IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1435

ANTHONY NEAL WASHINGTON,

Appellant,

v.

STATE OF FLORIDA

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

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

The following symbols will be used to designate references to the record in the instant case:

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

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

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Washington lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Washington accordingly requests that this Court permit oral argument.

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STATEMENT OF THE CASE

On April 12, 1990, a Pinellas County grand jury returned a three-count indictment against Appellant, Anthony Neal Washington (R. 1-8). The first count alleged the premeditated murder of Alice Berdat (R. 1). Count two charged that Appellant burglarized Berdat's dwelling and committed a battery upon her (R. 1). The third count alleged that Appellant committed a sexual battery upon Berdat using physical force likely to cause serious personal injury (R. 1).

On February 17, 1992, Appellant's trial counsel filed Defendant's 2nd Motion To Compel DNA Records (R. 949-951). A hearing was held on the motion February 25, 1992. Judge Downey entered his order on the motion February 28, 1992 (R. 863-864).

Appellant's jury trial took place on July 14-17, 1992, with the Honorable Susan F. Schaeffer presiding, replacing Judge Downey (R. 1979-2754). Prior to the commencement of the trial, Appellant's trial counsel filed a Motion in Limine attacking the DNA testimony, testing procedures and probability methods as not being generally accepted in the scientific community (PC-R. 1281-1283). The motion was ultimately denied, and the evidence admitted (R. 2005-2015, 2455-2523).

On July 16, 1992, Appellant's jury returned verdicts finding him guilty as charged on all counts of the indictment (R. 1505-1507, 2702).

The penalty phase was held on July 17, 1992 (R. 1670-1786, 2738-2754). After receiving additional evidence from the State and from the

defense, Appellant's jury recommended that Appellant be sentenced to life imprisonment (R. 1510, 2749-2750).

On August 6, 1992, Appellant filed a written memorandum addressing the sentence that should be imposed upon him (R. 1530-1536), followed by a supplemental memorandum on September 4, 1992 (R. 1553-1566). The State also filed an original and a supplemental sentencing memorandum, on September 1 and 4, 1992 (R. 1544-1552, 1567-1571).

At a hearing held on August 14, 1992, the court entertained arguments from counsel for the State and for the defense pertaining to what sentence Appellant should receive for the first degree murder (R. 1905-1916).

On September 4, 1992, the court denied Appellant's motion for new trial, which was filed on July 22, 1992, and imposed sentences (R. 1523-1525, 1918-1977). As to Appellant's murder conviction, the court overrode the jury's life recommendation and sentenced Appellant to die in the electric chair (R. 1572-1594, 1625, 1929-1977). The court found four aggravating circumstances (R. 1572-1580, 1931-1944): 1.) The capital felony was committed by a person under sentence of imprisonment. 2.) Appellant was previously convicted of another felony involving the use or threat of violence to the person. 3.) The capital felony was committed while Appellant was engaged in the crimes of burglary and sexual battery. 4.) The capital felony was especially heinous, atrocious or cruel. As for mitigating circumstances, the

court specifically rejected Appellant's age of 32 at the time of the offense as constituting a statutory mitigating circumstance, and did not find any other statutory mitigating factors to apply (R. 1580-1582, 1944-1947). The court found some nonstatutory mitigation in Appellant's positive character traits, but afforded it minimal weight (R. 1584-1587, 1957). The court also discussed, but rejected, several other proposed mitigating factors, including Appellant's potential for rehabilitation and/or ability to live within the prison system, drug abuse, emotional or psychological problems (including Appellant's childhood and family background), and that Appellant did not intend to kill the victim (R. 1582-1591, 1947-1969).

On direct appeal, Mr. Washington's conviction and sentence was affirmed. Washington v. State, 653 So.2d 362 (Fla. 1995). Mr. Washington then filed a Petition for Writ of Certiorari in the United States Supreme Court, which was denied on October 30, 1995. Washington v. Florida, 116 U.S. 387 (1995). On March 28, 1997, Mr. Washington filed his first Motion to Vacate Conviction and Sentence with Special Request for Leave to Amend.

On March 1, 1999, pursuant to Fla. R. Crim. P. 3.850, Mr. Washington filed his Amended Motion to Vacate Judgments of Conviction and Sentence (PC-R. 1-46). A hearing was held on August 12,1999, (PC-R. 614-688) in accordance with Huff v. State, 622 So.2d 982 (Fla. 1992). On October 5,1999, the circuit court issued an order granting

an evidentiary hearing on claims I(c), I(d) and I(g), as they pertained to the penalty phase of the trial. The remainder of the claims were summarily denied. An evidentiary hearing was held on November 18-19, 1999 (PC-R 689-917). Judge Susan C. Schaeffer entered an order on June 5, 2000, denying all claims of Appellant's 3.850 motion (PC-R. 282-307). Timely notice of appeal was filed on July 5, 2000 (PC-R. 598-599). This appeal is properly before this Court.

STATEMENT OF THE FACTS

A. TRIAL

In the penalty phase of Appellant's trial, the State put into evidence a judgment and sentence dated March 20, 1990, showing that Appellant entered a plea of nolo contendre to sexual battery and was sentenced to 15 years in prison (R. 1433-1437, 1691-1692), and a judgment and sentence dated July 20, 1988, showing that Appellant entered a plea of nolo contendere to burglary of an occupied dwelling with an assault or battery therein, and was sentenced to six years in prison (R. 1438-1443, 1691-1692). The state also called the victim of the prior sexual battery conviction to describe the details of the incident in the penalty phase of Mr. Washington's trial.

At penalty phase, the defense only called one lay witness, Appellant's mother, (R. 1723-1730) and one expert, Dr. Sidney Merin, who testified as to Appellant's rehabilitation potential (R. 1695-1722).

The mitigating circumstances upon which the jury was instructed were Appellant's age, and any other aspect of his character or record or background and any other circumstances of the offense (R. 2740-2741).

B. EVIDENTIARY HEARING

To prove the claim of ineffective assistance of counsel at the penalty phase, Appellant presented nine witnesses at the evidentiary hearing.

Appellant's mother, Willie Mae Washington, testified that she didn't know about the murder charge until an attorney called her to come up to Tampa for the trial (PC-R. 713). She stated that no investigator ever talked to her (PC-R. 713). She never spoke to the defense attorney about Appellant's background before she was put on the stand to testify in the penalty phase (PC-R. 714). The witness further explained that she did not testify about her son's drug use because she was not asked any questions by his attorney (PC-R. 716). She stated that the attorney never spoke to Appellant's childhood friends (PC-R. 715). The witness further testified that the family lived in Liberty City when Appellant was in elementary school, and moved to Carol City when he was about 14 years old and went to high school there (PC-R. 722). She also stated that Carol City borders Liberty City, and was a better place than Liberty City (PC-R. 722).

Ms. Washington testified that Appellant was drinking beer and

smoking cigarettes at age 14, and used pot as a teenager (PC-R. 702). His drug use worsened after high school and Ms. Washington believes that without drugs her son would have been a different person(PC-R. 711).

Holace Williams worked with Appellant in Appellant's father's construction company (PC-R. 728) and was his next door neighbor in Liberty City (PC-R. 727,728). Mr. Williams moved to Carol City along with Appellant's family (PC-R. 727). He stated that the families were close and that he knew Appellant from the time Appellant was a young child and had daily contact with Appellant when he was growing up (PC-R. 727,728). The witness testified that Appellant was a hard worker (PC-R. 738). Appellant started changing after he began to use drugs (PC-R. 729). Mr. Williams further stated that Carol City had a crime problem (PC-R. 729). Mr. Williams was still living in Carol City in 1992 and was available to testify in the trial, but was never contacted by Appellant's attorney (PC-R. 735).

Regina Batiste testified that she and Appellant met in 1973 and went to high school together (PC-R. 746). He was her first boyfriend(PC-R. 746). He "played plenty of ball and he worked as a teenager" and "was a good person"(PC-R. 746). She testified that Carol City was a good neighborhood, (PC-R. 746) but that there was a drug problem there and that it "got kind of rough" (PC-R. 747). As teenagers the witness and Appellant used marijuana and beer and about

1979 they started using crack, coke, THC and heroin (PC-R. 747). The witness stated that Appellant's drug use started out as social use and then got bad (PC-R. 750). Appellant's drug use got so bad that one night in 1987 Appellant came up to the witness and robbed her of a leather jacket (PC-R. 755,764). Ms. Batiste stated that she was never contacted about the case and would have been willing to testify at the trial (PC-R. 759). She further stated that the first she heard of the case was between 1993 and 1995 (PC-R. 758).

Maurice Houston testified that he is six years younger than Appellant and was a neighbor when he and Appellant were growing up in Carol City (PC-R. 767). He testified that Appellant's reputation was "all right", that he was a fighter, but wouldn't start trouble (PC-R. 772). Further, Mr. Washington kept young people straight, was looked up to and would not give them drugs (PC-R. 772-773). The witness was never contacted by the Appellant's attorney in 1992 and was available and would have testified (PC-R. 773).

Eric Bryant, a friend of Appellant's brother Dexter Washington, testified that Appellant played sandlot football during high school (PC-R. 786). Mr. Bryant described Carol City as a rough community with criminal elements and not a suburb like neighborhood (PC-R. 776). He further stated that in Carol City there were gangs and there was a section called Little Saigon because of the violence and shootings (PC-R. 785,787). Mr. Bryant knew Appellant to do drugs, including

marijuana, cocaine, heroin, valium, quaaludes and tuinals (PC-R. 789). He related a story of Appellant attempting to sell his mother's jewelry to obtain money for drugs and explained that Appellant was on crack cocaine, and that "crack will do that to people" (PC-R. 783). He stated that he was available to testify in 1992 but was never contacted by Appellant's attorney(PC-R. 783).

Dexter Washington, Appellant's brother, testified that Appellant contacted him while awaiting trial for the instant murder to bring him either drugs or money to buy drugs at the Pinellas County jail where he was being held (PC-R. 456,464,467-468). He testified that Appellant told him that drugs were available in the jail, but that he had no money to purchase them (PC-R 456-457,464).

Daniel Sprehe, M.D., a physician specializing in psychiatry, (PC-R. 850) was called to testify. Dr. Sprehe testified that he met with and examined Appellant a week before the evidentiary hearing (PC-R. 852). He stated that the main focus of his evaluation was to determine whether Appellant met the criteria of the Diagnostic and Statistical Manual of the APA (DSM-IV), the standardized and agreed upon criteria for diagnosing substance dependence and/or abuse (PC-R. 854). Dr. Sprehe opined that Appellant met the criteria for substance dependency disorder and a lesser pattern of substance abuse disorder based upon the history Appellant provided (PC-R. 854,856).

Dr. Sprehe testified that Appellant began using marijuana in

junior high school and crack cocaine by age twenty-two (PC-R. 852). He stated that crack cocaine was Appellant's drug of choice (PC-R. 853). Dr. Sprehe further stated that Appellant had a $40-$500 per week habit (PC-R. 852). To support his habit, Dr. Sprehe testified that "he had to steal to get drug money.... And **sometimes** he would sell drugs, though, and make **as much as** three thousand a week on drug sales" (emphasis added) (PC-R. 852,853). Dr. Sprehe stated that all of Appellant's criminal record was directly related to his need to get money immediately for drugs because of his habit (PC-R. 853).

Dr. Sprehe testified that the long term effect of cocaine use is increased impulsivity, because the main focus is getting more of the drug (PC-R. 853). He further stated that the impulsivity from long term use occurs even if a person is not using the drug at the time of the crime (854). This long term effect would not be present if a person stayed off the drug for a year or two, however Dr. Sprehe stated that this would not apply to Appellant because Appellant said he was using drugs while in the work release center (PC-R. 855).

Dr. Sprehe noted that Dr. Merin did not develop substance abuse history (PC-R. 857). Although the State recited numerous tests which Dr. Merin had given Appellant, (PC-R. 857,858) Dr. Sprehe stated that none of the tests given to Appellant by Dr. Merin's assistant at the time of the original trial bring out whether a person is a substance abuser because they do not bring out the historical information needed

to meet the criteria (PC-R. 858,859).

The State questioned Dr. Sprehe about Dr. Merin's evaluation process:

> Q. Right. The battery of tests was his third step in his evaluation process. The first step being the taking of the history, the second step being his own observations of the individual while he was doing the taking of the history?
>
> A. Yes. But let me caution you. Mr. Washington tells me that Dr. Merin was with him a very short time and then introduced his assistant who did all the history-taking and observing of him during this. And so Dr. Merin presented his testimony based on the summary of the assistant's work.

(PC-R. 860).

Dr. Sprehe disagreed with Dr. Merin's finding that Appellant had no emotional disorders, stating that substance abuse dependency is an emotional disorder (PC-R. 860). He went on to state that Appellant's condition could have been affecting his impulsivity and his desire to conform his conduct to the requirements of the law at the time of the crime (PC-R. 864).

Appellant's lead trial attorney, Franklyn Louderback, testified that prior to Mr. Washington's trial he had been involved in at least a dozen murder trials that involved a penalty phase (PC-R. 793). He was sure that he had inquired about friends, relatives and neighbors located in the Miami area that knew him and knew of his background (PC-R. 794). He could not recall how many people were in the group and his

independent recollection was that Appellant had at least indicated his mother (PC-R. 794). Mr. Louderback had no recollection as to how many defense witnesses from the Miami area he might have talked to (PC-R. 801), but any names Appellant had given them they would have tried to locate or speak to (PC-R. 807). The strategy at penalty phase was to present as much mitigation as they possibly could (PC-R. 810) and there was no tactical decision for not putting anyone else on to testify in penalty phase other than Appellant's mother and Dr. Merin (PC-R. 800-801).

Louderback could not recall if the subject of drug use ever came up in his discussions with Appellant (PC-R. 794). Likewise, he could not recall if he had asked Appellant's mother about his drug usage (PC-R. 798-799), and could not recall if he had spoken to her prior to her testifying (PC-R. 799,813), although he knew that either he or co-counsel spoke to her before she testified (PC-R. 798-799). When asked by the assistant state attorney if he had known about a girlfriend who would have testified about Appellant's drug use during high school, but that Appellant had robbed her later in life, would he have put that person on to testify, Mr. Louderback replied that he would never have put somebody like that on as a witness (PC-R. 812).

Tom McCoun, co-defense/penalty phase counsel, was called to testify. Mr. McCoun testified that he had some recollection of the case but that "it's not great" (PC-R. 824), and that he did not

remember any specific conversations with Appellant (PC-R. 825). He stated that the case was possibly initially with the public defender and that the Public Defender's office may have done some initial mitigation work-up as there were letters in his files going to schools and prisons (PC-R. 825). As to his own drug investigation he stated that he "would have done the standard work-up" (PC-R. 824). In referring to his notes, Mr. McCoun testified that in an interview with Appellant in May of 1992 there was mention of Appellant being involved with marijuana, quaaludes and cocaine, (PC-R. 827,842) and that the drug use led to burglaries and robbery (PC-R. 843). He further stated that the notes contained the names of friends and relatives that might be helpful in developing Appellant's drug use, however he did not have an investigator contact the witnesses because his practice was to go down and find and develop witnesses himself (PC-R. 827). In this case, however, he did not go down to Miami to find, develop or speak to witnesses (PC-R. 828). Mr. McCoun stated that if he had a phone number on the witnesses he would have tried calling them, however he had no recollection of whether he did or not (PC-R. 832). He further stated that failing to call witnesses who could testify about Appellant's childhood was not a tactical decision (PC-R. 829). He testified that Appellant's drug use was a significant fact (PC-R. 843), but he didn't think it was mitigating in this case because Appellant denied committing the crime (PC-R. 839):

> Q. Okay. Well, in Dr. Merin's testimony, after having done his battery of tests and his examination of the defendant, do you think it would have been very beneficial to present this particular jury with evidence of the fact that the defendant may have done drugs while he was in high school?
>
> Q. You know, we just – looking back at my notes, for instance, of the penalty phase, it seems to me that I may have made some passing mention of it, but it was just not a focus of what I was attempting to do.
>
> I think there are some cases when use of drugs can be a mitigating factor. And I have to say honestly that I don't think that it was a mitigation factor in the circumstance of this case, because we had a defendant who insisted and probably still insists that he didn't commit the offense.
>
> So I don't know that it lends – would have made a difference to the jury, because they recommended life anyway.

(PC-R. 839).

Mr. McCoun testified that in penalty phase he was trying to develop that the defendant had a useful existence and family support, and could live in a confined setting and had potential for rehabilitation (PC-R. 837). His focus was to convince the jury that Appellant did not intend to kill the victim, but to render her unconscious as he had to the victim of the previous rape (PC-R. 837,838).

The state presented no witnesses during the evidentiary hearing, and Judge Schaeffer denied all claims from the Fla. R. Crim. P. 3.850

Motion to Vacate in her June 5, 2000 Order (PC-R. 282-307).

SUMMARY OF ARGUMENT

1. Trial counsel was ineffective at the penalty phase of his jury trial for failing to investigate and present mitigating evidence.

2. Trial counsel was ineffective at the guilt phase of his jury trial for failing to request a *Frye* hearing on the issue of DNA evidence.

3. The lower court erred in denying Mr. Washington's claim that Mr. Washington's sentence of death under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States constitution and corresponding provisions of the Florida Constitution is invalid because the sentencing court failed to give great weight to the jury's recommendation of life imprisonment.

4. The lower court erred in denying Mr. Washington's claim that Mr. Washington's sentence of death under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution is invalid because the jury instructions in both the guilt/innocence and penalty phase of the trial were constitutionally invalid.

5. The lower court erred in denying Mr. Washington's claim that Mr. Washington's sentence rests upon an unconstitutionally automatic aggravating circumstance, in violation of Stringer v. Black, Maynard v. Cartwright, Hitchcock v. Dugger, and the Sixth, Eighth, and Fourteenth Amendments.

6. The lower court erred in denying Mr. Washington's claim that Mr. Washington's trial court proceedings were fraught with procedural and substantive errors, which cannot be harmless when viewed as a whole since the combination of errors deprived him of the fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth Amendments.

7. The lower court erred in denying Mr. Washington's claim that Florida's capital sentencing statute is unconstitutional on its face and as applied for failing to prevent the arbitrary and capricious imposition of the death penalty. And for violating the constitutional guarantee prohibiting cruel and unusual punishment, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

ARGUMENT I

THE LOWER COURT ERRED IN DENYING MR. WASHINGTON'S CLAIM THAT MR. WASHINGTON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AND AS A RESULT, MR. WASHINGTON'S DEATH SENTENCE IS UNRELIABLE.

The standard of review in this claim is a mixed question of law and fact requiring a *de novo* review with deference only to the factual findings by the lower court, Stephens v. State, 748 So.2d 1028 (Fla. 1999).

At the evidentiary hearing Mr. Washington presented evidence substantiating his claim of ineffective assistance of counsel at the penalty phase of trial.

To sustain a claim of ineffective assistance of counsel, the defendant must prove both prongs of the test pronounced by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). One prong of the Strickland test is for the defendant to demonstrate that his counsel's performance was deficient. This first prong involves showing that defense counsel's errors were so serious that counsel did not function as "counsel" as guaranteed by the Sixth Amendment to the United States Constitution. In assessing the performance standard the court must measure the reasonableness of counsel's performance from viewing all the circumstances in light of

the prevailing professional norms. The other prong of the Strickland test requires the defendant to demonstrate that his counsel's deficient performance prejudiced the defense. In assessing prejudice the court must determine "whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The court must evaluate this second prong in light of the totality of the evidence at trial since, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Id. 696.

The standard to be applied when dealing with ineffectiveness claims in the penalty phase is whether the defendant can establish that but for counsels' errors he would have probably received a life sentence. (See Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995); Rose v. State, 675 So.2d 567 (Fla. 1996)).

A. COUNSEL WAS INEFFECTIVE FOR FAILURE TO PRESENT MITIGATING EVIDENCE.[1]

Trial counsel failed to investigate, discover and present mitigation testimony from lay witnesses and an expert which would have provided additional reasonable basis for the jury's life recommendation and bolstered existing mitigators to such an extent that a jury override could not have been sustained. Counsel did not contact

[1] This was Claim I D. in the Amended 3.850.

friends, neighbors or relatives of Mr. Washington, besides his mother who testified at the evidentiary hearing that trial counsel never spoke to her about her son's background before she was put on the stand to testify in the penalty phase (PC-R. 714), that counsel did not ask her any questions about her son's drug use (PC-R. 716) and that counsel never spoke to Appellant's childhood friends (PC-R. 715).

Had trial counsel made any effort to investigate mitigation on behalf of Mr. Washington he would have found and been able to present that Appellant had in fact grown up in Liberty City and moved to Coral City, an area bordering Liberty City, when he started high school (PC-R. 722); that Coral City, while "better" than Liberty City, had a drug (PC-R.747), crime (PC-R. 729) and gang problem (PC-R. 785), and was a rough community with criminal elements and was not a suburb-like neighborhood (PC-R. 776); that although Mr. Washington would get into fights growing up in this rough neighborhood, he would not start trouble (PC-R. 772); and that Mr. Washington played a lot of ball during high school (PC-R. 746) including sandlot football (PC-R. 786).

Through a proper investigation, counsel would have discovered and could have presented that Appellant began using drugs as a teenager (PC-R. 702) and his drug use got worse after high school (PC-R. 711); that by 1979 Appellant was using crack cocaine, THC and heroin (PC-R. 747); further, that Appellant's drug of choice was crack cocaine (PC-R. 853), and his habit was so severe that he had to steal and sell drugs

in order to support his crack cocaine habit (PC-R. 852).

Counsel would have learned that crack cocaine is such a nefarious drug addiction that people will steal even from family and friends to support the addiction (PC-R. 783). Further, counsel would have discovered that Appellant's drug abuse continued even after his incarceration and while he was housed at the Largo Work Release Center in 1989 (PC-R. 855).

Although trial counsel stated that failing to investigate and call witnesses who could testify about Appellant's childhood was not a strategic decision (PC-R. 829), the lower court relies on several reasons for denial of this claim in her order.

First, the lower court states that:

> [Appellant's] serious drug addiction that provides these disorders, carries baggage that a sentencing jury would have to hear that his trial lawyer didn't want them to hear.

(PC-R. 301).

Although a novel theory propounded by the trial court in its leading cross examination of trial counsel, it is misleading. Child abuse is a negative to jurors. Being the victim of child abuse is not. Likewise, drugs may be a negative to jurors, however, being the victim of drugs, i.e., a drug addict, is not. It is mitigation. The trial court knows it, trial counsel should have known it.

The lower court next states:

> He [trial counsel] didn't want the Pinellas

> county jury to know he [Appellant] committed a felony every time he used cocaine, stole a gun, took a lady's purse, committed a burglary, or sold drugs.

(PC-R. 301).

The simple answer to this is presentation at the Spencer hearing. Even if presented to the jury however, knowing of his violent priors, including the prior rape, the jury voted for life. The non-violent priors could not have been seen as more horrifying to the jury than the priors they did hear about. In addition, the drug addiction testimony would have explained the crimes, and the evidence of the crimes in fact would have bolstered the testimony of the seriousness of Appellant's drug addiction.

Additionally, the evidence would have only proved to bolster the other mitigation evidence presented at trial of rehabilitation potential, which the lower court found not to exist due to Appellant's past criminal history of which the jury was not aware. This past criminal history is offset by the drug addiction mitigation, which also explains the criminal history and bolsters the argument of rehabilitation potential. All of Appellant's prior crimes were caused by his drug addiction (PC-R. 853). Solve the drug addiction and you have rehabilitated the person from future criminality. This is something any reasonable juror could understand. Presenting this testimony would not only have provided drug addiction and the non-statutory mental mitigation, but would have provided the additional

non-statutory mitigator of rehabilitation potential as a reasonable basis for the life recommendation.

Again, if counsel felt the jurors should not hear the testimony, the alternative was presenting this in the Spencer hearing. There can be no strategic decision on the part of trial counsel not to have pursued this course.

The lower court goes on to state that if the jury "[h]ad [] known all this, they may well have recommended a death sentence." (PC-R. 301).

This is purely speculation on the part of the trial court. However, it is not an issue in that trial counsel could have presented the evidentiary testimony through the lay witnesses and a second expert witness at the Spencer hearing rather than to the jury at penalty phase.

At the evidentiary hearing, trial counsel stated:

> I think there are some cases when use of drugs can be a mitigating factor. And I have to say honestly that I don't think that it was a mitigation factor in the circumstance of this case, because we had a defendant who insisted and probably still insists that he didn't commit the offense.

(PC-R. 839).

Trial counsel's statement that he did not believe Mr. Washington's drug addiction was a mitigator because he denied committing the murder is bizarre. His testimony would lead one to believe that if a

defendant claims innocence there can be no mitigation presented. There is absolutely no rationale presented in the attorney's testimony which supports how Appellant's drug addiction would have contradicted the guilt phase theory that he was not the person who committed the murder. This non-rational statement cannot form the basis of a valid strategic decision.

The reason the testimony was not presented to the jury or the court at the Spencer hearing is counsels' ineffectiveness for failing to investigate the matter. Trial counsel certainly had enough information from interviewing Appellant to recognize the need to investigate this mitigation evidence. There was no down side to presenting this evidence to the court at the Spencer hearing. His failure to investigate and present the evidence is below the standard of acceptable performance by counsel.

State and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration. See Phillips v. State, 608 So. 2d 778 (Fla. 1992); State v. Lara, 581 So. 2d 1288 (Fla. 1991); Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Bassett v. State, 541 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929, 930 (Fla. 1988); O'Callaghan v. State, 461 So. 2d 1154, 1155-56 (Fla. 1984). See also Eutzy v. Dugger, 746 F. Supp. 1492 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th

Cir. 1990); Harris v. Dugger, 874 F. 2d 756 (11th Cir. 1989); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded for reconsideration, 104 S.Ct 3575, adhered to on remand, 739 F.2d 531 (11th Cir. 1984); King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), vacated and remanded, 104 S.Ct 3575 (1984), adhered to on remand, 748 F.2d 1462 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985). See also Kenley v. Armontrout, 937 F.2d 1298, 1304 (8th Cir. 1991) (counsel's performance may be found ineffective is s/he performs little or no investigation); Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991) (an attorney is charged with knowing the law and what constitutes mitigation); Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989) (at a capital penalty phase, "[d]efense counsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and focus the jury on any mitigating factors"); Eldridge v. Atkins, 665 F.2d 228, 232 (8th Cir. 1981) ("[i]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty").

It is certainly not unreasonable to expect counsel to seek out and present testimony on the life history of their client. This did not occur in Mr. Washington's case.

There was no valid strategic decision of counsel to not investigate and present evidence of Appellant's drug addiction. The trial court is engaging in the same hindsight warned against in Strickland in order to attempt to justify trial counsel's ineffectiveness, Id. 466 U.S. at 689, 104 S.Ct. at 2065.

Mr. Washington was prejudiced by deficiency in counsels' presentation of such mitigation evidence. Had counsel presented such evidence it would have provided the jury with a reasonable basis for their life recommendation and prevented the lower court from validly overriding and sentencing Appellant to death.

B. COUNSEL WAS INEFFECTIVE FOR FAILURE TO PROVIDE MR. WASHINGTON'S MENTAL HEALTH EXPERT WITH ADEQUATE BACKGROUND INFORMATION TO PERMIT A MEANINGFUL EVALUATION OF MR. WASHINGTON FOR THE PRESENCE OF MITIGATION OR INTOXICATION AND/OR DRUG ABUSE NEGATING SPECIFIC INTENT.[2]

At the evidentiary hearing, Mr. Washington put forth evidence which established that trial counsel was ineffective for failing to provide Mr. Washington's mental health expert with adequate background information to permit a meaningful evaluation of Mr. Washington for the presence of mitigation which could be presented to the jury. Specifically, trial counsel was proven ineffective for failing to provide Dr. Merin with information on Appellant's drug use and for failing to have Merin evaluate Appellant for drug dependency.

Had counsel conducted a proper investigation they would have

[2]This was Claim I C. in the Amended 3.850.

discovered that Mr. Washington had been smoking marijuana since age fourteen (PC-R. 702), and by 1979 was using crack cocaine, THC and heroin (PC-R. 747); that Mr. Washington's drug of choice was crack cocaine (PC-R. 853), and his habit was so severe that he had to steal and sell drugs in order to support his crack cocaine habit (PC-R. 852). Counsel would have discovered that Appellant's drug abuse continued even after his incarceration and while he was housed at the Largo Work Release Center in 1989 (PC-R. 855).

Had Dr. Merin been armed with this background information he would have conducted a proper historical interview with Appellant and conducted it himself rather than through an assistant in order to make a proper diagnosis (PC-R. 859). In his interview inquiring specifically as to drug usage, Dr. Merin would have elicited the information previously missed that Mr. Washington had used drugs extensively since high school, and continued to use crack cocaine while in the Largo Work Release Center prior to the murder (PC-R. 855). Further, Dr. Merin would have given Mr. Washington the DSM-IV test and would have found that Appellant met the criteria of the diagnostic and statistical manual of the APA, which is the standardized agreed upon set of criteria for diagnosing substance dependence, and would have been able to render a diagnosis in court of substance dependency disorder, an emotional disorder and a non-statutory mental mitigator (PC-R. 854). This Court has found mental mitigators to carry great

weight. See White v. State, 664 So.2d 242, 247 (Fla. 1995) (We have consistently characterized mental mitigation as one of the "weightiest mitigating factors"); Santos v. State, 629 So.2d 838, 840 (Fla. 1994); Hildwin V Dugger, 654 So.2d 107 (Fla. 1995). This Court has also found that an extensive history of substance abuse constitutes strong nonstatutory mitigation. Clark v. State, 609 So.2d 513, 516 (Fla. 1992).

Dr. Merin could additionally have testified that an affect of long term habitual abuse of cocaine is an increase in impulsivity (PC-R. 853) and could have been affecting Appellant's desire to conform his conduct to the requirements of the law (PC-R. 864). Also, Dr. Merin would have testified that the long-term affects in people off drugs at the time of the crime would still be present, that is, it would still affect Appellant's impulsivity (PC-R. 854).

The lower court erred in its denial of the ineffective assistance of counsel claims by making findings of fact which were not supported by substantial competent evidence, by applying the wrong legal standard, and in making an improper conclusion of law that no ineffective assistance of counsel existed.

The lower court stated in the order denying Appellant's 3.850 motion:

> Judge McCoun didn't want the jury to know the defendant was a drug addict. He didn't want them to know the defendant sold drugs, sometimes making $3,000 per week, robbed his girlfriend and

> others, and stole from his mother, his brother and many others, to support his drug habit.

(PC-R. 301).

However, Mr. McCoun was not aware that Appellant was a drug addict; he did not know that Appellant sold drugs, or robbed his former girlfriend or others; that he stole from his mother, brothers or others to support his habit. He did not know these things because he had not spoken to any witnesses or looked into the issue to be aware of them so he could make a reasonable decison on whether to investigate or to provide the information to Dr. Merin or a jury. The lower court makes these statements as to trial counsel's reasoning to deny Appellant's claim of deficiency by employing the "distorting effects of hindsight" forbidden by Strickland (i.e., getting trial counsel to say today that he would have done things differently had he known facts at trial).

In Strickland the United States Supreme Court stated: "In other words, counsel has a duty to make a reasonable investigations, or make a reasonable decision that makes particular investigation unnecessary." 466 U.S. at 691. In this case trial counsel did neither.

The unreasonable performance of counsel in failing to provide Mr. Washington's mental health expert with adequate background information to permit a meaningful evaluation of Mr. Washington for the presence of mitigation of drug abuse prejudiced Mr. Washington in the penalty phase.

In this case it is clear that but for counsels' errors the trial

court could not have overridden the jury life recommendation as there would have been a reasonable basis for the jury decision that the Appellant should receive a life sentence supported by the mitigation evidence in the record. This testimony should have been presented to the jury, or to the trial court at the Spencer hearing, of substantial long term habitual drug abuse, a non-statutory mental health mitigator of an emotional disorder of substance abuse disorder, and increased impulsivity, through the lay witnesses presented at the evidentiary hearing and expert testimony.

This Court has found that an extensive history of substance abuse constitutes strong non-statutory mitigation. Clark v. State, 609 So.2d 513, 516 (Fla. 1992). In this case the evidence of Mr. Washington's drug abuse was uncontroverted as was the expert testimony of Dr. Sprehe as to Appellant's substance dependency disorder and his continued use of crack cocaine even while in the work release center prior to the murder, although not at the time of the murder, and the effect the substance abuse disorder would have on Mr. Washington at the time of the murder even though not under the influence at the time of the murder. In his testimony, Dr. Sprehe stated:

> Q. Okay. Can long-term habitual drug use such as that to which you have testified affect one's demeanor even after the use has ended?
>
> A. Yes. I – Let me just state that if someone really has a drug treatment program and stays off the drug for a

> year or two, it probably would not affect long-term use. Cocaine, for instance, would not affect their behavior.
>
> But that didn't apply to this individual who told me that he was even using drugs while in the Largo center. He was obtaining them there.

(PC-R. 855).

> THE COURT: So drugs weren't interfering with his cognitive ability, at least at that time?
>
> THE WITNESS: No. I don't think they were interfering to the extent of knowing the difference between right and wrong, knowing his legal position, that sort of thing. They could have been affecting his impulsivity and his desire to conform his conduct to the requirements of the law.

(PC-R. 864).

This Court has held that "whenever a reasonable quantum of competent, uncontroverted evidence of mitigation has been presented, the trial court must find that the mitigating circumstance has been proved. Spencer v. State, 645 So.2d 377 (Fla. 1994). Additionally, a "jury's life recommendation changes the analytical dynamics and magnifies the ultimate effect of mitigation on the defendant's sentence" Keen v. State, 775 So.2d 263 (Fla. 2000) at 285.

There was no strategic decision not to provide Dr. Merin with the witnesses and background information of Mr. Washington's drug abuse

history, as it is clear from the record presented at the evidentiary hearing that counsel was unaware of the evidence available due to their failure to properly investigate the case. Although counsel interview notes with Appellant mention his involvement with marijuana, quaaludes and cocaine (PC-R. 827), no investigator was sent to locate witnesses on Mr. Washington's behalf because "my practice, frankly, was to go myself and try to develop witnesses and that kind of thing" (PC-R. 827). However when asked at the evidentiary hearing if he had gone to Miami where Appellant grew up and where his family still lived to locate and develop witnesses, Mr. McCoun stated:

> Q. All right. Do you have any records of having personally gone to Miami or having gone down to try to talk to witnesses?
>
> A. Not in relation to this case.

(PC-R. 828).

In Torres-Arboleda v. State, 636 So.2d 1321 (Fla. 1994), the court was faced with a similar situation as here. At penalty phase the defense presented a psychologist who testified that the defendant was intelligent and an excellent candidate for rehabilitation. Id. at 1325. The jury returned a life recommendation for Mr. Torres-Arboleda, which the trial court overrode. Id. at 1323. This Court in reversing that decision found "Counsel made no attempt to investigate Torres-Arbodela's family history and background". Id. at 1326. Here, counsel talked to Mr. Washington, but never attempted to investigate to see if

there was mitigation evidence. An interview of a defendant and proceeding no further is not an investigation. In Asay v. State, (2000 WL1587997), this Court stated: "This Court has found counsel's performance was deficient where counsel 'never attempted to meaningfully investigate mitigation' although substantial mitigation could have been presented."

C. THE SENTENCING COURT'S INABILITY TO FIND AND APPLY VARIOUS MITIGATING CIRCUMSTANCES BECAUSE INEFFECTIVE PRESENTATION OF MITIGATING EVIDENCE VIOLATED THE EIGHTH AMENDMENT.[3]

Had trial counsel properly prepared and presented a mitigation case, Appellant would have received a life recommendation from the jury which the trial court would not have been permitted to override.

The trial court's order denying this claim stated:

> If the jury had recommended life, which I doubt, not much would have changed in my original sentencing order. I would note the following changes:
>
> A. Category 2: Defendant's positive contributions to his community or society, as evidenced by an exemplary work, military, family, or other record. The positive character traits would be less than in the original order. The defendant may have been kind to his mother, but he also stole her very own jewelry to support his drug habits. He was a clear menace to the neighborhood. He was always fighting and was violent when on drugs. He sold drugs in his neighborhood. He stole from his

[3]This was Claim I G. in the Amended 3.850.

brother and robbed and stole from his friends and others to support his habit. He did not play football, as originally thought. The minimal weight given to this category in my original sentencing order would lessen, or actually disappear altogether. Therefore, the category would produce no mitigation when taken together as a whole. (Exhibit A,pp. 14-16).

B. Category 3: Defendant's drug use. I would find the defendant once had a serious drug abuse problem, which would be mitigating. However, I would still find, as I did in my original order, that there was no evidence of any drug use at or around the time of the murder and, therefore, the mitigation of substance abuse, in the context of this murder, was entitled to very little weight. (Exhibit A,p. 16).

C. Category 3: Defendant's emotional or psychological problems, including defendant's childhood and family background. In discussing the defendant's emotional or psychological problems, I would find that he suffered from an emotional disorder of substance dependency, a disorder brought on by his long-term drug abuse. This may have increased his impulsivity at the time of the murder and rape, his "I don't care" attitude, as suggested by Dr. Sprehe. But, because he was not using drugs when he committed the burglary, rape, and murder, this additional information would still not rise to a mitigating circumstance in the context of the court's entire discussion of this category. (Exhibit A, pp. 16-17).

> My conclusion would be the same as it was in my original sentencing order, for all the reasons stated herein and therein: The aggravating circumstances in this case so far outweigh the mitigating circumstances that a sentence of death is so clear and convincing that virtually no reasonable people, armed with all the facts and all the law could differ. (Exhibit A,pp. 22-23).

(PC-R. 305,306) (emphasis in original).

The lower court erred in its finding that there was no evidence of Appellant's use of drugs while in the Largo Work Release Center around the time of the murder. There was testimony from Dr. Sprehe as to Appellant's use of drugs at that time, (PC-R. 855). This testimony was unrebutted. A reasonable jury could have believed this testimony and "such a determination could only have been bolstered by the fact that the state presented nothing to rebut the evidence", Keen v. State, 775 So.2d 286 (Fla. 2000). Therefore, the lower court erred in assigning Appellant's drug use very little weight.

The lower court erred in failing to find Appellant's emotional disorder as a mitigating circumstance. The lower court stated in its order:

> I would find that he suffered from an emotional disorder of substance dependency, a disorder brought on by his long-term drug abuse. This may have increased his impulsivity at the time of the murder and rape, his "I don't care" attitude, as suggested by Dr. Sprehe. But, because he was not using drugs when he committed the burglary, rape, and murder, this additional information would still not rise to a mitigating circumstance....

(PC-R. 305).

This Court has found mental mitigation to be of great weight. White v. State, 664 So.2d 242 (Fla. 1995) (We have consistently characterized mental mitigation as one of the "weightiest mitigating factors") 664 So.2d at 247; Santos v. State, 629 So.2d 838, 840 (Fla. 1994); Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995).

Dr. Sprehe's unrebutted testimony was that the effects from the long term use of crack cocaine, even if off drugs at the time of the crime, would still affect Appellant (PC-R. 854); and Appellant's condition could have been affecting his impulsivity and his desire to conform his conduct to the requirements of the law at the time of the crime (PC-R. 864). Dr. Sprehe testified that it would take a year or two off of cocaine before it would not affect Appellant's behavior (PC-R. 855).

The lower court erred in not finding the additional evidence presented at the evidentiary hearing established the non-statutory mitigator of rehabilitation potential. In affirming the jury override this Court stated, "We agree with the trial court's finding that Washington's potential for rehabilitation is extinguished by the 'totality of [his] past criminal history'", Washington v. State, 653 So.2d 362, 366. Appellant's drug addiction is an integral part of that totality of past criminal history and such history cannot be properly seen without taking the drug addiction into account. It provides not only an explanation for Appellant's past criminal history, but a reasonable basis for the finding that there is the potential for

rehabilitation through treatment for the drug addiction. Rehabilitation potential is a legitimate mitigating circumstance, McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Holsworth v. State, 522 So.2d 348 (Fla. 1988); Carter v. State, 560 So.2d 1166 (Fla. 1990); McCray v. State, 582 So.2d 613 (Fla. 1991).

The jury could have used this evidence of mitigation as a reasonable basis to support their life recommendation. Additionally, a jury life recommendation "magnifies the effect of mitigation on the defendant's sentence", Keen, Id. at 285.

Although the lower court is supposed to give great weight to the jury recommendation of life, the idea that the lower court was looking for a way to uphold the jury's recommendation if possible is illusory. Any fair reading of the original sentencing order, evidentiary transcript or denial of 3.850 order shows a clear intent of the lower court to look for ways to subvert the jury recommendation and impose her desire to have Mr. Washington executed. In the evidentiary hearing the court's leading questions were designed to bolster her order and show clearly she was not a neutral finder of fact. In the lower court's questioning of trial counsels she stated:

> BY THE COURT:
>
> Q. In other words, what I'm trying to suggest is that sometimes to get a jury to consider drug use or to get a judge to consider drug use, you have to admit to crime after crime after crime. Every time someone talks about

> a defendant's use, they're admitting the defendant committed a crime. They would otherwise not get to hear about it?
>
> A. That's correct.
>
> Q. And do you find that sometimes juries consider that in mitigation and sometimes even though they are exposed to it, they may think that makes the guy a little worse than they even thought?
>
> A. Might look at it either way.
>
> Q. That's what I'm saying.

(PC-R. 813-814).

Another example is in the lower court's order denying Appellant's 3.850:

> When specifically asked if he would have considered calling a **prior girlfriend who would testify she and the defendant used drugs throughout high school** and the he later robbed her (for drug money), Louderback said he would never have put her on as a witness.

(PC-R. 297) (emphasis added).

The lower court used this misstatement to show the justification of trial counsel in not calling Regina Batiste. Trial counsel was led to believe the witness would only be able to testify to Appellant's use of drugs in high school in 1973, **sixteen years before the murder**, and Appellant's commission of a felony, when in fact Ms. Batiste's testimony was of Appellant's continued worsening drug use up through

1987 (PC-R. 745-765).

In addition, the trial court in finding that there is no prejudice under the second prong of Strickland because even with the additional mitigation she would still override a jury life recommendation, utilized the wrong standard in her consideration of the jury's life recommendation. The trial court misapplied Tedder v. State, 322 So.2d 908 (Fla. 1975), as further clarified in Keen v. State, 775 So.2d 263 (Fla. 2000), wherein this Court in reversing Keen's first-degree murder conviction stated:

> 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," San Martin v. State, 717 So.2d at 471, rather than the weighing process which a judge conducts after a death recommendation.

Id. at 283.

In Keen, the trial court's sentencing order read in part:

> Had the jury considered the aggravating and mitigating circumstances, the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ. **The mitigating evidence is wholly insufficient to outweigh the aggravating circumstances in support of a life sentence**.

Id. at 283 (emphasis in original).

Using almost identical wording in her order denying Mr. Washington's 3.850 motion following the evidentiary hearing, the trial court stated:

> My conclusion would be the same as it was in my original sentencing order, for all the reasons stated herein and therein: **The aggravating circumstances in this case so far outweigh the mitigating circumstances that a sentence of death is so clear and convincing that virtually no reasonable people, armed with all the facts and all the law could differ.**

(PC-R. 306) (emphasis added).

Had the trial court applied the correct standard in Tedder, it would not have overridden the jury recommendation. Instead,

> the focus of the analysis was not upon finding support for the jury's recommendation, i.e., determining if a reasonable basis existed for the jury's decision, but rather toward proving that the jury got it wrong and lacked any reasonable basis to recommend life. In other words, the trial judge disagreed with their recommendation based on his view of the mix of aggravators and mitigators, rather than through the prism of a Tedder analysis.

Keen, 775 So.2d at 284.

Further, this Court in its *de novo* review, (see Stephens v. State, 748 So.2d 1028 (Fla. 1999)), should apply Tedder as clarified in Keen.

Prejudice has been shown in Appellant's case. But for counsels' errors he would have probably received a life sentence. (See Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995); Rose v. State, 675 So.2d 567 (Fla. 1996)).

ARGUMENT II

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. WASHINGTON'S CLAIM THAT MR. WASHINGTON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AND AS A RESULT, MR. WASHINGTON'S CONVICTIONS AND DEATH SENTENCE ARE UNRELIABLE.[4]

A Rule 3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; See also, Valle v. State, 705 So.2d 1333 (Fla. 1997); Rivera v. State, 717 So.2d 477 (Fla. 1998); Gaskin v. State, 737 So.2d 509 (Fla. 1999). This Court has stated, "[t]o uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record... Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." Peede v. State, 748 So.2d 253 (Fla. 1999).

Appellant contends that the lower court erred in denying him an evidentiary hearing on this claim, the pertinent portions of each are addressed below.

The lower court erred in summarily denying without hearing

[4] This was Claim I B. a. in the Amended 3.850.

Appellant's claim that trial counsel was ineffective in the guilt phase portion of Mr. Washington's trial for failing to adequately investigate and argue that the DNA evidence was unreliable (PC-R. 12).

Trial counsel was ineffective for failing to request a hearing under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), pertaining to DNA probabilities, either pretrial or at trial prior to the state's introduction of testimony of DNA evidence. Trial counsel was further ineffective for failing to present witnesses to prove the unreliability of the DNA probabilities.

The lower court in denying this issue stated in its order:

> As to all claims, contained in Claim I, dealing with ineffective assistance of counsel at the guilt phase of his trial, they are hereby denied. I specifically find defendant's counsel, Frank Louderback and Tom McCoun, were effective counsel. Further, this court is confident in the outcome of the guilt phase of the trial and is not persuaded that the issues claimed, singularly or collectively, undermine theis court's confidence in the outcome of the guilty verdicts. *Strickland v. Washington*, 466 U.S. 668 (1984) requires both ineffectiveness of counsel's performance and prejudice to warrant relief. Defendant has not satisfied either prong of the *Strickland v. Washington* standard, and is therefore, not entitled to a new guilt/innocence determination.

(PC-R. 290-291).

On February 28, 1992, Appellant's trial counsel filed "Defendant's 2nd Motion to Compel DNA Records." (R. 949-951). In the said motion Appellant's trial counsel requested, among other things, the following:

> g) Copies of the database used in making these statistical probability analysis provided previously in the report. In the event that the database is voluminous, the Defendant specifically requests that the Court enter an Order allowing his own witness to travel to the FBI and view the database for purposes of assisting the Defendant in the preparation of his case and assisting his counsel in the preparation of the defense.

(R. 950).

A hearing was conducted by Judge Downey upon the motion on February 25, 1992.[5] At that hearing trial counsel argued as follows:

> MR. McCOUN: Then Mr. Louderback got on the case. I think he's had it about nine months.
>
> The situation is Mr. Louderback asked me to get involved for two specific purposes. One of them to deal with the DNA. One to deal with the penalty phase.
>
> The motion to compel that we had filed today concerns the DNA aspect of this case. For the Court's information it may have been -- I'll be very brief.
>
> Mr. Washington is a young black male. The victim was an elderly white woman. There is evidence that at the time of the homicide there had been sexual activity, and in fact semen swabs were recovered from the scene.
>
> The swabs, along with numerous other items of evidence, were sent to various agencies. In particular the semen swabs were sent to various agencies. In particular the semen swabs were sent to the FBI in Washington. A DNA analysis was performed in Washington by an FBI expert.

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[5]Judge Downey was originally assigned the case. The case was transferred to Judge Schaeffer for trial.

The conclusion of the expert was that the DNA analysis conducted on the sperm was a quote, match for the DNA of Mr. Anthony Washington, the defendant in this case.

Thereafter the expert proceeded not only to say that there was a match but also proceeded to indicate that a statistical probability in connection with that Match -- the exact number escapes me right now, but it's a fairly substantial one in -- one in some very large number possibility or probability that it would be somebody other than Mr. Washington.

Well, Mr. Louderback asked me to get involved. We began collecting information, and as I indicated to Judge Luce this morning where I moved for costs in this matter, **we have collected probably about a two-inch volume's worth of material from other jurisdictions in which the DNA analysis as performed by the FBI has been subject to legal attacks. And at least in one instance in the DC circuit where the -- with the subject being suppressed.**

The basis of the opposition so to speak, the basis of the testimony by those experts who frankly have very distinguished educational pedigrees concerns the method by which the FBI performs not an analysis but takes the analysis and moves into the statistical probability aspect of their DNA work.

These experts have in fact indicated that it is faulty. Not reliable. That the numbers generated by the FBI, because of the lack of appropriate data in the databases, are extremely misleading.

I provided the State about two weeks ago a copy of a motion to suppress that was is in fact -- that has in fact been prepared in this case. That is in line with those cases in other jurisdiction where these experts have testified.

Because of a screw-up we didn't have the cost motion -- until today. The cost motion is designed to allow us to have an expert.

As I indicated I have got about 10 to 12 experts that have been accepted or whose testimony and/or affidavits have been accepted by other jurisdictions and -- in support of the defense position that DNA analysis conducted by the FBI is faulty.

The motion to compel leads into the motion to continue. Without getting totally tongue-tied and overly technical in this thing let me just indicate that the -- **what the experts concluded, Judge, is that the numbers, when the FBI gets to the point of scrunching down the numbers and saying this particular match will lead to this particular probability, statistical probability, are faulty because the data information used by the FBI is faulty. And in particular with regards to subclassification for Negro males it is particularly faulty.**

They also say that with regards to Hispanics and a couple of other subgroups within the overall "population."

The information sought in the motion to compel is detailed in the motion to compel. It relates to step by step requests for the FBI to produce information that they rely upon. The tangible documents, the databases. The notes, the test results, and so on and so forth of each -- of each aspect of the -- of the DNA analysis.

And I -- in particular in paragraph three I set out the particular steps that are used in the DNA analysis and the information that would be requested. **In particular is the database information relied upon by the FBI when this gets to the point of doing the numbers scrunching, and that's where they kick out these probability statistics that have such an incredible impact in any trial.**

This is something that goes beyond a request that would be contained in Rule 3.220, the rules of discovery. Rules of discovery essentially indicate you have a right to get reports and thing of that nature. That goes to the heart of the issue of whether or not we can confront the evidence, the expert evidence and expert testimony that is going to be produced against us.

If the Court looks at the evidence code related to -- related to expert testimony you will see that an expert is entitled to testify in opinion form as to the results of his test on cross-examination and he can do so actually without revealing all of his so-called database or all of the underlying bases of his opinion.

However, on cross-examination he is -- it is permissible to interrogate and require him to produce the bases of his expert opinion.

What Mr. Louderback and I are doing is looking forward to the time when we are going to have to confront this witness at trial or motion hearing and saying that we need this information. One, to be able to present to our own expert who -- we didn't get a lot of money out of Judge Luce, but nonetheless I think we'll have an expert within the next week. So that we can sit down with him, let him begin preparing so he can not only help us in the motion to suppress but also can provide us with testimony that will enlighten the jury at the time of trial.

So what we do by the motion to compel is seek that which we think we're entitled to if we get to the point of trial. Not necessarily what the discovery rule says. We're actually asking the Court to go beyond the specific working in the discovery rule and looking forward to the point in time in trial to get this information so that we can be prepared for it.

Hand in hand with this, Judge, I have filed a motion to continue...

(R. 2764-2769).

The trial began on July 14, 1992. At the beginning of the trial Mr. Washington's counsel filed a Motion in Limine. The issues argued in the Motion in Limine in paragraphs 3 and 4, pertaining to the validity of the science of DNA and that the science, as performed by the FBI, was not "generally acceptable within the scientific community" (R. 1282). Paragraph 3 of the Petitioner's Motion in Limine states:

> 3) The DNA analysis performed by the FBI, although purporting to be generally acceptable within the scientific community, is still insufficient and inadequate and not as yet acceptable within the scientific community as a basis for use as forensic evidence in a criminal prosecution. The FBI DNA procedures lack sufficient safeguards, quality control, and procedural regularity to allow the admission of any test results. Additionally, the FBI purports to provide statistical probabilities in relation to the testing procedures done. The databases which comprise the FBI's statistical database are insufficient to allow for such statistical probability. The lack of sufficient subgroupings, for instance, in black male populations is a serious deficiency which destroys the reliability of any statistical probability conclusions as brought by the FBI. Similar to the actual testing itself, statistical probability analysis performed by the FBI is subject to substantial criticism within the scientific community and cannot be said to be substantially acceptable within the scientific community, nor, given the database deficiencies can it be found to be relevant.

(R. 1282).

The trial court denied the Motion in Limine (R. 2490).

During the state's case-in-chief, Dwight Adams (FBI agent) was

called to testify and was admitted as an expert in the area of DNA profiles (R. 2459).

At that point the state continued with direct examination of Mr. Adams. The testimony regarding the population database and statistical probabilities was as follows:

> Q. (By Mr. Brown) We're going to the matching here. There is a statistical probability that you come up with; is that correct?
>
> A. Yes, sir.
>
> Q. Let's explain the statistical figure.
>
> A. The first thing required is to obtain a population database. You simply go out in the population and you sample, by taking blood samples from individuals, and you perform the same analysis on all of these individuals. You rank them as far as what type of patterns they have based upon this analysis.
>
> Then, you can take an individual, for example, in this case Mr. Washington, and compare him to that population database. The reason you're doing this is to determine if other individuals or how many other individuals could have a similar profile for all three of these results like Mr. Washington.
>
> In this case we have 500 individuals in our black population database which I compared to Mr. Washington's known blood sample.
>
> Q. You say could have had a similar result regarding the three probes. Does the figure change if have the four probes?
>
> A. Yes, sir. It would be less likely that an individual would have four probes like another than it would be if they only had three probes like another individual.

> Q. Now when you say you compare them to this database that you have, how do you exactly go about doing that?
>
> A. I sit down at a computer that is programmed to take the data that I have generated from this particular case and I actually compare these profiles to the population database so that I come up with the probability statement. A statement that says that this number of individuals would likely have a similar profile from the black population.[6]

(R. 2507-2509).

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> Q. What is the statistical probabilities that you came up with through the computer on this case?
>
> A. Using just the three probe results that I was able to make an interpretation on the comparing that to our black population database, I determined that the likelihood of finding another unrelated individual chosen at random from that population would be approximately 1 in 195,000 individuals.

(R. 2509).

On cross-examination Mr. Adams admits that there are other scientists in the same field, including the National Research Counsel, that contend that the FBI's method of determining probabilities is faulty.

> CROSS-EXAMINATION BY MR. MCCOUN OF MR. ADAMS
>
> Q. You would agree, would you not, that the statistical probability work that is done by the

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[6]Mr. Adams was not offered as an expert in statistical probabilities.

FBI is the subject of some criticism by some others in the statistical probability field that don't agree with the process used by the FBI, correct?

A. I know of a handful of individuals who think that we're not conservative enough. I know of many more people who have actually published articles in the scientific literature who totally agree with the way our statistics are conservatively arrived at.

Q. Let me ask you this, the National Research Counsel has presented a paper, has it not?

A. Yes, sir, they have.

Q. It suggest a statistical probability formula that is different from the FBI's, correct?

A. The formula is the same. The population data would just be more conservatively arrived at.

Q. Do you us the ceiling principle that they suggest in their report that should be used?

A. No, sir.

Q. Well, some other lab or some other agency which performs this type of analysis using their own theories as to probabilities might come up with a different number from that of the FBI, correct?

A. Most of the laboratories I'm familiar with would come up with a figure much larger than we came up with.

Q. So the answer is yes?

A. The figure would be larger, therefore, different.

(R. 2515-2517).

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Q. Does not the National Research Counsel recognize that one of the deficiencies in the FBI's statistical probability work is the lack of consideration of the existence of black subgroups in the United States?

A. They don't specifically refer to it as black subgroups, but they refer to it as sub-populations. But as is stated in the research articles that have been published by the FBI as well as other population geneticists, the conservative nature of our approach is so conservative that it would offset any sub-population difficulties that might arise and, therefore, it really becomes a non-issue.

Q. That's the position of the FBI, right?

A. Not just the FBI. For example, just recently Bruce Ware (phonetic) published a paper in the Scientific Journal of Genetics. Rice and Devlin (phonetic) published a paper in –

THE COURT: Sir, this might be very interesting if it was three o'clock, but it's going on six o'clock. If you'll just answer the question, unless you need to explain your answer. If you need to explain, you may do so.

Q. I'll ask it this way and get a quick answer here and get out of here.

What we're dealing with when we get into this aspect of DNA testing is certain theories that the FBI tries to put into practice, certain theories relative to statistical probabilities, correct?

A. Yes, sir.

Q. <u>There are other, individuals, scientists, agencies who may take a different view than the FBI, correct?</u>

A. <u>Yes, sir, in each direction.</u>

(R. 2520-2521)(emphasis added).

A. TRIAL COUNSEL'S DEFICIENCY

Counsel was ineffective for failure to request a *Frye* hearing even though there are numerous instances where trial counsel made it clear that the evidence did not meet the standards set out in Frye, and that he had experts who could testify to such as well as knowledge of other jurisdictions where the evidence he was attacking had been suppressed.

During the hearing conducted on February 25, 1992, before Judge Downey, trial counsel specifically argued to the court the need for discovery in order to attack the scientific methods applied by the FBI in conducting their probability methods.

> The basis of the opposition so to speak, the basis of the testimony by those experts who frankly have very distinguished educational pedigrees concerns the method by which the FBI performs not an analysis but takes the analysis and moves into the statistical probability aspect of their DNA work.
>
> These experts have in fact indicated that it is faulty. Not reliable. That the numbers generated by the FBI, because of the lack of appropriate data in the databases, are extremely misleading.
>
> I provided the State about two weeks ago a copy of a motion to suppress that was is in fact -- that has in fact been prepared in this case. That is in line with those cases in other jurisdiction where these experts have testified.

(R. 2468).

On the day the trial was to begin, Judge Schaeffer, after

replacing Judge Downey, announced that Judge Downey's prior rulings would be the law of the case. Trial counsel filed a motion in limine, which specifically requested that the DNA testimony and evidence not be admitted because it was not generally accepted in the scientific community.

> 3) The DNA analysis performed by the FBI, although purporting to be generally acceptable within the scientific community, is still insufficient and inadequate and not as yet acceptable within the scientific community as a basis for use as forensic evidence in a criminal prosecution. The FBI DNA procedures lack sufficient safeguards, quality control, and procedural regularity to allow the admission of any test results. Additionally, the FBI purports to provide statistical probabilities in relation to the testing procedures done. The databases which comprise the FBI's statistical database are insufficient to allow for such statistical probability. The lack of sufficient subgroupings, for instance, in black male populations is a serious deficiency which destroys the reliability of any statistical probability conclusions as brought by the FBI. Similar to the actual testing itself, statistical probability analysis performed by the FBI is subject to substantial criticism within the scientific community and can not be said to be substantially acceptable within the scientific community, nor, given the database deficiencies can it be found to be relevant.

(R. 1282).

In arguing to the court the motion in limine, trial counsel informed the court that he had filed, attached to a motion to compel, the publication on DNA Technology in Forensic Science from the National Research Counsel, dated April 16, 1992, which contested the testimony

of Mr. Adams. Trial counsel failed to request a *Frye* hearing in either his motions or in his arguments on the motions.

Hayes v. State, 660 So.2d 257 (Fla. 1995) was decided June 22, 1995. In that case this Court stated: "In this opinion, this Court addresses for the first time how deoxyribonucleic acid (DNA) test results may be admitted in the trial courts of this State." Id. at 259. That statement should have been made in Mr. Washington's case. However, Mr. Washington's trial counsel failed to request that the trial court conduct a *Frye* hearing on the issue.

In Hayes this Court stated the four-step inquiry necessary for the admission into evidence of expert testimony of a new scientific principle:

> The trial judge must determine whether: (1) expert testimony will assist the jury in understanding the evidence or in determining a fact in issue; (2) the expert's testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs" under the *Frye* test; and (3) the particular expert witness is qualified to present opinion evidence on the subject in issue. If the answer to the first three questions is in the affirmative, the trial judge may proceed to step four and allow the expert to present an opinion to the jury.

Id. at 262.

Mr. Washington's trial counsel, however, did not make a request for the trial court to make a determination in accordance with the

second step, although the trial counsel had stated numerous times that the evidence would not withstand a *Frye* inquiry. Further, this Court's opinion in Hayes included a substantial amount of the report published by the National Research Counsel on April 16, 1992, and acknowledged that the agency is a major voice in the scientific community. Id. at 264. Mr. Washington's trial counsel not only possessed the National Research Counsel's report (R. 1222-1255), trial counsel possessed the FBI's protocol as well (R. 1201-1221).

Further, Appellant's trial counsel attacked the state's expert's database and method of determination of probability statistics. Once again, however, trial counsel failed to request a *Frye* hearing at the hearing on his motion in limine or at trial. On June 1, 1994, the First District Court of Appeals issued an opinion in Vargas v. State, 640 So.2d 1139 (Fla. 1st DCA 1994), wherein it held:

> Having reviewed the expert testimony in the instant case, as well as scientific and legal writings, and judicial opinions from other jurisdictions, we conclude appellant has demonstrated that the method by which FDLE arrived at population frequencies of one in 30 million and one in 60 million, using the FBI data bases, is not generally accepted in the relevant scientific community. Therefore, those population frequencies are not admissible[7].

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[7]Counsel acknowledges that the court in Brim v. State, 654 So.2d 184 (Fla. 2nd DCA 1995) held differently than the court in Vargas. However, this Court in Brim v. State, 695 So.2d 268 (Fla. 1997) rejected the Second District's ruling that DNA population frequency statistics need not satisfy a *Frye* test.

Id. at 1150.

Unlike the trial court in Mr. Washington's case, the trial court in Vargas conducted a *Frye* inquiry upon a Motion in Limine filed by Vargas' counsel attacking the validity of the scientific method followed by FDLE in computing population statistics utilizing the FBI database. Id. at 1145. Had trial counsel made a request for a *Frye* hearing as in Vargas, a similar ruling would have occurred.

B. PREJUDICE PRONG

DNA carries a large impact upon a jury. Had the DNA not been permitted to be presented to the jury, there is a strong probability that the verdict would have been different.

In Thorp v. State, 777 So.2d 385 (Fla. 2001) this Court vacated the defendant's judgment and sentence and remanded for a new trial upon circumstances similar to that of Mr. Washington:

> The only other significant evidence of guilt included Thorp's statements to a fellow inmate and a witness's testimony that Thorp had blood on his clothes on the night of the murder. Based on the conclusive nature of the DNA evidence, however, and because it is the only physical evidence placing Thorp at the scene of the crime, we cannot say beyond a reasonable doubt that the improperly admitted DNA evidence had no effect on the verdict in this case.

Id. at 394.

In Appellant's case the jury heard the following: (a) hairs were found on the victim, which were testified to as being consistent with

Mr. Washington, although admittedly not conclusive for positive identification, (b) two witnesses gave equivocal identification testimony that the individual in the courtroom (Mr. Washington) was the person who looked like the person who attempted to sell jewelry to one individual and sold a broken watch to the other individual. The watch was identified as belonging to the victim by the victim's son, and (c) that upon Mr. Washington's return to jail from work release he was immediately placed in handcuffs and he stated words to the effect of "am I being charged with murder."

Mr. Adams testified that the probability of another black individual having the same three probes as that of Mr. Washington would be 1 in 195,000 or 1 in 400,000 other black individuals, depending upon what database was utilized (R.2509). Certainly this testimony had a great impact upon the jury. Therefore, it must be concluded that but for the admission of DNA testimony, one could not say beyond a reasonable doubt that the verdict would not have been different.

This Court should order the lower court to grant an evidentiary hearing on this issue.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING MR. WASHINGTON'S CLAIM THAT MR. WASHINGTON'S SENTENCE OF DEATH UNDER THE FOURTH, FIFTH SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE

FLORIDA CONSTITUTION IS INVALID BECAUSE THE SENTENCING COURT FAILED TO GIVE GREAT WEIGHT TO THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT.

The lower court ruled that this claim was not the proper subject of a 3.850 motion. Mr. Washington contends that this claim should not be procedurally barred and asserts it herein. Mr. Washington argues that, despite adverse rulings, due process and fundamental fairness in the context of a capital case mandate that this claim should be considered on the merits.

Under Tedder v. State, 322 So. 2d 908 (Fla. 1975) and other Florida law, the weighing of the aggravating and the mitigating circumstances were the jury's function, and the lower court was required to give great deference to the jury's recommendation of life imprisonment. It was possible that the jury weighed all the aggravators that were presented and found that the mitigating evidence outweighed the aggravators. Without the lower court's polling of the jury to ascertain whether they found any aggravators beyond a reasonable doubt, we must assume that they did not and they chose to give the evidence of Mr. Washington's mitigation more weight, thereby giving him "the necessary individualized treatment that would result from actual weighing." Clemmons v. Mississippi, 494 U.S. 738, 739, 110 S. Ct. 1441, 1443. The lower court should not therefore, have overturned the jury's life recommendation because, under Tedder, apparently there was evidence by which the jury weighed and could have

formed a rational basis for the recommendation, giving rise to reasonable doubt of proof that death was appropriate. Accordingly, the lower court should not have substituted its judgment for that of the jury's individualized weighing process determination.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING MR. WASHINGTON'S CLAIM THAT MR. WASHINGTON'S SENTENCE OF DEATH UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND

FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION IS INVALID BECAUSE THE JURY INSTRUCTIONS IN BOTH THE GUILT/INNOCENCE AND PENALTY PHASE OF THE TRIAL WERE CONSTITUTIONALLY INVALID.

A Rule 3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; See also, Valle v. State, 705 So.2d 1333 (Fla. 1997); Rivera v. State, 717 So.2d 477 (Fla. 1998); Gaskin v. State, 737 So.2d 509 (Fla. 1999). This Court has stated, "[t]o uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record... Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." Peede v. State, 748 So.2d 253 (Fla. 1999).

Appellant contends that the lower court erred in denying him an evidentiary hearing on this claim, the pertinent portions of each are addressed below.

A. THE JURY INSTRUCTIONS FAILED TO PROVIDE A LIMITING CONSTRUCTION OF THE "HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING FACTOR IN VIOLATION OF THE CONSTITUTION GUARANTEES AND COUNSEL FAILED TO PROPERLY OBJECT.

At the time of Mr. Washington's sentencing, the jury was given the standard jury instruction that was in effect at the time pursuant to the language of 921.141(5)(h) as adopted by Dixon v. State, 283 So. 2d 1 (Fla. 1973), with the language approved in Proffit v. Florida, 428 U.S. 242.[8] However, in Sochor v. Florida, 504 U.S. 527, 112 S. Ct. 2114, 119 L.Ed.2d 326 (1992), the United States Supreme Court suggested that the Florida Supreme Court had not "adhered to Dixon's limitation as stated in Proffit. Additionally, in post Profitt cases, the United States Supreme Court has suggested that even definitions such as those employed in Dixon are not sufficiently specific to allow a HAC aggravator to sustain a vagueness challenge.

Defense counsel argued that the especially heinous, atrocious or cruel factor was too vague to pass muster under the Constitution and objected to allowing Mr. Washington's jury to consider this aggravator at all (R. 1745-1748, 2720-2725).

The lower court acknowledged that pursuant to Sochor v. Florida, 504 U.S. 527, 112 S. Ct. 2114, 119 L.Ed.2d 326 (1992), "the entire Dixon instruction is not acceptable," (R. 1577) and gave the following

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[8]Heinous atrocious or cruel would not be vague or overbroad as long as it was "directed only at the conscienceless or pitiless crime which is directed unnecessarily torturous to the victim."

instruction:

> ...the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. The kind of crime intended to be include the [sic] as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

Counsel for Mr. Washington objected to the vagueness of the aggravating factor of heinous, atrocious and cruel at trial and raised the issue on direct appeal to the Florida Supreme Court, citing to the inconsistent manner in which this aggravator has been applied, the danger of which is that the sentencing court has no legitimate guidelines in assessing whether it applies (R. 1745-1748, 2720-2725). The issue has not been waived and must now be revisited.

The manner in which the judge and jury were allowed to consider the "Heinous, Atrocious or Cruel" aggravating circumstance provided no genuine narrowing of the class of persons eligible for the death penalty.

In Florida, the heinous, atrocious and cruel aggravating circumstance applies only to "torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990).

The focus is thus on the intent of the defendant, as opposed to

the injuries suffered by the victim. The record in this case is absent any evidence that Mr. Washington intended to torture or inflict a high degree of pain or suffering on the victim. The jury was unaware that heinous, atrocious, or cruel requires an intent to torture. The jury was unaware that intoxication or drug abuse could negate such an intent. Thus, the jury instructions were inadequate, and the court erred in finding the heinous, atrocious or cruel aggravating circumstance.

The State did not address the constitutionally required narrowing construction of this aggravating circumstance and the State did not carry its burden of proof beyond a reasonable doubt as to this aggravating circumstance. The terms of heinous, atrocious or cruel were not defined in any cogent manner and a reasonable juror could thus believe <u>any</u> murder to be heinous, atrocious or cruel.

When an aggravating factor does not legally apply, the jury should not be instructed on the factor. Although the jury, in the instant case, returned a life recommendation in spite of it, the prejudice is still apparent by the judge's override.

To the extent that either Mr. Washington's trial counsel or appellate counsel failed to adequately raise this issue, Mr. Washington received ineffective assistance.

Mr. Washington's jury was given a legally invalid circumstance to apply and weigh. The judge clearly instructed the jury that they were

to weigh each statutory aggravator and determine whether it was proven by the State beyond a reasonable doubt. The State, however, failed to prove this aggravating factor beyond a reasonable doubt, as evidenced by the jury's finding. Fundamental error occurred when Mr. Washington's jury received wholly inadequate instructions regarding the elements of these aggravating circumstances. Although the jury recommended life, the judge's override and death sentence were clearly tainted by the invalid aggravating circumstance.

The lower court instructed the jury that if they found for life, they need not indicate how they individually voted. To the extent that defense counsel did not poll the jury, he was ineffective. He should have reasonably been aware that the judge could override the jury's recommendation, and because she did, Mr. Washington was prejudiced.

Although Mr. Washington's penalty jury recommended life imprisonment, the Court found this aggravator was proved "beyond a reasonable doubt" (R. 1579) and attributed it great weight in her sentencing order (R. 1574-1580). The errors detailed in this claim cannot be harmless beyond a reasonable doubt.

B. THE JURY'S INSTRUCTION ON THE AGGRAVATOR, OF COMMISSION OF A MURDER DURING THE COURSE OF A ROBBERY, IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The jury was given the following instruction regarding the murder during the course of a robbery aggravating circumstance:

The crime for which the defendant is to be

> sentenced was committed while he was engaged in the commission of or an attempt to commit the crimes of robbery, sexual battery, or burglary.

(R. 2740).

This instruction was unconstitutionally vague. An aggravating circumstance that merely repeats an element of first-degree murder does not genuinely narrow nor does it provide the sentencer guidance in a weighing state as required.

C. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY UNCONSTITUTIONALLY DILUTED ITS SENSE OF RESPONSIBILITY IN DETERMINING THE PROPER SENTENCE.

Mr. Washington's jury was repeatedly and unconstitutionally instructed by the court that its role was merely "advisory." (See, e.g., R. 249, 250, 266, 267, 269, 270, 268, 556, 557, 567, 576, 583, 590, 597, 606, 618, 626, 631, 642, 643, 649, 655, 659, 683). Because great weight is given the jury's recommendation, the jury is a sentencer in Florida. Here, however, the jury's sense of responsibility was diminished by the misleading comments and instructions regarding the jury's role. This diminution of the jury's sense of responsibility violated the Eighth Amendment.

ARGUMENT V

THE LOWER COURT ERRED IN DENYING MR. WAHINGTON'S CLAIM THAT MR. WASHINGTON"S SENTENCE RESTS UPON AN UNCONSTITUTIONALLY AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A Rule 3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; See also, Valle v. State, 705 So.2d 1333 (Fla. 1997); Rivera v. State, 717 So.2d 477 (Fla. 1998); Gaskin v. State, 737 So.2d 509 (Fla. 1999). This Court has stated, "[t]o uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record... Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." Peede v. State, 748 So.2d 253 (Fla. 1999).

Appellant contends that the lower court erred in denying him an evidentiary hearing on this claim, the pertinent portions of each are addressed below.

Mr. Washington was convicted of one count of first-degree murder, with burglary being the underlying felony. The jury was instructed on the "felony murder" aggravating circumstance:

> Two. The crime for which the defendant is to be sentenced was committed while he was engaged

> in the commission of the crimes of robbery, sexual battery, or burglary.

(R. 2741).

The trial court subsequently found the existence of the "felony murder" aggravating factor (R. 912-913).

The jury's deliberation was tainted by the unconstitutional and vague instruction. See Sochor v. Florida, 112 S. Ct. 2114 (1992). The use of the underlying felony as an aggravating factor rendered the aggravator "illusory" in violation of Stringer v. Black, 112 S. Ct. 1130 (1992). The jury was instructed regarding an automatic statutory aggravating circumstance, and Mr. Washington thus entered the penalty phase already eligible for the death penalty, whereas other similarly (or worse) situated petitioners would not.

The death penalty was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the felony-murder finding that formed the basis for conviction.

Aggravating factors must channel and narrow the sentencer's discretion. A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion."

ARGUMENT VI

THE LOWER COURT ERRED IN DEYING MR. WASHINGTON'S CLAIM THAT MR. WASHINGTON'S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A Rule 3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; See also, Valle v. State, 705 So.2d 1333 (Fla. 1997); Rivera v. State, 717 So.2d 477 (Fla. 1998); Gaskin v. State, 737 So.2d 509 (Fla. 1999). This Court has stated, "[t]o uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record... Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." Peede v. State, 748 So.2d 253 (Fla. 1999).

Appellant contends that the lower court erred in denying him an evidentiary hearing on this claim, the pertinent portions of each are addressed below.

Mr. Washington did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. The process itself failed Mr. Washington. It failed because the sheer

number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he received.

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

A series of errors may accumulate a very real, prejudicial effect. The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence.

The flaws in the system that sentenced Mr. Washington to death are many. They have been pointed out throughout this proceeding, but also in Mr. Washington's direct appeal. Repeated instances of ineffective assistance of counsel and error by the trial court significantly tainted the process. These errors cannot be harmless. Relief is proper.

ARGUMENT VII

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

A Rule 3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; See also, Valle v. State, 705 So.2d 1333 (Fla. 1997); Rivera v. State, 717 So.2d 477 (Fla. 1998); Gaskin v. State, 737 So.2d 509 (Fla. 1999). This Court has stated, "[t]o uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record... Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." Peede v. State, 748 So.2d 253 (Fla. 1999).

Appellant contends that the lower court erred in denying him an evidentiary hearing on this claim, the pertinent portions of each are addressed below.

Florida's capital sentencing scheme denies Mr. Washington his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied. Florida's death penalty

statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. See Profitt v. Florida, 428 U.S. 242 (1976). This state's law failed to meet these rudimentary constitutional guarantees, and therefore violates the Eighth Amendment.

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

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to the arbitrary and capricious imposition of the death penalty, and violates the Eighth Amendment.

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

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner, and the

jury receives unconstitutionally vague instructions on the aggravating circumstances.

Florida law creates a presumption of death where only a single aggravating circumstance applies. This creates a presumption of death in every felony-murder case, and in almost every premeditated murder case. Once one of these aggravating factors is present, Florida law provides that death is presumed to be the appropriate punishment, and can only be overcome by mitigating evidence so strong as to outweigh the aggravating factors. This systematic presumption of death cannot be squared with the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders.

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

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Washington’s Rule 3.850 relief. This Court should order that his conviction and sentence be vacated and remand the case for a new trial, new evidentiary hearing, or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this ***23rd day of April, 2001***.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief, was generated in Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

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