficient performance and highly prejudicial.

Counsel also failed to investigate the derivation of the male Caucasian hair that was found in the female victim's underpants which prejudiced Mr. Thompson. The prejudice to Mr. Thompson resulting from counsel's deficient performance is clear because death was the result. Confidence in the outcome is undermined and no reliable adversarial testing occurred in this case. Mr. Thompson's sentence of death should not be permitted to stand.

FAILURE TO OBJECT

The court continues its use of the sufficiency of evidence as a basis for its ruling that no prejudice resulted (PC-R. 150). Yet, an evidentiary hearing would have revealed that not only was counsel's performance deficient, but that it was highly prejudicial to Mr. Thompson and could have changed the outcome of the trial.

E. COUNSEL WAS INEFFECTIVE FOR FAILURE TO VOIR DIRE, CALL WITNESSES AND OBJECT TO INADMISSABLE EVIDENCE.

Trial counsel stipulated to Dr. Gonzalez's qualifications as an expert in psychiatry at the competency hearing rather than voir dire him about his expertise in retardation. However, the doctor stated that he had not examined Mr. Thompson between 1987 and 1992, and that he only had the records from 1987 at the time of his last evaluation and no other information (R. 675-677). Further, Dr. Gonzalez testified that he concluded that Mr. Thompson was not mentally retarded, and therefore, the defendant was competent to proceed to trial (R. 674-692).

Dr. Gonzalez did not however perform any psychological tests to determine Mr. Thompson's intelligence level (R. 680, 684-686).⁶ Counsel was ineffective for failing to voir-dire Dr. Gonzalez or Dr. Sprehe as to what information they used to

⁶Dr. Sprehe, the other State expert, also testified that he did not conduct any tests to determine Mr. Thompson's intelligence (R. 731-732).

determine their competency evaluation opinions. By stipulation to the doctor's qualifications, counsel forfeited the ability to impeach the doctors' testimony that Mr. Thompson was competent to stand trial in 1992. Counsel was thus ineffective. The resulting prejudice was that the court found Mr. Thompson competent to proceed to trial.

FAILURE TO VOIR DIRE

The court erred by stating that the defense theory during trial was that defendant did not commit the crimes, and therefore even if assuming counsel was ineffective no prejudice occurred. However, assuming that the jury had known about Mr. Thompson's retardation it may have impacted them in rendering a verdict so stating that no prejudice resulted is a quantum leap to a incorrect conclusion.

The trial court should have held an evidentiary hearing to make findings of fact that would support its ruling.

JURY NEVER HEARD OF RETARDATION

The jury heard very little, if any evidence, of Mr. Thompson's mental retardation during the guilt or sentencing phase. Also, counsel failed to cross-examine or call as a witness Kathleen Shannon, Mr. Thompson's probation officer, about Mr. Thompson's mental retardation which would have aided the jury, and he failed to call her as a defense witness. In fact, counsel did not even cross-examine her at all (R. 219-221). This

was especially ineffective since Ms. Shannon knew Mr. Thompson for over a year and a half, and she was well aware of his mental retardation and mental deficiencies at the time of the crime.

FAILURE TO CALL WITNESS

The court in its order denying relief stated that counsel was limited on cross-examination to the subject matter of the direct-examination. While this is a correct statement of the law, it is not the reason counsel was ineffective. Counsel not only did not cross-examine this witness at all, but he failed to call her as a defense witness which would have allowed him to inquire about the retardation for the benefit of the jury. This is why he was ineffective, and the court should have held an evidentiary hearing to discover why counsel made the error. The resulting prejudice was death.

ADMISSION OF THE ID CARD

Defense counsel failed to object to the admission of Mr. Thompson's identification card (R. 198-200). This photo I.D. had no relevance to this case as to who murdered the victims, and it was prejudicial to Mr. Thompson because it was suggestive of guilt. Defense counsel was ineffective for not objecting to the introduction and admission of this evidence. The jury voted 7-5 to convict, which indicates that this photo I.D. probably was highly prejudicial against Mr. Thompson.

The court erroneously utilized the sufficiency of the evidence again to decide that there was not any prejudice to Mr. Thompson resulting from the ineffective performance of counsel. The court makes the assumption of ineffectiveness, but applies an incorrect standard. Only an evidentiary hearing would have provided for a determination that such defective performance was not prejudicial.

OBJECTION AND IMPROPER QUESTION

Defense counsel failed to properly object and request a Richardson hearing when Mr. Smith, a witness, made a statement that his crew members saw Mr. Thompson "carry" the victims out of their office with a gun in his pocket (R. 314). Mr. Smith was the foreman of the graveyard crew on which Mr. Thompson had worked. He was also the individual who was identified as trying to cash the check for \$1500 dollars signed by Mr. Swack. Additionally, counsel failure to request a Richardson hearing prejudiced Mr. Thompson as well as counsel asking the question which set the chain of events in motion.

Upon the removal of the jury, the court asked trial counsel what he wanted to do. Counsel asked that the court instruct the witness to answer his question. The last question defense counsel asked was, "When did your crew see him?". Defense counsel also asked the court initially to give a curative instruction to the jury to disregard Mr. Smith's last remark as being non-

responsive. However, counsel asked for a mistrial later which the court denied probably because he had set the event in motion (R. 312-317). The court then inquired, sua sponte, when was the first time that anybody from law enforcement -- including the State Attorney's office -- knew about this alleged eyewitness. The State responded that he had known for about two weeks (R. 314). At this point, defense counsel should have moved for a Richardson hearing based on the State's continuing duty to disclose statements under Fla. R. Crim. P. 3.220. However, defense counsel merely repeated his former request for a curative instruction, and then, he simultaneously, asked for a mistrial (R. 314-316). The court denied the motion for a mistrial and gave the following limiting instruction:

"Members of the jury, the witness, Mr. Smith, was asked a question whether he had seen Mr. Thompson at the cemetery on the date in question, and his answer to that was, 'no, he did not.' The remainder of his answer -- you are being instructed to disregard the remainder of his answer concerning what somebody told him may have occurred. You will disregard all of the answer, except the witness saying, 'no, he did not.' "

(R. 319).

The bell could not be un-rung by this instruction. The prejudice to the defendant should be readily apparent. If the State had revealed that they had spoken to Mr. Smith earlier about this alleged eyewitnesses' testimony, defense counsel would have had the opportunity to either investigate or eliminate the

statement that tended to implicate Mr. Thompson in the crimes. Defense counsel's performance here was ineffective and prejudicial, especially since this was the only inculpatory evidence relating to Mr. Thompson. Had the jury not been allowed to hear this testimony, no reasonable juror would have been able to convict Mr. Washington.

The lower court correctly in its order stated that the Florida Supreme Court had ruled on direct appeal that counsel had invited the deadly response, and found the evidence to be more than sufficient to support the convictions in ruling that there was not prejudice to Mr. Thompson. However, this is error because the issue here is whether counsel's performance was deficient and caused prejudice. Counsel asked an improper question and had failed to request a Richardson hearing. The resulting prejudice was in not preventing the only piece of inculpatory evidence from going to the jury, thereby assuring a conviction and sentence of death. An evidentiary hearing would have been proper to determine whether counsel's performance failed the test of Strickland.

F. COUNSEL WAS INEFFECTIVE FOR FAILURE TO MAKE PROPER OBJECTIONS DURING PENALTY PHASE.

During penalty phase closing, the State made incorrect statements about the weighing instructions.

"Please don't go back there and think, well, I've heard that there are so many factors for the other side and the other side

has only one or two so it must be that one.
It's not that. You listen to the things.
You listen to the instructions and you go
back and **weigh which of these you think are
more important"**

(R. 540)(Emphasis added).

This statement was prejudicial because it directed the jury to place their own worth on the aggravators and the mitigators rather than listening to the judge's instructions as to how to give them proper weight. Counsel was ineffective for not properly preserving this issue by objection and requesting an instruction from the court.

COMMENT BY STATE DURING PENALTY PHASE

The court erred by suggesting that these comments were cured by the court's instructions to the jury, and that therefore, they were not improper (PC-R. 156, 157). However, counsel was ineffective for not objecting and preserving this issue for the direct appeal. The court could have cured this error by granting an evidentiary hearing. .

G. COUNSEL WAS INEFFECTIVE FOR FAILURE TO PROVIDE MR. THOMPSON'S MENTAL HEALTH EXPERT WITH ADEQUATE BACKGROUND INFORMATION TO PERMIT A MEANINGFUL EVALUATION OF MR. THOMPSON FOR THE PRESENCE OF MITIGATION OR INTOXICATION NEGATING SPECIFIC INTENT.

Trial counsel did not provide Mr. Thompson's mental health experts with adequate background information to enable them to make a meaningful evaluation of Mr. Thompson at the time of the offense. This failure constitutes ineffective assistance and

greatly prejudiced Mr. Thompson's defense at all phases of his trial.

A criminal defendant is entitled to meaningful expert psychiatric assistance when the State makes his mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 470 U.S. 68 (1985). What is required is an "adequate psychiatric evaluation of [the defendants'] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). Counsel has a duty to conduct proper investigation into his client's mental health background, and to assure that the client is not denied a professional and professionally conducted mental health evaluation.

A qualified mental health expert serves to assist the defense consistent with the adversarial nature of the fact-finding process. Defense counsel in this case was well aware that Mr. Thompson functioned well below normal and had only a third-grade education. Defense counsel had also represented Mr. Thompson in his second trial, and thus, he was privy to all of the medical reports from the first and second trial. It was, therefore, incumbent upon him to relay all necessary facts to the mental health experts, since Mr. Thompson was unable to do so. In effect, Dr. Logan's testimony in the sentencing phase was very short and devoid of any of the intricacies and hardships of Mr. Thompson's life (R. 452-456) .

In Mr. Thompson's capital penalty phase proceedings, substantial mitigating evidence, both statutory and non-statutory, went undiscovered, and it was not presented for the consideration of the judge and jury, both of whom are sentencer's in Florida. Mr. Thompson pleads both Brady and ineffective assistance of counsel relating to the penalty phase. The resulting death sentence was unreliable.

Mr. Thompson was sentenced to death by a judge and jury who knew very little about him. The evidence set forth in this claim demonstrates that an unreliable death sentence was the resulting prejudice. At the penalty phase, counsel provided only scant information about Mr. Thompson to the judge and jury in contrast to the vast amount of revealing information that was available for mitigation.

Counsel failed to effectively discover and present mitigating evidence, such as:

- a. Mr. Thompson's long history of substance abuse;
- b. the toxicological, pharmacological, and neurological effects of long-term use of crack cocaine, especially when coupled with alcohol abuse, as well as Mr. Thompson's retardation;
- c. the impoverished childhood he endured and the limited education he received.

Counsel also failed to object or refute the introduction of improper aggravating testimony and prosecutorial argument including:

a. the prosecutor's argument that Mr. Thompson manipulated Drs. Logan and Berland into believing that he could not read. In fact, all the testimony at sentencing was that Mr. Thompson was not able to read well; he suffered from very low intellectual functioning; he was not smart enough to lie on a mental health exam; he was not malingering.

b. the prosecutor's inappropriate "golden rule" argument of how you punish a child for their bad conduct (R. 535);

c. the prosecutor's inappropriate statement about how to weigh mitigators.

d. the prosecutor's ludicrous argument that Mr. Thompson could have driven Mr. Swack's car to the park (R. 544).

In fact, rather than objecting to or trying to refute the prosecutor's argument in the penalty phase, all that Mr. Murphy argued was policy -- that there was no rationale for deterrence in executing the mentally retarded.

Had information been provided to a competent mental health expert at or prior to trial, and had that mental health expert

performed the tests which any competent mental health expert would have performed, Mr. Thompson would have been able to present evidence to the jury that at the time of the offense, his conduct was impaired and he was suffering from extreme emotional or mental disturbance. These are two of the weightiest mitigating factors under Florida law.

Florida law is clear that insanity and mental health mitigation are assessed under distinctly different standards. A defendant may be legally answerable for his actions and sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of his sentence because of his mental state. As stated above, compelling evidence of mental health disabilities was not presented to Mr. Thompson's jury. Under the basic tenets of death penalty jurisprudence, ignorance of mental health issues, and the capricious results it engenders, is unconstitutional.

In addition, the aforementioned mental health experts could have rebutted the weight of the aggravating circumstances presented by the prosecution.

H. COUNSEL WAS INEFFECTIVE BECAUSE PENALTY PHASE COUNSEL NEVER MET WITH THE DEFENDANT PRIOR TO THE ACTUAL COMMENCEMENT OF THE PENALTY PHASE.

Penalty phase trial counsel failed to meet Mr. Thompson prior to trial, and he never even questioned Mr. Thompson directly on facts that related to mitigation issues (i.e.

witnesses with knowledge of Mr. Thompson's drug habits and background). Consequently, the jury never knew about his retardation, his state of mind, and other mental health issues.

ARGUMENT II

MR. THOMPSON WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE DEFENSE COUNSEL FAILED TO OBTAIN A MENTAL HEALTH EXPERT WHO WOULD CONDUCT A PROFESSIONALLY COMPETENT AND APPROPRIATE EVALUATION OF MR. THOMPSON DURING THE TRIAL AND SENTENCING PROCEEDINGS. MR. THOMPSON'S RIGHTS TO A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITAL SENTENCING DETERMINATION WERE DENIED.

A criminal defendant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to the proceeding. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendants] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979).

When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984), and to assure that the client is not denied a professional

and professionally conducted mental health evaluation. See Fessel; Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Mason v. State, 489 So.2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

The mental health expert must also protect the client's rights, and the expert violates these rights when he or she fails to provide adequate assistance. State v. Sireci, 502 So.2d 1221, 1224 (Fla. 1987); Mason v. State. The expert also has the responsibility to obtain and properly evaluate and consider the client's mental health background. Mason, 489 So.2d at 736-37. The United States Supreme Court has recognized the pivotal role that the mental health expert plays in criminal cases:

[W]hen the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they might believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of

insanity, and tell the jury why their observations are relevant.

Ake, 105 S. Ct. at 1095 (citation omitted).

Generally accepted mental health principles require that an accurate medical and social history be obtained "because it is often only from the details in the history" that organic disease or major mental illness may be differentiated from a personality disorder. R. Strub & F. Black, Organic Brain Syndrome, 42 (1981). This historical data must be obtained not only from the patient but from sources independent of the patient. Patients are frequently unreliable sources of their own history, particularly when they have suffered from head injury, drug addiction, and/or alcoholism. Consequently, a patient's knowledge may be distorted by knowledge obtained from family and their own organic or mental disturbance, and a patient's self-report are thus suspect:

[I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information in the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Bonnie & Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case of Informed Speculation, 66 Va. L. Rev. 727 (1980) (cited in Mason, 489 So.2d at 737).

In Mr. Thompson's case, counsel failed to provide his client with "a competent psychiatrist...[to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake, 105 S. Ct. at 1096 (1985). The relationship between Mr. Thompson and trial counsel had deteriorated to such degree that Mr. Thompson's mental state led him to believe that trial counsel was not working in his best interest, and the appointed mental health expert was not to be trusted. The breakdown of attorney client relationship was directly caused by trial counsel's abandonment of his duty to effectively represent Mr. Thompson. Both the experts and trial counsel have a duty to perform an adequate background investigation. When such an investigation is not conducted, due process is violated. The judge and jury are deprived of the facts which are necessary to make a reasoned finding. Information which was needed in order to render a professionally competent evaluation was not investigated. Mr. Thompson's judge and jury were not able to "make a sensible and educated determination about the mental condition of the defendant at the time of the offense." Ake, 105 S. Ct. at 1095.

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

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

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

Perri v. State, 441 So.2d 606, 609 (Fla. 1983).

Because of counsel's failure to properly investigate and prepare for the penalty phase, his "minimal preparation is plainly evident." Cunningham v. Zant, 928 F.2d 1006, 1017 (11th Cir. 1991).

The prejudice to Mr. Thompson resulting from the expert's and counsel's deficient performance is clear. Confidence in the outcome is undermined, and the results of the penalty phase are unreliable.

ARGUMENT III

MR. THOMPSON'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH

AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. THOMPSON TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. THOMPSON TO DEATH. FAILURE TO OBJECT OR ARGUE EFFECTIVELY RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE.

Under Florida law, a capital sentencing jury must be:

[T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .

[S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So.2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Thompson's capital proceedings. To the contrary, the court repeatedly and unconstitutionally shifted to Mr. Thompson the burden of proving whether he should live or die (R. 780). 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 employed shifted to the defendant the burden on the question of whether he should live or die. The Hamblen opinion said these claims should be addressed on a case-by-case basis in capital post-conviction actions. Mr. Thompson urges that this Court assess this significant issue in his case and grant him the relief to which he entitled.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the constitution; such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate 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, thus violating Caldwell.

In her preliminary penalty phase instructions to the jury, the judge explained that the jury's job was to determine whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any (R. 414).

The jury understood that Mr. Thompson had the burden of proving whether he should live or die. But just in case the jury was unsure, the judge twice repeated the incorrect statement of the law immediately before the jury retired for deliberations:

As you have been told, the final decision as to what punishment shall be imposed is my responsibility...(R. 414) it is your duty to follow the law that will now be given to you by the Court and to render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(R. 414) (emphasis added). And:

Now, should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances if any.

(R. 416) (emphasis added).

The instructions violated Florida law and the Eighth and Fourteenth Amendments in two ways. First, the instructions shifted the burden of proof to Mr. Thompson on the central sentencing issue of whether death was the appropriate sentence.

Second, while being instructed 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. Thus, the jury was precluded from considering mitigating evidence, Hitchcock, and from evaluating the "totality of the circumstances" in considering the appropriate penalty. 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. Therefore, Mr. Thompson is entitled to a new sentencing hearing because his sentencing was tainted by improper instructions.

Counsel's failure to object to the instructions was deficient performance. But for counsel's deficient performance, there is a reasonable probability that the jury would have recommended life.

ARGUMENT IV

MR. THOMPSON'S TRIAL COURT PROCEEDINGS WERE REplete WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Thompson did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Ray v. State, 403 So.2d 956 (Fla. 1981); Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991). The process itself failed Mr. Thompson. It failed because of the sheer number and types of errors which occurred during his trial, and when considered as a whole, see claim I, those errors virtually dictated the ultimate sentence that he received.

The Supreme Court has consistently emphasized the uniqueness of death as a criminal punishment. Death is "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity." Furman, 408 U. S. at 287 (Brennan, J., concurring). It differs from lesser sentences "not in degree but in kind. It is unique in its total irrevocability." Id. at 306 (Stewart, J.,

concurring). The severity of the sentence "mandates careful scrutiny in the review of any colorable claim of error." Zant v. Stephens, 462 U. S. 862, 885 (1983). Accordingly, the cumulative effects of error must be carefully scrutinized in capital cases.

The flaws in the system that sentenced Mr. Thompson to death are many. They have been pointed out throughout this brief and are incorporated herein. There have been repeated instances of ineffective assistance of counsel and error by the trial court which significantly tainted this process.

Counsel will not re-iterate all the information related to error contained elsewhere in this brief. Suffice it to say that the main body of error is found in Claim I.

ARGUMENT V

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED FOR FAILING TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, AND FOR VIOLATING THE CONSTITUTIONAL GUARANTEE PROHIBITING CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Florida's capital sentencing scheme denies the right to due process, and constitutes cruel and unusual punishment on its face and as applied in this case. It did not prevent the arbitrary imposition of the death penalty nor narrow the application of the death penalty to the worst offenders.

Execution by electrocution or lethal injection imposes physical and psychological torture without commensurate justification, and constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U. S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. This leads to the arbitrary and capricious imposition of the death penalty, and violates the Eighth Amendment.

Florida's capital sentencing procedure does not have the independent reweighing of aggravating and mitigating circumstances envisioned in Proffitt v. Florida, 428 U. S. 242 (1976).

In view of the arbitrary and capricious application of the death penalty under the current statutory scheme, the constitutionality of Florida's death penalty statute is in doubt. Florida's death penalty statute as it exists, and as applied, is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

ARGUMENT VI

MR. THOMPSON'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE DENIED BY THE JURY AND THE JUDGE'S CONSIDERATION OF NON- STATUTORY AGGRAVATING CIRCUMSTANCES.

The State maintained during its closing argument its version of the facts that were stated in a manner to inflame and create an emotional response from the jury (R. 383-397). The totality of this argument violates legal principles as shown herein. Not only did the State use facts in an inflammatory manner, but it also made comments that would cause the jury to consider improper aggravators and application of the law. For instance:

[THE STATE]:. . .your verdict is
the sentence that Mr. Thompson will receive.

(R. 386).

And the process that you go through is you don't add them up, you don't go, well, there are like four of these and the other side only had two, that's not the process you go through. You weigh them, and one side may only have one factor, but you may decide that that factor is so important that it means much more than the five or six or eight factors that another side may have. You weigh it.

(R. 390).

There is another aggravating factor, what is called avoiding lawful arrest. And it's called by us witness elimination...

(R. 392)(emphasis added).

The judge and jury's consideration of improper and unconstitutional non-statutory aggravating factors violated the

Eighth Amendment, and prevented the constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S.Ct. 1130 (1992); Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). As a result, these impermissible aggravating factors evoked a sentence that was based on an "unguided emotional response," a clear violation of Mr. Thompson'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 has held similar 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 but that the State's argument was meant to evoke an emotional response from the jury. Clearly, confidence in the outcome of Mr. Thompson's trial has been undermined when jurors are exposed to such emotional oratory.

The cumulative effect 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, and that the 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 State Attorney in Mr. Thompson'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. Kemp, 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 unprejudiced 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, "[w]hen core Eighth 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).

The jury was also precluded from hearing any mitigation evidence regarding whimsical or residual doubt in violation of Lockett v. Ohio, 438 U. S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982).

Counsel's failure to object to the prosecutor's improper and erroneous statements was deficient performance.

ARGUMENT VII

MR. THOMPSON'S SENTENCING JURY WAS MISLED BY COMMENTS AND INSTRUCTIONS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Thompson's jury was repeatedly instructed by the court and the prosecutor that its role was merely "advisory". However, because great weight is given to the jury's recommendation, the jury is a sentencer. Espinosa v. Florida, 112 S. Ct. 2926 (1992). In fact, the jury "is a co-sentencer under Florida law." Johnson v. Singletary, 18 Fla. L. Weekly 90 (Fla. 1993).

Here the jury's sense of responsibility would have been 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). To the extent that defense counsel without a tactic or strategy failed to object to these repeated violations, he rendered prejudicially deficient performance.

ARGUMENT VIII

FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FACIAL INVALIDITY OF THE STATUTE WAS NOT CURED IN MR. THOMPSON'S CASE WHERE THE JURY DID NOT RECEIVE ADEQUATE NARROWING CONSTRUCTIONS. AS A RESULT, MR. THOMPSON'S SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED, ESPINOSA V. FLORIDA AND RICHMOND V. LEWIS.

The United States Supreme Court's opinions in Richmond v. Lewis, 113 S.Ct. 528 (1992), Espinosa v. Florida, 112 S. Ct. 2926 (1992), and Glock v. Singletary, Case No. 91-3528 (11th Cir., October 7, 1994), establish that the Florida Supreme Court erred in its analysis of Mr. Thompson's claim raised on direct appeal that the Florida Statute, setting forth the aggravating circumstance of "cold, calculated and premeditated," was vague and overbroad under the Eighth Amendment.

At issue in Richmond was whether an Arizona aggravating factor, statutorily defined as "especially heinous, atrocious,

cruel or depraved," was constitutional as applied in Mr. Richmond's case. In that case, the trial court had found three (3) aggravating factors, including the "especially heinous, atrocious, cruel or depraved" factor, and determined that these factors outweighed the mitigation which the defendant had presented, and sentenced him to death. On direct appeal, the Supreme Court of Arizona affirmed the defendant's sentence with two (2) justices finding that the "especially heinous, atrocious, cruel or depraved" aggravating factor was properly applied, two (2) justices finding that the factor was not properly applied but concluding that the sentence of death appropriate even absent the factor, and one (1) justice dissenting. The United States District Court for the District of Arizona denied habeas corpus relief, and the United States Court of Appeals for the Ninth Circuit affirmed, finding that the Arizona Supreme Court had applied a valid narrowing construction of the "especially heinous, atrocious, cruel or depraved" factor, or, in the alternative, that the case was distinguishable from Clemons v. Mississippi, 494 U. S. 738 (1990)(requiring either appellate re-weighing or a valid harmless error analysis after an appellate court strikes an aggravating factor) because under the statute at issue in Clemons the invalidation of an aggravating circumstance necessarily rendered any evidence of mitigation 'weightier' or

more substantial in a relative sense, while the same could not be said under the terms of the Arizona statute.

Challenging the latter determination, Mr. Richmond petitioned the United States Supreme Court for certiorari, arguing that the statute in question was unconstitutionally vague, and that the Supreme Court of Arizona failed to cure that invalidity during the appellate process.

In analyzing the issue, the Supreme Court stated:

The relevant Eighth Amendment law is well defined. First, a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty. See e.g., Maynard v. Cartwright, 486 U. S. 356, 361-364 (1988); Godfrey v. Georgia, 446 U. S. 420, 427-433 (1980). Second, in a "weighing" State, where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other valid aggravating factors obtain. See e.g., Stringer v. Black 112 S.Ct. 1130 (1992); Clemons v. Mississippi, supra, at 748-752. Third, a state appellate court may rely upon an adequate narrowing construction of the factor in curing this error. See Lewis v. Jeffers, 497 U. S. 764 (1990); Walton v. Arizona, 497 U. S. 639 (1990). Finally, in federal habeas corpus proceedings, the state court's application of the narrowing construction should be reviewed under the "rational factfinder" standard of Jackson v. Virginia, 443 U. S. 307 (1979). See Lewis v. Jeffers, supra, at 781.

113 S. Ct. at 535.

1. Reasoning that a majority of the Arizona Supreme Court had found that the trial Court

had applied the "heinous, atrocious, cruel or depraved" aggravating circumstance contrary to that court's narrowing construction, but had thereafter failed to apply that narrowing construction through an appellate reweighing or to conduct any meaningful harmless error analysis, the United States Supreme Court vacated Mr. Richmond's sentence of death and remanded for a new sentencing.

Id. at 534.

The same result is required here. In Mr. Thompson's case, the Florida Statute defined the aggravating factors at issue as follows: the capital felony "was committed in a cold, calculated, and premeditated manner." Fla. Stat. §121.141(5)(i). The statute did not further define this aggravating factor. This statutory language is and was facially vague. Richmond, 113 S. Ct. at 535; Espinosa v. Florida, 112 S. Ct. 2926 (1992).⁷

While the Florida Supreme Court has adopted narrowing constructions of this statutory provision, the United States Supreme Court held in Richmond that, not only must a state adopt "an adequate narrowing construction," but that construction must also be applied either by the sentencer or by the appellate court in a reweighing in order to cure the facial invalidity. Richmond, 113 S. Ct. at 535 ("Where the death sentence has been infected by a vague or otherwise constitutionally invalid

⁷The Florida Supreme Court has recognized that the cold, calculated, and premeditated instruction is also subject to attack on grounds of vagueness. See James v. State, 615 So.2d 668 (Fla. 1993).

aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand.").

In Mr. Thompson's case, the narrowing construction was not applied by any of the constituent sentencers. His penalty phase jury was not given "an adequate narrowing construction," but instead was simply instructed on the facially vague statutory language. Following the death recommendation, the sentencing judge imposed a death sentence.

In Florida, a sentencing judge in a capital case is required to give the jury's verdict "great weight." As a result, it must be presumed that a sentencing judge in Florida followed the law and gave "great weight" to the jury's recommendation. Certainly nothing in Mr. Thompson's case warrants setting aside that presumption. Florida law requires that where evidence exists to support the jury's recommendation, it must be followed. Scott v. State, 603 So.2d 1275 (Fla. 1992). Here the judge considered, relied on, and gave great weight to the tainted jury recommendation. A "new sentencing calculus" free from the taint, as required by Richmond, had not been conducted. The judge was not free to ignore the tainted death recommendation. Scott.

Richmond demonstrates that Mr. Thompson was denied his Eighth Amendment rights. The jury was not given the proper

narrowing construction so the facial unconstitutionality of the statute was not cured.

Therefore, even if "the trial court did not directly weigh any invalid aggravating circumstances," it must be "presume[d] that the jury did so." Id. Thus, "the trial court indirectly weighed the invalid aggravating factor[s] that we must presume the jury found. This kind of indirect weighing of . . . invalid aggravating factor[s] creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, . . . and the result, therefore, was error." Id.

Considering invalid aggravating factors adds thumbs to "death's side of the scale," Stringer, 112 S. Ct. at 1137, "creat[ing] the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." Id. at 1139. The errors resulting from the unconstitutional instruction regarding the "cold, calculated and premeditated" circumstance provided to Mr. Thompson's jury were not harmless beyond a reasonable doubt. "[W]hen the weighing process has been infected with a vague factor the death sentence must be invalidated." Stringer, 112 S. Ct. at 1139.

In Florida, the sentencer weighs aggravation against mitigation in determining the appropriate sentence. Id. Thus, assessing whether an error occurring during the sentencing

process was harmless or not requires assessing the effect of the error on the weighing process.

Unless the Respondent can establish beyond a reasonable doubt that the consideration of the invalid statutory provisions had no effect upon the weighing process, the errors cannot be considered harmless. Espinosa and Richmond require that Mr. Thompson receive a new sentencing proceeding in front of a jury that comports with the Eighth Amendment.

ARGUMENT IX

MR. THOMPSON'S SENTENCE RESTS UPON AN UNCONSTITUTIONALLY AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Under Florida law, capital sentencers 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 cornerstone of the state's first degree murder case against Mr. Thompson was premised on a felony murder theory -- that the murder took place during the course of a kidnaping. The State knew that Mr. Thompson suffered from a history of drug and alcohol abuse and that he was intoxicated at the time of the alleged offense which would undermine proof of premeditation at the time of the offense. Therefore, at Mr. Thompson's trial, the jury was read the felony-murder instruction and the definition of

kidnaping (R. 132, 143). Subsequently, Mr. Thompson was found guilty of first degree murder and kidnaping (R. 160).

At Mr. Thompson's sentencing and trial, the jury was instructed on the "felony-murder" aggravating circumstance and the definition of kidnaping, and the trial court also subsequently found the existence of the "felony murder" aggravating factor (R. 608).

The jury's deliberation was tainted by the 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. Thompson thus entered the sentencing eligible for the death penalty. See Porter v. State, 564 So.2d 1060 (Fla. 1990).

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 thus involve, by necessity, the finding of a statutory aggravating circumstance, a fact which violates the eighth amendment. This is so because an automatic aggravating circumstance is created that does not "genuinely narrow the class of persons eligible for the death

penalty," Zant v. Stephens, 462 U. S. 862, 876 (1983), and which renders the sentencing process unconstitutionally unreliable. Id. "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. Thompson was convicted of felony murder, he then automatically faced statutory aggravation for felony murder. 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 lower court neither instructed the jury on nor applied this limitation in imposing the death sentence.

The Wyoming Supreme Court recently addressed this issue in Engberg v. Meyer, 820 P. 2d 70 (Wyo. 1991). In Engberg, the Wyoming court found the use of an underlying felony both as an element of first degree murder and as an aggravating circumstance violation of the Eighth Amendment:

In this case, the enhancing effect of the underlying felony (robbery) provided two of the aggravating circumstances which led to Engberg's death sentence: (1) murder during commission of a felony, and (2) murder for pecuniary gain. As a result, the underlying robbery was used not once but three times to convict and then enhance the seriousness of Engberg's crime to a death sentence. All felony murders involving robbery, by definition, contain at least the two aggravating circumstances detailed above.

This places the felony murder defendant in a worse position than the defendant convicted of premeditated murder, simply because his crime was committed in conjunction with another felony. This is an arbitrary and capricious classification, in violation of the Furman/Gregg narrowing requirement.

Additionally, we find a further Furman/Gregg problem because both aggravating factors overlap in that they refer to the same aspect of the defendant's crime of robbery. While it is true that the jury's analysis in capital sentencing is to be qualitative rather than a quantitative weighing of aggravating factors merely because the underlying felony was robbery, rather than some other felony. The mere finding of an aggravating circumstance implies a qualitative value as to that circumstance. The qualitative value of an aggravating circumstance is unjustly enhanced when the same underlying fact is used to create multiple aggravating factors.

When an element of felony murder is itself listed as an aggravating circumstance, the requirement in W.S. 6-5-102 that at least one "aggravating circumstance" be found for a death sentence becomes meaningless. *Id.* At 767.

Black's Law Dictionary, 60 (5th ed. 1979) defines aggravation as follows:

Any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself. (emphasis added).

As used in the statute, these factors do not fit the definition of "aggravation." The aggravating factors of pecuniary gain and commission of a felony do not serve the

purpose of narrowing the class of persons to be sentenced to death, and the Furman/Gregg weeding-out process fails.

Engberg, 820 P. 2d at 89-90.

Wyoming, like Florida, provides that the narrowing occur at the penalty phase. See Stringer v. Black. The use of the "in the course of a felony" aggravating circumstance is unconstitutional. As the Engberg court held:

[W]here an underlying felony is used to convict a defendant of felony murder only, elements of the underlying felony may not again be used as an aggravating factor in the sentencing phase. We acknowledge the jury's finding of other aggravating circumstances in this case. We cannot know, however, what effect the felony murder, robbery, and pecuniary gain aggravating circumstances found had in the weighing process and in the jury's final determination that death was appropriate.

Engberg, 820 P.2d at 92.

In Tennessee v. Middlebrooks, 840 S. W. 2nd 317 (Tenn. 1992), the Tennessee Supreme Court followed the decision in Engberg. In remanding for a new sentencing in a case involving the torture murder of a fourteen year old boy, the Tennessee Supreme Court adopted the rationale expressed by Justice Rose of the Wyoming Supreme Court seven years before the majority of that court granted Mr. Engberg a new sentencing hearing in Engberg v. Meyer:⁸

⁸At that new sentencing hearing Mr. Engberg received a life sentence.

Automatically instructing the sentencing body on the underlying felony in a felony murder case does nothing to aid the jury in its task of distinguishing between first-degree homicides and defendants for the purpose of imposing the death penalty. Relevant distinctions dim, since all participants in a felony murder, regardless of varying degrees of culpability, enter the sentencing stage with at least one aggravating factor against them.

. . .

A comparison of the sentencing treatments afforded first-degree-murder defendants further highlights the impropriety of using the underlying felony to aggravate felony-murder. The felony murderer, in contrast to the premeditated murderer, enters the sentencing stage with one aggravating circumstance automatically against him. The Disparity in sentencing treatment bears no relationship to legitimate distinguishing features upon which the death penalty might constitutionally rest.

Middlebrooks, slip op. at 55 (citing Engberg v. State, 686 P. 2d 541, 560 (Wyo. 1984)(Rose J., dissenting)).

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").

In Mr. Thompson's case, mitigating circumstances are set forth in the record. There was evidence that Mr. Thompson suffered from a history of alcoholism and drug abuse, and there was evidence that he was intoxicated at the time of the alleged offense. Each of these constitute mitigation under Florida law. Cooper v. Dugger, 526 So.2d 900 (Fla. 1988). To the extent that defense counsel failed to object, he rendered prejudicially deficient performance. Mr. Thompson should have been provided an evidentiary hearing, and refusal by the court was error.

ARGUMENT X

THE STATE OF FLORIDA'S DEATH PENALTY REFORM ACT OF JANUARY 2000 IS UNCONSTITUTIONAL ON IT'S FACE AND AS APPLIED, AND PROVIDES EXECUTION BY LETHAL INJECTION WHICH CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT, AND DEPRIVES MR. THOMPSON OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

At the onset, counsel acknowledges that this issue was not raised in the 3.850 motion currently under appeal, however at the time of the filing of the 3.850 motion, electrocution was the means for execution and that has been replaced by the Death Penalty Reform Act, Florida Statutes Chapter 922, which proscribes lethal injection as the new means for execution.

After a review of this Court's decision in Sims v. State, 2000 WL 193226 (Fla.), and while being mindful of the rulings, this claim is now asserted as an adjunct to the claims contained in the 3.850 motion which relate to cruel and unusual punishment to ensure preservation for future federal claims.

Florida has now executed Terry Melvin Sims and Anthony Bryan on February 23rd and 24th respectively, however the appellant asserts that the new law is unconstitutional because it violates ex-post facto, separation of powers, and due process clauses of both state and federal constitutions and the prohibition against cruel and unusual punishment.

The newly enacted statute provides that death sentences in Florida may be presumptively carried out by the injection of poison into a condemned person's body. The change in the law appears to be more inspired by the legislatures agitation, anxiety and impatience with the timeliness of the execution of the death sentences rather than the common misconception and perception that death by lethal injection is painless and swift.

Despite the perception that lethal injection is a painless and swift means of inflicting death, it is a method in which negligent or intentional errors have in the past caused the persons being executed intense suffering. Even when persons executed by lethal injection are first paralyzed, it has not been clearly demonstrated that they become unconscious of pain and impending death.

Indeed, a significant number of the persons who have been executed by lethal injection in other states have suffered painful and prolonged deaths resulting in wanton and unnecessary infliction of pain. Accounts of botched executions have been widely reported. For example, one of the many botched executions reported includes the lethal injection of Rickey Ray Rector, described as follows:

On January 24, 1992, in Varner, Arkansas, it took the medical staff more than 50 minutes to find a suitable vein in Rickey Rector's arm. Witnesses were not permitted to view this scene, but reported hearing Rector's loud moans throughout the process. During

the ordeal, Rector, who suffered serious brain damage from a lobotomy, tried to help the medical personnel find a patent vein. The administrator of the State's Department of Corrections Medical Programs said, paraphrased by a newspaper reporter, "the moans came as a team of two medical people, increased to five, worked on both sides of Rector's body to find a suitable vein." The administrator said that may have contributed to his occasional outbursts. Joe Farmer "Rector, 40 Executed for Officer's Slaying," Arkansas Democrat-Gazette, January 25, 1995; Sonya Clinesmith, "Moans Pierced Silence During Wait," Arkansas Democrat-Gazette, January 26, 1992.

Based on eyewitness accounts of such executions, coupled with available scientific evidence regarding the hazards, lethal injection is as unreliable as a "humane" method for extinguishing life as was electrocution. Accordingly, execution by lethal injection constitutes cruel and unusual punishment.

The Eighth Amendment prohibits governmental imposition of "cruel and unusual punishments," and bars "infliction of unnecessary pain in the execution of the death sentence," Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464, 91 L. Ed. 422, 67 S. Ct. 374 (1947) (plurality opinion). "Punishments are deemed cruel when they involve torture or a lingering death . . ." In re Kemmler, 136 U.S. 436, 447, 34 L.Ed. 519, 10 S. Ct. 930 (1890). The meaning of "cruel and unusual" must be interpreted in a "flexible and dynamic manner," Gregg v. Georgia, supra, 428 U.S. at 171 (joint opinion), and measured against "evolving standards of decency that mark the progress of

a maturing society," Trop v. Dulles, 356 U.S. 86, 101, 2 L.Ed. 2d 630, 78 S. Ct. 590 (1958)(plurality opinion).

The Florida procedure for execution by lethal injection runs the risk of causing excruciating pain to the condemned inmate and therefore violates the United States and the Florida Constitutional prohibition against cruel and unusual punishment.

If a defendant is given sodium pentothal followed by pancurion bromide, but regains consciousness before the potassium chloride takes effect, he will be unable to move or communicate in any way while experiencing excruciating pain. As the potassium chloride is being administered he will experience an excruciating burning sensation in his vein, like the sensation of a hot poker inserted into and traveling up the arm spreading across the chest until it reaches the heart.

If the sodium pentothal, pancurion bromide, and potassium chloride are administered in the sequence described and the inmates heart fibrillates, but does not stop, he will wake up but be unable to breathe.

The initial dose of sodium pentothal can cause the pharynx to numb, causing choking gagging and vomiting. The risk is aspirating his vomit or swallowing his tongue and suffocating.

Failure to insert the IV catheter correctly may cause the chemicals to be injected into a defendant's muscle or other tissue rather than the blood stream thereby causing extreme pain

in the form of an intense burning sensation. In addition, the chemicals will be absorbed far more slowly and will not have the intended effects.

Mistakes in this process would result in the chemicals being administered in the wrong sequence thereby causing an inmate to suffer extreme pain with effects similar to those described above.

The pre-set dosage amounts may be inadequate to cause the intended sedation in appellant because of his physical characteristics and medical history, as well as the fact, that he will be in a state of stress during his execution. Under such circumstances, appellant will suffer an extremely painful sensation of crushing and suffocation, as the pancurium bromide will paralyze and render him unable to move or communicate in any way while he is experiencing excruciating pain.

Absent comprehensive and coherent procedural safeguards, a prisoner is exposed to, at the very least, a risk of unnecessary or excessive pain. Fierro v. Gomez, supra, 865 F. at 141; Campbell v. Wood, 18 F. 3d 662, 681 As the District Court noted in Fierro v. Gomez, 865 F. Supp 1387, 1410 (N.D.Cal.1994), Campbell "set forth a framework for determining when a particular mode of execution is unconstitutional: objective evidence of pain must be the primary consideration, and

evidence of legislative trends may also be considered where the evidence of pain is not dispositive." Id. at 1412. Significantly, the court in Fierro pointed out that the execution must also be considered in terms of the risk of pain. Id., at 1411.

In Lagrand v. Lewis, 883 F. Supp. 469, 470-471 (D. Arizona 1995), a prisoner's challenge to the constitutionality of lethal injection was based in part upon a doctor's affidavit, in which the doctor concluded that the lack of specific guidelines controlling dosage, sequence and delivery rate exposed the condemned to the risk that the drugs would not be administered properly, and that an improper procedure could cause the condemned to feel great pain. The court rejected his claim, concluding, among other things that the relevant written procedures clearly indicated that the executions were to be conducted under the direction of the prison's Health Administrator, knowledgeable personnel were to be used, and the presence of a physician was required.

The state has broad discretion to determine the procedures for conducting an execution. McKenzie v. Day, 57 F.3d 1461, 1469 (9th Cir. 1995). In McKenzie, the Ninth Circuit Court of Appeals noted that the state of Montana has developed procedures which "are reasonable calculated to ensure a swift, painless death and are therefore immune from constitutional attack." Id. Moreover, the Ninth Circuit declared in Campbell v. Wood, supra, 18 F.3d at

687, that "[t] the risk of accident cannot and need not be eliminated from the execution.

Since the decision of the Court of Appeal in the Ninth Circuit in the Ninth Circuit in Fierro v. Gomez, (No. 94-16775, February 21, 1996), holding execution by gas to be unconstitutional, the sole method of execution which the state may carry out under this provision is by lethal injection. Under the clear language of the statute, such a method of execution may only be carried out by explicit "standards" which the department of Corrections must "establish".

In McKenzie v. Day 57 F.3d 1461, 1469, the Ninth Circuit Court of Appeals held that execution by lethal injection under the procedures which had been defined in Montana was Constitutional. The Court of Appeal explained that those procedures passed constitutional muster because they were "reasonably" calculated to ensure a swift, painless death...." McKenzie v. Day, 57 F3d at 1469. Such a statement cannot be made about the procedures in Florida. A swift, painless death cannot be ensured without standards in place to ensure that the lethal chemicals will be administered to Appellant in a competent, professional manner by someone adequately trained to do so.

Further, the United States Supreme Court's repeated holdings that "[capital proceedings must of course satisfy the dictates of the Due Process clause," Clemons v Mississippi, 494 U.S. 738, 746

(1990) (citing Gardner v. Florida, 430 U.S. 349 (1977) (plurality opinion)), surely must apply to the procedures for actually carrying out an execution, which is the quintessential "capital proceeding." see also Hicks v. Oklahoma, 477 U.S. 343 (1980).

The capital sentencing statute is unconstitutional on its face and as applied to Mr. Thompson.

CONCLUSION

Mr Thompson's case was riddled with errors by both his counsel and the lower court judge which make the sentence of death imposed unreliable. Additionally, the Florida Statutes utilized in arriving at this sentence were unconstitutional either facially or as applied and do not meet United States Constitutional standards. The case should be reversed and remanded for a new trial and/or new sentencing.

CERTIFICATE OF FONT AND SERVICE

I **HEREBY CERTIFY** that a true copy of the Foregoing ***Initial Brief of Appellant***, which has been typed in **Courier New** font size 12, has been furnished by United States Mail, first class postage prepaid, to all counsel of record on **March 6, 2000**.

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