IN THE SUPREME COURT OF FLORIDA

CASE NO. 97,043

JAMES FLOYD

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's summary denial of Rule 3.850 relief. The following symbols will be used to designate references to the record in this appeal:

"R" -- record of Mr. Floyd's first trial;

"RS" -- record of Mr. Floyd's resentencing;

"PC-R." -- record on postconviction appeal;

REQUEST FOR ORAL ARGUMENT

Mr. Floyd has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. This Court has allowed oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Floyd, through counsel, accordingly urges that the Court permit oral argument.

STATEMENT OF FONT

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STATEMENT OF THE CASE AND OF THE FACTS

James Floyd was charged by indictment dated March 6, 1984, with one count of first-degree murder and related offenses (R. 6-7). He pled not guilty. After a jury trial, the jury returned a verdict of guilty on all counts on August 23, 1984 (R. 883-885). The next day, August 24, 1984, the jury recommended death by a vote of seven (7) to five (5).

On August 27, 1984, the trial court imposed a sentence of death on the count of first-degree murder and consecutive sentences of five (5) years imprisonment on each of the nine related counts (R. 950-951). A sentencing order was entered on August 28, 1984 (R. 107-108).

On direct appeal, the Florida Supreme Court affirmed Mr. Floyd's convictions, but overturned his sentence of death because: (a) the trial court improperly found the cold, calculated and premeditated aggravating factor; (b) the trial court improperly found the murder to prevent arrest aggravating factor; and (c) and the trial court failed to instruct the jury adequately about nonstatutory mitigating factors. Floyd v. State, 497 So. 2d 1211 (Fla. 1986).

Mr. Floyd's second sentencing hearing was held on January 12-14, 1988 before Circuit Court Judge Richard A. Luce. On January 14, 1988, the jury by a vote of eight (8) to four (4) returned a recommendation of death (RS. 1039).

On February 29, 1988, the trial court imposed a death sentence. In sentencing Mr. Floyd to death, Judge Luce said his personal belief was that the Florida Supreme Court incorrectly prevented him from doubling aggravators (RS. 1066); the Florida Supreme Court was incorrect in specifically finding that the murder to prevent arrest aggravating factor was not present in this case (RS. 1066); and that the Florida Supreme Court was incorrect in finding that the cold, calculated and premeditated aggravating factor was not present in this case (RS. 1068-1069). The trial judge said he would ignore these aggravating factors, notwithstanding his personal opinions. The trial court then said that although he found that Mr. Floyd demonstrated some remorse, a desire to live within the rules of his current prison sentence, and a desire to establish a rapport with his children, these did not qualify as the type of mitigation contemplated (RS. 1071).[1]

The Florida Supreme Court affirmed Mr. Floyd's second sentence of death, Floyd v. State, 569 So. 2d 1225 (Fla. 1990); cert. denied, 111 S.Ct. 2912 (1991). In its opinion, this Court noted that the trial court found and considered mitigating circumstances, but found that they did not outweigh the

[1]The trial court failed to mention the non-statutory mitigation that the Florida Supreme Court found to exist in Mr. Floyd's first case – the death of Mr. Floyd's father a year earlier; his childhood with an alcoholic mother; the fact that he was a parent of two small children; and the plea for mercy from the victim's daughter. Floyd v. State, 497 So. 2d 1211, 1212 (Fla. 1986).

aggravating circumstances. Id. at 123.

Mr. Floyd's initial Fla. R. Crim. P. 3.850 motion was filed on August 17, 1992, one year before it was due. The motion was signed by counsel, but unverified (PC-R. 1-25). Two months later, on October 6, 1992, after numerous State agencies failed to comply with public records, Mr. Floyd filed a motion to compel (PC-R. 26-32). The State did not respond in any way and the Circuit Court took no action on Mr. Floyd's Rule 3.850 motion.

The Florida Supreme Court then issued Anderson v. State, 627 So. 2d 1170 (Fla. 1993), which held that the verification requirement of Rule 3.850 applied to capital cases. Although the State made no effort to have Mr. Floyd's motion dismissed pursuant to Anderson, Mr. Floyd filed his verification on May 2, 1994 (PC-R. 1, 65). Neither the State nor the circuit court took any action on Mr. Floyd's 3.850 motion.

On August 1, 1994, Mr. Floyd filed an amended Rule 3.850 motion, reasserting the State's non-compliance with Chapter 119 (PC-R. 66-168). On November 28, 1995, the circuit court entered an order requiring a status hearing on Mr. Floyd's case (PC-R. 208-209). On April 12, the State moved to strike Mr. Floyd's amended Rule 3.850 as unverified, arguing that the original motion was unverified, notwithstanding the May 2, 1994 verification (PC-R. 211-212).

At a status hearing May 7, 1996, the court asked whether the

amended Rule 3.850 motion had to be verified (PC-R. 886-887). The court said it was not considering a motion to dismiss, but that it wanted to sort out a "procedural quagmire" (PC-R. 887). Mr. Floyd's counsel argued that only the original motion had to be verified, and that it was verified (PC-R. 211-212; 887). The court said it did not see whether either motion had been properly verified (PC-R. 890). Counsel for Mr. Floyd asked whether the court was dismissing Mr. Floyd's petition under Anderson as unverified and indicated that if that was the case, Mr. Floyd would simply file a verified pleading (PC-R. 907). The court did not enter an order dismissing Mr. Floyd's Rule 3.850 motion, stating that it was only making an observation (PC-R. 908).

The court asked about Mr. Floyd's public records claim. After discussion, it was agreed that the State Attorney would submit materials that it claimed were exempt to the court for an in camera inspection. Counsel for Mr. Floyd told the court that other state agencies also failed to comply with Chapter 119 requests. The court ordered Mr. Floyd to provide the State with the Chapter 119 requests he had already made to these agencies and for the State to "investigate" (PC-R. 905-906).

Mr. Floyd complied with the court order. The State did not (PC-R. 272). At an October 9, 1996 status hearing, the court said it would enter an order granting the State's motion to strike the 3.850 motion because of lack of verification, despite

the May 2,1994 verification (PC-R. 920; 926). Although the State conceded that the public records issue remained, the court specifically refused to resolve the Chapter 119 issue (PC-R. 925). On the day after the status conference, October 10, 1996, the State filed 466 pages of public records "investigation" that had not been previously disclosed to counsel(PC-R. 362-830).

Six days later, the court entered an order striking Mr. Floyd's motions and declining to address the public records issues at all(PC-R. 832-833). The order was mailed to Mr. Floyd the same day he filed his supplemental verification, October 16, 1996. (PC-R. 166-168; 834-836). Mr. Floyd filed a motion for rehearing and reinstatement, asserting that the original motion had been verified and that the amended motion had been verified (PC-R. 837-838). The circuit court denied the motion for rehearing and reinstatement.

Mr. Floyd filed a notice of appeal to the Florida Supreme Court. Briefs were submitted. This Court dismissed Mr. Floyd's appeal without prejudice for the defendant to file a properly verified Rule 3.850 motion on September 4, 1997.

On October 21, 1997, the CCRC Middle Region filed a Notice of Conflict of Interest requesting that another CCRC office be designated counsel for Mr. Floyd. The trial court struck the notice for failing to sufficiently allege reasons for the conflict. This Court ordered that the Southern Region of CCRC be

designated to represent Mr. Floyd. On March 11, 1998, the trial court entered an order designating CCRC-Southern Region to represent Mr. Floyd.

Mr. Floyd filed a properly verified Amended Rule 3.850 motion on April 9, 1998, in which Mr. Floyd outlined the state agencies that had not complied with public records requests. The trial court ordered counsel for Mr. Floyd to identify all agencies and documents not received. On July 10, 1998, counsel for Mr. Floyd outlined in detail the public records still outstanding. On July 14, 1998, Judge Luce ordered the state agencies who had not complied with public records to do so.

On November 13, 1998, Mr. Floyd filed a Third Amended Rule 3.850 motion, raising nineteen claims.

A Huff hearing occurred on January 29, 1999 (PC-R. 1009-1053). On March 2, 1999, the Court entered an order summarily denying thirteen (13) of Mr. Floyd's claims and ordered the State to show cause why Mr. Floyd was not entitled to an evidentiary hearing on his remaining six (6) claims. On April 16, 1999, the State filed its Response to Order to Show Cause. On July 21, 1999, the court issued a 13-page order summarily denying Mr. Floyd an evidentiary hearing on any and all of his claims. On August 2, 1999, counsel for Mr. Floyd filed a Motion to Set Aside and/or Reconsider Order Denying Defendant's Third Amended Motion to Vacate Judgments of Conviction and Sentence, arguing that the

trial court relied on ex parte communication with the State Attorney to deny Mr. Floyd relief. Mr. Floyd also filed a Motion to Disqualify Judge based on the improper conduct of the State and the judge. The trial court denied all of Mr. Floyd's motions (PC-R. 935). Mr. Floyd timely filed a Notice of Appeal (PC-R. 937). This appeal follows.[2]

[2]The following records have not been included in the record on appeal in this case and are required for proper consideration of this case: Mr. Floyd's Third Amended Rule 3.850 motion; March 2,1999 Order Denying Defendant's third Amended Motion to Vacate Judgements of Conviction and Sentence in Part and Order to Show Cause; July 21, 1999 Order Denying Defendant's third Amended Motion to Vacate Judgments of Conviction and Sentence, and the Court's Exhibits A-F.

Counsel is filing a Motion to Supplement the Record contemporaneous with the Initial Brief.

SUMMARY OF ARGUMENTS

1. The lower court erred in summarily denying Mr. Floyd's amended 3.850 motion. The lower court failed to accept the allegations as true and denied relief. Trial counsel failed to adequately investigate and prepare for the penalty phase. Mr. Floyd has an IQ of 51, which is in the mentally retarded range, as well as organic brain damage. Trial counsel never had his client examined by a mental health expert. Mr. Floyd was diagnosed as mentally retarded when he was 15 by the Pinellas County school psychologists. This information was easily found in Mr. Floyd's school records. Trial counsel failed to present evidence of Mr. Floyd's good prison record; failed to object to the State's improperly removing a juror based on race; and failed to request additional peremptory challenges. At the guilt phase, trial counsel failed to investigate the case; failed to challenge the State's witnesses; failed to retain blood and hair experts; and failed to investigate any mental health issues as they related to specific intent.

2. The State withheld exculpatory evidence that showed that two white men were seen entering the victim's home around the time police said she was murdered. This information was never turned over to defense counsel, in violation of Brady v. Maryland.

3. Judge Luce should have disqualified himself from the

Rule 3.850 proceedings. Mr. Floyd had a reasonable fear that the judge could not be fair and impartial due to an ex parte communication with the State Attorney. Because an evidentiary hearing is warranted in this case, this case should be remanded for a hearing before an impartial judge.

4. The trial court failed to find mitigation in the record and trial counsel was ineffective for failing to object.

5. The State engaged in prosecutorial misconduct and trial counsel failed to object.

6. Public records remain outstanding. The court refused to order the State to turn over records that may have exculpated Mr. Floyd in the murder.

7. Trial counsel failed to object to constitutional error during the penalty phase, including jury instructions, Caldwell error, and burden-shifting error.

8. Florida's death penalty statute violates the Eighth Amendment on its face and as applied to Mr. Floyd.

ARGUMENT I -- ERRONEOUS SUMMARY DENIAL

A. IMPROPER SUMMARY DENIAL.

The lower court summarily denied all of Mr. Floyd's claims, including significant allegations of ineffective assistance of counsel. The lower court's ruling was premised on the erroneous belief that allegations pled in the Rule 3.850 were already presented at Mr. Floyd's penalty phase. As the court said, "The theme of Defendant's mitigation evidence was that the Defendant was basically a good, responsible, nonviolent person, with a solid work record, who came from a troubled home (because of his mother's alcoholism) and that he fell apart after the death of his father, possibly becoming involved in drugs." (July 21, 1999 Order Denying Relief at 4). The court also said that the evidence presented in Mr. Floyd's penalty phase is "inconsistent with, and directly refutes, Defendant's current claims of mental illness or retardation." (July 21, 1999 Order Denying Relief at 5). This is the incorrect standard for assessing this claim. See, Freeman v. State, WL 2000 728622, 6 (Fla. June 8, 2000).

The lower court completely ignored facts pled in the Rule 3.850 motion. The files and records in this case do not conclusively rebut Mr. Floyd's allegations, and Mr. Floyd is entitled to an evidentiary hearing before an impartial judge.

B. INEFFECTIVE ASSISTANCE OF COUNSEL.

Counsel has "a duty to bring to bear such skill and

knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668 (1984). An attorney is charged with the responsibility of knowing the law and presenting legal argument in accord with the applicable principles of law. See, e.g., Garcia v. State, 622 So. 2d 1325 (Fla. 1993); Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); Beach v. Blackburn, 631 F.2d 1168 (5th Cir. 1980); Herring v. Estelle, 491 F.2d 125, 129 (5th Cir. 1974); Lovett v. Florida, 627 F. 2d 706, 709 (5th Cir. 1980). Counsel rendered prejudicially deficient performance, and a hearing is warranted.

In Mr. Floyd's resentencing, substantial mitigating evidence, both statutory and nonstatutory, went undiscovered and was not presented. An unreliable death sentence was the resulting prejudice. As confidence in the result is undermined, relief is appropriate. Strickland v. Washington; Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995).

The lower court erred as a matter of fact and law in denying an evidentiary hearing on the penalty phase allegations and failed to accept the allegations pled in the 3.850 motion as true. The court found that Mr. Floyd failed to show prejudice and that the "evidence presented during the penalty phase is inconsistent with, and directly refutes, Defendant's current claims of mental illness or retardation." (July 21,1999 Order Denying Relief at 5). The reason why the evidence presented at

the penalty phase was "inconsistent" with what was alleged in the Rule 3.850,is because trial counsel failed to discover it. Trial counsel's failure to investigate and find compelling mitigating evidence is precisely the reason why Mr. Floyd is entitled to an evidentiary hearing on this claim. Mr. Floyd's allegations cannot be rebutted by the records.

The lower court's conclusions are unsupported. The manner in which Mr. Floyd set forth his extensive factual allegations is consistent with numerous other cases where this Court has remanded for evidentiary hearings. See, e.g. Ragsdale v. State, 720 So. 2d 203 (Fla. 1998); Gaskin v. State, 737 So. 2d 509 (Fla. 1999); Freeman v. State, 2000 WL 7286232 (Fla.)(June 8, 2000); and Arbelaez v. State, 2000 WL 963175 (Fla.) (July 13, 2000).

1. Ineffective assistance of counsel at the penalty phase

Mr. Floyd is mentally retarded. When he was 15 years old and in the eighth grade, he was diagnosed as mentally retarded by psychologists with the Pinellas County schools. James had an IQ of 51, which places him in the mentally retarded range. James was academically years behind his peers. At age 15, when he should have been in the tenth grade, his grade level was at the third grade level. He missed weeks of school. Though incapable of performing anywhere near his grade level, James was promoted only to move him along so he would not stand out worse than he already did. School records show James was "below average" and

"slow" in all areas of school. James desperately tried to fit in and be a normal kid. No matter how hard he tried, he was ridiculed by his peers. Because of his mental limitations, he did not develop the social skills needed to survive.

The school records, which show that Mr. Floyd was diagnosed as mentally retarded when he was 15, were not discovered by trial counsel and never presented at the penalty phase. Had trial counsel conducted a thorough investigation into Mr. Floyd's background, counsel would have discovered that his client's history contained compelling mitigation. Had counsel adequately prepared and discharged his Sixth Amendment duties, overwhelming mitigating evidence would have precluded a sentence of death in this case. Evidence about Mr. Floyd's character and background, his early life marked by abandonment, abuse, emotional and educational deprivation, fetal alcohol syndrome, and his alcohol and drug dependency was inadequately investigated, considered, and presented by counsel. There was no tactical reason for not presenting this information to the jury and judge when the information was so easy to find and none offered in the record before the 3.850 court.

Mr. Floyd's mother was a severe alcoholic who neglected her children emotionally and physically. She often left her small children to fend for themselves, without stable adult supervision. Pinkie Floyd was incapable of providing even the

minimal amount of parental care for James.

Pinkie Floyd gave birth to James Floyd, the fourth of sixth children, in St. Petersburg, Florida, on July 25, 1960. Pinkie was a long-term alcoholic. She drank heavily during the critical stages of James' fetal development. His father, Johnny Floyd, Sr., was hard working, but had a quick and explosive temper. He repeatedly placed unreasonable demands on Pinkie and the children while tolerating nothing short of perfection. He also was a jealous man and demanded that everything be in place. Johnny Floyd, Sr. was unable to verbally communicate with his wife and children. However, he also was the type of man who would suddenly explode into violent anger.

Pinkie was born on a small farm in Georgia, where her family grew peanuts, tobacco, corn, peas, and beans. She was forced to quit school in the fourth grade so she could help with the family farm. Her family was unable to provide stability. She started drinking alcohol at age twelve. She was given her first drink by a local moonshine producer. It was not long before Pinkie began making trips to the neighborhood liquor house - the "hothouse" - for her daily pint of mash. This was the start of a very long and destructive battle with alcohol.

While still a teenager, Pinkie married fellow drinking partner Lawrence Rose. Although they had three children, Pinkie was incapable of forming a bond with them. Her abnormal

childhood and early involvement with alcohol left Pinkie desensitized and detached. Pinkie separated from Lawrence and abandoned her children. She left Georgia and moved to St. Petersburg in the 1950s. In 1959, she met a bus station porter named Johnny Floyd, Sr. Pinkie agreed to marry Johnny. They immediately started having children - six altogether.

The financial demands of raising a family kept Johnny away from the home for extended periods of time. Pinkie became the primary caretaker of the children. Pinkie's alcohol consumption accelerated at an alarming rate. Pinkie's drinking never allowed for a normal life. From the time James was a young child, Pinkie's sloppy-drunk conduct became a regular happening. She was unable to dress or feed the children.

Pinkie's inebriated attempts to prepare a meal for the children often resulted in kitchen fires. Pinkie grew frustrated with the demands of child care and entered in various extra-marital affairs -- often with the children present. The long-term affects of alcoholism revealed a mean, violent and hateful Pinkie. Not only was she unable to care for the children's physical needs but she battered their emotional development as well. Pinkie often told James that he was unwanted and hated. Pinkie mercilessly pounded into James' head that he was an unloved child who was nothing more than a burden.

Johnny struggled to provide a decent and positive

environment for his children. However, Pinkie's alcoholism sent him over the edge. When he returned home from work, Johnny violently confronted Pinkie's drinking. He exploded into a violent rage. These fights were often bloody and violent. Pinkie often had to receive medical treatment for the gashes, bruises and cuts that she would receive from her husband.

Johnny was a big, strong, and dominant man, who beat Pinkie on a regular basis because of her drinking and neglect of the children. He hated her drinking and showed it. Johnny lost control when he got angry. On numerous occasions, he choked Pinkie until she was unable to breathe. He hit Pinkie, who was always very petite, in the head, face, and mouth. Pinkie would grab a knife to try and defend herself, but she was no match for Johnny. From the beginning, James watched his parents who were constantly at war.

James tried to intervene, but was no match for his father once he would snap and became enraged. If not for James' intervention, Johnny would most certainly have killed Pinkie. James witnessed this type of behavior on a daily basis. Being raised in a violent and abusive environment had a profound and lifelong effect on James. James became more introverted. James often ran away from home to escape the violence.

Because of James' mental disabilities, he was unable to cope with the overwhelming toll that the violence took on his

emotional state. As he watched his mother's losing battle with alcohol, the violent fights, and the extramarital affairs, James became more emotionally scarred. James was never able to recover from this trauma that he experienced very early on in his life.

James' mental and emotional growth and intellectual development were severely stunted. He was slow to grasp and understand simple concepts. His faculties were not functioning at normal levels. This affected his relationship with his father and his overall ability to adjust socially.

James' father placed unreasonable expectations on his children. This fact, coupled with James' inability to comprehend simple concepts or follow directions, led to a tempestuous relationship. James desperately tried to live up to his father's expectations, yet Johnny Floyd was quickly frustrated with James' inability to assist with basic household chores.

James looked up to his father and, more than anything in the world, wanted his acceptance and approval. Yet, because James was mentally and emotionally underdeveloped, his father never gave him the kind of attention that he gave his older brother who was unburdened with James' limitations. James was never able to receive the kind of love, attention, nurturing, and bonding that he was in desperate need of receiving from his father. To the contrary, James was constantly being compared to his older brother, Johnny, who was his father's favorite. James' father

did not realize what was happening with his son. He did not understand the damage that was done to James as a result of his exposure to the violence and chaos of the Floyd house.

James faced additional frustrations and rejection in school. James was a big child for his age. He was the biggest student in his class. One psychologist said he was "shocked" to learn that James was only 15 years old. Because of his size, teachers and counselors expected accelerated performance. In an attempt to win the acceptance of his teachers and peers, James tried to mask his pain and the truth about his ailing home life. He tried to conceal his inability to understand basic school work. He was diagnosed as having a learning disability and emotional problems. He was placed in a special class. James quickly became known as not only the biggest kid in the class -- but also the slowest.

Teachers and experts recognized some of James' problems, but did nothing. James was diagnosed as mentally retarded by Pinellas County school psychologists at the age of 15 when he was in the eighth grade. James had an IQ of 51, which is mentally retarded. James was years behind his peers academically. At 15, his grade level was approximately third grade. He missed weeks of school. Though incapable of performing anywhere near his grade level, James was promoted only to move him along because he was no much bigger than the rest of his classmates. School records show James was "below average" and "slow" in all areas of

school. Problems at home escalated. Pinkie's drinking continued to have a damaging impact on James. Pinkie was hiding liquor bottles under her pillow. She began drinking even before she got out of bed in the morning. James begged his mother to stop. She scoffed at his attempt to bring normalcy to the family and responded with hateful insults.

Johnny Floyd reacted violently to Pinkie's worsening condition. James returned home one day and found his mother lying in a pool of blood. On one occasion, James found his mother unconscious in a ditch along side the road. It was impossible to determine what placed her there -- the alcohol or Johnny Floyd's beatings.

Pinkie's extramarital affairs continued. One man she had illicit sex with was named Jessie. Pinkie told James that Jessie was his uncle. This lie, however, was exposed the night Jessie met Johnny. Mr. Floyd pointed a shotgun at the man and threatened to kill him. James was terrified because he had already seen enough violence. Had the children not intervened, the outcome would have been disastrous.

James had no place to go or no one to turn to for help. James was left to grow up alone, without role models, guidance or understanding. His siblings were in similar straights, many involved with illegal drugs or in prison.

James lacked a father figure to give him love, attention or

guidance. Because he lacked a father figure, James sought substitutes among his peers. While continually facing rejection at school, James hit the streets to find approval and recognition. James confused love with exploitation. James' naivete got the best of him, and he unwittingly found himself on the wrong side of the law.

After spending time in state prison, James' mental and emotional condition deteriorated further. When he returned home, he was unable to adjust. This was made worse by James' learning disability. He lacked the coping skills to sort through his life. And the inevitable happened -- James' life completely unraveled.

James' coping skills were hindered by his mental retardation, fetal alcohol syndrome and a history of substance abuse. Each of these factors constitute substantial and compelling mitigation, both statutory and nonstatutory. Had a mental health evaluation been requested by defense counsel, these infirmities would have presented themselves.

Substantial evidence, available at the time of Mr. Floyd's sentencing, show that Mr. Floyd was intoxicated at the time of the offense, a fact relevant both at the guilt/innocence and penalty phases of the trial.[3] Mr. Floyd had a history of

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[3]Significant substance abuse is a mitigating factor. See Savage v. State, 588 So. 2d 975 (Fla. 1991); Cooper v. State, 581 So. 2d 49 (Fla. 1991); Downs v. State, 574 So.2d 1095 (Fla.

substance abuse, which included using quaaludes, smoking marijuana daily, and huffing kerosene. Mr. Floyd's acquaintances knew about his problems and would have testified extensively about them. In fact, when Mr. Floyd was arrested he was found to have marijuana on his person (R. 196). Even the State's undercover agent, Gregory Anderson, remarked about sharing drugs with Mr. Floyd (R. 118). Substantial and valuable lay testimony as to Mr. Floyd's intoxication was available, but not considered in terms of establishing mitigating circumstances.

Not only is intoxication at the time of the offense a mitigating circumstance in Florida, but the evidence of intoxication could have been presented to attack the aggravating circumstances that were presented by the prosecution. Trial counsel should have attacked the weight to be afforded the aggravating factors by presenting the substantial evidence of intoxication at the time of the offense. Similarly, with respect

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1991); Carter v. State, 560 So. 2d 1166 (Fla. 1990); Pentecost v. State, 545 So.2d 861 (Fla. 1989); Masterson v. State, 516 So. 2d 256 (Fla. 1987); Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987).

Evidence of intoxication at the time of the offense has been repeatedly recognized as a mitigating factor. See Buckrem v. State, 355 So. 2d 111 (Fla. 1978); Norris v. State, 429 So. 2d 688 (Fla. 1983); Amazon v. State, 487 So. 2d 8 (Fla. 1986); Proffitt v. Florida, 510 So. 2d 896 (Fla. 1987); Fead v. Florida, 512 So. 2d 176 (Fla. 1987); Masterson v. State, 516 So. 2d 256 (Fla. 1987); Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Carter v. State, 560 So. 2d 1166 (Fla. 1990); Cheshire v. State, 568 So. 2d 908 (Fla. 1990); Buford v. State, 570 So. 2d 923 (Fla. 1990); Downs v. State, 574 So. 2d 1095 (Fla. 1991).

to the prior felony convictions introduced by the State, ample evidence of Mr. Floyd's intoxication at the time of the offense should have been presented to lessen the weight of these circumstances. In this case, where only two aggravating factors were found, counsel's deficiencies prejudiced Mr. Floyd.[4] Substantial mitigation was readily available that the sentencer should have considered for "compassionate and mitigating factors stemming from the diverse frailties of humankind." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). This is the kind of humanizing evidence that "may make a critical difference, especially in a capital case." Stanley v. Zant, 697 F.2d 955, 969 (11th Cir. 1983). It would have made a difference between life and death in this case. None of this evidence, however,

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[4]The trial court found two aggravating circumstances: (1) that the murder was committed for financial gain; and (2) the murder was especially heinous, atrocious or cruel (RS. 1063-1066).

In their dissent, Justices McDonald and Barkett said they

> would not affirm the death sentence in this case. Floyd was surprised by the victim when he was burglarizing her home. Being scared, and with little or no thought, he killed her with a knife. Although he had been involved in other crimes, he had no record of violence. This homicide, though loathsome, does not place it in the category of "the most aggravated and least mitigated" for which the death penalty is appropriate. The sentence should be reduced to life imprisonment without eligibility for parole for twenty-five years.

Floyd v. State, 569 So. 2d 1225, 1233 (Fla. 1990).

reached the jury or the judge because counsel failed to adequately investigate and prepare for the penalty phase.

Mr. Floyd's mental disabilities were not presented to his jury. Trial counsel was ignorant of mental health issues. Mr. Floyd's jury should have been told that mentally retarded individuals do not fully understand the complex world in which they live. As a result, they are repeatedly subject to frustrations and confusions that the non-retarded never face, and their limitations further handicap them in coping with this stress.[5] The mentally retarded lack the impulse controls of a non-retarded person, and are particularly prone to impulsive, unthinking action. Moreover, "the mentally retarded might accompany perpetrators or actually commit a crime on impulse without weighing the consequences of the act." Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 428-31 (1985).

"[I]t is undeniable that those who are mentally retarded have reduced ability to cope with and function in the everyday world." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 (1985). Because of their "reduced ability to cope with and function in the real world," the mentally retarded are uniquely unfit for capital punishment. Given the increased

[5]See Handbook of Mental Illness in the Mentally Retarded 7 (F. Menolascino & J. Stark, eds, 1984)

susceptibility to confusion and frustration, the propensity to act out the frustration, and the diminished ability to control such impulsive behavior on the part of the mentally retarded, their culpability simply cannot be judged by the same standards applicable to the non-retarded. These disabilities preclude the mentally retarded from forming the mental state that the Florida Supreme Court's precedents require for imposing death.

In addition to statutory and nonstatutory mitigating circumstances, mental health experts could have rebutted the mental state requirements and weight of the aggravating circumstances presented by the prosecution. Because of Mr. Floyd's long-standing mental disabilities, expert testimony could have been presented to lessen the weight of these aggravating factors. The trial judge gave no weight to Mr. Floyd's mental age. When sentencing Mr. Floyd, the trial court failed to recognize, and counsel did not inform him, that the statutory mitigating factor of age deals not only with chronological age, but also with mental age. Eutzy v. State, 458 So. 2d 755, 758 (Fla. 1984). Mr. Floyd was prepared to present expert testimony that Mr. Floyd's mental age is that of a 10-year-old child.[6]

"[E]vents that result in a person succumbing to the passions

[6]Permanent organic impairment, such as that suffered by Mr. Floyd, results in impairment in motor functioning, memory deficits, and higher critical functioning, including problems in abstract thinking judgment capabilities.

or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990). This basic tenet was ignored.

Evidence about Mr. Floyd's character and background, the physical and psychological abuse he suffered, the emotional and educational deprivation, his serious problems with alcohol and drug addiction, and his intoxication at the time of the offense were never presented at the penalty phase. Numerous witnesses, including family members and friends, were available and willing to testify to these facts. The scant testimony presented at Mr. Floyd's penalty phase did not even begin to scratch the surface of his tragic upbringing and his devastating mental problems.

None of this mitigating evidence reachd the jury because counsel failed to adequately investigate and prepare for the penalty phase. Counsel failed to discover and use the wealth of mitigation available in Mr. Floyd's background. No individualized consideration of mitigation could occur. Any of the available material and relevant evidence discussed here that counsel could have presented would have made a difference. Yet, trial counsel failed to present it. Counsel's failure was not based on "tactics." It was based on the failure to adequately investigate and prepare. The evidence was not difficult to find. Counsel just had to look for it and present it. He did neither.

Counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration.[7] When counsel does not fulfill that duty, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. See, e.g, Harris v. Dugger; Middleton v. Dugger; Kimmelman v. Morrison, 106 S.Ct at 2588-89 (1986) (failure to request discovery based on mistaken belief that the state was obliged to hand over evidence); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses); Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986) (little effort to obtain mitigating evidence), cert. denied, 107 S.Ct 602 (1986); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984) (failure

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[7]Phillips v. State, 608 So. 2d 778 (Fla. 1992); State v. Lara, 581 So. 2d 1288 (Fla. 1991); Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Bassett v. State, 541 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929, 930 (Fla. 1988); O'Callaghan v. State, 461 So. 2d 1154, 1155-56 (Fla. 1984); Eutzy v. Dugger, 746 F. Supp. 1492 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. 1990); Harris v. Dugger, 874 F. 2d 756 (11th Cir. 1989); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), vacated and remanded, 104 S.Ct 3575 (1984), adhered to on remand, 748 F.2d 1462 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded for reconsideration, 104 S.Ct 3575, adhered to on remand, 739 F.2d 531 (11th Cir. 1984). Mr. Floyd's counsel failed to meet these rudimentary constitutional standards.

to present additional character witnesses was not the result of a strategic decision made after reasonable investigation), cert. denied, 471 U.S. 1016 (1985); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978) (defense counsel presented no defense and failed to investigate evidence of provocation); Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972) (refusal to interview alibi witnesses); see also Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985) (counsel did not pursue a strategy, but "simply failed to make the effort to investigate").

No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. See Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986). Mr. Floyd's death sentence is the resulting prejudice. It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trial would have been different if the evidence discussed below had been presented to the sentencer. Strickland, 466 U.S. at 694.

A new sentencing is required when counsel fails to investigate and, as a result, substantial mitigating evidence is never presented to the judge or jury. Stevens v. State, 552 S. 2d 1082 (Fla. 1989); Penry v. Lynaugh, 109 S. Ct 2934, 2951-52 (1989) (emphasis added). State v. Riechmann, 2000 WL 205094

(Fla.)(Feb. 24, 2000).

The prejudice from counsel's deficient performance is clear. Confidence is undermined in the outcome. No reliable adversarial testing occurred. Mr. Floyd's sentence of death should not be permitted to stand under the Sixth, Eighth, and Fourteenth Amendments. Mr. Floyd is entitled to a new trial.

2. Failure to retain a mental health expert

At resentencing, trial counsel called several witnesses who testified about Mrs. Floyd's alcoholism. They also testified that the James Floyd they knew was not violent (RS. 847-942). None of the witnesses called by the defense knew that Mr. Floyd had been in trouble with the law. None of the witnesses was asked how his mother's alcoholism affected him. Only one defense witness, Rex Estelle, testified that while James was a "good worker and nice disposition, very neat, extremely pleasant to be around," (RS. 855) he also had "extreme mood swings." (RS. 859). Mr. Estelle testified that James would stare into space, not noticing what was occurring around him. Mr. Estelle also noticed a "big depression" in James (RS. 859). Mr. Estelle said Mr. Floyd appeared "almost in a manic" state. Mr. Estelle confronted Mr. Floyd, thinking he was on drugs (RS. 859).

Despite these red flags, trial counsel failed to hire a mental health expert who could have evaluated Mr. Floyd, explain the mood swings that were seen by a lay witness, could have

determined if Mr. Floyd was abusing drugs or alcohol and could have provided statutory and nonstatutory mitigating evidence.

Mr. Estelle's testimony and the other mitigation witness testimony failed to scratch the surface of the vast amount of compelling information that was available. Even if it had, trial counsel was still responsible for requesting mental health assistance where there is an indicia of mental health issues. Mr. Floyd's trial counsel failed to provide his client with any psychological expert, much less "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake v, Oklahoma, 470 U.S. 68 (1985). Mr. Floyd's trial attorney failed to ask for a court-appointed expert despite the indicia of mental problems. Mr. Floyd's trial counsel failed to seek the background information necessary to assist such an expert. Had he done so, trial counsel would have learned that Mr. Floyd is mentally retarded, has an IQ less than 60, a third-grade reading level and functions as a 10-year-old child. Had counsel done so, he could argued that Mr. Floyd's mental retardation precluded him from having the intent required for first-degree murder. Had counsel done so, he could have attacked Mr. Floyd's inconsistent statements to police as being from a man with mental disabilities who wanted to please his captors.

Both the expert and trial counsel have a duty to perform an

adequate background investigation. When such an investigation is not conducted, due process is violated. The judge and jury are deprived of the facts necessary to make a reasoned finding. Information that was needed in order to render a professionally competent evaluation was not investigated. Mr. Floyd'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.

Important information about Mr. Floyd's mental disabilities was withheld from the jury, and this deprivation violated Mr. Floyd'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).

Considerable evidence was available of Mr. Floyd's intoxication at the time of the offense that would have been relevant both at the guilt/innocence and penalty phases of the trial. There also was considerable evidence documenting Mr. Floyd's mental retardation. At the age of 15, while still in the eighth grade, Mr. Floyd was diagnosed as mentally retarded by Pinellas County school officials. Mr. Floyd had an IQ of 51, making him mentally retarded. These school records were not discovered by trial counsel and the information contained in them were not presented at the penalty phase.

The Rule 3.850 motion alleged that qualified mental health

professionals have examined Mr. Floyd and have been provided with materials concerning his history. They were prepared to testify at an evidentiary hearing to compelling mitigating circumstances, both statutory and nonstatutory. None of this was presented at penalty phase, therefore, it could not have been "inconsistent" as Judge Luce said in his order. Had counsel investigated, this type of evidence would have been available to present to the jury. The records do not refute this claim.

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 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).

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 client, but from sources independent of the client. Clients are frequently unreliable sources of their own history, particularly

when they have suffered from head injury, drug addiction, and/or alcoholism. Consequently, a client's knowledge may be distorted by knowledge obtained from family and their own organic or mental disturbance, and a client's self-report is suspect. See, 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).

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

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

The information needed by an expert was readily available to defense counsel, yet he inexplicably failed to seek it out.

Because of counsel's lack of investigation and preparation, Mr. Floyd's judge and jury received an incomplete picture of the man they sentenced to die. As a result, Mr. Floyd was deprived of the full impact of substantial and compelling statutory and nonstatutory mitigating evidence. See, Cunningham v. Zant, 928 F.2d 1006, 1017 (11th Cir. 1991). The prejudice to Mr. Floyd resulting from counsel's failure to present a competent psychological expert was that the jury never knew Mr. Floyd was mentally retarded or suffered organic brain damage.

The Rule 3.850 motion alleged the fact that, based on testing conducted by experts in postconviction, Mr. Floyd suffers from mental retardation and has an IQ of 60. (Third Amended Post-Conviction Motion at 29, 95). This information was never presented to the jury because Mr. Floyd was never tested by trial counsel for IQ or neuropsychological deficits. A composite of his reasoning skills, which include his conceptual, verbal and language skills, place him in the range of child who is 10 years old. He has poor planning skills and has trouble grasping reality. Mr. Floyd plead that the expert who evaluated him would explain how the relevant mental health mitigating circumstances apply, including the low IQ and organic brain damage. All of the information relied upon by the experts was available at the time of Mr. Floyd's penalty phase, yet counsel failed to investigate, and the lower court erred in failing to accept these allegations

as true, concluding instead that Mr. Floyd failed to show prejudice and that "the evidence presented during the penalty phase **"is inconsistent with, and directly refutes, Defendant's current claims of mental illness or retardation."** (July 21,1999 Order Denying Relief at 5).

To support its position, the trial court submitted Exhibits B and C, the testimony from the penalty phase and letters that Mr. Floyd allegedly wrote while he was in prison. These records do not rebut Mr. Floyd's claims. The fact that Mr. Floyd can write a letter does not foreclose a finding of mental illness or retardation. The lower court failed to understand because no mental health expert explained that the mentally retarded are capable of writing letters and functioning at a low level in a structured environment. This does not mean that Mr. Floyd was not retarded and does not refute that he was entitled to present this information to the jury. An evidentiary hearing is warranted.

3. Failure to adequately investigate Skipper evidence

A good prison record is relevant mitigation and relevant to sentencing consideration. Skipper v. South Carolina, 476 U.S. 1 (1986). Excluding the jury from considering evidence that a defendant "should be spared the death penalty because he would pose no due danger to his jailers or fellow prisons and could lead a useful life behind bars if sentenced to life imprisonment"

would violate Eddings v. Oklahoma, 455 U.S. 104 (1982).

A defendant's potential for rehabilitation is a significant factor in mitigation. Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988). Such evidence is "clearly mitigating in the sense that it might serve as a basis for a sentence less than death." Id. See also, Lowe v. State, 650 So. 2d 969 (Fla. 1994)(Kogan, J., concurring in part, dissenting in part)(nothing "the general policy that death should not be imposed where the evidence supporting a potential for rehabilitation is strong");
Prison records show that Mr. Floyd has been an exemplary inmate while on death row. Despite the extreme and stressful circumstances of imprisonment, Mr. Floyd has had no disciplinary write-ups for bad behavior. Trial counsel presented no witnesses or records to document this outstanding record. These records were readily available to trial counsel in 1987 and 1988, before and during the resentencing, if counsel had only sought them out. Trial counsel's failure to obtain the readily available records and failure to present to the jury that Mr. Floyd was a model prisoner was ineffective assistance of counsel.

The trial court failed to address any aspect of this claim in its orders denying relief. Because the records do not conclusively rebut the allegations, Mr. Floyd is entitled to an evidentiary hearing on this claim.

4. Failure to object to the State peremptorily removing Juror Edmonds from the jury and failure to request additional peremptory challenges

The ethical rule that prevents Mr. Floyd from investigating claims of jury misconduct or bias that may be inherent in the jury's verdict is unconstitutional. Under the Fifth, Sixth, Eighth and Fourteenth Amendments, Mr. Floyd is entitled to a fair trial and sentencing. His inability to fully explore possible misconduct and biases of the jury prevent him from fully showing the unfairness of his trial. Misconduct may have occurred that Mr. Floyd can only discover through juror interviews.[8] Cf. Turner v. Louisiana, 379 U.S. 466 (1965); Russ v. State, 95 So. 2d 594 (Fla. 1957).

Rule 4-3.5 (d)(4), Rules Regulating the Florida Bar, conflicts with the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. It unconstitutionally burdens the exercise of fundamental constitutional rights. Mr. Floyd should have the ability to interview jurors who acted as co-sentencers in his case. Yet, the attorneys statutorily mandated to represent him are prohibited from contacting them. The failure to allow Mr. Floyd to interview jurors is a denial of access to the court under

[8]Robert Love, Mr. Floyd's resentencing attorney, filed a motion to examine the jurors, but the record fails to indicate whether the trial court considered this motion. No juror interviews were ever conducted (RS. 196).

article I, section 21 of the Florida Constitution. Rule 4-3.5(d)(4) is unconstitutional on state and federal grounds.

During voir dire, counsel for Mr. Floyd, objected to the jury panel as not being "represented" in the community because only two of its members were black (RS. 564). Mr. Floyd is black. The court noted and overruled the objection (RS. 564).

After the prospective jurors were questioned, the State excused the **only** two blacks on the panel. Watson Haynes was excused for cause, because of his opposition to the death penalty (RS. 664-665). Mark Edmonds was excused peremptorily (RS. 670). Immediately after the State peremptorily excused Edmonds, defense counsel objected and said Mr. Floyd was denied a cross section of the community(RS. 670-671). The court asked the State its reason for exercising its peremptory challenge, which left no black on the panel (RS. 671). The prosecutor said he did not need to give a reason unless systematic exclusion was shown, but then said, "I think he [Edmonds] said he would be satisfied for twenty-five years and that's punishment enough. You know, I thought that was enough" (RS. 671). The court said he did not specifically recall Edmonds' answer, but said it was on the record, and overruled Mr. Floyd's objection (RS. 671).

The State's explanation was patently false. Mr. Floyd's counsel was ineffective for not objecting to the explanation.

On direct appeal, this Court said:

> There is no question that the state's explanation was race-neutral, and if true, would have satisfied the test established in State v. Neil, 457 So. 2d 481 (Fla. 1984), clarified, State v. Castillo, 486 So. 2d 565 (Fla. 1986), and State v. Slappy, 522 So. 2d 18, 22 (Fla. 1988), cert. denied, 487 U.S. 1219, 108 S. Ct. 2873, 101 L.Ed.2d 909 (1988). It is uncontroverted, however, that the explanation was not true. At oral argument, the state conceded that the record indicates that Edmonds never made such a statement. Thus, we must determine the parameters of the trial court's responsibility to ascertain if the state has satisfied its burden of producing a race-neutral reason for the challenge.
>
> * * *
>
> Once the state has proffered a facially race-neutral reason, a defendant must place the court on notice that he or she contests the factual existence of the reason. Here, the error was easily correctable. Had defense counsel disputed the state's statement, the court would have been compelled to ascertain from the record if the state's assertion was true. Had the court determined that there was no factual basis for the challenge, the state's explanation no longer could have been considered a race-neutral explanation and Juror Edmonds could not have been peremptorily excused. Because defense counsel failed to object to the prosecutor's explanation, the Neil issue was not properly preserved for review. We reject Floyd's first claim of error.

Floyd v. State, 569 So. 2d 1225, 1229, 1230 (emphasis added).

Trial counsel's silence after making his objection was ineffective assistance. Counsel failed to challenge the prosecutor's representations in any way, and he added nothing to

the record. Trial counsel failed to be informed of the requirements of State v. Neil, 457 So. 2d 481 (Fla. 1984), and Batson v. Kentucky, 476 U.S. 79 (1986), which should have been central to his argument.[9]

Trial counsel was unaware that "the command of Batson is to eliminate, not merely minimize, racial discrimination in jury selection," United States v. David, 803 F.2d at 1567,1571 (11th Cir. 1986). Had trial counsel been informed of the law, he would have been aware of his obligations under Slappy, 522 So. 2d at 20. The law requires more of trial counsel than merely making his motion and settling back to an observer role. "Thus it is important that the defendant come forward with facts, not just numbers alone, when asking the (circuit) court to find a prima facie case," United States v. Moore, 895 F.2d 484, 485 (8th Cir. 1990). Trial counsel must actively "contest these reasons" offered by the state for peremptory challenges against black jurors, Happ v. State, 596 So.2d 991 (Fla. 1992). Examining a prosecutor's questions and statements during voir dire are a relevant part of this inquiry, United States v. Battles, 836 F.2d 1084, 1085 (8th Cir. 1987). "[A] pattern of discriminatory

[9]The presence of one or more blacks on a jury does not save the State from Neil/Batson. Foster v. State, 557 So. 2d 634 (Fla. 2nd DCA 1990); Smith v. State, 571 So. 2d 16 (Fla. 2nd DCA 1990); Smith v. State, 574 So. 2d 1195 (Fla. 3rd DCA 1991); United States v. David, 803 F.2d 1567 (11th Cir. 1986); United States v. Battles, 836 F.2d 1084 (8th Cir. 1987); and Fleming v. Kemp, 794 F.2d 1478, 1483 (11th Cir. 1986).

strikes, the prosecutor's statements during voir dire suggesting discriminatory purpose, or the fact that white persons were chosen for the petit jury who seemed to have the same qualities as stricken black venire persons" all can be considered, United States v. Young-Bey, 893 F.2d 178, 180 (8th Cir. 1990). The government's use of peremptory challenges in other cases against other defendants may also be relevant, United States v. Gordon, 817 F.2d 1538, 1541-1542 (11th Cir. 1987). To meet the requirement of race neutrality "the proffered reasons must bear some relationship to the case at bar. If the government offers explanations that are facially neutral, a defendant may nevertheless show purposeful discrimination by proving the explanation pretextual," United States v. Joe, 928 F.2d 99, 102 (4th Cir. 1991).

Trial counsel's ignorance of the basic law of jury selection was ineffective representation. "This lack of professional competence constitutes ineffectiveness within the meaning of Strickland." Harrison v. Jones, 880 F.2d 1279, 1281 (11th Cir. 1979). Not only was trial counsel ineffective for failing to properly preserve this issue, Mr. Floyd was deprived of his rights to a jury representative of the community in violation of Batson and Neil.

The trial court summarily denied this claim, stating that trial counsel’s performance was not ineffective based on law at

the time. (July 21,1999 Order Denying Relief at 6). The law at the time was Neil and trial counsel should have been familiar with the basic law of jury selection it when trying a capital case. There are no reasons on the record as to why trial counsel did not object or cite to Neil, which was the law at the time of trial. The court's efforts to rebut this claim must fail.

Trial counsel also failed to request additional peremptory challenges when the court improperly refused to strike Juror Hendry for cause. During resentencing, prospective juror Lee Hendry was initially questioned by the prosecutor on voir dire about his views on the death penalty. He said, "I'm for it" (RS. 603). Upon questioning by defense counsel, Hendry explained:

> VENIREMAN HENDRY: I think there is some kind of a deterrent for capital crimes. If you don't, I think there would be more capital crimes. In some circumstances, premeditated murder proven beyond a reasonable doubt, I think the death penalty is warranted.
>
> MR. LOVE: Okay. So, I just want to be clear, sir. If you have a premeditated murder, somebody's been pounding, what have you, on the system, that the death penalty would be warranted under your views?
>
> VENIREMAN HENDRY: Right.
>
> MR. LOVE: Do you think that's the case in all cases of those premeditated, finding death penalties warranted?
>
> VENIREMAN HENDRY: Yes.

(RS. 649-50).

Defense counsel moved to excuse Hendry for cause because he was in favor of the death penalty for any premeditated murder (RS. 665-667). The court refused to excuse Hendry for cause (RS. 667). Defense counsel then removed Hendry by exercising one of his peremptory challenges (RS. 671). Mr. Floyd subsequently exhausted all of his ten (10) peremptory challenges (RS. 676-677)[10] and failed to ask for more. This Court said:

> Although the trial court erred in failing to excuse Hendry for cause, reversal is warranted under our case law only if Floyd exhausted his peremptory challenges, requested additional peremptories and had that request denied by the trial court. See Hamilton; Moore; Hill. Although Floyd used a peremptory to remove juror Hendry, and he exhausted his peremptory challenges, he failed to request any additional peremptories to replace the one used to excuse juror Hendry. Nor did he show that a juror unacceptable to him served on the jury. Thus, Floyd failed to preserve his position for appeal.

Floyd v. State, 569 So. 2d 1225, 1230 (Fla. 1990).[11]

Mr. Floyd's counsel requested additional peremptory challenges before trial and exercised all of his peremptory challenges (RS. 268, 269, 291, 524). To the extent he failed to specifically request additional peremptory challenges to replace

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[10]Before resentencing, the court denied defense counsel's motion for additional peremptories (RS. 268-269, 291, 524).

[11]Juror impartiality is fundamental to due process and are particularly crucial in capital proceedings. See, e.g., Witherspoon v. Illinois, 391 U.S. 510, 523 (1968); Morgan v. Illinois, 112 S. Ct. 2222 (1992); Stroud v. United States, 251 U.S. 15 (1919); Crawford v. Bounds, 395 F.2d 297 (4th Cir. 1968), cert. denied, 397 U.S. 936 (1970); Hill v. State, 477 So. 2d 553 (Fla. 1985); Thomas v. State, 403 So. 2d 371 (Fla. 1981); Poole v. State, 194 So. 2d 903 (Fla. 1967).

the one used to remove juror Hendry, and failed to show a prejudiced juror was seated, he rendered ineffective assistance. See Hamilton v. State, 547 So. 2d 630 (Fla. 1989); Floyd v. State, 569 So. 2d 1225 (Fla. 1990).

The court found this claim "too speculative" to warrant an evidentiary hearing (Order Denying at 7). However, there is nothing on the record to indicate why counsel did not make this request. The only reason the judge must "speculate" is because he failed to hold an evidentiary hearing to discover the facts. Because counsel is prohibited from questioning jurors, he is prevented from discovering information that could warrant a new trial and will be procedurally barred if not investigated now. Buenoano v. State, 708 So. 2d 941 (Fla. 1998).

5. Ineffective assistance of counsel at the guilt phase

Mr. Floyd's first trial attorney, Martin Murray, did no preparation on Mr. Floyd's case. Mr. Murray's file has never been found or disclosed to defense or collateral counsel. The only information disclosed was a bill for services sent to Mr. Murray from Richard Price and Associates, Private Detectives. The services performed included crime scene work up, file review, location of possible witnesses and subpoena service. The investigator worked a total of 27 hours on Mr. Floyd's case. Assuming half of that time was spent either in reading the file, talking to the attorney or subpoenaing witnesses, the

investigator hired by Mr. Murray worked **less than one day** on a case where the evidence was circumstantial and the State was seeking the death penalty. This was deficient performance.

During opening statements, Mr. Murray told the jury that Mr. Floyd was innocent and that 14 people would testify to show that his client was innocent. But after the State rested its case, Mr. Murray failed to present any defense whatsoever. Mr. Murray rested after the state's case, without putting on even one of the 14 witnesses he said were available in Mr. Floyd's defense (R. 390-392; 816). The State's case went untested.

The trial court, in denying relief on this claim said "it is apparent that Mr. Murray's opening statement in this regard was directed at all the witnesses that would appear at trial, both Defense and Prosecution." (July 21, 1999 Order Denying Relief at 11). Noting in the record indicates that this is true. Without an evidentiary hearing on this issue, the 3.850 court is unable to point to where in the record this is rebutted. The trial court improperly relied on strategies that counsel did not have at the time of trial. Harris v. Dugger, 874 F. 2d 756 (11th Cir. 1989).

Besides taking depositions, counsel did **no** other factual investigation. Had counsel investigated, the results of this case would have been different. Mr. Murray's lack of preparation was a pattern of conduct that eventually was his undoing.

On January 17, 1989, Mr. Murray was disbarred from the practice of law by the Florida Supreme Court. Mr. Murray was disbarred because he was paid to represent clients in criminal matters, but failed to complete the cases or refund the unearned fees. In one case, Mr. Murray completely failed to file motions, send out subpoenas or appear at pre-trial conferences. The same occurred in Mr. Floyd's case. But the trial court inexplicably failed to grant a hearing on this issue.

Mr. Murray's legal troubles came to the trial court's attention in September, 1987. Mr. Murray failed to notify his clients of court hearings; took money from clients but failed to do the work or return the money. In March, 1987, Mr. Murray was hired to defend David McPartland in a capital first-degree murder. Mr. McPartland's family paid Mr. Murray $20,000 to represent their son. Mr. McPartland attempted to locate Mr. Murray on several occasions, but was unable to do so. Mr. Murray told the court in August, 1987 that he had moved to Texas and was in the process of winding down his practice, but that he still represented Mr. McPartland. Yet, Mr. Murray was doing nothing on his client's case. Mr. Murray failed to appear at pre-trial conferences and the State Attorney was unable to find Mr. Murray. The case was eventually turned over to the Public Defender, and the trial judge entered a judgment of acquittal. No part of the original fee was ever refunded to the client or his family.

In another case, Jack Cotrall paid Mr. Murray to represent him in a driving while intoxicated case. He paid Mr. Murray $1,500. Mr. Murray told his client not to appear in court unless told to do so by Mr. Murray. At a October 2, 1987 pretrial conference, Mr. Cotrall did not appear. Neither did his lawyer, Mr. Murray. A warrant was issued for Mr. Cotrall's arrest. Mr. Murray never refunded any fees to Mr. Cotrall.

Mr. Murray also failed to properly represent Deborah Vilvens, arrested for driving under the influence. In May, 1987, Ms. Vilvens gave Mr. Murray $1,500. Two months later, Mr. Murray sent Ms. Vilvens a note advising her that a plea agreement had been reached in her case. Without her knowledge, a hearing was scheduled. She did not appear, and a bench warrant was issued for her arrest. Ms. Vilvens was eventually represented by the Public Defender. No part of her fee was ever returned to her.

The referee who handled Mr. Murray's case said that Mr. Murray had no support staff of any kind, which is particularly significant in a capital case. He also said that there was competent evidence that Mr. Murray was suffering from a malignant melanoma and that his condition was worsening. The referee found Mr. Murray to be unfit to practice law.

Mr. Murray's pattern of neglect began well before the Florida Bar took notice. Mr. Murray failed to properly represent Mr. Floyd. Mr. Murray announced to the jury that he would

present the testimony of 14 witnesses on Mr. Floyd's behalf. He paid his investigator $540.00 to do less than one day's work investigating a circumstantial death penalty case. He failed to investigate mental health issues as they relate to specific intent. This was deficient performance and incompetence. It has been documented and acted upon by the Florida Bar.

Mr. Murray's performance also was deficient when he failed to cross examine the state witnesses at all. Mr. Murray failed to cross examine Jay Warthen Jr., (R. 397); Gloria McManus (R. 400); Edmond Lopus (R. 471); Zelma Ravenel (R. 483); Kenneth Williams (R. 486); John James Buggle (R.500); and Michael Kepto (R. 670). He did not ask them one question.

Mr. Floyd's jury was misled about the significance attached to the sock found in the jacket and the hair found in the victim's home. The state witnesses said the blood found on the sock was determined to be type O, which was the same type as the victim's blood (R. 688). This evidence was crucial to Mr. Floyd and his case, yet trial counsel failed to obtain his own expert to rebut the State's evidence. Similarly, the jury was told that the FDLE found eight Negroid hair fragments. While the State witness could not say whose hair it was, a defense expert could have told the jury about the difficulty of hair analysis.

Mr. Murray failed to obtain a hair analyst and blood expert to rebut the State's evidence. Mr. Murray did not know if

experts were available because he did not look and did not ask. The circumstantial nature of the evidence against Mr. Floyd made impeachment of the State's witnesses critical.

The trial court rejected this claim by stating that Mr. Murray "skillfully cross examined witnesses" including a "scathing cross examination of Gregory Anderson" (July 21, 1999 Order Denying Relief at 10). "Scathing" cross examination of one witness is insufficient in a circumstantial evidence case where many state witnesses were called and the forensic evidence went unchallenged.

A reasonable standard cannot attach unless defense counsel made a strategic or tactical informed choice that he will not present or seek certain evidence. Strickland v. Washington, 466 U.S. 668 (1984). The record did not reflect that Mr. Murray had a strategic or tactical decision for not cross examining the State's case. His non-decision was deficient performance. An evidentiary hearing and relief are proper.

ARGUMENT II -- THE STATE WITHHELD BRADY MATERIAL

The State must disclose evidence favorable to the defense "where the evidence is material to either guilt or punishment." Brady v. Maryland, 373 U.S. 83, 85 (1963); Strickler v. Greene, 119 S.Ct. 1936 (1999). United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985); Kyles v. Whitley, 115 S.Ct. 1555 (1995). Materiality is established and reversal is required once the

reviewing court concludes that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680 (1985). To determine materiality, undisclosed evidence must be considered "collectively, not item-by-item." Kyles, 115 S. Ct. at 1567. Such evidence must be disclosed regardless of a request by the defense, and the State has a duty to evaluate the point at which the evidence collectively reaches the level of materiality. Bagley, at 682. However, it is not the defendant's burden to show the nondisclosure "[m]ore likely than not altered the outcome in the case." Strickland v. Washington, 466 U.S. 668, 693 (1984). The Supreme Court specifically rejected that standard in favor of a showing of a reasonable probability. A reasonable probability is one that undermines confidence in the outcome.

The prosecution's failure to disclose testimony that was presented in exchange for lenient treatment violates Brady. The prosecution's presentation of false testimony at trial establishes a violation of Giglio v. United States, 405 U.S. 150 (1972).

The State violates Brady when it withholds exculpatory evidence and the withheld evidence is material to the outcome of the proceeding. Kyles, 115 S. Ct. at 1556. Kyles noted that materiality is defined "in terms of the cumulative effect of

suppression." 115 S. Ct. at 1567; See, also State v. Gunsby, 670 So.2d 920 (Fla. 1996). A capital defendant may be entitled to a resentencing because of a Brady violation, even if that violation does not entitle the defendant to a new trial. Garcia v. State, 622 So. 2d 1325, 1330-31 (Fla. 1993).

At the time of the murder, a witness told police that she saw several white men force their way into the victim's home. This witness saw this at the same time the State estimated the victim had died (R. 855). This witness said she told police this information. This witness was shown a photo lineup and identified two men who she saw at the victim's house that day. One of the men this witness identified was known by police to be bilking elderly women out of money and had forged checks. This information was never turned over to Mr. Floyd's trial or resentencing counsel. This was a clear violation under Brady.

The trial evidence linking Mr. Floyd to the murder of the victim was far from strong. This witness' statement to police would have been critically important to the defense. The jury, however, learned nothing about it. The State knew about it and the investigating detectives and/or police officers who investigated the case knew about it. But, this evidence was never disclosed to the defense. If defense counsel had a duty to investigate beyond relying on what the State gave him, he was ineffective because he did not do so. He relied only on what the

State disclosed. See Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984), subsequent history, 799 F.2d 1442 (11th Cir. 1986). Evidence of the police investigation into other possible suspects was not disclosed to the defense. This violated Brady 373 U.S. 83 (1963) and deprived Mr. Floyd of a fair trial.

In rejecting this argument, the trial court relied on an extra-record police report that was not made a part of the record on appeal nor was it submitted into evidence at trial. The police report was given to the Court by the State in 1999. This report has not been authenticated in any court proceeding. There was no showing that trial counsel received a copy of this police report at trial or resentencing. Yet, in denying relief, the trial court said that Mr. Floyd failed to show or allege that counsel did not have this evidence or could not have obtained it with any reasonable diligence through public records. (Order Denying at 8). The 3.850 court was in error.

First, trial counsel was not entitled to public records before or during trial and could not have obtained the document through public records. Second, the police report is Brady material. That State has an obligation to provide Brady material at all stages of the proceeding. Contrary to the court's ruling that "Defendant has not established that the State suppressed this information," Mr. Floyd need not prove that the State suppressed this information. Mr. Floyd alleged in his Rule 3.850

motion that counsel did not have this report. The court must take this allegation as true. See, Fla. R. Crim. P. 3.850 and Lemon v. State,498 So. 2d 923 (Fla. 1986).

Mr. Floyd need only allege that the information was exculpatory; that it was in the hands of the State, and that trial counsel did not receive it. It was up to the court to grant a hearing or show where in the record where this information was disclosed. The court was unable to do that.

Mr. Floyd also alleged that the State failed to disclose to defense counsel that Huie Bird, the man who was with Mr. Floyd when he was arrested, gave "deceptive responses" on his polygraph. This information was admissible at a penalty phase and the jury should have been given this "relevant" evidence as to Mr. Bird's credibility and possible involvement in the crime, Wood v. Rupe, 93 F.3d 1434 (9th Cir. 1997). No where in the record is this claim rebutted, yet the court failed to grant an evidentiary hearing on this claim.

Brady requires disclosure of evidence that impeaches the State's case or that may exculpate the accused "where the evidence is material to either guilt or punishment." The evidence here meets that test. This was a circumstantial case. The State's failure to disclose evidence about other suspects rendered this trial fundamentally unfair. Brady; Bagley. Confidence in the results of the guilt-innocence and sentencing

determinations has been undermined.

Mr. Floyd also alleged that the State failed to disclose impeachment evidence about the jail-house snitch Gregory Lee Anderson. United States v. Brumel-Alvarez, 991 F.2d 1452 (9th Cir. 1992). This evidence would have questioned Mr. Anderson's motives and undermined his credibility. The State was required to disclose this information. Bagley; see also, United States v. Fisher, 106 F.3d 622 (5th Cir. 1997)(government's failure to turn over report of law enforcement that contradicted the government's witness was a Brady violation).

Defense counsel never knew that Anderson did not testify truthfully, and his testimony could have been undermined and impeached. Anderson was coached and thoroughly prepared by the prosecution to elicit information from Mr. Floyd. The fact that the jury never learned this information undermines confidence in the outcome of the trial and sentencing. The 3.850 court could not show that the record refuted this claim. A hearing should have been granted.

Materiality is established and reversal is required once the reviewing court concludes that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680. However, it is not the defendant's burden to show the nondisclosure "[m]ore likely than

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

Mr. Floyd was denied a reliable adversarial testing. The jury never heard the considerable and compelling evidence that was exculpatory to Mr. Floyd. "[T]o ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential for the jury to hear the evidence. An evidentiary hearing is required on this claim.

ARGUMENT III -- JUDICIAL DISQUALIFICATION

Mr. Floyd sought the disqualification of Judge Richard Luce because of ex parte contact he had with the State Attorney. On July 21, 1999, Judge Luce issued an order denying Mr. Floyd's Third Amended Motion to Vacate Judgment of Conviction and Sentence. In denying relief, the court relied on records impermissibly obtained from the Office of the State Attorney. The communication between the Court and the State was conducted ex parte. Mr. Floyd had no knowledge that such communication was taking place nor was he allowed to take part in it.

On July 17, 1999, counsel for Mr. Floyd received from the State Attorney a supplemental record. This supplement was not in response to any motion or court order and was filed nearly three

months after the State had filed its initial response and supplement to Mr. Floyd's Amended Rule 3.850. Mr. Floyd was not requested to submit a supplement nor was he given an opportunity to rebut the State's arguments.

When counsel received the court's order denying Mr. Floyd relief on July 23, 1999 six days later, she saw that the Court's order had adopted the State's supplement in its entirety. Ex parte communication between the State and the Court took place in which the Court asked the State to provide it with records so the court could denying Mr. Floyd relief.

Communication had to occur between Judge Luce and the State because **only the transcript pages that Judge Luce referred to in his order appeared in the State's supplement**. If there had been no ex parte communication, then the State would not have known which items from the 1,100 page resentencing and more than 1,000 page trial of the record on appeal to include in its supplement. In addition, the front page of the State's supplement is the front page intended to be an index of exhibits for the Court's order. Had not improper communication occurred, the State would not have known that the court intended to include its supplement as the index to the court's order. There was communication between the State and the court but Mr. Floyd was not a party.

Mr. Floyd was not made aware of this ex parte contact between the State and the court. He was not given an opportunity

to argue against these issues. This was improper. Mr. Floyd's fear that he would not receive a fair hearing or rehearing before Judge Luce was legitimate and reasonable.

Mr. Floyd filed a Motion to Disqualify alleging that he feared the judge's inability to be fair and impartial. Mr. Floyd was entitled to full and fair Rule 3.850 proceedings. The court's ex parte communication with the State violated due process. Rose v. State, 601 So. 2d 1181 (Fla. 1992). See also, State v. Riechmann, 2000 WL 205094 (Fla.)(Feb. 24, 2000).

ARGUMENT IV --THE TRIAL COURT FAILED TO FIND MITIGATION IN THE RECORD AND COUNSEL FAILED TO OBJECT TO THE COURT'S FAILURE.

The trial judge at the resentencing failed to properly consider the mitigation that existed in Mr. Floyd's case. Defense counsel failed to object to the court's failure.

The judge failed to consider the following nonstatutory mitigating evidence:

– that Mr. Floyd had the capacity to form loving relationships. (RS. 629, 851). Scott v. State, 603 So.2d 1275, 1277 (Fla. 1992).

-- that Mr. Floyd had a deprived childhood, poor family life and unstable home (RS. 850-52, 857, 872-874). Scott; Savage v. State, 588 So. 2d 975, 980 (Fla. 1991); Hegwood v. State, 575 So. 2d 170, 173, (Fla. 1991); Buford v. State, 570 So. 2d 923, 925 (Fla. 1990); Freeman v. State, 547 So. 2d 125, 129 (Fla. 1990);

(found by the trial judge) Spivey v. State, 529 So. 2d 1088, 1095 (Fla. 1988); Brown v. State, 526 So. 2d 903, 907 (Fla. 1988); Burch v. State, 522 So. 2d 810, 813 (Fla. 1988); Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988); Duboise v. State, 520 So. 2d 260, 266 (Fla. 1988); Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987); Brookings v. State, 495 So. 2d 135, 142 (Fla. 1986); Amazon v. State, 487 So. 2d 8, 13 (Fla. 1986); Thompson v. State, 456 So. 2d 444, 448 (Fla. 1984); Neary v. State, 384 So. 2d 881, 886-887 (Fla. 1980).

-- that Mr. Floyd suffered extensive physical and emotional abuse Mr. Floyd suffered as a child. Nibert v. State, 508 So. 2d 1 (Fla. 1987); Scott v. Dugger, 604 So. 2d 465 (Fla. 1992).

-- that Mr. Floyd had a history substance abuse and had consumed drugs and alcohol on the day of the crime (RS. 117, 196-197, 640, 649, 864, 859). Carter v. State, 560 So. 2d 1166, 1168 (Fla. 1990); Masterson v. State, 516 So. 2d 1081, 1086 (Fla. 1987); Scott; Savage; Cooper v. State, 581 So. 2d 49, 51 (Fla. 1991)(concurrence); Downs v. State, 574 So. 2d 1095, 1099 (Fla. 1991); Buford; Pentacost v. State, 545 So. 2d 861, 863 (Fla. 1989); Amazon; and Huddleston v. State, 475 So. 2d 204, 206 (Fla. 1985).

Each of these factors in Mr. Floyd's life is a mitigating circumstance that was not considered but should have been. Cheshire v. State, 568 So. 2d 908 (Fla. 1990). The jury and

judge were required to weigh and give effect to all of Mr. Floyd's mitigation against the aggravating factors. The judge did not properly weigh this mitigation in sentencing. Mr. Floyd was deprived of the individualized sentencing required by the Eighth and Fourteenth Amendments and is entitled to a new sentencing hearing. Zant v. Stephens, 462 U.S. 862, 879-80 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

If the judge failed to consider these factors because trial counsel failed to investigate and develop them, Mr. Floyd is entitled to a new trial. To the extent that counsel failed to object to the judge's action, counsel rendered ineffective assistant in violation of the Sixth and Fourteenth Amendments.

ARGUMENT V – THE PROSECUTORS' MISCONDUCT AND TRIAL COUNSEL'S FAILURE TO OBJECT

Trial counsel rendered prejudicially deficient performance in failing to object to the prosecutor's inflammatory and prejudicial closing argument. During closing argument, the prosecutor discussed Mr. Floyd's alleged lack of remorse as an aggravating factor. Defense counsel failed to object.

> [T]he defendant [is] cool enough and reflective enough and calm enough to have committed murder, a brutal murder with blood everywhere, blood on him, blood on his hands, but cool enough to go to Landmark Bank and cash the victim's $500 check. . . the very day of the murder, he's cool enough to go to the bank and write a $500 check. . .

> Now, the stabbing of an eighty-six year old woman and then going to the bank a couple hours later and cashing her check, does that show some kind of conscienceless or some kind of -- does that show some type of remorse over there? He stabs a lady, leaves her bleeding in her bed and goes to the bank and cashes her check, or does that all seem like it's all in a day's work?

(RS. 989-993). Lack of remorse is not an aggravating factor that can be considered under Florida law. Kimmelman v. Morrison, 477 U.S. 363 (1986).

The State also argued that the jury should consider the aggravating factor of cold, calculated and premeditated murder even after this Court held that the aggravator should **not** be used in determining whether Mr. Floyd should be sentenced to death. Floyd v. State, 569 So. 2d 1255 (Fla. 1990).

The prosecutor's closing argument "improperly appeal[ed] to the jury's passions and prejudices." Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). Such remarks prejudicially affect the defendant's rights 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). Such prosecutorial commentary has been called "troublesome," Bertolotti v. State, 476 So. 2d 130, 132 (Fla. 1985), and improper when it "permeates" a case, as it did here. Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

The prosecutor also focused the jury's attention on the

victim's character in an effort to bolster his case (RS. 692-693, 709, 985 and 1061). Again, trial counsel did not object. This evidence was at the time impermissible under Florida law. See Taylor v. State, 583 So. 2d 323 (Fla. 1991); Jones v. State, 569 So. 2d 1234 (Fla. 1990); Welty v. State, 402 So. 2d 1159 (Fla. 1981). See also Grossman v. State, 525 So. 2d 833 (Fla. 1988).

The State failed to disclose that Gregory Anderson was working as an agent for the State. Gregory Anderson was a key State witness during Mr. Floyd's trial (RS. 724-798; 780-804). While at the Pinellas County Jail, Gregory Anderson was placed in a cell with Mr. Floyd. At that time and throughout their incarceration together, Anderson was an agent of the State. He was placed with Mr. Floyd for the sole purpose of obtaining incriminating information. Mr. Anderson was specifically told by the State what comments to elicit from Mr. Floyd. Mr. Anderson was thoroughly prepped on what and how to ask Mr. Floyd for information. This information was then passed onto the State.

Incriminating statements "deliberately elicited" by the police after an accused's right to counsel has attached may not be used against a defendant, absent a knowing and voluntary waiver. Massiah v. United States, 377 U.S. 201 (1964). The prohibition extends to the state placing an informant in the same cell as the defendant since the state, at minimum, "must have known" that its informant would take the steps necessary to

secure statements for the state. United States v. Henry, 447 U.S. 264, 274 (1980).

The State pursued, planted, and maintained active informants throughout the jail. The Sheriff's Department told incoming prisoners they will be rewarded for obtaining and revealing incriminating information from other prisoners and has consistently paid for such information in a quid pro quo manner.[12] Mr. Anderson appeared to inmates as just one more prisoner and not a state agent. Mr. Floyd was confined at the time the alleged confessions occurred. Anderson played upon their "common plight" Henry, 447 U.S. at 274.

Anderson was acting as a State agent. He was a known informant at the time he was placed in Mr. Floyd's cell. Anderson acted under instructions from the State to gather information and to continue talking to Mr. Floyd about the alleged offense. In exchange for Anderson's teamwork, he received special treatment and reduced charges. The prosecutor kept this bargain by personally appearing on Anderson's behalf at his sentencing and by dropping other charges.

Anderson's testimony, a product of those violations,

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[12]The Pinellas County State Attorney's Office has routinely and repeatedly used jail-house snitches in obtaining convictions in death penalty cases. The following capital cases involved convictions with the help of jail-house snitches: James Floyd, Patrick Hannon, Roosevelt Bowden, Richard Cooper, James Daily, Mark Davis, Samuel Jason Derrick, Martin Grossman, Jeffrey Muehleman, and Richard Rhodes.

prejudiced Mr. Floyd at both phases of trial. Anderson's testimony was crucial because it supported the State's theory that Mr. Floyd confessed and hid evidence of the crime. Anderson testified to several racist statements Mr. Floyd allegedly made that were highly prejudicial and were not refuted by any other witness (RS. 731).

Without Anderson's testimony, the State was unable to prove the aggravating factors against Mr. Floyd. The State only had circumstantial evidence against Mr. Floyd. Without Mr. Anderson's testimony, Mr. Floyd could not have been sentenced to death. As the State argued:

> Mr. Anderson's testimony is vital for us to be able to prove the aggravating factor beyond a reasonable doubt, both to establish a lack of remorse, which goes to the factor, especially the wicked, evil, atrocious or cruel and also to establish that the murder occurred during the course of a burglary. And Mr. Anderson's testimony is the only direct testimony we will have to be able to establish those factors. (RS. 528).

The facts about Anderson were concealed by the State and Anderson before, during, and after the trial and re-sentencing. See Brady and Giglio. Mr. Floyd is entitled to an evidentiary hearing to establish these facts.

ARGUMENT VI -- PUBLIC RECORDS

On September 16, 1998, Mr. Floyd sought additional public records from the Pinellas County State Attorney's Office relating to other suspects in Mr. Floyd's case. At the time of this

request, Fla. R. Crim. P. 3.852 was not yet in effect. After speaking with the Assistant State Attorney, counsel sent a second request on October 13, 1998, pursuant to Fla. R. Crim. P. 3.852, which went into effect on October 1, 1998.

Mr. Floyd requested information on four people including Renard Flemming. Mr. Flemming's name was found in State Attorney files on James Floyd. Information also was sought on Dwayne Walton, Darryl Murphy and Kim V. Walker.

Mr. Flemming is a black male who committed the murder of Julia Ann Martin, a white woman in January, 1984 in St. Petersburg, the same week that Ms. Annie Anderson, a white woman, was killed in her St. Petersburg home. Ms. Martin's driver's license was found in an alleyway in St. Petersburg. Mr. Floyd contended that he found Ms. Anderson's checkbook near a garbage dumpster in St. Petersburg. The information about Ms. Martin's license was given to Detective Engleke of the St. Petersburg Police Department, who was the investigating officer on the case. Detective Engleke was the same investigating officer on Mr. Floyd's case. All this information was found **in** the files of the State Attorney on James Floyd.

The State argued that the information sought by Mr. Floyd was unconnected to his case and the State was unaware of any connection or relevance to Mr. Floyd's case. The State also argued that the information did not "appear reasonably calculated

to lead to the discovery of admissible evidence and the request is therefore unduly burdensome."

If the information was not relevant, it would not have been in Mr. Floyd's files obtained from the State Attorney in the first place. Mr. Floyd alleged that the reason Mr. Flemming's name was found in Mr. Floyd's file was that he was a suspect in the murder of Annie Anderson. Mr. Floyd also believed that the name of Mr. Flemming and his involvement in a homicide was Brady material that may have exculpated Mr. Floyd in the murder of Annie Anderson. But, evidence that other persons could have committed this crime was admissible at Mr. Floyd's trial. See, State v. Gunsby, 670 So. 2d 920 (Fla. 1996). This information was never disclosed to defense counsel. Counsel must have the information so that she may investigate whether the evidence would have been beneficial to trial counsel. Mr. Floyd has the burden to prove these matters. The trial court erred in its March 2,1999 order denying Mr. Floyd relief on this claim. The court erroneously held that "the Florida Public Records Act has been available to James Floyd since his August 23, 1984 conviction." (March 2,1999 Order Denying Relief at 2).[13] The

[13]This was patently untrue. Public records only became available in Mr. Floyd's case when the conviction and sentence was final and rehearing denied on December 11, 1990. Floyd v. State, 569 So. 2d 1225 (Fla. 1990). The Court's order attempts to portray counsel for Mr. Floyd as failing to request public records for eighteen (18) years. This is wrong.

trial court also erroneously held that the public records were not requested until September 16, 1998, and then "not properly requested ...until October 13, 1998." The court failed to note that in July,1998, counsel outlined in detail for the court the outstanding public records. On July 14, 1998, Judge Luce ordered the state agencies who had not complied with public records to do so. Public records remained outstanding. But the court inexplicably refuted to allow counsel to get access to the documents.

The trial court's criticism that counsel failed to exercise due diligence in obtaining public records on Mr. Floyd for 18 years was wrong and unfair. Mr. Floyd has been prejudiced because other defendants similarly situated have received access to these public records.

Despite the trial court's view to the contrary, capital post-conviction defendants are entitled to Chapter 119 records disclosure. Ventura v. State, 673 So. 2d 479 (Fla. 1996); Muehleman v. Dugger, 623 So. 2d 480 (Fla. 1993); Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993); State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); Mendyk v. State, 592 So. 2d 1076 (Fla. 1992). Counsel has a duty to seek and obtain each and every public record that exists to determine whether any basis for post-conviction relief exists. See, Porter v. State, 653 So. 2d 375 (Fla. 1995); cert,

denied, 115 S.Ct. 1816 (1995); Devier v. Thomas, 29 F.3d 643 (11th Cir. 1995). Mr. Floyd is entitled to these public records. Relief is proper.

ARGUMENT VII -- FAILURE TO OBJECT TO CONSTITUTIONAL ERROR

A. HEINOUS, ATROCIOUS, AND CRUEL INSTRUCTION.

The trial court instructed Mr. Floyd's jury on the "heinous, atrocious and cruel" aggravator. The State failed to prove the existence of this aggravator beyond a reasonable doubt. There was insufficient evidence to support the finding of this aggravating circumstance. The State has the burden of proof to establish beyond a reasonable doubt that a victim is conscious during an attack. In Mr. Floyd's case, the medical examiner specifically testified that there was **no way to know** if the victim was conscious (RS. 754-758). Because the aggravating circumstance did not apply as a matter of law, it was error to submit it for the jury's consideration. Stringer v. Black, 112 S. Ct. 1130 (1992); Archer v. State, 613 So. 2d 446 (Fla. 1993); Kearse v. State, 662 So. 2d 677 (Fla. 1995).

The HAC instruction given to the jury violated the Eighth Amendment because it was unconstitutionally vague. Godfrey v. Georgia, 446 U.S. 420 (1980). See also State v. Breedlove, 655 So. 2d 74 (Fla. 1995); Shell v. Mississippi, 498 U.S. 1 (1990); Maynard v. Cartwright, 486 U.S. 356 (1988). To the extent that Mr. Floyd's counsel failed to adequately object to the jury

instruction at issue, Mr. Floyd did not receive effective assistance of counsel. Starr v. Lockhart, 23 F. 3d 1280 (8th Cir. 1994); Strickland v. Washington, 466 U.S. 668 (1984).

Judge Luce summarily denied this claim on the basis that it was procedurally barred. (March 2,1999 Order Denying Relief at 5).

B. NO LIMITING INSTRUCTIONS.

The jury was instructed on three aggravating factors:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence. One, the crime for which the defendant is to be sentenced was committed by the defendant while he was engaged in the commission of a burglary. Two, the crime for which the defendant is to be sentenced was committed for financial gain.
>
> Where the same aspect of the offense at issue gives rise to two or more aggravating circumstances, that aspect can only be considered as one aggravating circumstance. If you, the jury, find the State has proved beyond a reasonable doubt both aggravating circumstances number one and two, this may only be regarding as one aggravating circumstance for the purposes of the recommendation.
>
> The third potentially aggravating circumstance is the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel. In order that you might better understand and be guided concerning the meaning of aggravating circumstance, the Court hereby instructs you that what is intended to be included in the category of wicked, evil, atrocious or cruel are those capital crimes where the actual commission of the capital felony was

> accompanied by such additional facts as to set the crime apart from the norm of capital felonies, the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

(RS. 1024-25).

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

The jury's understanding and consideration of aggravating factors may lead to a life sentence. Yet, Mr. Floyd's jury was not given adequate guidance as to what was necessary to establish the presence of an aggravator. This left the jury with unbridled discretion and violated the Eighth amendment. Trial counsel's failure to object was ineffective assistance of counsel.

C. **UNCONSTITUTIONALLY VAGUE INSTRUCTIONS**

At the time of Mr. Floyd's sentencing, the language of § 921.141, Fla. Stat., which defined the aggravating circumstances was facially vague and overbroad. Godfrey v. Georgia, 446 U.S. 420 (1980); Richmond v. Lewis, 113 S. Ct. 528, 534 (1992).

During closing argument, the State argued in support of the heinous, atrocious, and cruel aggravating factor:

> Let's think about the actual act of killing and murdering and stabbing an eighty-six year-old woman, let's think about what other choices in that split second that James Floyd had to think about. He is in the bedroom and she comes meandering in the house. He has a choice to make right then. He knows the victim's old. He has a choice, and he had other choices available, he chose to stab her and take her life. The defendant could easily have knocked Annie Anderson down. She was eighty-six years old. She's probably got bad hearing and bad eyesight. He had other choices available. He made his choice then.
>
> That decision that James Floyd made on January 16 of 1984 tells you a lot about him, a lot about his soul and what's in him. January 16th he made the decision to kill an eighty-six year old lady, senselessly. Think of the options. He is doing a burglary, an old lady walks in on him. He could have thrown her down. He could have knocked her glasses off and thrown her down. He could have run out the door, but he made a decision then. That give's you insight as to him, what he's all about. He made the decision to take her life.
>
> Now the stabbing of an eighty-six year old woman and then going to the bank and cashing her check, does that show some type of remorse over there? He stabs a lady, leaves her bleeding in her bed and goes to the bank and cashes her check, or does that all seem like it's all in a day's work?

(RS. 992-993)(emphasis supplied).

During closing argument, the State argued the following, allegedly in support of the murder during the course of a

burglary aggravating factor:

> The murder in this case was committed during the course of a burglary. There is no question about that. A burglary was done. That was the purpose of why he went there. He planned it. Put socks on his hands and he was surprised.

(RS. 990-991).

During closing argument, the State argued in support of the murder for pecuniary gain aggravating factor:

> He took her checkbook, second aggravating circumstance, the murder was committed for financial gain. And that's obvious.
>
> He's in her house. She surprises him. He murders her, and he continues to take her checkbook. The following day -- and man, the very day of the murder, he's cool enough to go to the bank and write a $500 check.

(RS. 991).

To the extent that trial counsel failed to adequately object, Mr. Floyd did not receive effective assistance of counsel. Starr v. Lockhart, 23 F. 3d 1280 (8th Cir. 1994); Strickland v. Washington, 466 U.S. 668 (1984). At a minimum, an evidentiary hearing was required.

D. **CALDWELL ERROR**

A capital sentencing jury must be properly instructed as to its role in the sentencing process. Caldwell v. Mississippi, 472 U.S. 320 (1985). The court and prosecutor repeatedly made statements about the difference between the jurors'

responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase. Mr. Floyd's jury was repeatedly instructed by the court and the prosecutor that its role was merely "advisory." (See, e.g. (RS. 554, 555, 559, 560, 681, 691, 692, 1022, 1023).

The court gave the following erroneous instruction during his sentencing instructions:

> In these proceedings it is not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jurors. The fact that the determination of whether a majority of you recommend a sentence or life sentence, of life imprisonment in this case, can be reached by a single ballot -- can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings.

(RS. 2704-05). The judge, however, read part of the correct standard jury instruction, which advised the jury that if six or more of their number recommends life, they have made a life recommendation (RS. 1028, 29). This brief statement of the law was rendered moot by the previous instruction that misled the jury, giving them the wrong impression that they could not return a valid sentencing verdict if they were tied six to six.

The court repeated this wrong instruction in summarizing its charge to the jury:

> Ladies and gentlemen, you will now retire to consider your recommendation. When seven or more are in agreement as to what

> sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to the Court.

(RS. 1030, 31)(emphasis added).

Trial counsel objected to this erroneous instruction during the charge conference.

> MR. LOVE: Judge, I do have -- I am not sure, you might want to clarify this on the one recommending death. It says, the jury -- the jury, by a vote of to-do-do post death. The other one goes, the jury impose and recommend life in prison without possibility of parole. It says, so say we all. The problem I may have is where they may infer -- even without those other instructions, they are going to infer it's going to be unanimous to do that.

(RS. 956)(emphasis added). Trial counsel renewed his objection after this erroneous instruction was read to the jury:

> MR. LOVE: I hate to come up one more time. In listening to the last things it says reaching a majority, meaning the last things you are saying to them. I am not sure if that's going to be confusing to them. They still have to be -- before it happened it was explained to them as six.

(RS. 1032)(emphasis added).

In Rose v. State, 425 So. 2d 521 (Fla. 1983), and Harich v. State, 437 So. 2d 1082 (Fla. 1983), only a majority vote was required for a death recommendation. A six-to-six vote by the jury is a life recommendation. The jury instructions provided at Mr. Floyd's trial were erroneous.

These comments violated Caldwell and the Eighth Amendment,

and defense counsel's failure to adequately bject as ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). An evidentiary hearing is warranted.

E. BURDEN SHIFTING.

The State must prove that aggravating circumstances outweigh the mitigation. State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974)(emphasis added). This standard was not applied at Mr. Floyd's penalty phase, and counsel failed to object to the court and prosecutor improperly shifting to Mr. Floyd the burden of proving whether he should live or die. Mullaney v. Wilbur, 421 U.S. 684 (1975).

The judge instructed the jurors during penalty phase that it was their job to determine if the mitigating circumstances outweighed the aggravating circumstances:

> It is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of myself, however, it is your duty to follow the law that will now be given to you by myself and 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.

(RS. 1022,23). This wrong standard was repeated to the jury:

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

(RS. 1025).

These instructions violated Florida law and the Eighth and Fourteenth Amendments. The instructions shifted the burden of proof to Mr. Floyd on the central sentencing issue of whether he should live or die. Relief is warranted.

ARGUMENT VII -- DEATH PENALTY UNCONSTITUTIONAL

Florida's death penalty scheme is unconstitutional on its face and as applied to Mr. Floyd. Execution by lethal injection and/or electrocution constitutes cruel and unusual punishment under the Florida and United States Constitutions. Mr. Floyd hereby preserves any arguments as to the constitutionality of the death penalty, given this Court’s precedent.

CONCLUSION

Mr. Floyd submits that relief is warranted in the form of a new trial and/or a new sentencing proceeding. At a minimum, an evidentiary hearing should be ordered.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 21, 2000.

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