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**

REPLY 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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REPLY TO POINT I

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

Contrary to the State's assertion, the trial court's order summarily denying Claim IX was incorrect and must be reversed. The jury misconduct claims made by Mr. Marshall do not inhere in the verdict and at a minimum an evidentiary hearing is required on the issue. An evidentiary hearing is warranted "...unless (1) the motion, files, and records in the case conclusively show that the prisoner in entitled to no relief, or (2) the motion or a particular claim is legally insufficient." Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000). The record and motion in the instant case certainly warrant evidentiary development if not an outright new trial.

The compelling affidavit in this claim is Mr. Smith's. The State's disparaging remarks regarding Mr. Smith's signed and sworn affidavit simply does no more than call Mr. Smith a liar. It is clear from his affidavit that Mr. Smith knew the women, had contacts with her and knew she was a relative of one of his clients. Counsel for Mr. Marshall is troubled by the State's non-record argument that the Marshall family somehow set up the telephone call because Matthew Marshall's brother attempted an escape in the past. (Answer brief, pg. 9 middle paragraph). This conjecture only proves the necessity

for an evidentiary hearing. The last sentence in paragraph 9 of the State's Response is not only unrefuted by the record but actually admits error, "[i]t is not inconceivable that the caller was purposely trying to interject error into this case in an effort to achieve a new trial for Appellant." Indeed, there is nothing in the record to refute the facts set forth in Mr. Smith's affidavit. Therefore, error has in fact occurred.

The State proceeds to argue that the two juror affidavits make statements which only inhere in the verdict. Conversely, what the affidavits do is show the discomfort only two out of the 12 jurors had with the verdict. There are ten more jurors the lower court failed to take any testimony from in order to properly consider the claim. Furthermore, the State writes a great deal about their argument regarding issues which inhere in a verdict and citing cases along those lines. The State fails to mention however, that if Mr. Smith's affidavit is considered, which it must be because there is no other evidence refuting it, those matters do not inhere in the verdict and amount to cause for reversal.

The cases relied on by Mr. Marshall in his Initial Brief are exactly what this Court needs to consider when determining that a new trial is warranted. The State contends that "[a]n affidavit by an attorney that an unnamed juror made these allegations to him is hearsay and completely unreliable." The question must be asked -

why? There is absolutely no evidence to support the State's assertion and the statement is based on the State's own non-record conjecture. Evidentiary development is clearly warranted.

REPLY TO POINT 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

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

Trial counsel was ineffective for failing to investigate mitigation evidence. The State in general, correctly cites the standard of review for this Court to use when considering a lower court's ruling following an evidentiary hearing. However, the State refers to another standard of review set forth in Cade v. Haley, 222 F. 3d 1298 (11th Cir.2000)(underlying findings of fact are subject only to clear error review) and attempts to assert that this Court should use this standard in addition to the standard set forth in Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997). However, this Court is under no obligation to use a standard of review utilized by a Federal Appellate Court reviewing a Federal District Court's

findings. The correct standard of review is set forth in Rose v. State, 675 So. 2d 567, 571 (Fla.) as follows:

> "[A defendant] must demonstrate that but for counsel's errors he would have probably received a life sentence." Hildwin v. Dugger, 654 So.2d 107,109 (Fla.), cert. denied, 516 U.S. 965, 116 S.Ct. 420, 133 L.Ed.2d 337 (1995). Such a demonstration is made if "counsel's errors deprived [defendant] of a reliable penalty phase proceeding." Id. at 110 (emphasis added). The failure to investigate and present available mitigating evidence is a relevant concern along with the reasons for not doing so. Id. at 109- 10. In Baxter v. Thomas, 45 F.3d 1501, 1512-13 (11th Cir.), cert. denied, 516 U.S. 946, 116 S.Ct. 385, 133 L.Ed.2d 307 (1995), the United States Court of Appeals for the Eleventh Circuit outlined the legal framework for considering a claim of ineffective assistance of counsel at the penalty phase of a capital trial:
> An ineffective assistance of counsel claim is a mixed question of law and fact subject to plenary review under the test set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). See Cunningham v. Zant, 928 F.2d 1006, 1016 (11th Cir.1991). In order to obtain a reversal of his death sentence on the ground of ineffective assistance of counsel, [a defendant] must show both (1) that the identified acts or omissions of counsel were deficient, or outside the wide range of professionally competent assistance, and (2) that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different. Bolender v. Singletary, 16 F.3d 1547, 1556-57 (11th Cir.) (citing Strickland, 466 U.S. at 687, 104 S.Ct. at 2064), cert. denied, 513 U.S. 1022, 115 S.Ct. 589, 130 L.Ed.2d 502 (1994).
> "An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." Porter v. Singletary, 14 F.3d 554, 557 (11th Cir.), cert. denied, 513 U.S. 1009, 115 S.Ct. 532, 130 L.Ed.2d 435 (1994). The failure to do so "may render counsel's assistance ineffective." Bolender, 16 F.3d at 1557.

Plenary is defined by Black's Law Dictionary (7th ed. 1999), as

Full; complete; entire <plenary authority>. Therefore, the lower court's findings are subject to a full and complete review. However, the lower court makes no findings regarding credibility of witnesses nor weight to be given to the evidence. The order of the lower court is simply devoid of any such statements. Therefore, it would seem impossible for this Court to make any determinations regarding the evidence from the lower court's order. The lower court's order does no more than meagerly summarize the evidence presented which this Court could read for itself.

Since the trial court's ultimate conclusions as to deficient performance and prejudice are subject to plenary review this Court must reverse the lower court's ruling. The evidence presented absolutely demonstrates that trial counsel's representation was unreasonable and but for the deficiency the result of the proceeding would have been different.

The State cites Strickland v. Washington, 466 U.S. 688 (1984) and quotes "[s]trategic choices made after thorough investigation of the law and the facts relevant to plausible options are virtually unchallengeable." Interestingly, however that is exactly what did not happen here. There was in fact no thorough investigation of the facts and Mr. Marshall presented almost no mitigation to the court. Trial counsel admitted he did not do what could have and should have been done.

> Q.(Donoho) Did you think about asking for hospital records on Mrs. Marshall, Naomi Marshall?
>
> A.(Cliff Barnes) No, I didn't
> . . .
> Q. But it could have been something in your investigation?
>
> A. It could have given me more information if I had done that, that's correct. We didn't –- just to put this in prospective [sic]. At the public defender's office it was like a MASH unit and we went where the lead took you. And you didn't go down a lot of paths without leads because you had too many cases of each one. Your sole purpose in life, because there were too many defendants depending on you, so you did the best you could with the leads that you had.
>
> Q. So if there was a lawyer . . . with funds or a private lawyer that had funds to hire an investigator, that would have been probably better for Mr. Marshall at that time based on the funds and the investigators that you had at your availability as a public defender?
>
> A. . . . so I don't know what firsthand knowledge there was that we did not uncover. So assuming that, yes. (PC-R 2372)

The State recognizes that defense counsel has a duty to investigate mitigating evidence but argues that the investigation was sufficient in this case. The State specifically argues that defense counsel's interview with Mr. Marshall, his hiring of an expert who spent less than one hour with Mr. Marshall, his one telephone call to his father and his meager attempt to contact an Aunt Barbara amount to a sufficient investigation. Mr. Marshall wholeheartedly disagrees. If this Court were to adopt the State's interpretation

regarding sufficient investigation for mitigation, the death penalty would be constitutionally suspended in Florida.

The State would like this Court to believe that Mr. Barnes, Mr. Marshall's trial counsel, stated on the record that he had nothing to go on and that pursuing further investigation would have been a "fishing expedition." Answer Brief pg. 18. **However**, that is not what Mr. Barnes said and the record refutes the State's version of the evidence. The State cuts Mr. Barnes statement off just in time to leave out a crucial part of his sentence. In reality Mr. Barnes states: ". . . I want to say a fishing expedition because that's what you probably do first in capital cases. . . . In every capital case you should talk to as many family members, friends, everyone that you can. . . " (PC-R 2362) Additionally, the State asserts that the court "agreed that Mr. Barnes conducted a reasonable investigation...finding the following facts." **However**, nowhere in the court's order does it make findings regarding credibility of witnesses nor weight to be given to the evidence. The court's finding of facts simply restates the evidence presented during the evidentiary hearing.

Additionally, the State makes pages of assertions that the mitigation evidence presented was "weak and suspect." (Answer Brief pg.20). However, this would be the State's own interpretation of the evidence. The lower court made no such credibility findings.

Additionally, what other interpretation can the State make when the record so strongly indicates counsel’s deficient performance through days of testimony.

Upon a proper and thorough investigation in post-conviction, evidence was presented showing overwhelming and unrefuted evidence of severe child abuse inflicted upon Mr. Marshall. Outside of the State's own personal views, nothing in the record refutes the sincere and tearful testimony from family members recalling Mr. Marshall's abusive upbringing.

In furtherance of their factually unsupported argument that Mr. Marshall was not the victim of abuse, the State references Mr. Marshall's denial to Dr. Woods that he was abused. Included in the State's Response is the following selection from Dr. Woods' testimony: "He describes an idyllic, fairly solid, middle class family. His description of his father's discipline was that it was stern, but not abusive." (State's Response p. 21). Curiously, the very next sentence in the State's Response appears to be a "note-to-self" which was inadvertently not deleted for the final copy of the State's Response: "(Notes says father's discipline brutal R 1984, check this out)." This is quite telling because the actual testimony from Dr. Woods was that "[h]e (Matthew Marshall) did acknowledge that his father had been somewhat brutal in his discipline. He described him as a buck sergeant." (PC-R. 1984). Thus, contrary to the State's

opinion based upon evidence they wish to ignore, Dr. Woods had strong reason to support his medical opinion that Mr. Marshall was abused, but that his denial was symptomatic of his mood disorder. The State takes issue with Dr. Woods' clinical opinion that Mr. Marshall's denial of abuse is symptomatic of his mood disorder. However, not only did Dr. Woods explain that denial is a feature of Bi-polar II disorder, but the State's own witness, Dr. Klass acknowledged that denial is a component of Bi-polar II disorder, although not an essential feature. (PC-R 2632). Once again, the State substitutes it's own opinion of the evidence that is not born out in the record nor found by the lower court judge.

Furthermore, the State indicates that there was no independent evidence of abuse yet fails to mention that police and authorities had little if no interest in Liberty City (a notoriously dangerous high crime area at the time of Mr. Marshall’s childhood as well as today) in the 60's and 70's right when the civil rights movement was in full swing. The State also indicates that police reports and 911 records (calls which would have occurred between 20 and 30 years ago) would be available today. This assertion is not supported by any evidence. It is peculiar to claim 911 calls that were made 30 years ago could be retrieved at this time. Finally, as the record demonstrates, there is not a shred of evidence contradicting the family members testimony.

The State also fails to mention the medical records of Mrs. Marshall, Matthew Marshall's mother, which indicate her mental disorder and the fact that she was stabbed. Finally, the State questions Mr. Marshall's mental deficiencies. However, the record is clear that both the mental health experts agree on Mr. Marshall's bipolar disorder and neuropsychological deficits. Dr. Klass's opinion of Mr. Marshall was completely discredited on cross examination and it is undisputed that he spent less than one hour with Mr. Marshall before his sentencing.

The State's reliance on Asay v. State, 769 So.2d 974 (Fla. 2000), Jones v. State, 732 So.2d 313 (Fla.1999) and Cherry v. State, 25 Fla. L. Weekly S719 (Fla. Sept. 28, 2000) is misplaced. All these cases had trial counsel who did a moderate job to find mitigation, they all had investigators and this Court found that even with the new mitigation the outcome would not have been different.

The instant case is more akin to Phillips v. State, 608 So. 2d 778, wherein counsel for Phillips testified at the postconviction hearing that he did virtually no preparation for the penalty phase. The only testimony presented in mitigation was that of Phillips' mother, who testified that Phillips was a good son who tried to help her when he was not in prison. The evidence presented during Phillips postconviction evidentiary hearing was markedly different as in the instant case. Additionally, Phillips jury vote for death was 7 to 5.

Id. at 782. This Court found in Phillips, that if one person on the jury would have been swayed by the mitigation evidence, the outcome would have been different because Phillips would have received a life sentence. Id.

In the instant case defense counsel was given the names and ages of all Matthew Marshall's brothers yet trial counsel never pursued it. Trial counsel, Cliff Barnes, admitted knowing the names and ages and admitted doing nothing to find them, not even a minimum effort of checking inmate records, a very easy task. Furthermore, Mr. Barnes never indicated that "...he did not have time to waste." Answer Brief pg. 24. Indeed, what Mr. Barnes did indicate is that he was overwhelmed with too many murder cases and did not have the proper investigative staff nor funds. (PC-R 2339, 2357-2358). This Court must find that Mr. Barnes' performance was deficient.

Mr. Barnes deficient performance caused Mr. Marshall to suffer actual prejudice. The State alleges that this evidence would have made no difference to Mr. Marshall. However, this Court on direct appeal reviewed the lower court's findings and in a 4 to 3 opinion upheld the lower court's over-ride of the jury's life recommendation based on "... 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). Had this evidence been investigated and presented, this Court could not have upheld the

lower court's over-ride. The trial court and thereafter this 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), Marshall v. State, 604 So.2d 799, dissenting opinion (Fla. 1992), cert. denied, 113 U.S. 2355 (1993). Therefore, to say that Mr. Marshall was not prejudiced is incorrect.

In attempting to refute the prejudice Mr. Marshall suffered, the State repeatedly uses an incorrect standard of law, and bolsters their incorrect standard with inapplicable cases. The State argues that "the question is whether in light of this additional mitigation evidence it is 'reasonably probable, given the nature of the mitigation offered, that this altered picture would have led to the imposition of a life sentence, outweighing the multiple substantial aggravators at issue in this case." The State cites to Rutherford v. State, 727 So.2d 216 (Fla. 1998) to support their position. The State continues with their argument by citing to more inapplicable death recommendation cases to support their incorrect standard: "Applying those cases to the facts at hand, there is no reasonable probability that mitigation evidence about Appellant's allegedly abusive childhood would have led to the imposition of a life sentence by the trial judge." (State's Answer Brief p. 27) Simply put, all the cases cited by the State can be distinguished by one major factor

among others, those cases were **NOT** jury over-ride cases. The standard is different when an over-ride is at issue. Tedder. “[J]ust as a Tedder inquiry has no place in a death recommendation case, see Franqui v. State, 699 So.2d 1312, 1327 (Fla.1997) (rejecting reliance on jury override cases in death recommendation case because such cases "entail[ ] a wholly different legal principle and analysis"); Watts v. State, 593 So.2d 198, 204 (Fla.1992) (same), the reciprocal holds true when a jury life recommendation is independently analyzed by the trial court and independently reviewed by this Court. In other words, the jury's life recommendation changes the analytical dynamic and magnifies the ultimate effect of mitigation on the defendant's sentence.” Keen v. State, 775 So. 2d 263, 285 (Fla. 2000). In Keen, the lower court adopted the same incorrect standard which the State is now arguing in Mr. Marshall's case. The lower court in Keen held "the mitigating evidence is wholly insufficient to outweigh the aggravating circumstances to support a life sentence." This Court made clear that "[t]he last line emphasized above indicates the wrong standard was ultimately applied in consideration of the jury's life recommendation. The singular focus of a Tedder inquiry is whether there is a reasonable basis in the record to support the jury's recommendation of life. Keen v. State, 775 So. 2d 263, 285 (Fla. 2000). Just as this Court reversed the lower court's over-ride in Keen, the same must be done here. Mr. Marshall received deficient

performance and suffered prejudice therefore a new sentencing is warranted.

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

The use of proper mental health assistance is a fundamental right and when Mr. Marshall was denied such assistance by the lower court and through ineffectiveness of counsel his Constitutional right to Due Process and Equal Protection were denied. Ake v. Oklahoma, 470 U.S. 68 (1985). Contrary to the State's assertion such issues are cognizable on collateral appeal.

It is interesting that the State is willing to selectively rely on Dr. Klass' opinion who spent less than one hour with Mr. Marshall and testified during the evidentiary hearing regarding Mr. Marshall strictly from review of records. Thereafter, the State then accuses Dr. Woods of having an erroneous opinion regarding Mr. Marshall's mother because he only reviewed her medical records. Either an expert can rely strictly on medical records or they can't but it would be illogical to apply one standard to one's own witnesses and a different standard to opposing sides witnesses. In any event, Dr. Woods testified that his opinion was based not only on her medical records but the reporting of the family members as well. (PC-R 1985,

1987-1988)

Additionally, the State's assertion that Mr. Marshall does not suffer from organic brain damage understates the facts. Dr. Laterner conducted numerous hard data tests and opined that Mr. Marshall suffered from organic brain impairment.

The State's reliance on Jones v. State, 732 So.2d 313 (Fla. 1999)(Jones killed a police officer), Asay v. State, 769 So.2d 974, (Fla. 2000)(killed two people on a shooting spree) and Rutherford v. State, 727 So.2d 216 (Fla. 1998)(killed woman for money) is misplaced. In these cases defense counsel did obtain a proper mental health evaluation. The problem is that the evaluations did not yield a favorable result. In the instant case, however, a proper mental health evaluation was never obtained. The lower court unconstitutionally denied Mr. Marshall his fundamental right to adequate mental health assistance. The lower court knew that Dr. Klass was performing inadequately. The lower court also knew that Dr. Klass was not assisting counsel in any reasonable fashion. Yet, the lower court denied trial counsel the right to protect Mr. Marshall's rights by refusing to allow appointment of a different mental health expert.

Most importantly, the lower court never reached the critical question of prejudice resulting from the lack of mental health expert assistance. This Court stated in Rose that:

> . . .we consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order, Hildwin, 654 So.2d at 110; Santos v. State, 629 So.2d 838, 840 (Fla.1994), and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness. Hildwin, 654 So.2d at 110. For example, in Baxter the court held:
>
> We hold that Baxter suffered prejudice from his attorneys' failure to conduct a reasonable investigation into his background. Psychiatric mitigating evidence "has the potential to totally change the evidentiary picture." Middleton [v. Dugger], 849 F.2d [491] at 495 [(1988)]. We have held petitioners to be prejudiced in other cases where defense counsel was deficient in failing to investigate and present psychiatric mitigating evidence. See Stephens v. Kemp, 846 F.2d 642, 653 (11th Cir.) ("prejudice is clear" where attorney failed to present evidence that defendant spent time in mental hospital), cert. denied, 488 U.S. 872, 109 S.Ct. 189, 102 L.Ed.2d 158 (1988); Blanco [v. Singletary], 943 F.2d [1477] at 1503; Middleton, 849 F.2d at 495; Armstrong v. Dugger, 833 F.2d 1430, 1432-34 (11th Cir.1987) (defendant prejudiced by counsel's failure to uncover mitigating evidence showing that defendant was "mentally retarded and had organic brain damage"). . . Phillips v. State, 608 So.2d 778, 783 (Fla.1992) (prejudice established by "strong mental mitigation" which was "essentially unrebutted"), cert. denied, 509 U.S. 908, 113 S.Ct. 3005, 125 L.Ed.2d 697 (1993); Mitchell v. State, 595 So.2d 938, 942 (Fla.1992) (prejudice established by expert testimony identifying statutory and nonstatutory mitigation and evidence of brain damage, drug and alcohol abuse, and child abuse); State v. Lara, 581 So.2d 1288, 1289 (Fla.1991) (prejudice established by evidence of statutory mitigating factors and abusive childhood).

Although the above reference to ineffective assistance of counsel cases wherein counsel failed to obtain mental health assistance is relevant to the analysis in this case the underlying issue is somewhat different. The issue in the instant case is whether the lower court erred by denying Mr. Marshall the right to

adequate mental health assistance. Because the evidence presented overwhelmingly shows that Mr. Marshall was denied even minimal access to an adequate mental health evaluation, there can be no doubt that prejudice has occurred.

REPLY TO POINT 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

As the State noted, the standard of review in reviewing a trial court's application of the law to a rule 3.850 motion following an evidentiary hearing, is “[a]s long as the trial court's findings are supported by competent substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court." Blanco v. State, 702 So. 2d 1250 (Fla. 1997) Thereafter, the State refers to another standard of review set forth in Cade v. Haley, 222 F. 3d 1298 (11th Cir.2000)(underlying findings of fact are subject only to clear error review) and attempts to assert that this Court should add this standard on top of the standard already utilized by this Court. However, this Court is under no obligation to use a standard

of review utilized by a Federal appellate court reviewing a Federal District Court's findings.

As stated in Point II, the lower court never made any findings regarding the credibility of witnesses nor weight to be given to the evidence. The evidence set forth in support of this claim speaks for itself. George Mendoza and David Marshall were housed together in the same cell for nearly ten years. Defense counsel was not aware of this promise. Additionally, Mr. Barnes testified that Mendoza and Marshall were lovers and had he known about the undisclosed promise he certainly would have used it to impeach Mendoza. The State argues the inmates were housed together for security reasons and that the jury would have understood the reason to keep them together for security purposes. Conversely, most people have no idea what prison is like and would not have understood what would have happened to Mendoza and Marshall had they been known as snitches. Finally, there is nothing in the record to support the State's argument.

REPLY TO POINT IV

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

The State's reliance on Zeigler v. State, 452 So.2d 537 (Fla.

1984) is misplaced. Zeigler refers to claims which could have or should have been raised on direct appeal and were therefore not cognizable within a 3.850 motion. This Court has determined that error which is properly raised in a 3.850 motion may be examined cumulatively. See Gunsby v. State, 670 So.2d 920, 921 (Fla. 1996).

In Gunsby, this Court agreed with the trial judge's finding that Gunsby was entitled to a new penalty-phase proceeding, but this Court also found that Gunsby was entitled to a new guilt-phase proceeding. This Court stated,"We reach this conclusion based on the **combined effect of the errors in this case**, which include the State's erroneous withholding of evidence, the ineffective assistance of counsel in failing to discover evidence, and newly discovered evidence reflecting that this was a drug-related murder rather than a racially motivated crime." (Emphasis added) Id. It is therefore clear that it is certainly appropriate for the error which occurred in Mr. Marshall's case to be reviewed cumulatively. When the error is reviewed in such a manner the combined effect warrants a new trial and sentencing.

POINT V

THE LOWER COURT ERRED BY SUMMARILY DENYING MERITORIOUS CLAIMS

In the instant case the lower court did not state it's

rationale nor attach specific parts of the record to refute the claims presented. Both Mr. Marshall and the State rely on Anderson v. State, 627 So. 2d 1170 (Fla. 1993), for their arguments. This Court in Anderson did hold that a trial court must either state it's rationale in its decision or attach those specific parts of the record that refute the claims. Id. at 1171. In Anderson the lower court's order read in part ". . . [s]aid Motion is facially insufficient because the allegations thereof set forth grounds which were or should have been raised on direct appeal and/or contain mere conclusions." Id. No portions of the record were cited or appended to the one-page order in Anderson. Id. This Court thereafter appears to reverse the case so that Anderson can pursue public records and amend his motion. It can be argued that because the lower court's order in the instant case summarily denies Mr. Marshall's claims in a similar fashion to that in Anderson, then it follows that the order in the instant case did not meet the standard set forth for a proper denial of claims.

Moreover, since Anderson, this Court has further articulated what amounts to a sufficient order. "[A}n 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 v. State, 769 So.2d 974 (Fla. 2000), citing, Diaz v. Dugger, 719 So.2d 865, 867 (Fla.1998). In Asay the trial court's order set

forth a clear rationale explaining why each claim was summarily denied, satisfying the requirements of Diaz. Id. No such rationale was articulated in the instant case. The lower court's meager order and lack of rationale is cause for reversal.

CONCLUSION AND RELIEF SOUGHT

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 July 31, 2001.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief complies with the requirements of rule 9.210(a) & (d), Fla. R. App. P. (2001).

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