IN THE SUPREME COURT OF FLORIDA

CASE NO. SCOO-1186

MATTHEW MARSHALL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT JUDICIAL CIRCUIT,
IN AND FOR MARTIN COUNTY, FLORIDA COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the denial of post-conviction relief pursuant to Fla. R. Crim. P. 3.850 after a limited evidentiary hearing. The following symbols will be used to designate references to the record in this appeal:

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

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

"Supp. PC-R. ___" -- supplemental record on appeal to this Court;

References to other documents and pleadings will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE

Trial

Mr. Marshall was charged by indictment dated February 16, 1989 with first degree murder. Both Mr. Marshall and the victim, Jeffrey Henry, were inmates at the Martin Correctional Institute at the time of the crime for which Appellant was convicted. Appellant pled not guilty and presented a theory of self-defense at trial. Appellant's trial was held in November and December of 1989. A jury returned a verdict of guilty on first degree murder. At the penalty phase, Appellant's father was scheduled by trial counsel to testify but he failed to surface. Trial counsel was permitted to proffer Appellant's father's anticipated testimony which included that "Mr. Marshall did well in school until his early teens when his older brother influenced him to run the streets and break the law; that Mr. Marshall's mother did not discipline Marshall and allowed him to believe there would be no consequences for his behavior; and that Marshall's father loved him and

requested a life sentence for his son." (PC-R 14). Trial counsel presented no mental health witnesses, no live testimony from family members, and after being questioned on the record by the trial judge, Appellant waived his right to present any statutory mitigation. The Appellant also waived his right to the judge reading and presenting to the jury for their consideration jury instructions on the statutory mitigators. (R. 2773).

Following the conclusion of the penalty phase, the jury recommended a life sentence without possibility of parole for 25 years. On December 12, 1989, the trial court overrode the jury's life recommendation and sentenced Appellant to death. The trial Judge found the information proffered by trial counsel regarding Appellant's father's anticipated testimony not to be mitigating. The trial judge did find as mitigation the fact that Appellant behaved well at trial and the fact that he entered prison at a young age. (PC-R. 14).

On direct appeal, the Florida Supreme Court affirmed the conviction and sentence, specifically finding that the "record in this case contains insufficient evidence to reasonably support the jury's recommendation of life. Marshall v. State, 604 So. 2d 799 (Fla. 1992), cert. denied, 113 U.S. 2355 (1993). Chief Justice Barkett, and Justices Kogan and Shaw concurred in the affirmance of guilt but found that "reasonable people could differ as to the appropriateness of the death penalty, and the court's override was therefore improper." Id.

Post-Conviction

On January 29, 1999, Appellant filed his final amended 3.850 motion which raised twenty-seven claims. On March 29, 1999, the State filed its response. After the circuit court held a Huff[1] hearing on April 14, 1999, the court ordered an evidentiary hearing on three of Appellant's claims. Two of the three claims involved allegations of ineffective assistance of counsel at the penalty phase, the other claim for which a hearing was granted involved a Brady[2] violation affecting the guilt phase of the trial. Counsel for Appellant argued at the Huff hearing that Claim IX in his Rule 3.850 motion, which specifically alleged that Appellant was denied a fair trial due to a biased and impartial jury, required evidentiary development.

The order following the Huff hearing found claims I, V, IX, XXI, XXII, XXVI and XXVII do not warrant an evidentiary hearing "because the motion and record in this case conclusively show that Defendant is not entitled to relief." "Claim IX is specifically denied as the allegations alleged in the attached affidavits inhered in the verdict." (PC-R 1829). Claims II, IV, VI, VII, VIII, X, XII, XIII, XIV, XV, XVI,

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[1]. Huff v. State, 622 So.2d 982 (Fla. 1993)

[2]. Brady v. Maryland, 373 U.S. 83 (1963).

XVIII, XIX, XX, XIV, and XV[3] were found by the circuit court to be procedurally barred and did not warrant a hearing. The circuit court ordered a evidentiary hearing on Claims III, XI, XVII, XXIII. There were no files or records attached in support of the order. Beginning on August 23, 1999, the Circuit Court conducted an evidentiary hearing lasting three days. In support of his allegations of ineffective assistance of counsel at the penalty phase, Appellant presented testimony from a psychiatrist, Dr. George Woods, a neuro-psychologist Dr. Ruth Latterner, three of Mr. Marshall's brothers who were raised in the same household as Mr. Marshall, five cousins of Mr. Marshall each of whom spent time visiting or living in Mr. Marshall's childhood home, lead trial counsel Cliff Barnes as well as the second chair attorney at trial David Golden. In support of the Brady claim, Appellant called as witnesses inmate George Mendoza, inmate David Marshall (no relation to the appellant), and former Department of Corrections employee Kerry Flack. The State presented as witnesses investigator Ed Sobach, investigator Howard Riggins, the trial prosecutor John Spiller, and Dr. Joel Klass, the psychiatrist appointed by the trial court to assist Appellant at trial.

After both the State and Appellant submitted post-hearing memorandum, the Circuit Court issued an order on April 18, 2000 denying

[3]. It is apparent that the last numerals referred to as XIV and XV was an error and were intended by the lower court to be XXIV and XXV.

Appellant's Rule 3.850 motion. After timely filing his Notice of Appeal, this Appeal follows.

SUMMARY OF ARGUMENTS

1. Mr. Marshall maintains the necessity of an evidentiary hearing and/or relief in the form of a new trial or penalty phase on numerous claims raised in his Rule 3.850 Motion. However, Claim IX, the jury misconduct claim particularly requires evidentiary development. Claim IX states that Mr. Marshall’s due process rights were violated when he was deprived of his right to a fair and impartial trial by jury. (PC-R.1598) Although claim IX contained specific allegations to the jury being tainted by racial remarks, racist jokes and the reading of newspaper articles in violation of the judges orders, the lower court denied a hearing on Claim IX because "the allegations alleged in the attached affidavits inhered in the verdict." (PC-R 1829). The lower court failed to attach any files or records refuting Mr. Marshall's allegations. The lower court's denial of an evidentiary hearing regarding the deprivation of a fair and impartial jury interconnects with other claims including Mr. Marshall's claim of innocence of first degree murder which was supported by the juror affidavits. The motion, files and records in this claim do not conclusively show that Mr. Marshall is entitled to no relief.

2. The lower court erred in denying Mr. Marshall's claims of ineffective assistance of counsel at the penalty phase, as well as

trial counsel's failure to secure a competent mental health expert to assist at both the guilt and penalty phases of trial. The lower court denied relief notwithstanding that the factual findings in his order denying relief conclusively demonstrate that trial counsel failed to conduct a reasonable investigation of Mr. Marshall's background, unreasonably failed to investigate and present available statutory and non-statutory mitigation, and unreasonably failed to obtain a competent mental health expert despite clear indications of psychological disorders. The lower court erred by stating in conclusory language, that trial counsel was not ineffective for failing to send an investigator to Liberty City, the ghetto where Mr. Marshall was raised. The lower court also erred by simply concluding that trial counsel was not ineffective for failing to call Dr. Klass as a witness. The lower court failed to consider the reasonableness of trial counsel's decisions. In lieu of any files or records or evidence demonstrating that Mr. Marshall is entitled to no relief, the lower court's order simply offers conclusory language that trial counsel was not ineffective.

3. The lower court erred in finding that the State did not withhold exculpatory information that a State's key witness was offered a deal to testify against Mr. Marshall in violation of <u>Brady v. Maryland</u>. The lower court further erred in finding that the State did

not knowingly present false testimony at trial[4]. Both George Mendoza, who testified at trial, and David Marshall who gave the State information and sworn testimony before a grand jury, testified at the evidentiary hearing that they were offered a promise to be housed together if they testified against Matthew Marshall. This promise to be housed together was never disclosed to the defense, nor was George Mendoza prevented by the State from falsely testifying at trial that he was not promised anything in exchange for his testimony. Contrary to the lower court's conclusion that there was no promise to be housed together, Mr. Marshall presented unrefuted evidence that George Mendoza and David Marshall were indeed not only housed in the same institution, but in the same prison cell over the course of nearly ten years. Evidence was presented and unrefuted that within a few days after testifying in front of the grand jury, both George Mendoza and David Marshall were transferred to Avon Park Correctional Institution where they shared a cell for eight and a half years. After which, they were both transferred to Lake Correctional Institution where they shared a cell for an additional ten months. The lower court's acceptance of the State's position that no promises were made is simply unreasonable in light of the evidence presented at the evidentiary hearing.

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[4] The deliberate deception of a court and jurors by presentation of known false evidence is incompatible with the rudimentary demands of justice. Giglio v. United States, 150 U.S. 150,153 (1972).

4. The lower court erred by failing to conduct a proper cumulative error analysis. The order denying relief simply asserts in conclusory language that the cumulative effect of all of Mr. Marshall's claims and the evidence admitted to support them does not show the defendant is entitled to relief. Notwithstanding this inadequate conclusion, the sheer number of errors at trial, the issues raised on direct appeal, the improper override of the jury's recommendation of a life sentence, the ineffective assistance of counsel Appellant received at both the guilt and penalty phases, the Brady and Gilglio violations, the deprivation of due process suffered by Appellant from being denied a competent mental health expert, and all of the claims for which Appellant did not receive an evidentiary hearing, cumulatively indicate that Appellant's conviction and sentence are unreliable.

5. The lower court erred by summarily denying meritorious claims. The lower court's order denying post-conviction relief fails to provide any reason for denying Appellant's Rule 3.850 claims for which no evidentiary hearing was held. There were no records attached to the order, and aside from Claim IX, there was no rationale provided for why these claims should be denied without an evidentiary hearing.

This Court has stated many times that under rule 3.850, a movant is entitled to an evidentiary hearing unless the motion, files, and

records conclusively show that the movant is not entitled to relief. Fla. R. Crim. P. 3.850(d); e.g. Provenzano v. Dugger, 561 So.2d 541, 543 (Fla. 1990); Harich v. State, 484 So.2d 1239, 1240 (Fla. 1986), O'Callaghan v. State, 461 So.2d 1354, 1355 (Fla. 1985). To support summary denial without a hearing, a trial court must either state it's rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion. Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993); citing Hoffman v. State, 571 So.2d 449, 450 (Fla. 1990) (Hoffman I).

ARGUMENT

ARGUMENT I

THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON MR. MARSHALL'S CLAIM OF JUROR MISCONDUCT.

Matthew Marshall's Motion alleged that he was denied his right to a fair an impartial jury based on juror misconduct. Claim IX specifically asserts that racial remarks, racial jokes and use of non-evidentiary outside materials by the jury deprived Matthew Marshall of due process and his right to a fair and impartial trial by jury. (PC-R.1598) Post-conviction counsel asserted Mr. Marshall's right to an

evidentiary hearing on Claim IX at the Huff hearing. Counsel stated, "...the main claim that I'm also interested in the court taking evidence on, is Claim 9 which is the juror misconduct issue ..."(2nd Supp. PC-R. 1912). Despite the fact that Claim IX contained these specific allegations that the jury was tainted by racial remarks, racist jokes and the reading of newspaper articles in violation of the judge's orders, the lower court denied Mr. Marshall's request for an evidentiary hearing. For reasons not specifically explained, the lower court found these allegations "...inhered in the verdict." (PC-R. 1829)

Attached to Claim IX is a signed affidavit by a member of the Florida Bar, Ronald B. Smith, who had no involvement in Mr. Marshall's case. Mr. Smith's affidavit presents specific allegations of racial bias and other jury misconduct as follows:

> **I, RONALD B. SMITH, duly licensed to practice law in the State of Florida since 1977, and having been duly sworn or affirmed, do hereby depose and say:**
> **1. After the trial of Matthew Marshall, I received a telephone call from a woman who was calling in reference to a client of mine to whom she was related.**
> **2. In the course of our conversation, she became upset and said she would never serve on another jury. She had told me she had served on a jury for the Matthew Marshall trial which she said was a trial about an inmate who had been killed. She went on to say that she was appalled by what the jurors were doing during that trial. She said some jurors decided before the trial was over that Matthew Marshall was guilty. She said some jurors told jokes about Matthew Marshall. She**

> **said the joking was racial. 3. She also said that before the end of the first phase of the trial, some jurors had announced that they were going to vote for a guilty verdict and a life sentence because they wanted Matthew Marshall to go back to prison and kill more black inmates.**
> **4. She also said that the judge told them not to read anything about the trial or watch anything on television about the trial. Then she said that some jurors did read articles about the trial and talked with each other about the articles they had read.**
> **5. This woman was really upset because everyone on the jury had taken an oath and now she was not sure what to think about the jury system.**
> **6. I have made attempts to remember the name of this woman and simply cannot recall it.**

(PC-R.1708-1710).

After these facts emerged, a few jurors were contacted before a lower court enjoined any further jury interviews. The affidavits which were obtained further bolster Mr. Smith's affidavit regarding jury misconduct. The statements from the jurors indicate that the conviction was based on a "deal" and "trade-off." (PC-R.1711-1712, 1713-1714) Juror Judy Cunningham stated:

> 2. During the course of the guilt phase deliberations, I told the other jurors that I did not believe that the state had proven their case beyond a reasonable doubt. I was not sure Mr. Marshall was guilty as charged. I also made it clear to other jurors that I would not vote for death in this case.
> 3. I only compromised my true feelings regarding the case because the other jurors did not want a hung jury to result. I voted for first degree murder only when it was agreed that there would be a vote for life recommendation and it would be unanimous. At least I was relieved of the worry that Mr. Marshall would be executed.

(PC-R. 1713-1714).

The lower court’s denial of Matthew Marshall’s motion was a fundamental error. The evidence presented in the affidavits required an evidentiary hearing based on the overt acts of juror misconduct. Indeed, based solely on the affidavits presented, the lower court should have immediately ordered a new trial.

Florida's evidence code holds that jurors are not competent to testify as to any matter which “inheres” in the verdict. Fla. Stat. s 90.607 (2)(b). (1997). Notwithstanding this rule, this Court has consistently held that jurors are permitted to testify about "overt acts which might have prejudicially affected the jury in reaching their decision." Powell v. Allstate Insurance Company, 652 So.2d 354, 356(Fla. 1995). See State v. Hamilton, 574 So.2d 124 (Fla. 1991).

In a series of cases, this court and others have explained the types of misconduct which do not inhere in the verdict and constitute error. The two most egregious and prejudicial acts of juror misconduct are racial remarks and the reference to outside sources such as newspaper articles. Both these types of misconduct occurred during Matthew Marshall’s trial as reflected in Mr. Smith’s affidavit. In Powell, this Court held that racial jokes made by an all white jury about a black plaintiff constituted overt acts which tainted the jury's verdict. Powell at 357. In Powell, this Court held that:

> [I]t would be improper, after a verdict is rendered, to individually inquire into the

> thought processes of a juror to seek to discover some bias in the juror's mind, like the racial bias involved here, as a possible motivation for that particular juror to act as she did. Those innermost thoughts, good and bad, truly inhere in the verdict. But when appeals to racial bias are made openly among the jurors, they constitute overt acts of misconduct. This is one way that we attempt to draw a bright line.

This court declared "the issue of racial, ethnic, and religious bias in the courts is not simply a matter of political correctness to be brushed aside by a thick-skinned judiciary." Id. at 357.

In United States v. Heller, 785 F.2d 1524 (11th Cir.1986), jurors made anti-semitic jokes and told stories using the word "nigger" during deliberations. The judge learned of this information and ordered deliberations to cease. After asking the jury if they could still deliberate fairly, he allowed deliberations to continue. Id. On appeal, the Eleventh Circuit reversed concluding that "comments made by the jurors displayed the sort of bigotry that clearly denied the defendant, Heller, the fair and impartial jury that the constitution mandates." Id. at 1527.

The racist comments alleged in Ronald B. Smith's affidavit certainly rise to the level of overt acts of jury misconduct. In 1995, the Court in Wright v. CTL Distribution, INC., 650 So.2d 641, 642 (2nd DCA 1995), relying on Powell and Baptist Hospital of Miami, Inc. v. Maler, 579 So.2d 97 (Fla. 1991), ordered an evidentiary hearing when a juror came forward and confessed that during deliberations, "she heard

several members of the jury say they did not want to award anything to a fat black woman on welfare who would simply blow the money on liquor, cigarettes, jai alai, bingo, or the dog track." Relying on Powell, the court "found the making of racial jokes and racially biased statements by jurors to each other to be overt acts of misconduct rather than misconduct which inheres in the verdict." Id. at 643.

The racial remarks alleged in Ronald B. Smith's affidavit are of the type so insidious and filled with racist contempt that it is impossible to believe Appellant's jury was fair and impartial. Furthermore, racial jokes in the context of jury deliberations should not be taken lightly in any proceeding much less in a first degree murder case where the defendant's life is literally on the line. The jurors in Mr. Marshall's case did not keep their racial bias in their own minds, instead, they openly made racial jokes and stated that Mr. Marshall should be sent back to prison so that he could kill more black inmates.

The jurors in this case also consulted non-evidentiary material in direct contravention of the trial court's instructions. This misconduct also warrants a new trial. In another series of cases this court and others have determined which kinds of information received by the jury from outside the courtroom do not inhere in the verdict. This Court in Devoney v. State, 717 So.2d 501 (Fla. 1998), surveyed the kinds of jury misconduct which justified "an attack upon a jury

verdict" including: relating personal knowledge of non-record facts to other jurors, Russ v. State, 95 So.2d 594 (Fla.1957); an assertion that a juror received information from outside the courtroom, Carcasses v. Julien, 616 So.2d 486 (Fla. 3d DCA 1993); allegations that jurors read newspapers contrary to court orders or lied about knowledge of an incident in parking lot where jury threats might have been made do not inhere in the verdict, Sentinel Communications Co. v. Watson, 615 So.2d 768 (Fla. 5th DCA 1993); allegations that a courthouse custodian urged jurors to give a large award to the plaintiff, International Union of Operating Eng'rs Local 675 v. Kinder, 573 So.2d 385 (Fla. 4th DCA 1991).

In Sentinel Communications Co. v. Watson, 615 So.2d 768 (Fla. 5th DCA 1993), the court specifically held that juror misconduct, such as reading newspapers contrary to court orders, does not inhere in the verdict. In paragraph 4 of Ronald B. Smith's affidavit cited above, the juror stated that the "..judge told them not to read anything about the trial or watch anything on television about the trial. Then she said that some jurors did read articles about the trial and talked with each other about the articles they had read." (PC-R. 1708-1710) According to the cases cited above, such "outside influences" do not inhere in the verdict. It is clear that Mr. Marshall's jury referred to outside sources and read newspaper articles after the court admonished them not to.

The true extent of the racial bias, racial joking and influences of non-evidentiary, outside material at the expense of Mr. Marshall's constitutional right to a fair trial, remains unknown because Appellant was not permitted by the lower court to present all of the jurors as witnesses during an evidentiary hearing. The case law presented above demonstrates that the allegations in attorney Ronald Smith's affidavit are overt acts that do not inhere in the verdict. The lower court's finding that the allegations alleged in the attached affidavits inhere in the verdict is contrary to this Court's previous opinions.

The lower court's denial of an evidentiary hearing regarding the deprivation of a fair and impartial jury interconnects with other constitutional violations asserted by Mr. Marshall, including Mr. Marshall's claim of innocence of first degree murder which was supported by juror affidavits.(See Claim XVIII, PC-R. 1666-1669) A review of the record supports the theory that Jeffrey Henry was killed in self-defense. Matthew Marshall was defending himself when a fight erupted within the cell (R. 2027,2429,2026). There were offensive wounds on Jeffrey Henry (R. 2056). All of the major injuries received by Jeffrey Henry could have occurred by successive blows transpiring within a matter of "seconds" (R. 2057). Dr. Hobin could not have ruled out Jeffrey Henry as the aggressor (R. 2058). Clearly, a fair and impartial jury could have rejected first degree murder and voted for a

lesser degree of guilt or found Jeffrey Henry was killed in self-defense.

In Mr. Marshall's case, the idea that twelve white jurors, who were not convinced beyond a reasonable doubt that Mr. Marshall was guilty of first degree murder, would make a deal to convict Mr. Marshall and agree on a life sentence so that he could return to prison and kill more black inmates should shock the conscience of any court. Because the motion, files, and records do not conclusively show that the movant is not entitled to relief, the lower court's denial of an evidentiary hearing was in error.

As demonstrated above, an evidentiary hearing was certainly warranted in this case. Matthew Marshall however, contends that an evidentiary hearing would be a waste of judicial economy and urges this court, based on the strength of the affidavits presented to the lower court to forego the formalities of an evidentiary hearing and instead immediately grant a new trial.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING APPELLANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL RESULTING FROM TRIAL COUNSEL'S FAILURE TO CONDUCT REQUIRED INVESTIGATIONS AND SECURE A COMPETENT MENTAL HEALTH EXPERT TO ASSIST AT BOTH THE GUILT AND PENALTY PHASES OF TRIAL

A. <u>TRIAL COUNSEL'S FAILURE TO INVESTIGATE DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS TO PRESENT AVAILABLE MITIGATING EVIDENCE DURING HIS PENALTY PHASE (CLAIM III)</u>

The lower court's order denying relief and holding that Matthew Marshall's trial counsel, Cliff Barnes, did not render ineffective assistance of counsel, presents a shallow, watered-down version of the evidence presented at Appellant's post-conviction evidentiary hearing. Contrary to the lower court's factually thin order, the record in this case unequivocally establishes the allegations of deficient performance by trial counsel and prejudice during Appellant's penalty phase.

In order to prove an ineffective assistance of counsel claim, a defendant must establish two elements:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose results are reliable.

<u>Riechmann v. State</u>, 25 Fla. L. Weekly S163, 25 Fla. L. Weekly S242, 2000 WL 205094 (Fla. 2000); <u>Strickland v. Washington</u>, 466 U.S. 668 (1984); <u>see also</u> <u>Rutherford v. State</u>, 727 So.2d 216 (Fla. 1998); <u>Rose v. State</u>, 675 So.2d 567 (Fla. 1996). Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary

review based on the Strickland test. See Rose v. State, 675 567, 571 (Fla. 1996). This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings. Riechmann v. State, Supra. Although the lower court's order lacks detail, the court's factual findings amply support the allegations of deficient performance and prejudice during Appellant's penalty phase. The lower court's order reflects that Mr. Marshall's trial attorney did very little to investigate for mitigation.(PC-R 2709-2711) The court also found that Mr. Marshall's trial attorney was counsel on several other capital cases simultaneously to Appellant's case. (PC-R 2709)

A particularly egregious failure of counsel was his failure to obtain an investigator who could have recovered critical mitigation evidence on Appellant's behalf. The lower court's order recounts trial counsel's testimony that the Public Defender's Office had one and sometimes two investigators. One of the investigators was a woman and trial counsel declined to send her to Liberty City, Miami, home of Appellant. (PC-R 2713). Rather than take the simple and obvious steps of asking the court for a special investigator or personally traveling to Miami to speak with relatives about Appellant's troubled past, trial counsel inexcusably relied solely on conversations with Appellant. (PC-R 2714). Trial counsel admitted that any evidence that might have explained Appellant's behavior would have been important evidence for

his defense. Id.

The trial court's order denying relief reflects only a pale shadow of the testimony presented during the post-conviction hearing. In particular, the lower court's order fails to provide an adequate account of the utter lack of investigation and subsequent deficient performance by trial counsel. During the hearing, trial counsel could offer only the most unreasonable and meager of excuses for not conducting a proper background investigation, failing to secure an investigator, or actually finding and interviewing Appellant's family. The following testimony by trial counsel provides the essence of why no reasonable investigation was conducted:

> Q: (Donoho): Was there an investigator in Martin County that you could have used?
>
> A: (Barnes): I think there was an investigator, but like I say, it was a female investigator and I would not have sent her into urban Dade County looking for witnesses, that wouldn't have been safe for her. We wouldn't have done that.
>
> Q: Was there an investigator, a male investigator, you said maybe she was one of two investigators?
>
> A: There may have been a male in Indian River or I think it was an elderly guy. And I don't believe we would have sent him into Dade County, either. (PC-R 2358).
>
> Q: Did you at any time motion the court for fees to allow you to get the professional investigator to investigate mitigation on behalf of Matthew Marshall?

A: No.

Q: Did you yourself ever think about driving into Liberty City and investigating the case?

A: No. Did I think about it? I thought about it. Did I do it? No, I didn't do it. (PC-R 2360).

Q: But you recall him (Appellant's father) giving you names of brothers?

A: Yes ma'am.

Q: Do you recall how many brothers?

A: Looks like five brothers with ages. Brindley was 27 at the time. Matthew 24. Percy 23. Looks like Marvin 19 and Ted, 18.

Q: So you at least knew the names of his family members you could have contacted?

A: I knew their names.

Q: Did you do a Department of Corrections check to find out whether any of them were in custody?

A: No, I didn't do that at all.

Q: Is that something you can do when you are looking for witnesses?

A: I think you can.

Q: Now, obviously, we already talked about you not going to Liberty City and not sending an investigator to go to Liberty City, but could you or an investigator have gone to Liberty City where these boys were raised all their lives and looked for the brothers?

A: Physically we could have. When I thought about it, I know that I thought, number one, it's a crime area; and number two, I don't have a clue as to where to start; and three, I really didn't

have any leads that took me down there other than just I want to say a fishing expedition because that's what you probably do first in capital cases. I really didn't have any leads that I might obtain in his favor.

Q: Do you think that it would have been good to at least talk to the brothers to see what they had to say?

A: In every capital case you should talk to as many family members, friends, everyone that you can. I didn't sit through testimony here, but I mean, every capital case you should do that, if you can. And if you think they have something good to say.

Q: You say good to say, is that always the case? What do you mean by good?

A: It's not always the case and probably, as I said, you should probably talk with them regardless of whether or not they have anything to say. You don't know until you talk to them. (PC-R 2360-62).

Counsel had the names and ages of Appellant’s four brothers but made no attempt to locate or speak with them. There were many important pieces of information that trial counsel had to work from, but failed to pursue. Matthew Marshall provided trial counsel with the name and address of his Aunt Barbara. Trial counsel twice sent letters to Aunt Barbara with no response. (PC-R 2709-2710). Even the meager investigation that trial counsel did conduct, such as obtaining school records and speaking with Appellant's father, a grotesque child abuser, should have raised a red flag to trial counsel that a thorough

investigation needed to be done.(PC-R 2711) Appellant's father reported to trial counsel the names of Appellant's brothers but stated he “disowned” them due to their bad behavior. (PC-R 2711) Mr. Marshall’s father also reported that appellant's older brother Brindley Marshall had led Matthew into a life of crime, and that Aunt Barbara was on drugs and "she doesn't know if the sun is shining." Id. In fact, as described further below, Appellant’s father only “disowned” his sons in his brief conversations with counsel in order to cover up the years of brutal mental and physical abuse he inflicted on Appellant and his family. Even though he had never looked for or spoken to them, trial counsel listed three of Appellant’s brothers as witnesses for the penalty phase. He also listed Mr. Marshall’s father but neither he nor unsurprisingly the uncontacted brothers, showed up at trial. Id. In fact, as the post-conviction testimony of trial counsel indicates, the proffer he presented at trial, in lieu of actual live testimony by family members, was inaccurate and clearly indicates the father’s patent dishonesty:

> Q: (Donoho): Now, I went over this with one of the experts, but just to remind you about what it says, do you recall looking at the grade point average in third, fourth, fifth, and sixth grade and noticing the numbers being in the fifties and noticing the chart across the top saying sixty-nine and below equals an "F"?
>
> A: I recall he had terrible grades almost throughout his school years. Ds and Fs mostly.

> Q: Can you tell us why it is that you put in your proffer that he had beautiful grades knowing the information that you got from school regarding the actual bad grades?
>
> A: I don't recall why I would have done that. I don't recall why I did that. The proffer was at a time after we had been at trial for four or five, six days. I didn't introduce, I don't believe, the school records and I probably didn't recall how bad they were. In some families if there had been any Bs and Cs in there, some families think those are beautiful grades. And I didn't -- like I say, I didn't want to filter out for the court or the jury -- I didn't want to -- even if he had said, as apparently he said, that he had beautiful grades, I don't know how I would have edited that if I'm introducing what I'm trying to convince the court is his accurate statement made by him. In other words, I wouldn't change what he said to meet the facts if that's what he told me.
>
> Q: Right. But let me ask you this. Does the fact that early school records, because I think --
>
> A: His account is at odds with the accurate -- I mean, with reality. In retrospect, they weren't beautiful grades, they were terrible. But I think -- even to this day I don't think I would have edited to say something else. (PC-R 2364-65).

Trial counsel’s failure to investigate prejudiced Mr. Marshall. The lack of investigation kept the jury and the trial court from hearing the true extent to which Matthew Marshall suffered at the hands of his father. The lower court's brief account of the Appellant's family member's testimony grossly diminishes the extreme nature of the abusive environment in which Appellant was raised. The live testimony

presented at the evidentiary hearing is dissimilar in magnitude and in substance from the lower court's terse findings of fact: "Mr. Marshall grew up in the Liberty City section of Miami, Dade County, Florida, an area known for street violence, prostitution, and drugs. Mr. Marshall's father is charged to have been an alcoholic who abused Marshall as a child and beat him and his brothers with various instruments. Mr. Marshall's father also is accused of engaging in open infidelity while married, and physically abusing and humiliating his wife." (PC-R 2721). Appellant's brothers also testified "their mother suffered from mental disorders, talked to herself, and practiced voodoo." Id. The trial court's order notes that the testimony relating to abuse was presented by Appellant's brothers, two of whom have felony conviction records. The order further summarizes that Appellant presented testimony from five cousins who "tell also of the violence toward the defendant and his mother and of defendant's father's daily drinking habits." Id. "Each of them was available to testify in 1989, but none was called as a witness at defendant's trial." Id. at 2722.

The severity, frequency and atrociousness of the abuse far exceeded this sterile rendition of the facts. As corroborated by three of Appellant's brothers and five cousins, the abuses suffered by Matthew Marshall were shocking and horrific and constituted vital mitigation evidence seemingly ignored by the lower court:

Q: (Veleanu): When you said that he used to beat

you, I want you to clarify what that means.

A: (Brindley Marshall): There was no spanking. My father used extension cords. (SIC). He used tree branches. He used whatever he could have gotten his hands on, you know. When he whopped us with an extension cord or whooped you across your back or face or shoulder, it's going to open up. My skin had been broken up a lot.

Q: Did it happen to Matthew?

A: Me and all my brothers.

Q: He would hit you with an extension cord and cut your skin open?

A: My father was so tensed up he would duct tape us with duct tape, our hands first. He used to take off all our clothes, strap us in the bedroom, whatever room we were in. And he'll make us take off our clothes and he'll duct tape us. Take off all our clothes, duct tape our hands and feet and commence on whipping us. (PC-R 2119).

Q: Would it be fair to say throughout your childhood you always lived under the fear you might get beat today from your father?

A: That was the main thing. We tried to avoid him as much as possible. You know, like I said, he used to beat us so bad we started fearing for our life. I mean, he abused us to the point where he cut off all our hair. He tried to low grade us as much as he can. Because all of us had long hair. Like now, my hair was like this. He figured that's his pride and joy. Pierced ear. We all had long hair, off.

Q: How would he cut it off?

A: No barber shop, just cut it off. Too embarrassed to go to school. It got to the point where he used to beat Matt so bad, me and him,

we'd sleep out in the yard, you know. We had a tool shed in the back yard and me and Matt would sleep in the tool shed.

Q: Is the tool shed, the doghouse?

A: Call it the doghouse, the dog slept in there.

Q: Was there a bed in the tool shed?

A: No.

Q: Was there running water?

A: None.

Q: Where would you sleep?

A: Sleep on the floor. Get a blanket or whatever the case might be. Sometimes our mom, she knew how bad it was, and she would sneak us a blanket out there and me and Matt would sleep in the back yard.

Q: It was concrete?

A: Yeah, concrete. But Pop's started to get smart. Like the boys ain't coming in the house, where they at. He got smart and caught us in the tool shed a few times. First he threw us a bucket of cold ice water to wake us up.

Q: You would be sleeping?

A: Yeah.

Q: How big a bucket?

A: Five gallon bucket.

Q: A big yard bucket?

A: Yeah. Throw the water on us. (PC-R 2125-25)

> A: (Brindley Marshall): ...There's a health clinic that's behind our house. We used to climb up on the roof.
>
> Q: Why?
>
> A: We climbed up there and we used to sleep on top of the clinic roof just to avoid him.
>
> Q: Where would you sleep?
>
> A: On the roof.
>
> Q: Was there beds up there?
>
> A: No. We used to take blankets up there. He had a blanket and I had a blanket. Sometimes it would used to rain on us. I preferred to sleep in the rain where he couldn't catch us or catch him.
>
> Q: How many times did you sleep on the roof?
>
> A: Numerous times.
>
> Q: More than twenty?
>
> A: Probably more than that, it became part of our livelihood. (PC-R 2126).

Appellant's father also physically and emotionally battered the boys' mother:

> Q: when you say he slapped her, did you ever see him punch her like he would punch you?
>
> A: We seen it. I'm going to get to that. They are in a room, you hear punches, stop, stop. She was trying to run out of the room. Grab her head by the back of the hair pulling her back in there or whatever. She tried to get out of there.
>
> Q: You saw that with your own eyes?

A: Me, Matt, Percy, we saw them. It used to piss us off. We were young, we were like, what can we do. At the time, we are thinking, hey, man, this man is beating our mom, and he is going to kill her. But us being afraid of our dad, if we are going to say something like you're wrong, I believe we would have been dead. So he asked us, what the hell are you all looking at. We just put our head down and shy away and go in a room. Because if we sat there and looked -- he knew he was wrong, but if we stood up like that, I believe we would have been dead.

Q: Do you mean that literally?

A: Literally, yeah. (PC-R 2130-31).

Q: Would he ever beat you or your mother or your brothers in public?

A: I remember one time I was at the barber shop and I was getting my haircut and my cousin Dwelly came around there. And he said, man, Pop's got your mama outside beating the hell out of her. I said, man, you serious. I know that he's not lying because he's not just going to come out and tell me nothing. I said I'll be back. I got around there, Matt was standing there, Percy was standing there, across the street though.

Q: Matthew and Percy, your other brothers were already there?

A: Standing across the street. They were too afraid to go near the yard. So I'm looking. He's beating our mom and he pulled on her hair. Got her by the hair and punching her face and chest and all of that. And she was trying to get her head on the ground and he was holding her and punching on her face. And then he tore her top part off and then her breast and all was falling, hanging out. And all the neighborhood people were laughing like it was funny. It wasn't funny to us. It got to the point where I was ready to

> kill. I was ready to kill. That's my mom, that's my -- that's the lady that had me. You understand what I'm saying? (PC-R 2133).
>
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>
> Q: Did you or Matthew ever get beat where other neighborhood children would see as well?
>
> A: Oh, yeah.
>
> Q: Could you explain that?
>
> A: A couple of times I can tell you where he took our clothes off getting ready to beat us. I got away, but I ran outside butt naked and he came behind me and beat us in the yard and people walk past laughing.
>
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>
> Q: Did you ever see Matthew being beat naked in the back yard?
>
> A: He did the same thing to Matt.
>
> Q: Was that an isolated incident or did it happen more than once?
>
> A: That time he did it to me, I don't know how many times he did it to Matt.
>
> Q: But you saw it on more occasions than he? (SIC)
>
> A: The point is, it's no real regular beating, it ain't no regular beating. My Pop's didn't believe in what is a spanking. These kids, he would laugh, that's that, what's a spanking. My dad looked at us as men. We were men to him and he beat us like men. (PC-R 2134).

Appellant's brother Percival Jr. (Percy) provided corroboration to the child and spousal abuse, and violent upbringing that defined

Appellant's childhood.

> Q: (Veleanu): Can you please tell this Court what Liberty City was like, what it was like growing up in Liberty City?
>
> A: (Percy Marshall): Liberty City was a rough neighborhood. I mean drugs, crime, you name it. Anything that's rough that's (SIC) goes on that's violent, that's Liberty City.
>
> Q: How early do you remember seeing drugs and violence in Liberty City?
>
> A: Well, I used to see a lot of violence, you know. I didn't come to really know what drugs was, the drug activity. I realized a lot of violence, shooting, gun shooting, robbing, robbery. All types of violence. You name it. (PC-R 2171).

Percy tearfully recalled violence his father directed at Appellant and his brothers, and the assaults he witnessed his father mete out against his mother.

> Q: How would you describe the relationship let's start out with your father and you and your brothers?
>
> A: The relationship with my father, it was rough.
>
> Q: What do you mean by "rough"?
>
> A: Man, the abuse. It was an abusive house. It was a whole thing from when I was young, you know, growing up. Man, sometimes I felt like running away, you know.
>
> Q: Well, describe what you mean by abusive. Did you get yelled at in the house, did you get spanked? Explain what abuse was.
>
> A: Spanked. Was I spanked, you mean like

spanked? No, no, no. I was not spanked. I was knocked, slammed, punched, beaten. That's what it was. It wasn't like you spank a little child, nothing like that in that household.

Q: And it was your father who beat you?

A: Yeah, Yeah, it was.

Q: You said he punched you with a closed fist?

A: Closed fist. Or he would slap you down, you know what I'm saying? Punch you down, strong man.

Q: He was a strong man you would say?

A: Yeah, strong. He was very strong. You know how I look, he was a little bit bigger than me, heavier than me.

Q: For the record, how much do you weigh?

A: I weigh about two fifty-five, two sixty.

Q: And you describe your father being at least as big as you are?

A: He was bigger than that.

Q: How early in your life do you recall being beaten and seeing your brothers being beaten by your father?

A: Well, it's like five. Five on up. We suffered abuse from a child, from childhood, you know what I'm saying? Whenever it was time for us to get beat, it was like from five on up. First it started with the stitches off the trees and then it started with the extension cord.

Q: I'm sorry. What are stitches off the tree?

A: Like a good piece of tree branch.

Q: And he would hit you with a tree branch?

A: Yes. Thick enough where it wouldn't break.

Q: Where would he hit you with the tree branch?

A: All over. Wherever he could hit you at, he would hit you. He made sure he got the message across to you whenever he hit you, across the head, on the back. If you ran from him, you were in trouble.

Q: You got hit in the head with a tree branch?

A: In the head, the face, all over. Wherever he would hit you.

Q: Did you ever see Matthew Marshall get hit with a tree branch?

A: He was the worse.

Q: What do you mean by "the worse"?

A: Man, he use to treat him worse than he treat us, the worse of us.

Q: Would you say Matthew was the main target of his abuse?

A: He was right there, right there, you know what I'm saying, man? (PC-R 2714-16).

Q: Would he hit you on the bare skin or clothing?

A: Naked. Butt naked. I remember a time -- I remember a time I was asleep and he must have got tired of us running from him. Matter of fact, it was me and him.

Q: Who is "him"?

A: Matthew. And we were asleep. And when I was awaken, I was taped up.

> Q: Taped up with what?
>
> A: Duct tape.
>
> Q: Your wrists were taped together?
>
> A: The wrists and the legs were taped. He was partially taped. When I woke up, I woke up crying. The abuse in that house, man.
>
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>
> Q: Did anyone from outside the house say what are those welts on your arm that you described?
>
> A: I went to school one day with it on it. He told my mama not to let me go to school, my mother. And I begged, I cried, and she let me go. And when I went, she put like a towel on my back.
>
> Q: Because it was bleeding?
>
> A: Yeah, from the welts. She put a towel in my back, like put my shirt in my pants. And when I got to school, it didn't like stay and bulged, went down.
>
> Q: The towel came down your back and bulged on your back?
>
> A: Yeah. And the person behind me said, "Look at Percy, his back is bleeding." I said, "My back it ain't bleeding." Later on that day, they sent a letter on home with me. That stopped for about a month. (PC-R 2178-80).

Percy also described the public abuse and humiliation both he and his brothers endured as well as their mother:

> Q: Were you ever hit in the back yard where, say, anyone else could see you from the outside?
>
> A: Naked. Since you want to stay out there, stay

out there. Let your friends look at you out there butt naked. Since your out there, you stay out there, running from him, running out the door. Since you out there, you stay out there.

Q: So people in the neighborhood, did they see you being struck in the back yard?

A: Yes. Yeah. Yes they did. Yeah.

Q: Were you and your brothers the only ones that were hit in your family by your father?

A: We was the only ones, yeah. Oh, man, back that up. What you mean? No, no. My mama, she suffered a little bit of abuse, too.

Q: She suffered a little bit of abuse, too?

A: A lot. She took a lot of that abuse for us. When she would go to stop, you know what I'm saying, don't beat the boy, don't beat him, he'd turn on her.

Q: Did he hit her in the same fashion that he would hit you and your brothers?

A: Yeah, He used to beat her.

Q: He used to punch her with a closed fist?

A: Yeah.

Q: Did you ever see bruises on her body?

A: Yeah.

Q: Like what, did you see black eyes or bruises?

A: All of that. He was a big man, you know what I'm saying. Just imagine a big man punching on you and you can't do nothing. You're helpless. That's how he was with her. Man, took a lot of abuse.

Q: Did your father ever drink?

A: Yeah.

Q: Do you need a couple of seconds, a couple of minutes?

Mr.. Veleanu: May I approach the witness to get tissues?

The Court: Sure.

By Mr.. Veleanu:

Q: Here you go, Percy, here's tissues if you need them.

A: He used to beat her. I loved her. He used to beat her. She didn't do nothing. We was young, he used to beat her. I loved my mama. I don't do nothing. He used to beat her in the front yard. Hold on.

Q: Take your time, Percy.

A: She suffered for us, too. She suffered a lot for us. Like sometimes we would be out in the yard and he used to get mad when she let us back in the house. He'd get mad at her. I know they have been in our house. I know they have been in my house. I know they have been in there. And he'd beat on her. Got tired of that.

Q: Percy, how often would you say your father drank?

A: He drank a lot.

Q: Would you describe him as an alcoholic?

A: Yeah, that's what he was, an alcoholic. (PC-R 2184-86).

This catalogue of violence -- horrifying beatings; severe violence

against his mother including a stabbing (PC-R. 2215, See also Record Evidence, “Background material,” Volume 2, Section 9A); alcoholism; rampant emotional abuse; psychologically damaging humiliation such as being forced out of the house naked; and a life of perpetual fear that caused him to seek refuge on rooftops and the concrete floor of the doghouse/shed was repeated, corroborated, and testified to in detail by three of Appellant's brothers and five of his cousins. Each testified that they were never contacted by trial counsel at the time of trial, and each testified they were available and willing to testify at trial and would have provided the same evidence that they offered in the post-conviction hearing. (PC-R. 2141-2142, 2189,2221,2240-2241,2274,2286-2287,2305-2306,2313-2314) The lower court's order minimally acknowledges the bare substance of their collective testimony but only skims the surface of the abuse and violence tin the Marshall household. The lower court makes absolutely no findings that any of the witnesses were not credible nor finds any of the testimony presented at the post-conviction hearing to be untruthful.

Most critically, the lower court’s order does not even reach the question of whether these uncontradicted facts demonstrated the prejudice prong as required under Strickland v. Washington, 466 U.S. 668 (1984). The lower court's entire legal conclusion regarding the ineffective assistance of counsel claims is as follows: "Mr. Barnes conducted a proper investigation to consider and rule out abuse as

mitigation. Because defendant's father had told Mr. Barnes that the (SIC) had basically disowned the defendant's brothers and did not know where they were, Mr. Barnes' not sending an investigator to Liberty City was not ineffective." (PC-R 2722). As it will be shown below, the lower court's findings that trial counsel did a proper investigation under these circumstances is manifestly erroneous under relevant case law. Given that Appellant's jury recommended a life sentence, there is no question that had trial counsel conducted a normal and proper investigation and presented the significant mitigation that the investigation would have revealed, the trial court would have been legally precluded from finding that "the facts suggesting a death sentence are so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908 (1975).

1. Trial counsel's failure to investigate was manifestly ineffective assistance under relevant case law

In Riechmann v State, 25 Fla. L. Weekly S163, 25 Fla. L. Weekly S242, 2000 WL 205094 (Fla. 2000), this Court reaffirmed the established law that "an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence. See Rose, 675 So.2d at 571 (citing Porter v. Singletary, 14 F.3d 554,557 (11th Cir. 1994)). The failure to investigate and present available mitigating evidence is of critical concern, along with the

reasons for not doing so. See Rose, 675 So.2d at 571. "It seems apparent that there would be few cases, if any, where defense counsel would be justified in failing to investigate and present a case for the defendant in the penalty phase of a capital case." Riechmann v. State, 25 Fla. L. Weekly S163 (Fla. 2000); Mitchell v. State, 595 So.2d 938 (Fla. 1992) (holding that penalty phase representation was ineffective where defense counsel presented no evidence of mitigation but where evidence was later presented at the evidentiary hearing that could have supported statutory and nonstatutory evidence); Stevens v. State, 552 So.2d 1082, 1087 (Fla. 1989) (holding that defense counsel's failure to investigate defendant's background, failure to present mitigating evidence during the penalty phase, and failure to argue on defendant's behalf, rendered defense counsel's conduct at the penalty phase ineffective).

Recently, the United States Supreme Court in Williams v. Taylor, 120 S.Ct. 1495 (2000), reemphasized the continuing vitality of the Strickland test and reiterated how the standards for capital cases are to be properly applied.[5] The Supreme Court makes it clear that Appellant "had a right--indeed a constitutionally protected right--to provide the jury with the mitigating evidence that his trial counsel

[5]The Supreme Court granted relief to Mr. Williams on the basis of ineffective assistance of counsel as to the penalty phase. As demonstrated at the hearing, Mr. Marshall's case is even stronger than Mr. Williams' and his entitlement to relief is clearly established under the Williams decision.

either failed to discover or failed to offer." Williams, 120 S.Ct. at 1513. Counsel in a capital case has a duty to conduct a "requisite, diligent investigation" into his client's background for potential mitigation evidence. Id. at 1524.

Contrasting the investigation trial counsel actually performed with the facts elicited at the evidentiary hearing, demonstrates that trial counsel failed to scratch the surface of Appellant's background. As the facts above demonstrate, the extent of trial counsel's investigation was to retrieve a meager quantity of Appellant's records, interview his client and obtain a self-reported life history, write two letters to an Aunt Barbara (which counsel received no response and failed to follow up), and speak to Appellant's father on telephone on two occasions. Although the father provided counsel with the names and ages of Appellant's siblings, counsel did not attempt to contact them. The lower court found this investigation to be reasonable "[B]ecause defendant's father told Mr. Barnes that he had basically disowned the defendant's brothers and he did not know where they were, Mr. Barnes' not sending an investigator to Liberty City was not ineffective." (PC-R 2722).

The lower court's rationale is unreasonable and legally inadequate for several reasons. First, as trial counsel testified at the evidentiary hearing,

> Q: Do you think that it would have been good to

> at least talk to the brothers to see what they had to say?
>
> A: In every capital case you should talk to as many family members, friends, everyone that you can. I didn't sit through testimony here, but I mean, every capital case you should do that, if you can. And if you think they have something good to say.

Without talking with Appellant's brothers, or sending an investigator to speak with them, trial counsel had no reasonable basis for knowing whether Appellant's father was truthful in his description of Appellant's upbringing. (Which was the basis of counsel's proffer in the penalty phase). In fact, trial counsel had reason to believe Appellant's father was dishonest and in fact covering up the true facts of Appellant's life. As trial counsel testified, he knew that Appellant did not have "beautiful grades" as the father told him, the school records clearly indicated terrible grades. Secondly, the fact that a father would "disown" his kids should raise a red flag that an actual investigation needed to be conducted. This is especially true in capital cases since parental abuse is a well-known and common precursor of the violence such cases involve.

Furthermore, despite trial counsel's hindsight testimony at the hearing that he would not have put Brindley Marshall on the stand even had he done the minimal investigation necessary to find him, is clearly not a reasonable tactical decision. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, <u>see</u> <u>Brewer v.</u>

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). See also Rose v. State, 675 So. 2d 567 (Fla. 1995); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Deaton v. Dugger, 635 So. 2d 4 (Fla. 1994). Not only did trial counsel have no idea what Brindely would have to say about his brother's life, but the fact that the abuse Appellant endured was corroborated by seven other family members would have brought credibility to Brindley's testimony, even if trial counsel ultimately chose not to put him on the stand.

Trial counsel’s failure to conduct even a remotely adequate investigation must be viewed in light of his meager excuses for this failing. Perhaps the most troubling rationale trial counsel gave for not conducting a proper investigation was his fear of sending a female investigator to a dangerous neighborhood such as Liberty City. This rationale is patently unreasonable in any criminal case, let alone a death penalty case. The reality of the actual work of a criminal defense investigator is that they do not only travel to quiet and safe suburbs. In fact, common sense dictates the opposite. The fact that Appellant was raised in such a violent neighborhood only makes the need for a thorough investigation more glaring. Trial counsel's concern that he did not want to travel himself or send an investigator on "a fishing expedition," is patently unreasonable. The job of an

investigator is to find witnesses. Not having an exact address for important witnesses certainly does not justify failing to even attempt to find family members in a death penalty case.[6] Had trial counsel properly investigated Appellant's background, and spoke with the numerous available family members, the abundant mitigation that was presented at the evidentiary hearing would have been available at the time of trial.

The fact that Appellant was prejudiced by trial counsel's failure to investigate has been proven by substantial and credible evidence corroborated by numerous witnesses. The credibility of each witness has not been questioned in any way. In fact, the lower court's order does not touch upon the prejudice prong of an ineffective assistance of counsel claim. The lower court simply found trial counsel's investigation to be proper. Based upon counsels patently unreasonable rationale for not conducting a thorough investigation, the compelling mitigation presented at the evidentiary hearing, and the fact that the jury recommended a life sentence, Appellant has more than met his burden in showing ineffective assistance of counsel. Had a proper and

[6] Appellant's family members testified that it would not have been difficult to find them in Liberty City. In fact, Brindley Marshall was incarcerated in Florida at the time of Appellant's trial.(PC-R. 2146) A telephone call to the Department of Corrections would have been sufficient to find Brindley Marshall. It is not unusual for investigators to track down witnesses based on only a first name or even a nickname, in this case, trial counsel knew the city the brothers had lived in, as well as their full names and ages.

thorough investigation been done, and had the jury heard the wealth of mitigation which was presented at the evidentiary hearing, the trial judge would have been legally precluded from over-riding the jury's life recommendation.

B. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHTS TO EXPERT MENTAL HEALTH ASSISTANCE (CLAIM XVII)

Matthew Marshall was deprived of his rights to due process and equal protection, when he was denied the expert psychiatric assistance which the U.S. Supreme Court requires in Ake v. Oklahoma, 105 S. Ct. 1087 (1985). Additionally, Mr. Marshall’s trial counsel rendered ineffective assistance of counsel for failing to secure expert mental health assistance on behalf of his client. A criminal defendant is entitled to expert psychiatric assistance when the state makes his or her mental state relevant to the proceeding. Id. What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979).

Claim XVII of Appellant's Rule 3.850 Motion presented the court below with a pre-trial motion filed by trial counsel which had

requested an alternative mental health expert for trial. The bases for this motion was that Dr. Joel Klass, the court appointed expert, had conducted a woefully inadequate examination and refused to communicate or cooperate with defense counsel:

> COMES NOW the Defendant, by and through his undersigned attorney, and hereby moves this Honorable Court to appoint an additional Mental Health Expert, in particular Dr. Robert Berland, to conduct a psychological evaluation of the Defendant, including the issues of competency and to stand trial, sanity at the time of the offense, and the identification and evaluation of any factors relating to the present or past mental health of the Defendant which may be relevant for use as mitigation.
>
> As grounds therefore, the Defendant states:
>
> 1) The Defendant is charged with First Degree Murder and the State has indicated its intent to seek the death penalty for the Defendant if convicted.
>
> 2) Dr. Joel Klass of Hollywood was previously appointed to conduct an examination of MATTHEW MARSHALL.
>
> 3) On or about May 26, 1989, Dr. Klass conducted some type of interview and/or testing with MATTHEW MARSHALL.
>
> 4) Personnel at Martin Correctional have advised that Dr. Klass spent no more than one hour with MATTHEW MARSHALL.
>
> 5) Since that visit, counsel has received two short letters containing Dr. Klass's ultimate conclusions. Neither letter describes the history given by MATTHEW MARSHALL, what tests, if any, were conducted, nor any discussion of what, if any, evidence might be gathered for

mitigation.

> 6) Since Dr. Klass's visit, counsel has tried to reach Dr. Klass several times by phone, to no avail, and Dr. Klass has not returned any of counsel's phone calls. Other than two short letters, the only communication from Dr. Klass are his bills.
>
> 7) It is counsel's sincere belief that because of the brevity of MATTHEW MARSHALL'S interview, the apparent lack of extensive testing, and the total failure of Dr. Klass to confer and cooperate with counsel, MATTHEW MARSHALL has not received the minimum testing required to insure due process in both phases of the trial. State v. Sireci, 536 So. 2d 231 (Fla. 1988).
>
> 8) Forcing the Defendant to proceed to trial without an adequate mental health examination would violate the Defendant's rights to due process, a fair trial, and against Cruel and Unusual Punishment, contrary to Article I, Section 9, Section 16, and Section 17 of the Florida Constitution, and the 5th, 6th, 8th, and 14th Amendments to the United States Constitution.

Appellant's trial counsel explained to the trial court the difficulty he was having with Dr. Klass, the defense mental health expert:

> [DEFENSE COUNSEL] Your Honor, the other Motion is for an additional Mental Health expert and the Court has my Motion. I won't read it into the record, I mean, basically what it says is that Dr. Class (phonetic) was appointed. I didn't choose Dr. Class, another lawyer in our office had heard that he was good or had worked with him before and was impressed with him. But, I can tell you what, he -- I called out to the jail to find out how long he spent with Matthew

[sic] Marshall, keep in mind this is a death penalty case, and he was at the jail an hour and ten minutes which means he could not possible [sic] have spent any more than an hour with Matthew Marshall. Since that time I have gotten two short letters with just ultimate conclusions. He has not returned my calls. I don't feel that he, based on what I have seen from his letters, is aware of the issues regarding mitigation, etcetera, that are just as important in the second phase as whether or not the person was insane is in the first phase. And, all I have gotten from this man are bills every month. He won't return my calls. He hasn't sent me any letters addressing any of these areas and, you know, most of the adequate examinations I see list a history, they spend several hours with the Defendant getting history of his life, they list the techniques that they use to test his sanity and his competency. Then they tell you the results of those tests whether they were MMPI or ink blot tests or drawing tests or whatever they are. And then they list their conclusions, five, six, seven, eight, nine, ten pages worth of information. All I have gotten out of this man are some ultimate conclusions and two very short letters and the time is now, you know, drawing close to the trial and we don't -- we are certainly at this stage aren't going to ask for a continuance but what I would like is to get an adequate examination of this defendant and I don't think that less than one hour is -- I don't think the Supreme Court of Florida will allow this man to be executed having an hour long examination and that indicates that it is just a violation of due process, I think, to force him to prepare for trial with that short of an examination with no consultation.

I can't get this fellow to consult with me so he is useless for my purposes. (PC-R 1659-62).

The trial court denied the request for additional Mental Health

experts. During post- conviction proceedings, the lower court here granted an evidentiary hearing on this issue.

In the same cursory manner it treated trial counsel’s failure to investigate, the lower court's order denying relief provides a shallow, incomplete account of the facts elicited at the evidentiary hearing. The court's order includes the fact that Dr. Joel Klass was the court appointed expert during Appellant's capital trial and that Dr. Klass is a board certified psychiatrist who had been appointed in between ten and twenty death penalty cases since 1978. (PC-R 2712). The lower court also made the following factual findings:

> "Dr. Klass examined Mr. Marshall for an hour or less after he reviewed the materials provided by Mr. Barnes. He found Marshall to be guarded and reluctant to give information except that everything in his life was "O.K." and that he had no problems. Mr. Marshall denied any history of family problems or abuse, but did admit that the (SIC) had been in trouble several times in the past including an assault on a thirteen year old girl. He did not state he ever had any head injury.
>
> Dr. Klass could not uncover any evidence of an active psychosis and concluded that Mr. Marshall understood the criminal justice system. He concluded that Mr. Marshall was neither incompetent nor insane. He also considered potential mitigating circumstances and concluded that Mr. Marshall did not appear to be remorseful and that he had no family history or personal history of drug or alcohol use. He did feel that the defendant was a paranoid-schizophrenic.
>
> Mr. Barnes endeavored to contact Dr. Klass after his examination of Mr. Marshall, but Dr. Klass would not return his phone calls. Mr. Barnes was thus unable to talk with him

> concerning developing mitigating evidence for trial. Dr. Klass sent Mr. Barnes a one-page report which stated that Marshall did not have any mental illness.
>
> Mr. Barnes petitioned the court to appoint an additional mental health expert , and the motion was denied. In the order denying the motion, the court ordered Dr. Klass to cooperate with Mr. Barnes, and Dr. Klass thereafter submitted a supplemental report. Mr. Barnes at this time learned that Dr. Klass had diagnosed Mr. Marshall as a paranoid-schizophrenic." (PC-R 2713).

Additionally, the lower court's order included that "[b]ecause Dr. Klass had only spent one hour interviewing Mr. Marshall, Mr. Barnes decided not to call Dr. Klass to testify at the guilt-innocence phase of the trial so the jury would not learn of the short examination period or apparent lack of interest he had shown in defendant's case. He describes his overall experience with Dr. Klass in this case as "atrocious." ... "He also again elected not to call Dr. Klass because this would probably result in cross-examination concerning the rape of the 13 year old girl, prison rapes by Mr. Marshall, and the short amount of time Dr. Klass had spent with examining Mr. Marshall." (PC-R 2715).

In reference to Appellant's mental health claims, the lower court's order reflects the following factual findings:

> Post-sentencing Mr. Marshall has received both a psychological examination by Ruth Laflener (SIC), a PhD neuropsychologist, and a psychiatric examination by George W. Woods, an M.D. psychiatrist. These experts state that Mr.

> Marshall has a full-scale IQ of 88, which is two points below "low-normal." He has neuro-cognitive and neuro-psychological deficits. He also may have some organic brain dysfunction or impairment, but is not brain-damaged. He suffers from a bipolar disorder with mood swings.
>
> Dr. Woods also opines that there is a definite connection between Mr. Marshall's now stated abuse as a child and his violent acts while he has been imprisoned. (PC-R 2720).
>
> ------
>
> Dr. Klass today opines that Mr. Marshall is a sociopath, although he has only recently reached this conclusion. He still feels Marshall was competent to stand trial." (PC-R 2722).

The excerpts from the lower court's order presented above are notable for several reasons. First, there is a stark disparity between the factual findings the lower court chose to include in the order denying relief, and the utter wealth of evidence in the form of records, expert testimony, and family testimony presented at the post-conviction evidentiary hearing. Secondly, despite the meagerness of the factual findings, these findings convincingly support Appellant's allegation that he was denied the expert assistance mandated by the law. Finally, it is significant that after including the above factual findings in the lower court's order, the following one line sentence disposes of this issue in terms of a conclusion of law: "Mr. Barne’s not calling of Dr. Klass as a witness was not ineffective."(PC-R 2722).

Numerous facts were presented at the evidentiary hearing that

illustrated the utter lack of expert assistance provided to Appellant. Trial counsel Cliff Barnes requested and received Dr. Joel Klass to assist him in preparing his defense. What he received was a "nightmare." (PC-R 2350). When asked on direct examination about his experience with Dr. Klass on this case, Mr. Barnes responded: "[M]y experience was atrocious. That's the worst experience I had until then or since then with any court appointed consultant of any type." (PC-R 2348). Mr. Barnes continued:

> I will tell you what he did do. He didn't return my phone calls. He wrote a, I believe it was, a one -- I think it's in the file somewhere, a one page, one or two paragraph summary that basically the defendant exhibited no mental illness, I think, and then sent me a bill and didn't return my phone calls. Finally I asked the Court to appoint someone who would work with me. And my recollection of Doctor Klass is he had spent more time recovering his three hundred and thirty-seven dollar bill than he spent working with the defendant or me and his lawyer. It was atrocious. To this day, I have never seen anything like it. (PC-R 2350).

Mr. Barnes testified that the only background information he provided to Dr. Klass were police records and a mental status assessment. (PC-R 2353). Evidence was also produced that Dr. Klass spent a maximum of one hour with Appellant. (PC-R 2356). Ultimately, Mr. Barnes' motion for an additional expert was denied. Due to Dr. Klass' insufficient and unprofessional performance, Mr. Barnes decided:

> I remember -- my overwhelming memory is this doctor's total lack of cooperation, little bit of time he spent with him. And I wouldn't put anybody before a jury when the first question you would have asked, no matter what he said, how long did you spend with this gentlemen. I spent an hour. And based on one hour you're going to decide that this gentlemen is whatever the diagnosis is. He would have been blown out of the water, **so I wouldn't have put him on no matter what conclusions he drew in his letter**. (PC-R 2382-83).

Despite Mr. Barnes' adamant answer that Dr. Klass' deficient performance rendered him completely worthless as an expert witness, the State attempted but failed to show that it was Dr. Klass' conclusions and not his performance as the true reason for not calling Dr. Klass at the penalty phase:

> Q: (Mirman): But simply by using him, utilizing him or calling him as an expert, he told you there was no statutory mitigation?
>
> A: (Barnes): **I wouldn't put that -- after dealing with him, I wouldn't put him on the witness stand if he had something good to say, because he showed so little interest in me, my client and his job and duties here, and I couldn't put somebody on to say something good about my client and have you point out that he only spent an hour with him or your predecessor. I wouldn't put him on. He wasn't interested, he wanted to be paid his three hundred and seventy-five dollars and be done with it**. (PC-R 2390).

Thus, trial counsel's testimony reveals a harsh reality. Appellant was tried and sentenced without the expert assistance which law

demands. He was sentenced to death in a jury override without the expert assistance which would have established mitigating circumstances and provided a reasonable basis for the jury's recommendation of a life sentence.

The evidence presented at the hearing below conclusively established that Appellant suffered significant prejudice by being denied expert psychiatric assistance at trial. Collateral counsel presented two mental health experts who testified that Appellant suffers from organic brain impairment, bipolar disorder, and further testified to statutory and non-statutory mitigation. At collateral counsel’s request, Dr. George Woods, a Board Certified psychiatrist with eighteen years of experience, evaluated Matthew Marshall. Dr. Woods testified that he spent four to five hours over a two day period with Appellant. (PC-R 1982). Dr. Woods testified that he reviewed prison records, family medical records, school records, and spoke with Appellant's brothers to corroborate notes he reviewed concerning family history. In evaluating Appellant, Dr. Woods explained that "you really want to look at three areas. You want to look at the genetic area, you want to see what environmental issues there may be, and you also want to see if there are any medical or psychological factors that are apparent." (PC-R 2007). In assessing the genetic area, Dr. Woods testified that when a parent has a mood disorder, the possibility of a child also having a mood disorder increases to thirty-five to forty-

five percent. (PC-R 2008). Dr. Woods testified that he reviewed the medical records of Naomi Marshall, Appellant's mother, including a psychiatric evaluation taken of her after an incident where Naomi Marshall insisted to her doctors that she was pregnant despite the fact that she was sterilized many years earlier. Dr. Woods reported that the medical evaluations and his review of all the provided records indicate that Naomi Marshall, at some point, suffered from a psychotic disorder.(See documents entered into evidence, “Background Materials,” Volume 2, Section 9A)

Regarding the environmental component of Appellant’s psychiatric evaluation, Dr. Woods explained how the severe abuse and the brutal upbringing that defined Appellant's childhood could impact on someone with a genetic predisposition to a mood disorder:

> When you have a child's developing brain that is in a situation where there is chaos and this level of trauma, you really -- you have cortical means, which are just hormones that we all get poured out when you're in a fight or flight situation. And so you really express this anxiety in you body all the time. Now, what happens and what makes it so much more difficult for children particularly, is the fight or flight, the changes in your brain and in your body that occur when the actual abuse is going on is not the only time. Because if you're not getting beaten, you're worried about getting beaten. And for children particularly you have what we call type two trauma. You find extraordinary anticipation that keeps that tension, that keeps that change in how a person responds. What happens to kids like that is a term called, and I don't want to get into a lot

> of psycho babble, but it's called an effective dis-regulation. And what that really means is kids don't know how to respond. They become highly violent. They are highly suspicious. They don't know where the next lick is coming from. Now, the reason why this is so important from an environmental point of view is if you already have a genetic vulnerability to a mood disorder and you lay on top of that this type of chaos and trauma, because we are not only talking about those times and the type of abuse that Mr. Marshall went through specifically, we are talking about those times when his mother was beaten, when his mother was stabbed, when his mother was hit. Him experiencing those as well. Those are the types of circumstances that can often make a mood disorder come to life[7].

(PC-R 2014-17).

The third element of Dr. Woods' evaluation dealt with psychological and medical factors. Dr. Woods' expressed that "Mr. Marshall had very interesting and very pronounced symptoms of psychiatric disorder." (PC-R 2021). Dr. Woods testified that the first symptom he noticed was "pressured speech." In fact, Dr. Woods described how Appellant had told him that his speech has always caused him problems and even was the cause of Appellant being teased and getting beat up at school. (T. PC-R 2020). Dr. Woods continued to describe other symptoms Appellant displayed such as grandiosity and denial. Besides his personal observations, Dr. Woods testified that he

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[7] Dr. Woods' description is especially compelling in light of Mr. Marshall's brothers description of unprovoked abuse at the hands of their father, that occurred at any time of the day or night. In fact, the Marshall brother's testified that they would sleep on neighboring roofs, and avoid their father as much as possible.

looked through Appellant's prison records and found that on at least two occasions, there were records describing Appellant's speech as rapid and anxious. (PC-R 2024). Dr. Woods' also testified that the neuropsychological testing performed on Appellant were consistent with his diagnosis of Bi-Polar II Disorder. Finally, Dr. Woods described how the neuropsychological findings of brain impairment, inability to conceptualize, and extreme distractibility, all of which were evidenced as symptoms before this offense occurred, led him to the conclusion that Appellant suffers from an ongoing psychiatric disorder.... "[A]nd there's no question in my mind that someone that suffers a consistent Bipolar II Disorder would be suffering under an extreme emotional disturbance, it's a very serious disease." (PC-R 2031).

At the post-conviction evidentiary hearing, the State tried but failed to make an issue of Dr. Woods' clinical assessment that Appellant's denial of being abused constituted an important component of Bipolar II disorder. The State attempted to challenge Dr. Woods' on this issue by pointing out that denial is not listed as an essential feature of bipolar disorder in the Diagnostic and Statistical Manual of Mental Disorders, 4th edition. Testimony from Dr. Woods, as well as the State's expert witness, Dr. Klass, established that the State's challenge was without merit. Dr. Woods provided a full explanation confirming that the DSM IV is "really a minimal criteria for any psychiatric disorder." "That's just a classification manual, it does

not have in any way the depth or breadth of any psychiatric disorder. And if you look at Roman numeral twenty-three, it says diagnostic and statistical manual should not be used in these types of legal circumstances because it's only a classification manual, it is not a description of the disorder." (PC-R 2054). Secondly, upon cross-examination, Dr. Klass acknowledged that denial is a component of bipolar II disorder, although not an essential feature. (PC-R 2632).

In order to corroborate Dr. Woods' findings, collateral counsel had a board certified neuro-psychologist evaluate Appellant. Dr. Ruth Latterner testified that she spent three to five hours with Appellant administering a battery of neuropsychological testing. After an extensive discussion of the different types of testing which were administered, Dr. Latterner testified that although none of the individual tests are conclusive on their own, the testing as a whole indicated brain impairment. Dr. Latterner explained: "I found neuro-cognitive deficits particularly in unit three. That is the area of the test involving abstract reasoning, problem solving, maintenance of sets with a visual interference and non-verbal abstraction in particular. He also had difficulty in memory, concentration, verbally mediated, social organizational capacities that were documented on comprehension and he had auditory processing problems." (PC-R 1928). Dr. Latterner also testified that she saw characteristics of a bipolar disorder including "[M]ood swings, pressured speech, the tangential verbiage.

Loose associations and his general clinical presentation." (PC-R 1928). Dr. Latterner described other behavioral observations; "**[P]ressured speech was noted episodically. Where his speech was so rapid where it was words were firing out of his mouth. It was very rapid. It's called pressured speech. This was episodic and it's rather bizarre to see this when you don't see this in ordinary people.**" (PC-R 1925-26).

Both Dr. Woods and Dr. Latterner presented testimony that demonstrated what the jury could have and should have heard had Appellant been provided with the expert psychiatric assistance which the law requires. Dr. Woods testified to a myriad of non-statutory mitigation that was both compelling and supported by credible evidence. He further testified to the applicability of the statutory mitigating circumstance that Appellant was under the influence of extreme mental or emotional disturbance. His diagnosis was further validated not only by Dr. Latterner's testing which indicated brain impairment, but also by her clinical observations of Appellant's pressured speech and flight of ideas. Furthermore, both experts testified that Appellant's current diagnosis and brain impairment would have been consistent with his condition in 1989 at the time of trial.

In an attempt to refute Appellant's ineffective assistance of counsel claim, and the diagnosis of Appellant's mental health experts, the State called Dr. Klass as a witness. What became remarkably evident from the start of Dr. Klass's testimony is that he completely

misunderstood the purpose of his appointment to assist Appellant at trial. Dr. Klass's own testimony revealed that he had very little experience as an expert for mitigation purposes:

> Q: (Mirman): With regard to capital cases and potential mitigation being involved, would your approach differ in any way?
>
> A: (Klass): If that were the pointed question, there would be more detail assessments of aggravating and mitigating circumstances. **That occurred very rarely. I did not do those very often. Most was assessment of a person's state at the time of the alleged offense and their ability to assist counsel. I don't remember doing many of the primary assessments for mitigation**. I do remember some, but not a lot. (T. 728).

Dr. Klass' testimony revealed that he believed the emphasis of his expertise was focused on Appellant's ability to proceed to trial: "I remember the emphasis was on his ability to go to trial. There was, I remember which a note I reviewed about mitigating circumstances, I think it was the latter part of the request, and I recall getting very little from him in the way of anything mitigating." (PC-R 26-6-07). It appears from Dr. Klass' testimony that he was looking to Mr. Marshall to provide him with mitigating circumstances. This is a clear reflection of Dr. Klass' lack of experience as a penalty phase mental health expert, and an indication that he misunderstood his role in Marshall's defense. On cross examination, Dr. Klass once again stated his belief on what his duties were:

> Q: (Donoho): So you believe that he asked you to just do the competency to stand trial evaluation of Mr. Marshall?
>
> A: (Klass): No, that was the thrust of his request, but there were listed several different things which I can get for you here. Including even mitigating circumstances.
> (PC-R 2614).

A conspicuous element of Dr. Klass's testimony was his repeated reference to Appellant's guardedness and reluctance to provide information. In fact, Dr. Klass stated that "of all the people I've evaluated, he was the most guarded. Gave me very little information. It was very difficult to obtain information from him. He was suspicious." (PC-R 2604). Dr. Klass testified that Appellant denied any problems at all in his life, and in fact, Dr. Klass testified that Mr. Marshall was so guarded that he had "probably the fewest notes of anyone that I've had in twenty years." (PC-R 2609). After a direct examination detailing over and over how guarded and how suspicious Appellant appeared, how little information he received from Appellant, Dr. Klass opined that based upon the records he was provided in preparation for the evidentiary hearing, and based upon his interview with Appellant, he was able to diagnose Mr. Marshall as a sociopath. (PC-R 2611). When questioned on cross-examination about how an expert could make a diagnosis of an individual, ten years after their one hour interview, Dr. Klass responded:

> Q: (Donoho): Because you only met with him for an hour ten years ago?
>
> A: (Klass): No, from the voluminous history available.
>
> Q: **So you're able to look at just documents and give somebody a diagnosis. So we wouldn't need you to talk to our clients then, we could hire you to look at documents and you could come to the court and make a diagnosis?**
>
> A: **You're correct, I could**. That's why I said I purposely did not make the diagnosis at that time because I felt from the information I had it didn't fulfill the criteria. (PC-R 2629-30).

When presented with the fact that two independent mental health experts, each of whom spent three to five hours with Appellant, clearly saw pressured speech and flight of ideas, Dr. Klass answered: "But I don't see him fulfilling grandiose pressured stability -- instability to keep quite. I don't see where he continually talks. I just don't see those criterias." (PC-R 2631). The post-conviction evidentiary hearing produced evidence from two mental health experts who noted Appellant's remarkable pressured speech, as Dr. Latterner described it; "Where his speech was so rapid where it was words were firing out of his mouth." (PC-R 1926). Dr. Woods testified that Appellant's records noted anxious and pressured speech, even trial counsel, Cliff Barnes noted: **"And it was frustrating because just sitting with Mr. Marshall and talking with him, I could tell that there was something wrong with him."** (PC-R 2519). Yet, Dr. Klass, after his one hour interview, which

he described as the most guarded interview he ever conducted, did not observe what every other person saw as obvious. When confronted with the question of why other experts noticed the telltale signs of bi-polar disorder and he had not, Dr. Klass provided a very telling response:

> Q: (Donoho): You don't see them because you haven't talked to him in ten years?
>
> A: (Klass): At the time I saw him I didn't see it and from the materials I was given and the history, I did not see those criterias being met.
>
> **Q: Isn't it episodic?**
>
> **A: Yes.**
>
> **Q: So it could have been when he saw you he could not -- he could not have been in an episodic state for the hour that you spent with him?**
>
> **A: That is true.** (PC-R 2631).

What is most apparent from Dr. Klass' testimony is that he did not understand his role as a mental health expert assisting the defense for the penalty phase. He acknowledged that he had very little experience outside of evaluating for competency, and he stated repeatedly that he felt that the thrust of his job was to determine if Mr. Marshall was competent to stand trial. Furthermore, trial counsel testified to the dearth of records he provided to Dr. Klass, that his encounter with Dr. Klass was the worst he had ever experienced, and it was obvious to trial counsel that Dr. Klass was only interested in getting paid and

completely uninterested in assisting Mr. Marshall.

The expert testimony at the evidentiary hearing convincingly demonstrated what Appellant alleged in his Rule 3.850 Motion: that he was denied his right to competent expert mental health assistance at trial. If Matthew Marshall was provided with expert psychiatric assistance, statutory and non-statutory mitigation would have been established. Such mitigation would have supported the jury's recommendation of a life sentence and would have legally precluded the judge from over-riding the jury's recommendation.[8]

1. The Denial of Expert Mental Health Assistance suffered by the Appellant violated his Constitutional Rights under relevant case law

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), counsel must assure that the client is not denied a professional and professionally conducted mental health evaluation. See Fessel; Cowley v. Stricklin,

[8]. This issue demonstrates precisely why the judge who presides over the trial should not thereafter preside over the post-conviction motion. It certainly would save this Court time if impartial (although judges are expected to be impartial they are still reviewing their own prior decisions) judges were reviewing post-conviction motions.

929 F.2d 640 (11th Cir. 1991); Mason v. State, 489 So. 2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

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

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

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

Testimony at the evidentiary hearing revealed that Appellant was utterly denied even minimal expert assistance. Trial counsel informed the trial court of the complete communication breakdown between Dr. Klass and himself. Dr. Klass' egregious failure to assist forced trial counsel to file a motion with the court requesting a different expert. This motion was denied. Trial counsel's testimony regarding his experience with Dr. Klass was remarkable. Trial counsel described his experience with Dr. Klass as "a nightmare," "atrocious," and the worst experience he has had with an expert before Appellant's trial or since that time.

Appellant was finally provided with expert assistance and a professional evaluation in post-conviction. Both Dr. Woods and Dr. Latterner presented testimony that demonstrated what the jury could have and should have heard had Mr. Marshall been provided with the expert psychiatric assistance which the law requires. Dr. Woods testified to a myriad of non-statutory mitigation that was both compelling and supported by credible evidence. He further testified to the applicability of the statutory mitigating circumstance that Appellant was under the influence of extreme mental or emotional disturbance. Dr. Woods testified that his diagnosis of Bi-Polar II, a severe mood disorder, was substantiated by Appellant's mother's medical

records which indicated serious psychiatric illness. Naomi Marshall's bizarre behavior was not only indicated in hospital records but Dr. Woods testified that he spoke with Appellant's brothers who informed him and the court about Naomi Marshall's mental state including depression and talking to her self. His diagnosis was further validated not only by Dr. Latterner's testing, which indicated brain impairment, but also by her clinical observations of Appellant's pressured speech and flight of ideas. Furthermore, both experts testified that Mr. Marshall's current diagnosis and brain impairment would have been consistent with his condition in 1989 at the time of trial.

The lower court's order denying relief conspicuously fails to account for the evidence presented by Dr. Woods and Dr. Latterner. The order briefly summarizes their findings but goes no further. In fact, the entire mental health issue is disposed of with the following sentence: "Mr. Barnes' not calling of Dr. Klass as a witness was not ineffective." (PC-R 2722). The lower court never reaches the critical question of prejudice resulting from the lack of mental expert assistance and disposes of the issue in terms of trial counsel's decision to not call Dr. Klass as a witness. The lower court's rationale is unreasonable and legally insufficient.

First, trial counsel repeatedly testified that he would not have called Dr. Klass as a witness regardless of what conclusions or

opinions he held because an expert who spends less than one hour with a “guarded” subject in reaching his diagnosis, obviously lacks credibility. Secondly, Appellant's Ake claim goes beyond an ineffective assistance of counsel claim. Due process was violated when Appellant, for all reasonable intents and purposes, was denied expert assistance. Trial counsel was ineffective for failing to secure an adequate mental health expert. However, regardless of trial counsel's deficient performance, the system failed Matthew Marshall and denied him his right to due process and expert assistance.

At the evidentiary hearing, the State presented Dr. Klass to rebut Dr. Woods and Dr. Latterner. Dr. Klass, ten years after his one hour evaluation, and after reviewing various records, felt he was able to diagnose Appellant as a sociopath. The record is replete with reasons why Dr. Klass' opinion is not credible in the instant case. Dr. Klass' evaluation was plainly inadequate. Not only in terms of duration but in substance as well. Dr. Klass testified that in twenty years of conducting evaluations, Appellant was the most guarded defendant he had ever seen. Dr. Klass also testified that he had the fewest notes taken in this case of all the evaluations he had conducted. This notion of Appellant's "guardedness" was repeatedly testified to by Dr. Klass. Despite the unproductive evaluation, Dr. Klass testified that he was able to diagnose someone as a sociopath on viewing records alone.

In the instant case, the lower court heard testimony from a

psychiatrist and a neuro-psychologist who both testified to Appellant's remarkable "rapid-fire" speech. Dr. Woods also testified that Appellant's records also note this remarkable speech. Furthermore, Dr. Woods provided evidence of the genetic disposition Appellant had for mental illness, as well as meeting other criteria for Bi-Polar II disorder. Dr. Woods continued by explaining that the neuro-psychological testing which indicated scattered brain impairment further reinforced his diagnosis. Both Dr. Woods' and Dr. Latterner's findings indicate that Appellant was not a sociopath. Instead, he is an individual who had a genetic and environmental disposition for mental illness, who suffers from brain impairment and a severe mood disorder. It is these findings that explain Appellant's behavior, not Dr. Klass' patently inadequate, casual diagnosis that Appellant is a sociopath; a diagnosis belied by an abundance of credible evidence. Ultimately, even Dr. Klass admitted on cross-examination that Bi-polar Disorder is episodic and it was possible that during his one hour evaluation of Appellant, he was not in an episodic state.

The evidence presented at the evidentiary hearing demonstrates that Appellant was denied a competent, professional evaluation. Had Appellant been provided with expert assistance, both statutory and non-statutory mitigation would have been established which would have supported the jury's recommendation of a life sentence. In Torres-Arboleda v. State, 636 So.2d 1321 (Fla. 1994), the trial judge overrode

the jury's recommendation of life. Upon direct appeal, the Florida Supreme Court affirmed the trial judge's override. This Court found that the mitigation presented at the post-conviction hearing which trial counsel failed to discover and present at trial, was "exactly the type of mitigating factors that this court found lacking in Torres-Arboleda's case on direct appeal." Id. at 1325. Appellant's case is analogous. However, in Appellant case, the quality and quantity of mitigation presented at the evidentiary hearing is even more compelling than in Torres-Arboledo. This mitigating evidence, which existed at time of trial, "might have provided the trial judge with a reasonable basis to uphold the jury's life recommendation." Torres-Arboleda v. State, 636 So.2d 1321, 1326 (Fla. 1994). See Heiney v. State, 620 So.2d 171, 174 (Fla. 1999). Had these factors been discovered and presented to the court at [Marshall's] original sentencing, there would have been a reasonable basis to support the jury's recommendation and the jury override would have been improper. See Ferry v. State, 507 So.2d 1373, 1376 (Fla. 1987).

ARGUMENT III

THE LOWER COURT ERRED IN DENYING APPELLANT'S CLAIM THAT THE STATE WITHHELD EXCULPATORY INFORMATION IN VIOLATION OF BRADY V. MARYLAND AND GIGLIO V. UNITED STATES

A. <u>TESTIMONY AT THE EVIDENTIARY HEARING ESTABLISHES THAT THE STATE WITHHELD EXCULPATORY INFORMATION AND PRESENTED FALSE TESTIMONY (CLAIM XI)</u>

George Mendoza and David Marshall were two inmates who testified for the state before the Grand Jury. Thereafter, George Mendoza testified at trial as one of the state's main witnesses. His testimony was essential to the conviction of Mr. Marshall. George Mendoza identified the Appellant as the person exiting the victim's cell and described the sights and sounds of the crime in detail .(R. 2167-2172). At trial, significant exculpatory evidence existed which would have shown that inmates George Mendoza and David Marshall were made a promise to be housed together in the correctional system in exchange for their testimony against Matthew Marshall. The state had in its possession this material exculpatory evidence and never turned it over to the defense. This evidence should have been revealed to defense counsel and presented to the jury. The failure to allow the jury to consider this evidence prevented them from rendering an accurate determination of Appellant's guilt.

The prosecution's suppression of evidence favorable to Mr. Marshall violated due process. <u>Brady v. Maryland</u>, 373 U.S. 83 (1967); <u>United States v. Bagley</u>, 105 S. Ct. 3375 (1985). The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or

punishment, and regardless of whether defense counsel requests the specific information. Bagley. It is of no constitutional importance whether a prosecutor or a law enforcement officer is responsible for the misconduct. Williams v. Griswald, 743 F.2d at 1542.

In the instant case, the conduct by law enforcement and the state seems more akin to deliberate deception of a court and jurors by presentation of known false evidence in violation of the standards set forth in Giglio v. United States, 150 U.S. 150, 153 (1972). Knowingly deceiving the court and jurors is "incompatible with the rudimentary demands of justice." Id. Consequently, unlike cases where the denial of due process stems solely from the suppression of evidence favorable to the defense, in cases involving the use of false or misleading testimony, "the Court has applied a strict standard . . . not just because [such cases] involve prosecutorial misconduct, but more importantly because [such cases] involve a corruption of the truth-seeking process." Agurs, 427 U.S. at 104.

During the evidentiary hearing before the lower court here, Appellant presented the testimony of inmate George Mendoza, inmate David Marshall, and Kerry Flack from the Department of Corrections. George Mendoza testified that at the time of the alleged incident involving Mr. Marshall and the victim Jeff Henry, he was an inmate at Martin Correctional Institute and shared a cell with David Marshall. (PC-R 2408). On the morning of the incident, George Mendoza and David

Marshall spoke with a detective (whose name he could not recall) and Inspector Riggins who was investigating the event. (PC-R 2409). During that discussion, George Mendoza indicated that he did not want to be further involved, but inspector Riggins insisted he must testify. (PC-R 2409). Mendoza and Marshall were thereafter sent to separate facilities. Thereafter, George Mendoza did testify before the grand jury. Following his grand jury testimony, George Mendoza had a meeting with Assistant State Attorney, Mr. Spiller, Inspector Riggins and Inspector Sobach. It was at this meeting that a promise to house George Mendoza and David Marshall together, and in a facility close to their families was confirmed. When asked regarding the specifics of this meeting, George Mendoza responded:

> ...I asked him well, what about keeping us together now and sending us close to home. Mr. Riggins at that moment looked at Mr. Sobach and said yes, I did promise them that. Then they looked over to Mr. Spiller and Mr. Spiller said, I talked to my boss, he says we don't have a problem with it, they done testified at the grand jury. And that's when Mr. Sobach said fine. He says -- his words were I'm going to transfer you together and I'm going to send you close to home. But he says if you get yourself in trouble or you get yourself in a trick bag, you're on your own.

(PC-R 2412).

Although the two inmates were housed at separate facilities prior to the grand jury, within a few days of this meeting George Mendoza and David Marshall were both transferred to the same facility, Avon Park

Correctional Institution. (PC-R 2413). They remained together at Avon Park, in the same cell, for approximately eight and a half years. (PC-R 2415). Again, both inmates were transferred together to Lake Correctional Institution, where they were housed in the same cell for approximately ten months. After the transfer to Lake C.I., David Marshall was transferred to South Bay Correctional Institution without George Mendoza. (PC-R 2416).

David Marshall corroborated the testimony of George Mendoza that the two inmates were made a promise, in exchange for their testimony, to be housed and kept together within the prison system. (PC-R 2445). David Marshall testified that on the day of the initial incident, Investigator Riggins informed him and George Mendoza that they would have to be transferred to different locations. When both inmates expressed their displeasure, Inspector Riggins insisted they must be transferred our for safety.(PC-R 2446). Just before testifying before the grand jury, David Marshall had a conversation with Assistant State Attorney John Spiller in which Spiller informed David Marshall that he would be housed with George Mendoza as soon as possible. (PC-R 2448). After both inmates testified for the grand jury they were made the same promise again. David Marshall described the same meeting detailed by George Mendoza in which Spiller, Riggins and Sobach were present and where Spiller informed the inmates he had "talked to his boss and as far as they were concerned from that point on Mendoza and me would be

together because we already went before the grand jury." (PC-R 2448).

At the point where David Marshall was transferred to South Bay, Kerry Flack, Director of Information, Communications and Legislative Planning for the Department of Corrections, became involved. Ms. Flack testified that she became involved when Investigator Ed Sobach asked her to review the files of George Mendoza and David Marshall to determine why they had been separated and if they should be placed back together. (PC-R 2536-2538). When Ms. Flack was questioned if Investigator Sobach had informed her why he was interested in these two inmates, she responded:

> ...He said that they had been transferred to different locations and that -- and that the bottom line was he did not know whether or not they should be allowed to remain at the same location. And after reviewing the file and talking to classification and talking to Mr. Sobach, I decided that they had agreed that the inmates could move together in order to watch out for each other. And I recommended and requested a transfer back to the same institution.

(PC-R 2538). George Mendoza and David Marshall were placed in the same facility for almost a year as a result of Ms. Flack's involvement.

George Mendoza and David Marshall were able to stay together within the prison system, not only at the same institution, but also in the same cell, for a period of approximately ten years. Witnesses for the defense, as well as for the State, agreed that this was extremely

unusual. (PC-R 2477, 2549). After their first separation, it is even more unusual that Inspector Sobach, one of the original parties alleged to have been involved in making the promise to George Mendoza and David Marshall, not only took an interest in why they were separated, but took steps to remedy the situation.

It is clear from the testimony of Appellant's trial counsel, Cliff Barnes, that he never had any information regarding any promises made in exchange for the inmates' testimony. (PC-R 2374). When Mr. Barnes attempted to cross examine witness George Mendoza at trial, Mendoza denied that any promise was made. (PC-R 2374). In addition to Assistant State Attorney Spiller's failure to correct Mendoza's false testimony, George Mendoza testified that he had been instructed by Spiller to state no promises had been made. When asked at the evidentiary hearing why he testified that no promise was made, George Mendoza replied:

> **...And he said they would ask you just like when you took your plea agreement, if you were promised anything. He says it's normal procedure in the courtroom to say that you weren't promised anything. John Spiller said this. So when they ask you, you say that you weren't promised anything.**

(PC-R 2424-25).

Had the promises to George Mendoza and David Marshall been heard by the jury, it would have seriously undermined the credibility of Mendoza's testimony. With this testimony, there is a reasonable

probability that the jury would have found Mr. Marshall not guilty or guilty of a lesser offense than first degree murder. When asked by Mr. Marshall's collateral counsel at the evidentiary hearing about the significance of a promise in exchange for testimony, Cliff Barnes stated:

> Well, with these two, they were lovers, so if they had been made that promise, it certainly would have been more important than just two bunkmates who enjoyed each others conversation...If that was the case and that promise had been made, that would have been extremely important.

(PC-R 2375-76). Evidence of a promise would have been critical to the impeachment of George Mendoza, and its absence caused Appellant manifest prejudice.

The fact that the jury never heard this significant impeachment evidence must be analyzed in conjunction with Appellant's claim of juror misconduct (for which the lower court refused to hear evidence). The prejudice Appellant suffered is clearly reflected in the jurors' affidavits regarding inappropriate conduct and deal making during the deliberation of Appellant's guilt or innocence. Juror Pamela H. Bachmann, in a sworn statement, stated:

> ...During the course of the guilt phase deliberations, there were jurors who did not want to vote for first degree murder. There was much discussion of how guilty Mr. Marshall was. In other words, how high a degree of guilt the verdict should be. There was concern there might be a hung jury. A unanimous verdict of first

> degree murder was obtained when it was agreed upon that the jury would vote unanimously for guilty of first degree murder and unanimously for a life sentence.

(Affidavit of Pamela H. Bachmann). Juror Judy Cunningham stated:

> ...During the course of the guilt phase deliberations, I told the other jurors that I did not believe that the state had proven their case beyond a reasonable doubt. I was not sure Mr. Marshall was guilty as charged. I also made it clear to other jurors that I would not vote for death in this case.
>
> I only compromised my true feelings regarding the case because the other jurors did not want a hung jury to result . I voted for first degree murder only when it was agreed that there would be a vote for life recommendation and it wold be unanimous. At least I was relieved of the worry that Mr. Marshall would be executed.

(Affidavit of Judy Cunningham). Any evidence of improper motives on behalf of state witnesses, specifically the promise made to George Mendoza and David Marshall, would have significantly strengthened the doubts of the jury. At least two jurors wanted to find Mr. Marshall guilty of the lesser offense of second degree murder. Clearly, had the jury heard a cross examination in which a promise in exchange for testimony was revealed, there is a reasonable probability that the outcome would have been different, either second degree murder or a hung jury. This information certainly undermines confidence in the outcome. <u>Strickland v. Washington</u>, 466 U.S. 668 (1984)

B. <u>THE STATE'S WITHHOLDING OF EXCULPATORY INFORMATION AND</u>

PRESENTATION OF RELATED FALSE AND MISLEADING EVIDENCE, VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS UNDER RELEVANT CASE LAW

The State's action of withholding exculpatory evidence, including impeachment evidence, violated Mr. Marshall's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. When the withheld evidence goes to the credibility and impeachability of a State's witness, the accused's Sixth Amendment right to confront and cross-examine witnesses against him is violated. Chambers v. Mississippi, 93 S. Ct. 1038 (1973). Of course, counsel cannot be effective when deceived, so hiding exculpatory or impeaching information violates the Sixth Amendment right to effective assistance of counsel as well. United States v. Cronic, 104 S. Ct. 2039 (1984). The unreliability of fact determinations resulting from such state misconduct violates the Eighth Amendment requirement that no unreliable death sentence be imposed.

The State allowed its witnesses to misrepresent the truth and failed to correct the witnesses' misrepresentations. The State's knowing use of false or misleading evidence is "fundamentally unfair" because it is "a corruption of the truth-seeking function of the trial process." United States v. Agurs, 427 U.S. 97, 103-104 and n.8 (1976). The deliberate deception of a court and jurors by presentation of known false evidence is incompatible with the rudimentary demands of justice." Giglio v. United States, 150 U.S. 150, 153 (1972).

Consequently, unlike cases where the denial of due process stems solely from the suppression of evidence favorable to the defense, in cases involving the use of false or misleading testimony, "the Court has applied a strict standard . . . not just because [such cases] involve prosecutorial misconduct, but more importantly because [such cases] involve a corruption of the truth-seeking process." Agurs, 427 U.S. at 104.

Accordingly, in cases involving knowing use of false or misleading evidence, the defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict. United States v. Bagley, 105 S. Ct. 3375, 3382 (1985). The most rudimentary requirements of due process mandate that the government not present and not use false evidence if it comes from the mouth of a State's witness.

Applying these legal principles to the testimony presented during the evidentiary hearing, it is irrefutable that the prosecution and law enforcement agencies involved in this case withheld material exculpatory evidence from defense counsel. Furthermore, it is clear that the State knowingly presented false and misleading evidence to the jury when it failed to correct the trial testimony of George Mendoza, asserting that no promises were made to him in exchange for his testimony.

The lower court's order dismisses Appellant’s allegations by

simply stating that Mr. Mendoza acknowledged that the State did not offer him any promises to induce his testimony. Incredibly, the lower court's order simply ignores Mr. Mendoza's explanation that he was instructed to provide this answer by the prosecutor. Without making any credibility finding against David Marshall or George Mendoza, the lower court asserts that there was no Brady or Giglio violation. This position cannot be reconciled with the inmates testimony at the hearing or the undisputed and highly unusual fact that Mr. Mendoza and David Marshall were housed in the same cell within multiple facilities for nearly ten years. It is unreasonable to accept the lower court's cavalier conclusion that there was no promise in light of the hearing testimony of Mendoza and Marshall, the fact that they were kept together for such an extraordinary length of time, and Kerry Flack's testimony that she understood that there was indeed an agreement to house Mendoza and Marshall together,

The trial judge, who also presided over the evidentiary hearing, apparently accepted the veracity of Mr. Mendoza's testimony at trial. Now, despite the evidence from Mendoza himself that a quid pro quo promise by the State was made, the lower court suddenly choose not to believe what Mr. Mendoza had to say. The State is in the same quandary. They vouched for Mr. Mendoza's credibility at trial when he was their star witness. Now, he is liar. It is not surprising that the prosecutor Mr. Spiller would deny these allegations. After all,

Mr. Mendoza's evidentiary hearing testimony that Mr. Spiller instructed him that "it's normal procedure in the courtroom to say that you weren't promised anything," is a very serious charge. However, the fact remains that David Marshall and George Mendoza testified that a promise to keep them together was indeed made and kept for nearly ten years. To believe that they remained cell-mates for such a long time by mere coincidence is unreasonable. The lower court's order can overlook Mr. Mendoza's testimony but the facts cannot be discarded so easily.

ARGUMENT IV

THE LOWER COURT ERRED BY FAILING TO CONDUCT AN ADEQUATE CUMULATIVE ERROR ANALYSIS

The flaws in the process which sentenced Mr. Marshall to death are many. They have been pointed out not only throughout this brief, but also in Mr. Marshall's direct appeal. Addressing each error on an individual basis will not afford constitutionally adequate safeguards against Mr. Marshall's improperly imposed death sentence.

The lower court failed to consider the cumulative effect of all the evidence not presented at Mr. Marshall's trial as required by Kyles v. Whitley, 115 S. Ct. 1555 (1995), and this Court's precedent. Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996); Gunsby v. State, 670 So. 2d 920 (Fla. 1996).[9] In Kyles, the Supreme Court established that "[t]he fourth and final aspect of Bagley materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item-by-item." Kyles, 115 S. Ct. at 1567. In Gunsby, this Court ordered a new trial in Rule 3.850 proceedings because of the cumulative effect of Brady violations, ineffective assistance of counsel, and/or newly discovered evidence of innocence. This Court noted that while it agreed with the circuit court that Mr. Gunsby had failed to demonstrate a reasonable probability of a different result if not for the State's Brady violations, it criticized the circuit court's consideration of this claim in isolation: "When we consider this error in combination with the evidence set forth in the second issue [the ineffective assistance of counsel and newly discovered evidence], however, we cannot agree with the State's position." Gunsby, 670 So. 2d at 923. This Court has clearly

[9]That Kyles v. Whitley is not limited to Brady claims is evidenced by its application to sufficiency of the evidence claims, United States v. Burgos, 94 F.3d 849 (4th Cir. 1996); United States v. Rivenbark, 81 F.3d 152 (4th Cir. 1996); ineffective assistance of counsel claims, Middleton v. Evatt, 77 F.3d 469 (4th Cir. 1996); and newly discovered evidence claims, Battle v. Delo, 64 F.3d 347 (8th Cir. 1995).

established that circuit courts cannot consider the effect of unpresented evidence item-by-item but must evaluate the collective impact of such evidence.

When examined cumulatively, it becomes apparent that Mr. Marshall was denied a fair and constitutionally adequate trial and sentencing. The combined effect of the State's withholding of vital impeachment evidence, the State's presentation of false and misleading evidence, trial counsel's utter failure to investigate and present significant and copious mitigation evidence, the trial court's improper override of the jury's recommendation of a life sentence, as well as the many significant claims for which Mr. Marshall was denied an opportunity to present evidence, all demonstrate Appellant's entitlement to relief.

ARGUMENT V

THE LOWER COURT ERRED BY SUMMARILY DENYING MERITORIOUS CLAIMS

The lower court's order denying post-conviction relief fails to provide any reason for denying Appellant's Rule 3.850 claims for which no evidentiary hearing was held. The lower court's order following the Huff hearing simply states:

> that an evidentiary hearing is not warranted on the following claims because the motion and the record in this case conclusively show that Defendant is not entitled to relief: Claims I, V, IX, XXI, XXII, XXVI, XVII, XXVI, XXVII. Claim IX is specifically denied as the allegations alleged in the attached affidavits inhered in the

> verdict. FURTHER ORDERED AND ADJUDGED that an evidentiary hearing is not warranted on the following claims because they are procedurally barred: Claims II, IV, VI, VII, VIII, X, XII, XIII, XIV, XV, XVI, XVIII, XIX, XX, XIV, XV. (PC-R 1830).

There were no records attached to the order, and aside from Claim IX, there was no rationale provided for why these claims should be denied without an evidentiary hearing. This Court has stated many times that under rule 3.850, a movant is entitled to an evidentiary hearing unless the motion, files, and records conclusively show that the movant is not entitled to relief. Fla. R. Crim. P. 3.850(d); e.g. Provenzano v. Dugger, 561 So.2d 541, 543 (Fla. 1990); Harich v. State, 484 So.2d 1239, 1240 (Fla. 1986), O'Callaghan v. State, 461 So.2d 1354, 1355 (Fla. 1985). To support summary denial without a hearing, a trial court must either state it's rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion. Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993); citing Hoffman v. State, 571 So.2d 449, 450 (Fla. 1990) (Hoffman I). In Asay v. State, Asay relied on Hoffman and argued that the trial court's order summarily denying claims was insufficient because it did not contain attachments of the record. This Court found that "an order denying an evidentiary hearing is sufficient if it sets forth a clear rationale explaining why the motion and record conclusively refute each claim. Asay; See Diaz v. Dugger, 719 So.2d 865, 867 (Fla. 1998). In

Asay, this Court found that the trial court's order did set forth a clear rationale explaining why each claim was summarily denied, satisfying the requirements of Diaz. Asay v. State. In the instant case, the order denying relief, found in the order following the Huff hearing, failed to attach any files or records, and with the exception of Claim IX, failed to provide any rationale whatsoever, explaining why Appellant is not entitled to relief. "Thus, we can only speculate as to the Court's basis for denying the motion." Roberts v. State, 678 So.2d 1232,1236 (Fla. 1996).

Appellant's Rule 3.850 motion was sufficiently pled and the allegations presented remain unrefuted by the record. **The following claims were dismissed for no articulated rationale:**[10]

a. CLAIM I: ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. MARSHALL'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES MAY HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLORIDA STATUTES, THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Marshall is not in a position to know if any documents were not disclosed. He does not waive any Chapter 119 claim that may exist, but that due to circumstances beyond his control, he does not know about.(PC-R.1543-1544)

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[10]. The claims are presented in the same chronological order as reflected in the lower court’s order following the Huff hearing.

b. CLAIM V: THE RULES PROHIBITING MR. MARSHALL'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT VIOLATES DUE PROCESS AND EQUAL PROTECTION PRINCIPLES (PC-R. 1579-1580)

c. CLAIM XXI: THE TRIAL COURT'S FAILURE TO GRANT A CHANGE OF VENUE DEPRIVED MR. MARSHALL OF HIS RIGHT TO TRIAL BEFORE A FAIR AND IMPARTIAL JURY. (PC-R. 1676-1683)

d. CLAIM XXII: MR. MARSHALL WAS IMPROPERLY SHACKLED DURING HIS TRIAL AND PENALTY PHASE.(PC-R. 1683-1684)

e. CLAIM XXVI: MR. MARSHALL IS BEING DENIED HIS RIGHT TO EFFECTIVE REPRESENTATION BY THE LACK OF FUNDING AVAILABLE TO FULLY INVESTIGATE AND PREPARE HIS POST-CONVICTION PLEADINGS IN VIOLATION OF <u>SPALDING V.DUGGER</u>.(PC-R. 1689-1694)

f. CLAIM XXVII: EXECUTION BY ELECTROCUTION IS CRUEL AND/OR UNUSUAL PUNISHMENT. (PC-R. 1694-1706)

The following claims were erroneously denied as being procedurally barred:

g. CLAIM II: MR. MARSHALL TRIAL TRANSCRIPT WAS AND IS UNRELIABLE AND INCOMPLETE.(PC-R.1544-1548)

h. CLAIM IV: MR. MARSHALL'S SENTENCING TRIAL VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN MR. MARSHALL WAS ALLOWED TO WAIVE HIS RIGHT TO PRESENT PENALTY PHASE EVIDENCE WITHOUT AN ADEQUATE RECORD INQUIRY TO DETERMINE WHETHER THE WAIVER WAS VOLUNTARY AND INTELLIGENT. COUNSEL WAS INEFFECTIVE FOR FAILING TO ADVISE THE TRIAL COURT OF THE REQUIREMENTS UNDER <u>FARETTA</u> TO ACCEPT A WAIVER OF FUNDAMENTAL RIGHTS.

It was error for the trial court to allow Mr. Marshall to waive presentation of mitigating evidence, absent an inquiry into whether that decision was knowing, intelligent and voluntary. The question

raised in Mr. Marshall's case is "whether waiving the right to present mitigating testimony in the penalty phase of a capital trial is a decision of such great magnitude that minimal procedural safeguards must be followed to assure on the record that the waiver was knowingly, intelligently, and voluntarily exercised." Anderson v. State, 574 So. 2d 87 (Fla.), cert. denied, 112 S. Ct. 114 (1991) (Barkett, J., concurring in part, dissenting in part). This question must be answered in the affirmative; Mr. Marshall purportedly waived a fundamental constitutional right, the right to present mitigating evidence in a capital sentencing proceeding. Saffle v. Parks, 110 S. Ct. 1257, 1270 (1990)(Brennan, J., dissenting) ("The right to an individualized sentencing determination is perhaps the most fundamental right recognized at the capital sentencing hearing."); Eddings v. Oklahoma, 102 S. Ct. 869, 876-77 (1982); Lockett v. Ohio, 98 S. Ct. 2954, 2964-65 (1978) (plurality); Woodson v. North Carolina, 96 S. Ct. 2978, 2991 (1976) (plurality); Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993) ("The rights to testify and to call witnesses are fundamental rights under our state and federal constitutions."). Florida has recognized that fundamental rights can be waived only in open court on the record. See, e.g., Torres-Arboledo v. State, 524 So. 2d 403, 410 (Fla.), cert. denied, 109 S. Ct. 250 (1988). As Mr. Marshall purportedly waived a fundamental constitutional right, the trial court should have conducted a substantial record inquiry to determine Mr.

Marshall's competence to knowingly, intelligently, and voluntarily waive his right to have his sentencing judge consider mitigating evidence. A significant inquiry on the record into Mr. Marshall's competence to waive mitigation was required.

In Mr. Marshall's case, rather than a careful record inquiry to determine whether Mr. Marshall knowingly, intelligently and voluntarily waived his right to present mitigating evidence, the trial court made a perfunctory inquiry:

MR. BARLOW: Yes, Judge, another issue that was raised this morning was the Defendant's waiver of the statutory circumstances. The Defense requested --

THE COURT: Okay. Mr. Barnes indicated that he needed to talk with Mr. Marshall.

MR. BARLOW: Yes, Judge.

MR. BARNES: Yes sir, we had a talk and he agrees with me and I don't know how you want to address this, but --

THE COURT: Okay. I can just ask Mr. Marshall. Mr. Marshall, you have discussed with your lawyer what are the statutory mitigating circumstances and do you agree that none of them apply in you case or at least that you will waive presenting any of those to the jury and that the jury need not be instructed on any of the statutory mitigating circumstances?

MR. MARSHALL: Your Honor.

THE COURT: Yes sir.

MR. MARSHALL: Number eight. Number eight.

THE COURT: Which is -- what does number eight say?

MR. BARNES: Any other aspect.

THE COURT: Okay. Now that -- maybe what I've said is a misnomer, but that's not been classified as a statutory mitigating circumstance. It's listed in the statute, but that's everything else. So what we're talking about here would be the mitigating circumstances numbered one through seven. I'm going to specifically give that one which would be any aspect of Defendant's character record and any other circumstances of the offense.

MR. MARSHALL: Okay, Your Honor, excuse me for the delay. In agreeance with my -- my attorney I agree with you pertaining to this -- this --

THE COURT: You agree that the Court need not instruct and you give up any right to have the Court instruct on statutory mitigating circumstances which are numbered one through seven in the statute?

MR. MARSHALL: Yes, yes, Your Honor.

THE COURT: Okay. I am going to give eight as you've noted.

MR. MARSHALL: Yes sir.

THE COURT: Yes sir, I will give that.

MR. SPILLER: Your Honor, the State's request for inquiry in this area also included the Defendant's giving up personally giving up the right to present any evidence that might tend to support any of these first seven exceptions.

THE COURT: Okay. And then Mr. Marshall, I -- I'd intended that be part of what I was asking, but just so it's clear. Mr. Marshall, you're giving up any right to present any -- any evidence on statutory mitigating circumstances that are set out in the statute numbered one through seven, is that correct?

MR. MARSHALL: Yes, Your Honor.

(R. 2773-75). The trial judge failed to ask Mr. Marshall if he understood the consequences of the waiver, and did not inquire into factors such as Mr. Marshall's education, reading ability, or capacity to understand the proceedings.

The Court's inquiry into Mr. Marshall's alleged waiver of mitigation evidence was insufficient. Counsel failed to conduct an adequate investigation which was necessary to fully inform Mr. Marshall of his legal rights and options thus making it impossible for Mr. Marshall to make rational choices regarding his case. Counsel was also ineffective for failing to advise the Court of its obligation to conduct proper Faretta hearings regarding Mr. Marshall's purported waiver of mitigation evidence. As a result of these errors the outcome of Mr. Marshall's sentencing was materially unreliable and no adversarial testing occurred in violation of Mr. Marshall's rights as guaranteed by the Constitution of the State of Florida and the Fifth, Sixth, Eighth, and Fourteenth amendments to the United States Constitution.

To the extent that trial counsel failed to object or argue this issue effectively, his performance was deficient under the principles of Harrison v. Jones, 880 F.2d 1277 (11th Cir. 1989) and Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). Under Strickland v. Washington, 466 U.S. 668 (1984), ineffectiveness of counsel occurs when trial counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Where an adversarial testing does not occur and confidence is undermined in the outcome, relief is appropriate.

This fundamental procedural and substantive error should be

corrected now. Mr. Marshall was given the ultimate penalty with no adequate inquiry ever being made, contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal constitution into his capacity to knowingly, intelligently, and voluntarily waive fundamental constitutional rights.

i. CLAIM VI: THE TRIAL COURT PREJUDICIALLY ERRED IN PERMITTING A STATE PRISON INMATE TO TESTIFY BEFORE THE JURY AS AN ANONYMOUS STATE WITNESS.(PC-R. 1580-1588)

j. CLAIM VII: THE PROSECUTOR PREJUDICIALLY VOUCHED FOR THE CREDIBILITY OF ITS WITNESSES IN ARGUMENT TO THE JURY.(PC-R. 1589-1593)

k. CLAIM VIII: MR. MARSHALL'S SENTENCE RESTS UPON AN UNCONSTITUTIONALLY AUTOMATIC AGGRAVATING CIRCUMSTANCE.(PC-R. 1593-1598)

l. CLAIM X: MR. MARSHALL'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE DENIED BY THE CONSIDERATION OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES THAT MR. MARSHALL WAS A FUTURE DANGER TO SOCIETY.(PC-R. 1605-1610)

m. CLAIM XII: PARKER V. DUGGER ESTABLISHES THAT MR. MARSHAL WAS DENIED HIS CONSTITUTIONAL RIGHTS WHEN THE TRIAL COURT AND THE FLORIDA SUPREME COURT IMPROPERLY FAILED TO ADEQUATELY EVALUATE MITIGATION EVIDENCE AT SENTENCING AND APPELLATE REVIEW. (PC-R. 1616-1627)

n. CLAIM XIII: MR. MARSHALL WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE, THE SENTENCING JUDGE MISAPPLIED AGGRAVATING CIRCUMSTANCES AND THIS COURT HAS FAILED TO CURE MR. MARSHALL'S DEATH SENTENCE. (PC-R. 1627-1637)

o. CLAIM XIV: THE BURDEN WAS SHIFTED TO MR. MARSHALL TO PROVE THAT

DEATH WAS INAPPROPRIATE.(PC-R. 1638-1642)

p. CLAIM XV: THE JURY OVERRIDE IN MR. MARSHALL'S CASE RESULTED IN AN ARBITRARILY, CAPRICIOUSLY, AND UNRELIABLY IMPOSED SENTENCE OF DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.(PC-R. 1643-1654)

The jury override procedure in Florida is constitutionally valid only to the extent that it is utilized within specific reliable procedural parameters, and so long as it does not lead to freakish and arbitrary capital sentencing. Spaziano v. Florida, 468 U.S. 447, 465, 104 S. Ct. 3154, 3165 (1984). Spaziano upheld the facial validity of Florida's jury override scheme, but at the same time examined the scheme's application in that case in order "to ensure that the result of the process is not arbitrary or discriminatory." Id. at 465. Spaziano's upholding of the jury override procedure and its application in that case did not forever insulate an override from eighth amendment review. While upholding the validity of the scheme, Spaziano also assessed petitioner's challenge to the application of the Tedder standard. See Tedder v. State, 322 So. 2d 908 (Fla. 1973). Finding that the standard provides capital defendants with a "significant safeguard," that "the Florida Supreme Court takes that standard seriously," and that "there is no evidence that the Florida Supreme Court has failed in its responsibility to perform meaningful appellate review," id. at 465-66, the Court concluded that the override there was constitutional. Id. at 467. Clearly, the Supreme Court did not

consider its task at an end once it determined the facial validity of the override scheme, but found it necessary and proper to determine the constitutionality of the scheme's application in the particular case. See also Magill v. Dugger, 824 F.2d 879, 894 (11th Cir. 1987) ("Although Spaziano indicates that a state may allocate the sentencing power as it wishes between the judge and the jury, it does not stand for the proposition that the state may arbitrarily alter this allocation as it applies to particular defendants.").

Under Florida law, if a jury's recommendation of life is supported by a reasonable basis -- such as valid mitigating factors -- that jury recommendation cannot be overridden.[11] This is the nature of the sentencing process under Florida law, and the standard that has been recognized by the United States Supreme Court as a "significant safeguard" provided to a Florida capital defendant. Spaziano, 468 U.S. at 465. See Parker v. Dugger, 111 S.Ct. 731 (1991).

The record here demonstrates reasonable basis for life. For

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[11]Florida's capital sentencing process ascribes a role to the sentencing jury that is central and fundamental. Espinosa v. Florida, 112 S.Ct. 2926, 28 (1992); Stevens v. Florida, 613 So. 2d 402 (Fla. 1992); Johnson v. Singletary, 612 So.2d 575 (Fla. 1993). A Florida sentencing jury's recommendation of life is entitled to "great weight," and can only be overturned by a sentencing judge if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)(emphasis supplied). See also Eutzy v. Dugger, 746 F. Supp. 1492 (N.D. Fla. 1989), aff'd., No. 89-4014 (11th Cir. 1990); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986); Mann v. Dugger, 844 F.2d 1446, 1450-51.

example, Mr. Marshall was influenced by his older brother who encouraged him to run the streets and break the law (R. 2789). This undisputed fact is a mitigating circumstance. Whitley v. Bair, 802 F.2d 1487, 1494 (4th Cir. 1986) (older brother "exercised an undue criminal influence on him during his adolescence"). Mr. Marshall had "beautiful grades" until his early teens (R. 2788-2789). Mr. Marshall's mother did not discipline appellant and led him to believe that there would be no consequences for his behavior (R. 2789). The jury could consider this as mitigating. Buford v. State, 570 So. 2d 923, 925 (Fla. 1990) ("conditions of parental neglect in which Buford had been raised").

Due to problems, the marriage of Mr. Marshall's parents was turbulent with members of the family taking sides (R. 2789). Eddings v. Oklahoma, 102 S. Ct. 869, 877 (1982) ("evidence of difficult family history" is a typical mitigating circumstance). Mr. Marshall's father loves appellant very much (R. 2789). See Pardo v. State, 563 So. 2d 77, 79 (Fla. 1990) (Trial court found that "love and affection of his family" mitigating).

The trial court found the mitigating circumstance that Mr. Marshall entered prison at an early age (R. 4086). See Porter v. Wainwright, 805 F.2d 930, 933 (11th Cir. 1986) (recognizing that people incarcerated at a young age are often "molded in such a way that, to some extent, they are not responsible for their behavior"). The trial

court found that Mr. Marshall's good behavior during the course of the trial could be considered in mitigation (R. 4086).

The jury could have also recommended a life sentence based on the circumstances of this case. The jury could view the evidence as showing that Jeff Henry was a very violent individual.[12] The evidence is unclear whether the chair leg was already in Henry's cell unarmed (R. 2423).[13] A fight erupted within the cell (R. 2027, 2429, 2066).[14] There were offensive wounds on Henry (R. 2056). All of the major injuries received by Henry could have occurred by successive blows transpiring with a matter of "seconds" (R. 2057). Dr. Hobin couldn't rule out Henry as the aggressor and testified that he could have kept from fighting with the head injuries (R. 2058). When Mr. Marshall later tied up the violent Henry, it was apparently to ensure that Henry would not immediately try to retaliate.

The outstanding fact bearing upon the mitigated nature of this offense is the fact that Mr. Marshall, after being involved in a fight

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[12]This is amply demonstrated by the evidence that Henry had been placed in confinement, and at that time was given a disciplinary report (DR) for fighting with another inmate (R. 1961).

[13]There was evidence that Henry was struck with a battery which came from his own cell. Thus, one could reasonably conclude that it was during this fight that Mr. Marshall obtained the weapon, thus no calculated killing was proved.

[14]Dr. Hobin testified that the injuries to Henry's hands were of the nature that one might receive in a fistfight (R. 2021). The injuries show one person "grappling" with another (R. 2066). Also, the scene inside the cell showed evidence of a struggle (R. 1898).

with Henry, could not retreat to any place of safety. The evidence showed a prison where everyone was vulnerable to violence. Mr. Marshall cannot be judged by the same standards that would apply if he had been on the outside. If this incident had occurred outside the prison, appellant could have gone home, sought the protection of the police and simply locked himself in until safety arrived. But in the prison he could not go home. He could not go anywhere to safety where he could not be gotten for revenge by Henry.

Although the facts do not reveal whether Henry died as a result of injuries occurring in the first or second alleged entry by Mr. Marshall into the cell, the facts do not rule out Mr. Marshall simply tying the hands of Henry and pulling his trousers down to prevent him from coming after appellant during the second entry. The facts do not prove any additional acts to make this offense an aggravated and unmitigated one for which the death penalty is reserved. The medical examiner stated that it was possible that all of the injuries were inflicted during the first visit to the cell and that Henry was tied upon the second visit while he remained conscious (R. 2062). Further, it was also possible that Henry could have kept fighting with the injuries (R. 2058). Henry could have been the aggressor (R. 2058).

In such a case, the facts do not prove the kind of defenseless crime that is deserving of the death penalty in the face of a jury recommendation of life imprisonment. After all, the jury heard all of

the admissible aggravating facts, was aware of the realities of life in prison, had ample evidence to gauge the culpability of Mr. Marshall, and decided against the appropriateness of the death penalty. The jury's decision on such an undetermined set of facts of what actually provoked the homicide must be accorded the weight of a reasonable recommendation.

Under the circumstances of this case, the jury could legitimately find that the death occurred as the result of a fight or confrontation and was not the result of lust of greed. See Christian v. State, 550 So. 2d 450 (Fla. 1989) (even though facts were legally insufficient to serve as a defense to crime, it was error to override the jury recommendation where there was a colorable claim that the killing of a handcuffed inmate was motivated out of self-defense).

Any of these non-statutory mitigating circumstances might provide a reasonable basis for the jury's recommendation. Certainly the cumulative effect of the mitigating circumstances would serve as a basis for a reasonable person to differ on the propriety of a death sentence for Mr. Marshall.

In addition, the jury may have decided that not all of the aggravating factors were proven beyond a reasonable doubt, or that some were entitled to little weight. See Hallman v. State, 560 So. 2d 223 (Fla. 1990). For example, while it is obvious that Mr. Marshall was under a sentence of imprisonment, the jury could have given this factor

very little weight in light of the facts. Also, the jury could have given very little weight, or at least less than the trial court did, to the prior violent felonies when one considers Mr. Marshall's young age at the time of the commission of these offenses.[15]

The factor that the killing occurred during the commission of a burglary could be given little weight, or even rejected, by the jury. Assuming that there was a burglary, the jury could legitimately find that the circumstances showed a technical burglary of shared prison confinement which is less egregious than the situation where there is forcible entry of a home occupied by a family. Moreover, the jury may have found that the killing was premeditated, but that it did not occur during the course of a burglary. There is evidence that Mr. Marshall went into the cell unarmed and that a fight erupted. The jury could legitimately find that Mr. Marshall did not enter with the intent to commit a criminal offense, and thus could give this circumstance little or no weight.

The jury could have reasonably found that the killing was not extremely heinous, atrocious, or cruel. This circumstance is reserved for the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Brown v. State, 526 So. 2d 903, 906 (Fla. 1988) (quoting from State v. Dixon, 283 So. 2d 1 (Fla. 1973)). See

[15]Mr. Marshall was 18 or 19 at the time of these prior offenses (R. 2723, 2788).

also Cook v. State, 542 So. 2d 946, 970 (Fla. 1989) ("This aggravating factor generally is appropriate when the victim is tortured, either physically or emotionally, by the killer"). The crime must be "committed so as to cause the victim unnecessary and prolonged suffering." Brown at 907. Of course, the prolonged suffering cannot merely be fortuitous,[16] it must be "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering." Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989); Burns v. State, 609 So.2d 600 (Fla. 1992); McKinney v. State, 579 So. 2d 80 (Fla. 1991). In Porter v. State, 564 So. 2d 1060 (Fla. 1990), the Court explained that for this circumstance to apply the crime must be meant to be deliberately and extraordinarily painful and that a murder involving the succession of actions resulting in the fatal injuries (the firing of three shots at close range) would not apply. Porter, 564 So. 2d at 1063; see also, McKinney v. State, 579 So. 2d 80, 82 (Fla. 1991) ("The evidence in the record does not show that the defendant intended to torture the victim").

In the instant case the jury could properly find that there was not evidence beyond a reasonable doubt of prolonged suffering. More importantly, the jury could legitimately find that the fight was not designed to inflict a high degree of pain. The medical examiner

[16] See Mills v. State, 476 So. 2d 172, 178 (Fla. 1985) ("whether death is immediate or whether the victim lingers and suffers is pure fortuity").

testified that the injuries to Henry could have occurred "in a matter of seconds" (R. 2057). Thus, the incident could be found not to be especially heinous, atrocious, or cruel. See Amoros v. State, 531 So. 2d 1256 (Fla. 1988) (victim shot three times while futily trying to escape not especially heinous, atrocious, or cruel). The jury could reasonably either totally reject, or give little weight to, this reason.

In light of the different view the jury may have had of the mitigating circumstances, and the aggravating evidence, it cannot be said that the facts are so clear and convincing that no reasonable person could differ as to whether a death sentence is appropriate. The trial court erred by overriding the jury recommendation of life imprisonment and imposing a sentence of death. The state's argument that the court could simply fail to find mitigation despite evidence of mitigation, amply shown above to have included extensive non-statutory facts, was an erroneous basis to impose the death sentence contrary to a jury's recommendation of life imprisonment (R. 2861).

In recommending life, the jury obviously found reasonable doubt to the existence of the aggravating circumstances and found a basis for the mitigation argued by counsel. "[T]he facts suggesting a sentence of death [are not] so clear and convincing that virtually no reasonable person could differ." Tedder, 327 So. 2d at 910. Thus, under Florida law, the jury's recommendation should have been followed.

Based on all of the above, it is quite plain that reasonable people could differ as to the propriety of the death penalty in this case, and thus the jury's recommendation of life must stand. See Eutzy; Tedder. There were valid and eminently reasonable nonstatutory mitigating factors in this case. Whatever balance the trial judge may have struck, the jury's balancing and resulting life recommendation, were undeniably reasonable under Florida law. See Mann, 844 F.2d at 1450-55. The trial judge and Florida Supreme Court, however, refused to provide Mr. Marshall with the right which the law clearly afforded him -- the right not to have a reasonable jury verdict overturned.

In fact, in this case, the trial judge failed to in any way explain why the jury had no rational basis for its recommendation, as Tedder requires. A jury life recommendation magnifies the sentencing judge's duty to fully consider the mitigating factors upon which reasonable jurors could rely as a "reasonable basis," because the usual presumption in Florida that death is the proper sentence upon proof of one or more aggravating factors does not apply (and indeed is reversed) when a jury recommendation for a life sentence has been made. Williams v. State, 386 So. 2d 538, 543 (Fla. 1980).[17]

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[17]The judge considering an override must weigh aggravating circumstances "against the recommendation of the jury." Lewis v. State, 398 So. 2d 432, 439 (Fla. 1981). The overriding judge must make findings that explain why the jury was unreasonable, why no reasonable person could differ, and why death is proper. Tedder v. State, 322 So. 2d 908 (Fla. 1975). Neither this procedure, nor the substantive "no reasonable juror" determination, occurred in this

The judge found four statutory aggravating circumstances. The judge made no findings regarding the unreasonableness of the jury, and did not explain why the jury's recommendation was not entitled to great weight. Nor did the trial judge discuss to any significant degree the mitigation in the record or say anything whatsoever to indicate why that mitigation should not be deemed a "reasonable basis" supporting the jury's verdict of life in this case (R. 4084). The record reflects that the override was predicated upon the trial court consideration of the non-statutory aggravating factor of future dangerousness. That is not the law in Florida. Ferry v. State, 507 So. 2d 1373, 1376-77 (Fla. 1987).

The only hint why the trial judge overrode the jury's life recommendation is noted in the trial court's written findings:

> The court has considered the evidence presented relevant to the nature of the crime and the character of the defendant, including a certified copy of the judgment and sentence in Dade County Case Number 84-18638-B wherein defendant was convicted of the crime of escape in 1984. In this case the defendant was sentenced to imprisonment. This record of conviction and sentence was not admitted into evidence for the jury to consider. This record has been disclosed to the defendant prior to sentencing.

(R. 4084).

The state courts thus arbitrarily ignored their own standards and arbitrarily denied Mr. Marshall the protections, i.e., the "liberty

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case.

interest," afforded under Florida's capital sentencing statute. See Vitek v. Jones, 445 U.S. 480, 488-89 (1980) (state-created liberty interest is one that fourteenth amendment preserves against arbitrary deprivation by the state); Hicks v. Oklahoma, 447 U.S. 343 (1980)(same). Neither the Eighth Amendment, Due Process, nor Equal Protection can be squared with the fact that Florida law afforded Mr. Marshall the right to an affirmance of the jury's reasonable life recommendation, while the Florida courts' unfounded, unique, and illogical ruling arbitrarily withdrew that right. See Evitts v. Lucey, 469 U.S. 387, 400-01 (1985); Mills v. Avery, 393 U.S. 483, 488 (1969); Smith v. Bennett, 305 U.S. 708, 713 (1961). See also Reece v. Georgia, 350 U.S. 85 (1955). Given this situation, it is manifestly apparent that the override death sentence in this case is arbitrary.

q. CLAIM XVI: TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S ACTION WHEN IT REFUSED TO GRANT DEFENSE'S MOTION THAT MORE PEOPLE PARTICIPATE IN THE VENIRE.(PC-R. 1654-1656)

r. CLAIM XVIII: MR. MARSHALL IS INNOCENT OF FIRST DEGREE MURDER AND WAS DENIED AN ADVERSARIAL TESTING. (PC-R. 1666-1669)

s. CLAIM XIX: MR. MARSHALL'S SENTENCE OF DEATH WAS BASED UPON UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTIONS.(PC-R. 1670-1671)

t. CLAIM XX: FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, AND IT VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND PROHIBITING

CRUEL AND UNUSUAL PUNISHMENT.(PC-R. 1671-1676)

u. CLAIM XIV[XXIV][18]: CHARGING MR. MARSHALL WITH BOTH PREMEDITATED MURDER AND FELONY MURDER VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY FAILING TO GIVE HIM ADEQUATE NOTICE OF WHICH CRIME HE MUST DEFEND AGAINST.

v. CLAIM XV[XXV][19]: MR. MARSHALL IS INSANE TO BE EXECUTED

Mr. Marshall is insane to be executed. In Ford v. Wainwright, 477 U.S. 399 (1986), the United States Supreme Court held that the Eighth Amendment protects individuals from the cruel and unusual punishment of being executed while insane.

Mr. Marshall acknowledges that this claim is not ripe for consideration. However, it must be raised to preserve the claim for review in future proceedings and in federal court should that be necessary. See Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998). Accordingly Mr. Marshall must raise this issue in the instant pleading.

Appellant's Rule 3.850 motion was sufficiently pled and the allegations presented remain unrefuted by the record.

CONCLUSION AND RELIEF SOUGHT

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[18]. It is apparent from the Circuit Judge’s post Huff hearing order that a mistake has been made and that he intended claim XIV to be XXIV.(PC-R. 1830)

[19]. It is apparent from the Circuit Judge’s post Huff hearing order that he made a mistake and intended claim XV to read XXV.(PC-R.1830)

Based on the foregoing Matthew Marshall respectfully requests that this court immediately vacate his convictions and sentences, including his sentence of death and order a new trial. In the alternative, Mr. Marshall additionally requests that this court remand for an evidentiary hearing on issues previously denied by the lower court. Finally, Mr. Marshall requests that a new sentencing be ordered.

STATEMENT OF FONT

The foregoing brief is typed in COURIER 12pt.

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 22, 2001.

____

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