IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2248

HARRY FRANKLIN PHILLIPS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, STATE OF FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's summary denial of Rule 3.850 relief, as well as various rulings made during the course of Mr. Phillips' request for postconviction relief. The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal of 1994 resentencing to this Court;

"T" -- transcript of 1994 resentencing hearing;

"Supp. R" -- supplemental record on 1994 resentencing appeal;

"PCR" -- record on instant postconviction appeal;

"Supp. PCR" -- supplemental record on instant postconviction appeal;

"PCR1" -- record on direct appeal of 1988 postconviction appeal.

REQUEST FOR ORAL ARGUMENT

Mr. Phillips has been sentenced to death. The resolution of the issues in this action will therefore

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

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STATEMENT OF THE CASE AND FACTS

Harry Franklin Phillips was originally convicted of first degree murder in the death of Bjorn Thomas Svenson and sentenced to death in 1983. Mr. Phillips was found guilty of one count of first degree murder. The jury voted in favor of death by a vote of seven (7) to five (5). The Honorable Arthur Snyder followed the jury's recommendation and sentenced Mr. Phillips to die in the electric chair.

This Court affirmed that sentence on direct appeal. Phillips v. State, 476 So.2d 194 (Fla. 1985). The lower court, the Honorable Arthur Snyder, denied Mr. Phillips postconviction motion following an evidentiary hearing in 1988. On the appeal from denial of 3.850 relief, this Court determined that Mr. Phillips had received ineffective assistance of counsel at the sentencing phase of his trial and his death sentence was vacated. Phillips v. State, 608 So. 2d 778 (Fla. 1992).

Subsequently, in 1994, a resentencing proceeding was held in the Circuit Court for the Eleventh Judicial

Circuit, in and for Dade County (now Miami-Dade County), Florida, before the Honorable Arthur Snyder. Mr. Phillips was resentenced to death by the trial court after the jury, again by a vote of seven (7) to five (5), recommended death. On direct appeal, this Court affirmed the sentence imposing the death penalty. Phillips v. State, 705 So. 2d 1320 (Fla 1997), cert. denied, 119 S. Ct. 187 (1998).

On September 13, 1999, Mr. Phillips filed an incomplete motion in this case in order to toll the time in which he is entitled to file a Petition for Writ of Habeas Corpus in federal court. See 28 U.S.C. §2244(d)(2) (1996).

Following hearings before the Honorable Alex Ferrer on September 23, 1999 and November 17, 1999, the court ordered Mr. Phillips counsel to file a final 3.850 by December 2, 1999. After a hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993), on February 25, 2000, the lower court entered an order on August 28, 2000 denying relief to Mr. Phillips without benefit of an

evidentiary hearing on any issue. On September 12, 2000, Mr. Phillips filed a timely motion for rehearing, and an order denying the motion for rehearing was entered on September 26, 2000. This appeal follows.

SUMMARY OF ARGUMENTS

1. The lower court's summary denial of Mr. Phillips' 3.850 motion without an evidentiary hearing on any of the claims contained therein was erroneous and failed to meet the minimal standards set forth in Fla. R. Crim. P. 3.850 and the applicable case law. Mr. Phillips was prepared to present expert testimony at an evidentiary hearing that Mr. Phillips was and is mentally retarded and suffers from organic brain damage. Resentencing counsel's deficient performance prejudiced Mr. Phillips.

2. Mr. Phillips should have an opportunity to prove in circuit court that he meets the criteria for mental retardation described in new § 921.137 Florida Statutes, which prospectively ends the practice of sentencing mentally retarded persons to death in Florida.

3. The lower court erred in denying Mr. Phillips

adequate time to review recently produced public records before requiring him to file a final 3.850 motion. In addition, the lower court refused to allow Mr. Phillips to file public records affidavits in a timely manner. The result of the biased decisions of the lower court created a conflict of interest between Mr. Phillips and postconviction counsel.

4. Mr. Phillips resentencing was prejudiced by ineffective assistance of counsel at jury selection and by the instructions given to the jury over objection by resentencing counsel. This error was compounded by the failure of the lower court considering Mr. Phillips' 3.850 motion to allow Mr. Phillips leave to interview the jurors in his case in the face of the circumstances involving the jury at resentencing.

5. The State and the lower court improperly shifted the burden to Mr. Phillips to establish that mitigating circumstances outweighed aggravating circumstances.

6. The State was improperly allowed to focus their rebuttal case and argument on non-statutory aggravation.

7. Mr. Phillips is innocent of the death penalty.

8. Mr. Phillips' insanity precludes his execution under the Eighth Amendment.

9. It was a violation of Mr. Phillips' rights for the jury or trial court to consider Mr. Phillips' prior convictions.

10. Mr. Phillips' was not present at numerous unrecorded bench conferences and sidebars during his resentencing proceeding.

11. Cumulative error at Mr. Phillips' resentencing was grounds for an evidentiary hearing.

ARGUMENT I -- SUMMARY DENIAL OF ALL CLAIMS WAS ERRONEOUS

The lower court entered an *Order On Defendant's Amended Motion To Vacate Judgement Of Conviction And Sentence With Special Request For Leave To Amend* on August 28, 2000, summarily denying Mr. Phillips' Rule 3.850

motion. (R. 142-44). The order makes the finding in Paragraph 1 that Claims 1 through 6, 15, 21, and 24 were summarily denied on the grounds that they are "facially insufficient," and in Paragraph 2, that:

> With regard to Claims 5 and 6, in particular, the record is replete with evidence that trial court acknowledged the Defendant's low IQ, abusive childhood, inadequate parental guidance and poor family background as non-statutory mitigating circumstances. Considering all, factors, Defendant's claim fails to satisfy, even on its face, the requirements of Strickland v. Washington, 466 U.S. 668 (1984).

(R.142). Claims 5 and 6 were the penalty phase ineffective assistance of counsel and Ake v. Oklahoma, 470 U.S. 68 (1985) claims. Judge Ferrer's finding fails to mention that the 1994 resentencing judge's order, while "acknowledging" that Mr. Phillips had a low IQ, failed completely to give either that fact or **any** of the other non-statutory mitigation any weight. The order entered by Judge Snyder following the resentencing made the following findings concerning non-statutory mitigation:

> The Court also recognizes that the

> defendant had a low IQ. However, the evidence also shows that he is street smart. The defendant could follow the rules of work, or parole, when he wanted to. He was able to plan a false alibi and indirectly threaten witnesses. The Court finds that to the extent these nonstatutory mitigating circumstances are found to reasonably exist, then they should be given little weight, as they simply do not extenuate or reduce the degree or moral culpability of the defendant's actions in committing this homicide.

(Supp. R. 187). Undersigned counsel is aware that the weight assigned to a mitigating circumstance is within the discretion of the trial court and subject to the abuse of discretion standard. Rogers v. State, 783 So. 2d 980, 995 (Fla, 2001). The law did not require that Mr. Phillips establish the existence of mitigating circumstances beyond a reasonable doubt. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1991) ("when a reasonable quantum of uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved"). The language of the resentencing court's order directly tracks the language of

the State's proposed order prior to sentencing.[1] In addition, the lower court's "finding" relies on the hearsay evidence presented in 1994 through the testimony of Miami-Dade detective Greg Smith concerning statements made to him by numerous jailhouse witnesses who had

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[1]This Court denied relief to Mr. Phillips on the Spencer v. State, 615 So. 2d 688 (Fla. 1993), hearing issue on appeal from the resentencing as noted in paragraph 15 of Judge Ferrer's summary denial order relying on the procedural bar for denial of the related claim in Mr. Phillips' 3.850 motion. (PCR. 144). Mr. Phillips' position is that Judge Snyder's order was a clearly erroneous order in light of the following factors: defense counsel's inability due to Judge Snyder's rulings to rebut Detective Smith's hearsay testimony concerning the jailhouse witnesses and documents; the reliance of Drs. Miller and Haber on the same unrebutted information for their opinions regarding Mr. Phillips' mental abilities; the flawed opinions of Drs. Miller and Haber about what constitutes statutory mitigation especially the meaning of extreme mental or emotional disturbance, a position that is mirrored in the sentencing order; resentencing counsel's inability to properly cross-examine Drs. Miller and Haber about Mr. Phillips' alleged attempt to fabricate an alibi based on the documents and information connected to the jailhouse witnesses; Judge Snyder's finding that the testimony of Drs. Haber and Miller was "inherently more credible" than the testimony of Drs. Carbonell and Toomer; unrebutted evidence of the possibility of brain damage; and, the failure of resentencing counsel to properly choose and prepare his one live mental health expert resulting in credibility findings against Dr. Toomer by Judge Snyder.

testified against Mr. Phillips at his 1983 trial, testimony which resentencing counsel was unable to effectively rebut due to evidentiary rulings at the 1994 proceeding by Judge Snyder. The state's proposed order read:

> **The State** also recognizes that the defendant **has** a low IQ. However, the evidence also shows that he is street smart. The defendant could follow the rules of work, or parole, when he wanted to. He was able to plan a phony alibi and indirectly threaten witnesses. The **State submits** that to the extent these nonstatutory mitigating circumstances are found to reasonably exist, then they should be given little weight, as they simply do not extenuate or reduce the degree or moral culpability of the defendant's actions in committing this homicide.

(R. 136-37)(emphasis added). Judge Ferrer's summary denial order ignored Mr. Phillips' assertions in the 3.850 pleadings, at the Huff hearing and in his motion for rehearing that postconviction counsel was prepared to present expert testimony at an evidentiary hearing from both a medical doctor who had examined Mr. Phillips (a neurologist) and from a mental retardation expert

(psychologist) who had both tested and interviewed Mr. Phillips as well as having interviewed other family members and friends and that their testimony at an evidentiary hearing would establish that Mr. Phillips had a history of adaptive behavior deficits and current IQ scores meeting the professional standard for mental retardation. (PCR. 30-37).

The testimony of these two experts at an evidentiary hearing would establish that at the time of the offense and at present Mr. Phillips suffered from both organic brain damage and mental retardation (not merely "low IQ") and that based on these mental and emotional disturbances Mr. Phillips, in the opinion of these two experts, "can show that he fulfilled the criteria for two statutory mitigating circumstances; namely that Mr. Phillips was unable to appreciate the criminality of his conduct at the time of the offense and that his capacity to conform his conduct in accordance with the law was substantially impaired; and that he was suffering from extreme mental and emotional disturbance." (PCR 28). The lower court's

failure to grant an evidentiary hearing in these circumstances took no account of the fact that the jury recommendation in Mr. Phillips' resentencing was only seven (7) to five (5) in favor of death in spite of the fact that Judge Snyder found **no** statutory mitigation. Relevant portions of Claim IV of Mr. Phillips' 3.850 motion outlined why an evidentiary hearing was required in these circumstances:

> A review of the files and records currently available to undersigned counsel indicates that **(1) Mr. Phillips is mentally retarded, and (2) that his mental capacity results from and is exacerbated by his organic brain damage, itself the result of multiple causative factors**.
>
> The concept of mental retardation is not an easy one for lay persons to grasp. In the words of the American Association on Mental Retardation (AMR) it:
>
> > ..is not something you have, like blue eyes or a bad heart. Nor is it something you are, like being short or thin. It is not a medical disorder, although it may be coded in a medical classification of diseases. Nor is it a mental

> disorder although it may be coded in a classification of psychiatric disorders. *Mental retardation* refers to a particular state of functioning that begins in childhood and in which limitations in intelligence coexist with related limitations in adaptive skills.

Mental Retardation. Definition, Classification, and Systems of Supports (9th edition, American Association on Mental Retardation. In short, Mental Retardation is "..a fundamental difficulty in learning and performing certain daily life skills. The personal capabilities in which there must be a substantial limitation are conceptual, practical and social intelligence. Id

Mental retardation is a severe impairment, affecting both cognitive and adaptive functioning. The essential feature of mental retardation is significantly subaverage general intellectual functioning, accompanied by significant limitations in adaptive behavior. The affected individual is not merely a "slow learner", but suffers from a condition that permeates every aspect of daily life. **The diagnostic criteria for mental retardation are specific. Without assistance from a competent mental health expert, adequately briefed with Mr. Phillips' social history, it was impossible for the jury or judge to understand of the extent and severity Mr. Phillips' disability**.

Trial counsel however failed to present adequate evidence to support Mr. Phillips' impaired intellectual functioning, his impaired adaptive behavior, or his brain damage. The triers of fact were thus left with a misleading impression that Mr. Phillips' alleged "street smarts" compensated for his low intellectual functioning (R. 751-53). In fact, paradoxically, mentally retarded people characteristically have a great ability to hide their retardation. This may be due to a genuine misreading of their own skills, or from defensiveness about the degree of their handicap. **Without adequate testimony from a specialist in mental retardation however, this "masking" phenomenon may be taken at face value and attributed to "street smarts", which is exactly what happened in Mr. Phillips' resentencing, to his substantial prejudice**.

Mr. Phillips can show that he fulfilled the criteria for two statutory mitigating circumstances; namely that Mr. Phillips was unable to appreciate the criminality of his conduct and that his capacity to conform his conduct in accordance with the law was substantially impaired; and that he was suffering from extreme mental and emotional disturbance. **Expert testimony can be presented that also prove numerous non-statutory mitigating factors. For example, his mental retardation and low intellectual**

functioning, his organic brain damage, his impulsivity and poor memory functioning should have been considered by the sentencing jury. Furthermore, Mr. Phillips can show that his mental deficits should have precluded the imposition of the cold, calculated and premeditated aggravating circumstance.

Trial counsel unreasonably failed to obtain the proper experts in Mr. Phillips' case. Despite his awareness of Mr. Phillips' low intellectual functioning, **counsel failed to consult a specialist expert in mental retardation. Despite his awareness of Mr. Phillips' numerous head traumas, gunshot wounds, and fetal alcohol exposure, counsel failed to consult and present a medical specialist - a neuropsychiatrist or neurologist - who would have supported the neuropsychological indications of brain damage** (Supp. R. 36)(R. 610). There was substantial other evidence of past trauma to indicate the etiology of organicity; including, but not limited to, systemic racism (R. 554, 564), a gunshot wound to the head in childhood (R. 531-32; 568-69)(Supp.R. 645-46), a history of abuse and parental abandonment (R. 525-27; 530; 551-52; 554; 564), childhood alcohol exposure, poverty, and the likelihood of exposure to toxins through the agency of Mr. Phillips' parents' history as migrant workers and Mr. Phillips' own work history (R. 519-20, 547). Despite the explicit appearance of these factors in

> the record, counsel failed to establish the links between them and Mr. Phillips' mental deficits.
>
> Trial counsel's ineffectiveness in failing to retain appropriate experts in mental retardation and medicine also precluded the trial court from fulfilling its duty to Mr. Phillips.

(PCR. 54-59)(emphasis added). The emphasized portions of this recitation of what was actually plead is of critical importance when this Court considers the summary denial of an evidentiary hearing by the lower court. The state's response to Mr. Phillips' postconviction motion took the position that "resentencing counsel in fact presented every aspect of alleged mitigation complained of in these post-conviction proceedings, and then some." (PCR. 199-200). Additionally, the state took the position that postconviction counsel included "no allegations herein that the Defendant has been subsequently examined by [a mental retardation specialist or neurologist]" (R. 208). Neither were the case. The State has never agreed and the lower courts have never heard specific testimony that Mr. Phillips is brain damaged and mentally retarded. Such

evidence would not be cumulative, as envisioned in Valle v. State, 705 So. 2d 1331 (Fla. 1997). Undersigned counsel emphasized these points at the Huff hearing. (Supp. PCR. 226-227, 241-244).

There was virtually no factual discussion of any of the claims that were found to be inadequately plead in the lower court's summary denial order. The summary dismissal of the Strickland[2] and Ake[3] claims included only one sentence of discussion. The lower court appears to have made no use of the record or files in this case, which certainly do not show conclusively that Mr. Phillips is not entitled to relief. Thus, the order of the lower court ignores the express requirements of Rule 3.850 and the substantial and unequivocal body of case law from this Court holding that courts must comply with the Rule. As to the sufficiency of the pleadings of ineffectiveness of trial counsel, Mr. Phillips has clearly met the burden under Fla. R. Crim. P. 3.850. As noted by this Court,

[2]Strickland v. Washington, 466 U.S. 668 (1984).

[3]Ake v. Oklahoma, 470 U.S. 68 (1985).

"[w]hile the post conviction defendant has the burden of pleading a sufficient factual basis for relief, an evidentiary hearing is presumed necessary absent a conclusive demonstration that the defendant is entitled to no relief". Gaskin v. State, 737 So. 2d 509 (Fla. 1999). See also Peede v. State, 24 Fla. L. Weekly 5391 (Fla. 1999). The rule was never intended to become a hindrance to obtaining a hearing or to permit the trial court to resolve disputed issues in a summary fashion. Id.

In their response to Mr. Phillips' 3.850 motion, the state relied on the hearsay testimony of Detective Greg Smith for the proposition that Mr. Phillips failed to demonstrate prejudice in light of the state's rebuttal evidence presented through lead detective Greg Smith as well as state experts Dr. Miller and Dr. Haber at the resentencing hearing. (PCR. 209-211). As noted elsewhere, Mr. Phillips was not allowed to rebut much of this important evidence because the state objected to rebuttal that in any sense raised "lingering doubt" issues of Mr. Phillips' guilt when he had only been granted a

resentencing and not a retrial. (T. 269-70). The lower court allowed the state to present Detective Smith's testimony to rebut the defense expert testimony. The result was that a jury that eventually split only seven (7) to five (5) for death never heard a proper defense attack on the 1983 testimony of the jailhouse witnesses. Evidence from these absent witnesses also came up in the testimony of state mental health experts Drs. Miller and Haber. In fact, the evidence and testimony presented at the 1988 evidentiary hearing about the jailhouse witnesses would have supported the findings of the defense experts that Mr. Phillips was easily manipulated and targeted by jailhouse snitches who had their own agenda. That evidence had been presented at the 1988 evidentiary hearing. The resentencing jury deserved to know about the existence of all the evidence in order to determine the credibility of the State's case in rebuttal.

The law strongly favors full evidentiary hearings in capital post conviction cases, especially where a claim is grounded in factual as opposed to legal matters. "Because

the trial court denied the motion without an evidentiary hearing...our review is limited to determining whether the motion conclusively shows whether [Mr. Phillips] is entitled to no relief." Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988). See also LeDuc v. State, 415 So. 2d 721, 722 (Fla. 1982).

Some fact based claims in post conviction litigation can only be considered after an evidentiary hearing, Heiney v. State, 558 So. 2d 398, 400 (Fla. 1990). Holland v. State, 503 So. 2d 1250, 1252-3 (Fla. 1987). "Accepting the allegations . . .at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing", Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla 1989). Mr. Phillips case is such a case.

Under Rule 3.850 and this Court's well settled precedent, a postconviction movant is entitled to evidentiary hearing unless the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief", Fla R. Crim. P. 3.850. See also Lemon v. State, 498 So. 2d 923 (Fla.

1986); Hoffman v. State, 613 So. 2d 1250 (Fla. 1987); O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984). Mr. Phillips has alleged facts, in this instance the presence of mental retardation and organic brain damage, which, if proven, would entitle him to relief. Mr. Phillips plead with greater specificity than was required by the case law. Valle v. State, 705 So. 2d 1331 (Fla. 1997).

The question for this Court is whether, in Mr. Phillips' case, re-sentencing counsel did an Constitutionally adequate job pursuant to Strickland of developing and presenting his own case for the presence of statutory and non-statutory mental health mitigation at the 1994 resentencing. The fact that a case had been first presented at the 1988 evidentiary hearing that subsequently led to this Court's grant of a resentencing proceeding is not dispositive. This Court outlined the bases for the grant to Mr. Phillips of a new penalty phase:

> More compelling evidence was

presented by Phillips' experts. These experts testified that Phillips is emotionally, intellectually, and socially deficient, that he has lifelong deficits in his adaptive functioning, that he is withdrawn and socially isolated, that he has a schizoid personality, and that he is passive aggressive. Phillips IQ was found to be between seventy-three and seventy-five, in the borderline intelligence range. Both experts concluded that Phillips falls under the statutory mitigating circumstances of extreme emotional disturbance and an inability to conform his conduct to the requirements of the law. They also opined that Phillips did not have the capacity to form the requisite intent to fall under the aggravating factor of cold, calculated, and premeditated or heinous, atrocious, or cruel.

Again, the State contends that this mitigation is not sufficiently compelling to demonstrate prejudice. However, this testimony provides strong mental mitigation and was essentially unrebutted. The testimony of the State experts related solely to the issue of competency. While these experts testified that they did not believe Phillips had significant mental or emotional disorders, they offered no opinion as to the applicability of the statutory mental mitigators, and even these experts agreed that Phillips' intellectual functioning is at least low average and possibly borderline retarded. Accordingly, even giving full

> credit to the testimony of the State's experts there was significant, unrebutted mental mitigation which should have been considered by the jury.

Phillips v. State, 608 So. 2d 778 (Fla. 1992)(PCR. 55-56).

The same judge, Judge Arthur Snyder, **was** the lower court at the 1983 trial, the 1988 evidentiary hearing, and at the 1994 resentencing. In 1988 and in 1994 he failed to find credible the testimony of the two defense psychologists, Drs. Carbonell and Dr. Toomer, that statutory mental health mitigation was present in Mr. Phillips' case.[4] And that is hardly surprising in the case of Dr. Carbonell, since the testimony heard by Judge Snyder and the jury in 1994 was simply her 1988 evidentiary hearing testimony being read into the 1994 record. (T. 544). The relevance of Dr. Carbonell's testimony and its impact was severely diluted. The

[4]Mr. Phillips' claim that Judge Snyder did not provide a fair hearing before an impartial judge was denied by the lower court on grounds of both procedural bar and legal insufficiency. (PCR. 113, 144).

resentencing jury was thus denied to opportunity to assess the demeanor, presence, and style of Dr. Carbonell, to Mr. Phillips' substantial prejudice. A substantial portion of her 1988 testimony concerned not mitigation issues but rather her opinion that Mr. Phillips was not competent. (Compare Supp. R. 59-96 of Supp. R. 2-170).

Neither of the defense experts were medical doctors. They never affirmatively testified that Mr. Phillips was brain damaged and/or mentally retarded. The experts retained by postconviction counsel were prepared to do so after evaluation of Mr. Phillips. The lower court's summary denial order finding that Mr. Phillips' claims had been insufficiently plead ignored Fla. R. Crim. P. 3.850 (c)(6) which describes the pleading requirements under the rules, namely "a brief statement of the facts (and other conditions) relied on in support of the motion." And as is described in Fla. R. Crim. P 3.850(d), "[i]f the motion, files and records in the case **conclusively show** the prisoner is entitled to no relief, the motion shall be denied without a hearing." (emphasis added). This is

simply not the situation in Mr. Phillips' case. The proper place for factual development of claims is not at the pleading stage in postconviction but rather during an evidentiary hearing in circuit court where witnesses can be called and evidence can be introduced. The lower court's summary denial order ignored the fact that the sentencing order of the trial court made credibility findings regarding the resentencing live testimony of defense expert Dr. Toomer and the testimony of Dr. Carbonell from the 1988 evidentiary hearing such that their testimony regarding statutory mental health mitigation was disregarded by the lower court and additionally little weight was given to non-statutory mitigation found by the trial court. (R. 183-85). The resentencing court's order rejecting the extreme mental or emotional disturbance mitigating circumstance, Fla.Stat. Section 921.141(6)(b), found:

> The Court finds that this statutory mitigating circumstance does not reasonably exist. There is no evidence that the defendant suffered from a mental disturbance that "interfere(d)

> with but (did) not obviate the defendant's knowledge of right and wrong." Duncan v. State, 619 So.2d 279 (Fla. 1993); State v. Dixon, 283 So.2d 1 (Fla. 1973). There is simply no basis to support either Dr. Carbonell's or Dr. Toomer's testimony that this mitigating factor exists. Dr. Miller and Dr. Haber's testimony were inherently more credible.

(Supp. R. 183-84). Again, the only difference between the order and the State's proposed order is the first three words, with "[t]he State submits" replaced with "[t]he Court finds." Duncan and Dixon before both stand for the proposition that extreme mental or emotional disturbance "is easily interpreted as less than insanity but more than the emotions of an average man, however inflamed." Dixon at 10. This was not the interpretation cited to in the lower court's order. Rather, the standard recited was for the "capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law" mitigating circumstance, Fla. Stat. Sect. 921.141(6)(f). And further, Dixon makes clear that both of these mental mitigators are "provided to

protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state." Id. Resentencing counsel failed to object to the testimony of Drs. Haber or Miller about their personal standard for finding extreme emotional disturbance. (T. 496-97, 708-09). Undersigned counsel submits that testimony from experts prepared to testify that Mr. Phillips is mentally retarded and suffers from organic brain damage certainly meets the proper standard and should be heard at an evidentiary hearing.

State psychiatrist Dr. Lloyd Miller testified at the resentencing that in his opinion Mr. Phillips exhibited no mental illness or impairment, emotional disturbance or extreme emotional disturbance. (T. 495). He described what his own standard for a finding of statutory mental mitigation was:

> Based upon my interviews with Mr. Phillips I found no extreme emotional disturbance and no emotional disturbance. I found him to be well mannered, quite cooperative and rational. It's as I described before not obviously subsequently impaired.

> Not in an extreme mental or emotional state. **That would constitute a psychiatric emergency or need to treatment, medication or hospitalization**.

(T. 496-97)(emphasis added). Resentencing counsel failed to object to Dr. Miller testifying regarding his opinion as to the legal standard for the presence of statutory mitigation or to cross examine him about it. Dr. Miller also testified that he regarded Mr. Phillips' "less than average intelligence" to be mitigating. (R. 513). Based on this testimony, Dr. Miller's position appears to be that in order for Mr. Phillips' "less than average intelligence" to reach the level of statutory mitigation, he would effectively have to be psychiatrically institutionalized. Similarly, and without objection, psychologist Leonard Haber described extreme emotional disturbance as:

> ...something along the order of a psychosis which means a person who suffers a blank in contact with reality or could be a paranoid disorder...They start to believe things that an average person wouldn't believe. They might take the form of what we call a major

> depression...Those are emotional disturbances involving either depression or confusion and begins to have lack of context with reality or be paranoid or such an extreme suspicion as to being unable to function normally.

(T. 708-09). These opinions as to what minimally qualifies as statutory mitigation were what the resentencing court relied on in his order denying relief based on the court's credibility findings against the defense experts who opined that statutory mitigation was present:

> There is simply no basis to support either Dr. Carbonnell's (sic.) or Dr. Toomer's testimony that this mitigating factor exists. Dr. Miller and Dr. Haber's testimony were inherently more credible. Thus, the Court finds that this mitigating circumstance has not been reasonably established by the greater weight of the evidence.

(Supp. R. 183-84). The resentencing court's failure to find statutory mitigation when, as here, it was present in the record was due to an inaccurate, flawed and prejudicial analysis by the resentencing court. This is reflected in an order that was effectively prepared by the

State which simply parroted the patently incorrect legal opinion of the State's mental health experts.[5] Mr. Phillips' believes that the facts set forth in the order of the resentencing court when viewed in the entire context of his case as explicated herein should be reviewed de novo by this Court and determined to be clearly erroneous. See United States v. United States Gypsum Co., 333 U.S. 364 (1948)("A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake is being committed"). Alternatively, Mr. Phillips submits that the statutory mental health mitigating circumstances were established and that the competent substantial evidence

[5] "[The trial court's] failure to follow the procedure set out in Spencer, coupled with its adoption of the State's sentencing memorandum, create both an appearance or partiality and a failure to carefully consider the contentions of both sides and to take seriously the independent judicial "obligation to think through [the] sentencing decision." Gibson v. State, 661 So.2d 288, 293 (Fla. 1995) cited in Phillips v. State, 705 So.2d 1320, 1324 (Fla. 1997) (Anstead, J., concurring specially).

standard was met. See Rogers v. State, 783 So. 2d 980 (Fla. 2001).

In Mr. Phillips' case, counsel failed to provide his client with "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.", Ake at 1096. The need for an independent mental health evaluation in 1994 was critical given the information in the hands of counsel subsequent to the evaluations by defense expert psychologists Carbonell and Toomer in 1987 and 1988 and their testimony in the prior proceedings in the case along with the participation of Drs. Haber and Miller as competency evaluators.

Resentencing counsel was aware, or should have been aware that Mr. Phillips suffered from mental retardation and organic brain damage. However counsel's failure to retain appropriate experts to adequately diagnose and explain these conditions to the sentencing jury in terms of their effect on Mr. Phillips behavior, meant that Mr. Phillips was denied effective mental health assistance.

At the 1994 resentencing, Mr. Phillips' presented the testimony of the same two psychologists who had testified at the 1988 evidentiary hearing after conducting psychological testing and evaluations upon Mr. Phillips. Both psychologists opined that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance as well as that the capacity of the defendant to appreciate the criminality of his conduct or to conform this conduct to the requirements of the law was substantially impaired (T. 630-31)(Supp. R. 103).

Despite the fact that both statutory mitigating circumstances were supported by psychological testing and expert opinions, the trial judge refused to give this testimony any weight and to properly consider this mitigation. Of course he was the same judge who had heard the testimony of Dr. Toomer and Dr. Carbonell in 1988. Furthermore, other mitigating circumstances were presented including Mr. Phillips' low IQ, poor and violently abusive family background, and an alcoholic father. The court

found this non-statutory mitigation deserved little weight because, among other reasons, Mr. Phillips' brother and sister were raised under the same circumstances and they "were able to overcome their background and become law abiding, productive citizens" (R. 841-42).

The prejudice to Mr. Phillips is evident in the sentencing order of the court which makes credibility findings such that the testimony of defense experts including Dr. Carbonell were given no weight in the finding of the court that **no** statutory mental health mitigating circumstances were present in Mr. Phillips' case (Supp. R. 182-85).

Both the expert and trial counsel have a duty to perform an adequate background investigation. When such an investigation is not conducted, due process is violated. Resentencing counsel's only affirmative act was to send Dr. Toomer to see Mr. Phillips for a single hour. The judge and jury were deprived of the facts that were necessary to make a reasoned finding. A full exploration of what had been revealed in 1988, that Mr. Phillips

likely suffered from organic brain damage and mental retardation, was not undertaken by resentencing counsel. Mr. Phillips' judge and jury were not able to "make a sensible and educated determination about the mental condition of the defendant at the time of the offense." Ake at 1095.

The result was that the mental health evidence that was presented in 1994 was nothing more than a repackaging of the testimony from 1988, and in the case of Dr. Carbonell, it was exactly the same testimony read into the record. The state was well prepared at the resentencing to present Dr. Haber and Dr. Miller as rebuttal witnesses to the presence of statutory mitigation. They had doubtless read the comments about the testimony of Drs. Miller and Haber at Mr. Phillips' 1988 evidentiary hearing in the opinion of this Court granting the resentencing to Mr. Phillips:

> The testimony of the State experts related solely to the issue of competency. While these experts testified that they did believe Phillips had significant mental or emotional

> disorders, they offered no opinion as to the applicability of the statutory mental mitigators, and even the experts agreed that Phillips' intellectual functioning is at least low average and possibly borderline retarded. Accordingly, even giving full credit to the testimony of the State's experts there was significant, unrebutted mental mitigation which should have been considered by the jury.

Phillips, 608 So. 2d at 783. Resentencing counsel simply sat on his hands. His inaction resulted in complete, accurate and valid information about Mr. Phillips' mental retardation and organic brain damage being withheld from the jury, and this deprivation violated Mr. Phillips' constitutional rights. See Penry v. Lynaugh, 492 U.S. 304 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

Resentencing counsel was obliged by the facts of the case and the record at the time he was appointed to retain an expert in mental retardation and a medical doctor, such as a neurologist, capable of determining the presence or absence of organic brain damage. He did neither. There was considerable evidence of Mr. Phillips' mental

condition at the time of the offense which would have been relevant to support statutory and non-statutory mitigating circumstances. Mr. Phillips suffers from organic brain damage and mental retardation, conditions that rise to the level of statutory mitigation. He was prepared to present these witnesses at an evidentiary hearing but was denied that opportunity.

In discussing the statutory mental health mitigating factors, this Court has recognized that:

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

Perri v. State, 441 So. 2d 606, 609 (Fla. 1983). The Eleventh Circuit has also recognized that "[o]ne can be competent to stand trial and yet suffer from mental health problems that the sentencing jury and judge should have had an opportunity to consider." Blanco v. Singletary, 943 F. 2d 1477, 1503 (1991). And this Court has described extreme mental or emotional disturbance as "less

than insanity but more than the emotions of an average man, however inflamed." State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). As a result, Mr. Phillips was deprived of the full impact of substantial and compelling statutory and nonstatutory mitigating evidence.

At the Huff hearing, the transcription of which is remarkably poor in the experience of undersigned counsel, undersigned counsel further attempted to explain to the court the reasons that an evidentiary hearing was necessary:

> ...[A]lthough it was six years after the evidentiary hearing in 1988 for the resentencing -- before the resentencing took place, resentencing counsel only called seven of the eleven witnesses that had been called at the evidentiary hearing. So, in fact, the development of the case went backwards not forward understand resentencing counselor and of those people that were called one of the people that wasn't called was the only employer that Harry Phillips had, who was called at an evidentiary hearing and cases involving mental retardation and behavior. Certainly, employment and supervision of employees are factors to consider when you are developing an adaptive behavior skills. None of the trial attorneys that represented

Phillips in 1982 were called in the resentencing hearing and those are the most people who had contact with him in the legal system and the development of the mitigation case that was put forward in the evidentiary hearing included those witnesses as well. So establishing that Harry Phillips was mentally retarded should have been a critical issue for resentencing counsel in 1994 and there was no additional development in the resentencing case and defense counsel was on notice as to the State's case and whose the state experts were because both of them testified in the evidentiary hearing in 1988

***

As to some of the specifics items. There was no neurological examination done by any defense expert prior to taking over this case. No medical doctor saw my client from the defense's side. No neurologist did a neurological examination from the defense's side. There was no physician who was in a position to testify about what the defendant neurological deficits were on the record and that is something that is entirely new and relevant for several reasons. Number one, because only the State put on a medical doctor and the medical doctor clearly was credible as far as the judge was concerned...It was crucial for resentencing counsel to have a medical opinion at resentencing about what Mr. Phillips' status was and we have that now -- we have a medical opinion by a neurologist showing severe neurological deficits on the part of Mr.

> Phillips to the point that statutory mitigators are in fact and when you think that in conjunction with mental retardation experts with many years on the fields, one is willing to come in and testify about Mr. Phillips' retardation, what counsel for the State doesn't point out is that no one ever found that Mr. Phillips was retarded at the prior proceedings. They danced around it, but the fact was the State acted because of Mr. Phillips' street smarts. No matter what his IQ is. His adaptive behavior was such that he was a master criminal and thus could not meet the possibility of mental retardation in the State of Florida. No neurological testimony and no medical opinion about brain damage or neurological deficits. No findings of mental retardation and seven [to] five jurors' recommendation for death...

(Supp. PCR. 222-23, 241-43). Defense neuropsychologist Dr. Carbonell was never sent back by resentencing counsel Wax to re-examine Mr. Phillips after a re-sentencing was ordered. Her failure to testify at the re-sentencing was strong evidence of deficient performance by resentencing counsel. As argued at the Huff hearing, the misuse of Dr. Carbonell and the failure to call other witnesses that had appeared at the evidentiary hearing in 1988 dealt a

serious blow to Mr. Phillips' penalty phase case. (Supp. PCR. 225). Resentencing counsel simply acquiesced to events and whether through negligence or ignorance, the effect was that he failed to retain the proper experts under the circumstances and also failed to make any use of one of his appointed experts.

The failure to retain a psychologist with an expertise in mental retardation diagnosis and treatment who could rebut the testimony of state expert psychologist Dr. Haber concerning Mr. Phillips' alleged "street smarts" by explaining to the jury the components of mental retardation, including the adaptive behavior prong, was deficient performance. Likewise, re-sentencing counsel's failure to obtain an examination by a neurologist who could diagnose organic brain damage was deficient performance. And the failure by re-sentencing counsel to retain a medical doctor, such as a neurologist or a psychiatrist, to rebut the testimony of the state expert psychiatrist Dr. Miller, who the defense was well aware of since he testified in 1988, was deficient performance.

Resentencing counsel advised Judge Snyder when he suggested appointment of Dr. Miller to replace Dr. Carbonell at a pre-trial hearing that "Miller testifies for the prosecution." (T. 25). As the lower court acknowledged in its Order, ineffective assistance of counsel claims are governed by the two-step analysis set forth in Strickland ; to establish a Sixth Amendment violation, a defendant must establish (1) deficient performance, and (2) prejudice. Id. at 687. The United States Supreme Court in Williams v. Taylor, 120 S. Ct. 1495 (2000), reemphasized the continuing vitality of the Strickland test and reiterated what the standards are with respect to capital cases and how they are to be properly applied.[6] The United States Supreme Court made it clear that Mr. Phillips "had a right--indeed a constitutionally protected right--to provide the jury with the mitigating

[6]The Supreme Court granted relief to Mr. Williams, the first time the Court has granted relief on the basis of ineffective assistance of counsel as to the penalty phase of a capital case. Mr. Phillips' entitlement to relief is clearly established under the Williams decision.

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

A. 1988 TESTIMONY OF DR. JOYCE CARBONELL

Dr. Joyce Carbonell was retained by then postconviction counsel prior to the 1988 evidentiary hearing. She testified in 1988 that she saw Mr. Phillips for four and a half hours on November 7, 1987, reviewed voluminous records, and performed various psychological tests on Mr. Phillips. (Supp. R. at 12). She testified that she used the Wechsler (WAIS-R) IQ test to determine that Mr. Phillips' full scale IQ was 75, his verbal IQ was 75 and his performance IQ was 77. (Supp. R. at 15. She also testified that Mr. Phillips performance on achievement tests was "somewhat lower than you would expect," explaining further that "having a low I.Q. score, be it borderline or retarded, doesn't mean you can't ever

learn anything. But, your pace may be painfully slow compared to other people." (Supp. R. 19-20). She acknowledged that her review of Mr. Phillips' prison records revealed that in 1983 he received an IQ score of 73 on the Revised Beta. (Supp. R. 32). She later testified that an earlier version of the Beta in the prison records indicated "an IQ of about 83." (Supp. R. 41).

Dr. Carbonell also testified about Mr. Phillips educational background, stating that her review of his school records from childhood indicated that Mr. Phillips got D's and F's, and had a difficult time in school, and that this was consistent with his low IQ. (Supp. R. 33). She testified that she also spoke with a former school teacher of Mr. Phillips, Mr. Ford, who she said "described Harry as being good, as being there, very unlike his brother who, for example, went out and engaged in activities, and that Harry didn't do those sort of things; that Harry tried hard but didn't do well. He pointed out that Ida, who was the Sister, was not all that smart and

yet could, in his words, run rings around Harry in terms of his performance in school." (Supp. R. 42-43). Ultimately, Dr. Carbonell's conclusions about whether Mr. Phillips was mentally retarded were equivocal:

> Q In a technical sense, is Mr. Phillips retarded?
>
> A In a technical sense, if you look at a number, no. The problem is that retardation is more than a number. Retardation is the total. You're supposed to look at three things. One is does the person suffer from significantly sub-average intellectual functioning; two, did this problem begin in what's known as the development stage; that is, before age 18, and, three, do they suffer from deficits in adaptive behavior. Those are the three things that are diagnostically important. American Association of Mental Deficiency also use -- I consult at a hospital now. We're required to report when someone is retarded. And, if all we report is an IQ score, it comes back with other questions -- did this occur developmentally, what;s the person's deficit in adaptive functioning in any sphere. Those three things are considered important to the diagnosis of retardation.
>
> Q Could you tell us how these three things, that three prong test, relates to Mr. Phillips?

A Okay. Mr. Phillips' problems did indeed start in the developmental period. There is all kind of evidence that it did by family reports, by reports from people in school. D.O.C. records report him to be dull normal, below average intelligence. We know it started in the developmental period. He has an IQ score of 74, sometimes 73. That was on the revised Beta. The number for IQ cut-off is in fact -- is in fact 70. A number of years ago it was 80. No, in a very technical sense he doesn't fall beneath the magic numbers. You have to understand there is a range around the numbers. Does he have deficits in adaptive functioning? Yes. Part of that is why we're here. He does have deficits in adaptive functioning. He's never particularly adapted well, no, and he's never particularly gotten along well. The only way he seems to get along is by being very passive. When he tries to do anything else, he relatively ineffective.

Q Would you say Mr. Phillips is intellectually impaired?

A Regardless, even if you don't want to look at all the criteria for mental retardation, he is, on the basis of his intelligence score.

(Supp. R. 57-59). Based on her testimony, Dr. Carbonell was obviously aware that there is "a range around the

numbers" and that her full scale IQ score of 75 does not, standing alone, disqualify Mr. Phillips from a diagnosis of mental retardation.

B. WHAT IS MENTAL RETARDATION?

The resentencing of Mr. Phillips took place in April 1994. This was the last month that the American Psychiatric Association's (APA) Diagnostic and Statistical Manual of Mental Disorders (Third Edition-Revised), (DSM-III-R), first printed in May 1987, was considered to be the authoritative reference for the diagnoses of mental retardation and other mental disorders. It was replaced and updated the APA's Diagnostic and Statistical Manual of Mental Disorders (Fourth Edition), (DSM-IV), was first printed in May 1994. An explanation of the relevance of the DSMs is necessary to explicate the issues in Mr. Phillips' case related to his IQ scores and the connection of IQ to a diagnosis of mental retardation.

DSM-III-R places mental retardation among the developmental disorders on Axis II, and states that the "essential feature of this group of disorders is that the

predominant disturbance is in the acquisition of cognitive, language, motor, or social skills." DSM-III-R at 28. DSM-III-R lays out the specific requirements for a diagnosis of mental retardation during:

> The essential features of this disorder are: (1) significantly subaverage general intellectual functioning, accompanied by (2) significant deficits or impairments in adaptive functioning, with (3) onset before the age of 18. The diagnosis is made regardless of whether or not there is a coexisting physical or other mental disorder.
>
> **General intellectual functioning.** General intellectual functioning is defined as an intelligence quotient (IQ or IQ equivalent) obtained by assessment with one or more of the individually administered general intelligence tests (e.g., Wechsler Intelligence Scale for Children-Revised, Stanford Binet, Kaufman Assessment Battery for Children). Significantly subaverage intellectual functioning is defined as an IQ of 70 or below on an individually administered IQ test. Since any measurement is fallible, an IQ score is generally thought to involve an error of measurement of approximately five points; hence, an IQ of 70 is considered to represent a band or zone of 65 to 75.
>
> Treating the IQ with some flexibility permits inclusion in the Mental Retardation category of people

with IQs somewhat higher than 70 who exhibit significant deficits in adaptive behavior. It also permits exclusion from the diagnosis of those with IQs somewhat lower than 70 if the clinical judgment is that there are no significant deficits or impairments in adaptive functioning. An IQ level of 70 was chosen because most people with IQs below 70 require special services and care, particularly during the school-age years.

The arbitrary IQ ceiling values are based on data indicating a positive association between intelligence (as measured by IQ score) and adaptive behavior at lower IQ levels. This association declines at the mild and moderate levels of Mental Retardation.

Adaptive functioning. Adaptive functioning refers to the person's effectiveness in areas such as social skills, communication, and daily living skills, and how well the person meets the standards of personal independence and social responsibility, expected of his or her age by his or her cultural group. Adaptive functioning in people with Mental Retardation (and in people without Mental Retardation) is influenced by personality characteristics, motivation, education, and social and vocational opportunity. Adaptive behavior is more likely to improve with remedial efforts than is IQ, which tends to remain more stable.

Useful scales have been designed to quantify adaptive functioning or behavior (e.g., the Vineland Adaptive

> Behavior Scales, American Association of Mental Deficiency Adaptive Behavior Scale). Ideally, these scales should be used in conjunction with a clinical judgment of general adaptation. If these scales are not available, clinical judgment of general adaptation alone, the person's age and cultural background being taken into consideration, may suffice.

DSM-III-R at 28-29. Because of the possible range of error on Mr. Phillips IQ scores as reported by the experts at the resentencing hearing, resentencing counsel should have been able to make out a convincing case that Mr. Phillips arguably fell into the classification of "mild mental retardation," as defined by DSM-III-R, with an IQ level of "50-55 to approx. 70" and his "concurrent deficits or impairments in adaptive functioning." Id. at 32.

> 317.00 **Mild Mental Retardation**
> Mild Mental Retardation is roughly equivalent to what used to be referred to as the educational category of "educable." This group consists the largest segment of those with the disorder - about 85%. People with this level of Mental Retardation typically develop social and communication skills during the preschool years (ages 0-5),

> have minimal impairment in sensorimotor areas, and often are not distinguishable from normal children until a later age. By their late teens they can acquire academic skills up to approximately sixth-grade level; during their adult years, they usually achieve social and vocational skills adequate for minimum self-support, but may need guidance and assistance when under unusual social or economic stress. At the present time, virtually all people with Mild Mental Retardation can live successfully in the community, independently or in supervised apartments or group homes (unless there is an associated disorder that makes this impossible).

DSM-III-R at 32. The failure by new resentencing counsel to retain a retardation expert in light of Dr. Carbonell's 1988 testimony was deficient performance. It was vital in the circumstances where the same trial judge who denied relief in 1988 was to hear evidence at the 1994 resentencing that updated intelligence and neuropsychological testing be administered to Mr. Phillips **and** that one of the "useful scales" noted in DSM-III-R that is designed to quantify adaptive functioning or behavior, like the Vineland Adaptive Behavior Scales, be administered to family friends and acquaintances of Mr.

Phillips to establish the presence of mental retardation.

DSM-IV became the APA's authoritative reference following its initial printing in the month after Mr. Phillips' resentencing in April 1994. Some modification and amplification of the diagnostic features of mental retardation can be found in DSM-IV. Due to space limitations only the most relevant modifications are included here:

> ***Diagnostic features***
>
> The essential feature of mental retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.
>
> *General intellectual functioning*

***

> It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning. The choice of testing instruments and interpretation of results should take into account factors that may limit test performance (e.g., the individual's sociocultural background, native language, and associated communicative, motor, and sensory handicaps). When there is significant scatter in the subtest scores, the profile of strengths and weaknesses, rather than the mathematically derived full-scale IQ, will more accurately reflect the person's learning abilities.

DSM-IV at 39-40. DSM-IV also notes that the American Association on Mental Retardation (AAMR) has a classification system that uses the same three general criteria as does the American Psychiatric Association:

significantly subaverage intellectual functioning, limitations in adaptive skills, and onset prior to age 18 years; and further notes that in the AAMR classification, "the criterion of significantly subaverage intellectual functioning refers to a standard score of approximately 70-75 or below (which takes into account the potential measurement error of plus or minus 5 points in IQ testing)." DSM-IV at 45.

C. DR. CARBONELL'S CONCLUSIONS

Dr. Carbonell testimony that a diagnosis of mental retardation doesn't depend solely on "magic numbers" was well taken and entirely consistent with DSM-III-R and the 65-75 IQ score margin of error around the "magic number" of 70 explicated therein. Her testimony in 1988 essentially boiled down to a finding that Mr. Phillips was "intellectually impaired" with adaptive behavior deficits which she would call "mentally retarded" unless there existed a rigid prophylactic rule that the presence of any IQ test score over 70 in a client's history rules out a diagnostic finding of mental retardation when all the

evidence is considered. (Supp. R. 59). On redirect, then postconviction counsel staked out Dr. Carbonell on precisely this issue:

> Q You indicated that the I.Q. score can go five points either way. That's a sloppy way to say it, but --
>
> A There is what is known as sort of a confidence range in terms around I.Q. scores. It depends on the test you use. But the I.Q. score is a number alone; has to be considered in relation to everything else along with the person, and in essence, how reliable is that particular test, is that particular score; how does it relate to the other tests that are given; and how does it relate to the person's level of adaptive skills 'cause all the definitions of retardation are real clear. It's not just the I.Q. score.
>
> Q Even in terms of the three prong test you mentioned earlier, was the behavior that Mr. Phillips exhibited the behavior of a retarded individual?
>
> A What he has are deficits in his adaptive functioning. He has life-long deficits in his ability to adapt. He's never been able to adapt vocationally. He certainly didn't adapt academically. He has deficits in all of those spheres. He's not able to cope with any adversities. He can't cope with any problems with his life. He doesn't seem

> to learn from his experience about what kind of behavior will keep him out of trouble and what kind will get him into trouble possibly because he doesn't really have the capacity for that.
>
> Q The traditional I.Q. score that the Department of Corrections cites as Mr. Phillips' I.Q. scores even before -- Yours I think is 73; right?
>
> A The most current I.Q. score in those records is an I.Q. of 73. It's what called Revised Beta.
>
> Q Even using the analysis that says you just use the numbers, if you add five to the 73 --
>
> A It's still borderline.
>
> Q If you subtract --
>
> A Becomes mildly retarded.

(Supp. PCR. 168-170). As noted in Argument II, as of June 2001 there is a new Florida Statute, § 921.137, barring the imposition of the death sentence on mentally retarded persons in Florida. This new statute specifically anticipates the problem of IQ scores and the margin of error by not specifying a "cutoff" IQ score for "significantly subaverage general intellectual

functioning" and instead defining it as "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services."[7]

In 1988 then postconviction counsel argued in his post-evidentiary hearing memorandum that evidence provided by the defense mental health experts proved the presence of mitigation in Mr. Phillips' case, specifically citing portions of Dr. Carbonell's written report concerning mental retardation:

> Mr. Phillips is pleasant and cooperative and attempts to disguise his low level of intellectual function with a veneer of social skills. In spite of this he appears obviously intellectually deficient and socially isolated. He has few interests and states that mostly he watches T.V. While he claims that he enjoys being out in the "yard", he has a history of refusing to go out. Like

[7]Florida currently defines mental retardation in chapters 916 and 393, F.S. The Florida definition specifies that "significantly subaverage general intellectual functioning" means "performance which is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the department." § 916.106(12) and § 393.063(42), F.S.

> many people of limited intellectual functioning he is passive, has less than adequate memory, and will generally try to please the examiner by answering in the way he believes is appropriate. While technically a score of 75 would not qualify as mental retardation, it is important to note that both IQ score and level of adaptive functioning contribute to classification. The cutoff scores for retardation are in fact arbitrary. Earlier definitions of retardation (Heber, 1961) used a score of 85 as the demarcation. The 1983 American Association on Mental Deficiency manual on classification and terminology notes that while an IQ of 70 is the cutoff for mental retardation, the "upper limit is intended as a guideline, it could be extended upward through IQ of 75 or more depending on the reliability of intelligence tests used."

(PCR1. 8670-71). Postconviction counsel hedged on the issue of whether Mr. Phillips was mentally retarded in his appeal brief after the denial of relief following the evidentiary hearing.

> Mr. Phillips was and is addled by intellectual impairment. He is almost mentally retarded. He is psychologically impaired. His functioning is that of a child.

(Initial Brief at 3, Phillips v. State, SC Case No. 75,

598). Red flag after red flag pointed to the possibility that Mr. Phillips suffered from mental retardation. Until undersigned counsel retained a mental retardation specialist to do the testing required under DSM no one was available to testify that Mr. Phillips was and is mentally retarded.

D. RESENTENCING COUNSEL'S DEFICIENT PENALTY PHASE PREPARATION

Resentencing counsel was surely on notice that mental retardation could potentially be an important issue in Mr. Phillips' resentencing case. And the state was certainly aware of the potential problem that could ensue if Mr. Phillips was presented to the jury as a mentally retarded person. For example, the State referred to Mr. Phillips during the examination of Dr. Toomer as "supposedly retarded." (R. 654-56). And Mr. Waksman made several comments in closing argument at the resentencing ridiculing the defense mitigation testimony by repeating over and over that Dr. Toomer has testified that Mr. Phillips was not "a vegetable." (R. 745, 752, 753).

Resentencing counsel's actions following his appointment as resentencing counsel are a virtual model of how not to select and prepare mental health experts. Barry M. Wax was appointed to Mr. Phillips' case on February 26, 1993. (R. 62). He entered the appearance of his law firm, Law Offices of Soven & Wax, as resentencing counsel for Mr. Phillips on March 2, 1993. (R. 388-89). More than seven months later, Wax filed a motion on October 18, 1993 requesting that the trial court reappoint the same two defense expert witnesses, the psychologists Toomer and Carbonell, that had testified almost six years before at the January 1988 evidentiary hearing. (R. 83-84). This motion was filed only three and a half months prior to the scheduled trial date, and explained:

> 3. In order to adequately present that [statutory] mitigating evidence, as well as other non-statutory mitigating evidence, it is essential that the Defendant utilize the services of Dr. Jethro Toomer and Dr. Joyce Carbonell. Both Dr. Toomer and Dr. Carbonell have previously been appointed by this court to testify on behalf of the Defendant, and are familiar with the facts and circumstances of this case. In fact,

> Dr. Toomer and Dr. Carbonell both testified at the Defendant's motion to vacate conviction and sentence held before this Honorable Court in January 1988. As a result of that hearing and appellate review of this Court's order denying the Defendant's motion, the Defendant was granted the resentencing hearing pending this Honorable Court. As such, Dr. Toomer and Dr. Carbonell are uniquely suited to testify on behalf of the Defendant.

(R. 84). Mr. Wax, the resentencing counsel, also filed a motion for a competency evaluation on October 18, 1993, in which he advised the trial court that "[s]ince the time of the [evidentiary] hearing on the Defendant's Rule 3.850 motion, he has been incarcerated on 'Death Row.' Counsel believes that the Defendant's condition has further deteriorated as a consequence of that incarceration." (R. 86). Of course since Mr. Phillips' competency had been an issue at the 1988 hearing and the appeal from the denial of relief, with Drs. Carbonell and Toomer opining that Mr. Phillips was not competent, this was a reasonable concern. See Phillips v. State, 608 So. 2d 778, 782 (Fla. 1992). At the hearing on the motion for re-appointment of defense

experts on October 26, 1993, resentencing counsel stated that while he had spoken to Dr. Toomer about accepting reappointment, he had not spoken with Dr. Carbonell about the case and was having trouble getting in touch with her. (T. 18). In spite of this revelation, the court re-appointed Drs. Toomer and Carbonell on October 28, 1993. (R. 91-94). Based on the record Mr. Wax's problems in communicating with Dr. Carbonell continued as the resentencing drew ever closer. At a hearing on January 11, 1994, less than a month before the scheduled resentencing, counsel indicated that he **still** had been unable to contact Dr. Carbonell:

> Mr. WAX: We are set for February 7. I have been doing everything; everything I can to be set ready on February 7th. I got a call from Mr. Waksman saying if I will be ready for trial. The only major hurdle that I'm having is Dr. Carbonell. Apparently she has been very ill. She has been -- She's one of the doctors -- one of the doctors that are familiar with the case originally. It listed her to the defense in 3.850 hearing.
>
> THE COURT: Lets not appoint her if she's sick. How about Miller?

Mr. Wax: Miller testifies for the prosecution.

THE COURT: Who else?

Mr. Wax: What I have to do is find a psychiatrist or psychologist who is willing to get up to speed in the case. So, let me make some phone calls and see if I can get someone but leave Dr. Carbonell now.

THE COURT: I don't want any delays on this.

Mr. Wax: I understand. I don't.

THE COURT: This is case is six, seven years old.

Mr. Wax: Well, yes. I think you're right. Realistically I know we are looking in March. Mr. Waksman was notified to be here. He will be down here soon. What I'll do --

THE COURT: I have no idea about this case. This case is something that really bugs me.

Mr. Wax: A life of its own. In any rate, I'll get in touch with you and let you know who to replace her with. I'll let you know immediately.

THE COURT: I'll like to go on the February 7th date if at all possible.

Mr. Wax: I don't know that's

> realistic because you the doctor's -- I'll still endeavor to try.

(T. 24-26). So with less than a month before the scheduled resentencing hearing and the court pressing to move forward resentencing counsel Wax who had entered his appearance in the case ten months before had failed to even contact Dr. Carbonell, the mental health expert that he considered to be "a crucial witness." (R. 121).

Following the hearing on January 11, the trial court signed an order appointing Drs. Toomer, Miller and Leonard Haber as "disinterested qualified experts" to determine the competency of Mr. Phillips! (R. 96). This was done without defense objection despite the fact that all three had opined in 1988 on competency with credibility findings to the detriment of Mr. Phillips made by Judge Snyder that were affirmed by this Court on appeal. Id. At the time of this proceeding Fla. R. Crim. P. 3.211(e) was in effect.[8] Defense counsel should have insisted on

[8] **(e) Limited Use of Competency Evidence**
(1) The information contained in any motion by the defendant for determination of competency to proceed or in

independent experts to be appointed to do the competency evaluation, and not the experts who had done competency evaluations in 1988 and were preparing to opine about the presence or absence of statutory and non-statutory mitigation in 1994. This mixing of competency issues with issues in mitigation became inevitable with the decision or absence of one by resentencing counsel in this regard. Dr. Toomer did a 1994 competency evaluation, finding Mr. Phillips to be competent. (T. 30). Yet resentencing counsel presented the canned testimony of Dr. Carbonell that Mr. Phillips was incompetent before the judge and

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any report of experts filed under this rule insofar as the report relates solely to the issues of competency to proceed and commitment, and any information elicited during a hearing on competency to proceed or commitment held pursuant to this rule, shall be used only in determining the mental competency to proceed or the commitment or other treatment of the defendant.

(2) The defendant waives this provision by using the report, or portions thereof, in any proceeding for any other purpose, in which case disclosure and use of the report, or any portion thereof, shall be governed by applicable rules of evidence and rules of criminal procedure. If a part of the report is used by the defendant, the state may request the production of any other portion of that report that, in fairness, ought to be considered.

jury. He never asked for a competency hearing. Dr. Toomer did not testify about his finding of competency in 1994 but in response to a question from the State he did testify that he had previously found Mr. Phillips to be incompetent five years before. (T. 638). At the State's urging, and without objection by resentencing counsel, the court specially instructed the jury after Dr. Carbonell's testimony and before Dr. Toomer's testimony that they were not to consider competency issues. (T. 593). Resentencing counsel's only reaction was to say that he had no intention of arguing the question of competency to the jury. (T. 586). There can be no strategic reason to support such a decision. Both of his experts testified in 1994 that Mr. Phillips was incompetent at the time of their evaluations in 1987-88. Surely Dr. Toomer's credibility would have been enhanced by the admission that he now believed Mr. Phillips to be competent in 1994 as a result of his most recent evaluations. The lack of evidentiary hearing testimony on this aspect in counsel's performance provides yet another reason that the summary

denial without hearing was inappropriate.

At some point counsel did contact Dr. Carbonell, but additional problems kept cropping up. At a hearing on March 24, 1994, eleven days before the resentencing hearing was scheduled to start on April 4, 1994, resentencing counsel informed the court that he was having difficulty arranging to get Dr. Carbonell down from Tallahassee to Miami because of her teaching schedule. (T. 35-39). He stated that his intent was to have Dr. Carbonell come to Miami to see Mr. Phillips (apparently for the first time since 1988), and to be available for deposition and testimony on the Thursday or Friday of the resentencing. (T. 36). The State also indicates on the record that they had been unable to depose Dr. Carbonell. (T. 36). The court indicates irritation at this plan, asking why resentencing counsel thinks the resentencing will take a week. (T. 36-37). Resentencing counsel then agreed to bring Dr. Carbonell to Miami the week before the resentencing was scheduled to begin on April 4. (T. 37). On the same date, March 24, the trial court signed another

"order appointing disinterested qualified experts," appointing Dr. Miller for what prosecutor David Waksman described as "for the aggravating and mitigating. He will probably contradict he has certain mitigating factors." (T. 31, R. 97). The next day, the trial court entered an order in chambers compelling discovery by the State of any psychological testing performed by Dr. Toomer or Dr. Carbonell on Mr. Phillips. (T. 99). Dr. Carbonell never saw Mr. Phillips after 1988, submitted to deposition, or testified in 1994. Resentencing counsel filed a Motion for Continuance on March 31, 1994, the Thursday before the resentencing was set to begin on the following Monday morning, April 4. (R. 121-123). The problem was again Dr. Carbonell. The motion outlines counsels concerns:

> The penalty phase proceeding in this matter is scheduled for April 4, 1994. The Defendant is not ready to proceed to the penalty phase at this time due to the unavailability of a crucial witness, Dr. Joyce Carbonell. Dr. Joyce Carbonell will testify on behalf of the Defendant as a mitigating witness. She is a professor of psychology at Florida State University, Tallahassee, Florida. She has conducted extensive

> psychological testing on the defendant and obtained a psycho-social history of the Defendant that is essential to the presentation of the mitigating circumstances that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance...and the capacity of the Defendant to appreciated (sic) the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired...Without her testimony, it will be virtually impossible to establish those mitigating circumstances.

The motion goes on to request that Dr. Carbonell be allowed to testify on Wednesday, April 13, 1994 or on Friday, April 15, 1994, citing Wike v. State, 596 So. 2d 1020 (Fla. 1992), wherein the defendant was granted a new penalty phase because the trial court abused its discretion in denying a continuance. (R. 122). The trial court had previously denied virtually the same *ore tenus* motion at the hearing noted above on March 24, 1994.

Following the selection of the jury on Monday, April 4, 1994, on the next morning, April 5, before opening statements, Mr. Wax informed the court that Dr. Carbonell

would not be appearing at the resentencing:

> Mr. Wax: Dr. Carbonell. Mr. Waksman and I spoke to Dr. Carbonell last night, Your Honor, and Mr. Waksman and I agreed to have a telephonic hook up to read the testimony of Dr. Carbonell from the 1988 Rule 3.850 hearing into the record. I spoke to Mr. Waksman about having my secretary coming in and reading the answers in response to the questions that were posed to her on direct and cross examination because her testimony would be consistent if she was to testify. It would be the same testimony.
>
> THE COURT: Why isn't she going to be available?
>
> Mr. Wax: Dr. Carbonell's availability was precluded by the fact as advised by the Court next to subpoena her and ensure her presence, and secondly through a miscommunication that she has scheduled matters on these dates this week. Because of that miscommunication between she and I that can not be rescheduled as such, Your Honor, this I believe is the best way to handle it.
>
> THE COURT: Has your client been informed of this?
>
> Mr. Wax: No, I have not spoken to him.
>
> THE COURT: You better inform him

> because I don't want it to come back for another thing of incompetency of counsel.
>
> Mr. Wax: I understand that, Judge.
>
> THE COURT: Make sure you understand it and he's willing to waive anything that has to do with it.
>
> Mr. Wax: All right. I'll talk to him on that at the break.
>
> THE COURT: He's right here.
>
> Mr. Wax: Judge, if I can talk to him later so we can get started?
>
> THE COURT: Let's go ahead with opening statements.

(R. 237-238). Then, moments before the jury came into the courtroom for the opening statements, Mr. Wax discussed his plan to have Dr. Carbonell's 1988 testimony read into the record with Mr. Phillips:

> MR. WAX: I just discussed with Mr. Phillips the situation with Dr. Carbonell and the use of her testimony from the 1988 Rule 3.85 hearing and Mr. Phillips has agreed to allow us to read that testimony into the record in lieu of Mr. Carbonell testifying over the speaker phone.

> THE COURT: Mr. Phillips, do you understand everything your attorney has said?
>
> MR. PHILLIPS: Yes.

(T. 239-40). Considering the gravity of Dr. Carbonell's potential testimony and in light of the claims in undersigned counsel's 3.850 motion as to Mr. Phillips' mental retardation and brain damage, the validity of a waiver solicited by resentencing counsel in these circumstances wherein the defendant forgoes his right to present live mitigation testimony from a mental health expert and agrees to what amounts to a proffer from a prior proceeding where no jury was present, is questionable at best. It becomes even more questionable when the expert has not re-examined the client or been deposed by the state. An analogous situation was presented to this Court in Deaton v. Dugger, 635 So. 2d 4 (Fla. 1994), where trial counsel rendered prejudicially deficient performance in failing to adequately investigate potential mitigating evidence, thereby rendering Deaton's purported "waiver" of mitigation invalid. It is certainly

additional support for the allegations of negligent and deficient performance in Mr. Wax's use of the mental health experts in this case. Shortly after these events, Mr. Wax told the jury during his opening statement: "I'm not going to go into the psychological tests right now. It's best to let the psychologists do that because I don't know enough about it as much as they do to tell you that." (T. 272).

Before Dr. Carbonell's 1988 testimony was read to the jury, the court explained to the jury: "The next witness that the defense is going to call is a psychologist by the name of Dr. Carbonell. She is not dead but for one reason or another she's not going to be able to testify in person, so we all agreed that her testimony from the previous trial or whatever hearing it was will be read the same way we read that last thing. [Testimony of the deceased teacher, Samuel Ford]. This is not as short as the other one so it will be some time." (Supp. R. at 2).

There apparently was never any additional work-up of

Mr. Phillips case by Dr. Carbonell after the 1988 evidentiary hearing. Although this is not surprising considering the communication problems Mr. Wax evidently had with Dr. Carbonell, this is no excuse for counsel's negligence. The testimony of Dr. Carbonell read into the record before the 1994 jury ended up being exactly the same testimony heard and rejected by Judge Snyder alone in 1988.

The record indicates that resentencing counsel knew he had dropped the ball and his closing argument touched on his concerns:

> The psychiatric testimony as well and I'll come to the psychiatric testimony and I was watching you. I was watching yesterday while Dr. Carbonell's testimony was being read back. It was tedious and it was long and hard to stay focused and to stay concentrated.
>
> And then Dr. Tomer (sic) came in and talked for a few hours more, but it's very, very important testimony. It tells you about Harry as a person. It tells you, yes, he's a borderline intellectual functioning with below average intelligence.
>
> You heard it from Dr. Miller, you heard it from Dr. Tomer and you heard it from Dr. Carbonell and from Dr.

> Haber. It's something to give you an insight into.

(R. 772-73). There was a confusing mixture of mental health expert testimony at the 1994 resentencing proceedings on the very different subject matters of the competency of Mr. Phillips to proceed versus the issues concerning the presence of absence of statutory and non-statutory mental health mitigation added to the reasons defense counsel's use of the experts was deficient performance. The State expressed concern after Dr. Carbonell's testimony was read into the record about the possibility that issues regarding both Mr. Phillips' competency and trial counsel's ineffectiveness in her testimony might result in the jury considering residual doubt of guilt. (T. 585).

Defense counsel's last minute decision to rely on the presentation of Dr. Carbonell's 1988 testimony in 1994 only served to confuse the mental health issues in Mr. Phillips' case, not to clarify them before the jury. Aside from confusing the jury, the fact that resentencing

counsel noticed that the reading of the testimony was "tedious and it was long and hard to stay focused and to stay concentrated" only serves to highlight the point that the reading of a six year old record, by a faceless and expressionless psychologist was not what this Court envisioned when it sent this case back to the circuit court for a resentencing. As seen in the prejudice section below, it is certainly probable that at least one out of the seven jurors who recommended death would have been persuaded by an actual live witness.

E. 1994 TESTIMONY OF DR. JETHRO TOOMER

Dr. Jethro Toomer, a psychologist, testified that he had only spent an additional hour with Harry Phillips after being reappointed in 1993, on January 14, 1994. (T. 599). Since Mr. Phillips was never seen by Dr. Carbonell after 1988, this means there was only a single hour of additional contact with Mr. Phillips by any defense mental health professional after he was granted a new sentencing hearing by this Court. Dr. Toomer testified that he administered the Revised Beta Instrument to measure Mr.

Phillips' intelligence. (T. 605). He explained that the Revised Beta "does not rely upon acquired information, in other words, most intelligence tests that are used, history based measures what one has acquired through the formal education process...the Revised-Beta Examination does not go into acquired information. It measures nonverbal intelligence and what is considered to be a more accurate measure of intelligence because it doesn't penalize the individual for lack of exposure." (T. 605-606). He then explained the results of his intelligence testing of Harry Phillips:

> A Harry Phillips' IQ, according to the results of the Revised Beta, came out to be 76.
>
> Q What does that number translate to?
>
> A A 76 IQ. 76 is considered to be an I.Q. that is in the borderline range of mental functioning.
>
> Q All right. Now, what is the range of numbers in the borderline level?
>
> A The range of numbers in the borderline range you're talking about in

the area of 70's in terms of that particular range. For example, recently the American Society for mental retardation revised it's guidelines for assessment retardation and the range for mental retardation is now 70 to 75.

Q Now, what is the margin of error in the Revised Bender (sic), in other words, how many numbers up or down did do take into account in assessing that individual's number?

A It's usually plus or minus five.

Q So, although you got a number of 76 for Mr. Phillips it could be as high as 81 or as low as 71?

A That is correct.

Q Now, if it was 81 that would take him out of the borderline level?

A Absolutely above the borderline level, yes.

Q What is the next level?

A The next level is below average or below normal.

Q If we were to go down to 71 points what range would that bring him in.

A You are talking about the range of retardation.

> Q Now, are you saying Harry is retarded?
>
> A No, I'm not.
>
> Q What exactly are you saying?
>
> A I'm saying that this level of functioning is indicative and would affect how one operates and how one functions and how one processes information.

(T. 606-607). Dr. Toomer also testified that the Department of Corrections records on Mr. Phillips contained a 1984 Revised Beta IQ score of 73. Dr. Toomer did not diagnose Mr. Phillips as mentally retarded, but as he testified, his own I.Q. testing results did not rule out that possibility as being within the margin of error of his testing. He testified that Mr. Phillips had "significant" deficits in intellectual functioning, emotional functioning and mental status. (T. 622-23). On cross-examination he agreed that Mr. Phillips was "not retarded." (T. 639). Dr. Toomer testified that the results of his own Bender Gestalt **suggested** that Mr. Phillips had brain damage, he freely admitted that further

referral to appropriate professionals would be necessary to "pinpoint the extent and existence of organicity disturbance." (T. 611). He repeated this position on cross-examination, testifying that he did not bring in a medical doctor. (T. 640). That, of course, was resentencing counsel's responsibility, not Dr. Toomer's. Resentencing counsel made the choice by commission or omission not to request a neurologist who could potentially **diagnose** brain damage. The debacle outlined elsewhere concerning Dr. Carbonell was supplemented by this failure. To his credit, Dr. Toomer was not prepared to overstate his findings beyond the limits of his own expertise. His testimony clearly demonstrates the rationale for postconviction counsel retaining a neurologist who examined Mr. Phillips and who was prepared at an evidentiary hearing to offer a medical opinion as to the presence of brain damage.

Likewise, Dr. Toomer's testimony underscores the necessity of postconviction counsel retaining an expert in the area of mental retardation to do updated full Wechsler

or other applicable intelligence testing as well as performing a complete and exhaustive investigation into the area of adaptive behavior as anticipated by DSM.

Dr. Toomer simply did not perform adequate intelligence testing and was not asked to do a detailed evaluation of the adaptive behavior prong, both of which are and were necessary for a finding of mental retardation. In opining about the presence of the statutory mental health mitigators he did touch on Mr. Phillips adaptive problems. He mentioned the evidence of long term intelligence deficits. (T. 631). He also mentioned other factors based on affidavits he had reviewed from people who had close contact with Mr. Phillips:

> His teachers and family members have described in their affidavits his behavior in terms of being withdrawn and in terms of being isolated and in terms of him not having a lot of friends.
>
> His teachers talked about the fact that he attended school on a regular basis, but he was very isolated and could not function appropriately in terms of mastering the material they described and what have you, so we're

> talking about long term.
>
> ***
>
> I think that if you look at his history and if you look at the testing and the totality of everything that we have been talking about what you basically have with Harry is a kind of developmental disorder, and if you look at his history you see there has been impairment life long in terms of the development of social interpretation skills.

(T. 631). On cross, Dr. Toomer stated, "he's not retarded. He's not a vegetable." (T. 661). The State picked up on these remarks in closing argument and used them as a feature in arguing that there was no mitigation. (T. 745, 752, 753). The State also went into the area of adaptive behavior on cross, asking Dr. Toomer, "[h]e worked for the Department of Sanitation for some years and like every other organization in the world they have some rules. He was not fired?" (T. 652). Defense counsel failed to call Mr. Phillips' supervisor as a witness at the resentencing.

Dr. Toomer had neither the expertise, the tools at hand, nor the charge from resentencing counsel to diagnose

either Mr. Phillips' mental retardation or organic brain damage. In addition, Dr. Toomer's credibility was impeached before the jury by the State during cross-examination when he testified that his training and expertise was in the specialized field of industrial organizational psychology. (T. 633). Neither Dr. Toomer or Dr. Carbonell were experts who were trained and qualified in the specialized area of mental retardation. Neither were medical doctors who could diagnose organic brain damage. Dr. Toomer apparently did not know that his IQ testing using the Revised Beta failed to meet the standard in DSM-III-R noted supra, which required that the relevant IQ score be obtained with an "individually administered intelligence test such as the WAIS, the Stanford-Binet, or the Kaufman." Resentencing counsel failed to even have Dr. Carbonell or anyone else do current Wechsler or other appropriate IQ testing which guaranteed that the only intelligence testing performed by any expert after 1988, Dr. Toomer's Revised Beta IQ screening, would be deficient for purposes of diagnosis of

mental retardation. Resentencing counsel's lack of preparation for the penalty phase also was apparent in his obvious lack of preparation of Dr. Toomer, his only live expert witness, for cross-examination.

The state asked Dr. Toomer about the so called "Brother White" letter and four "alibi notes" provided by Larry Hunter (T. 653-58, 659-62), both which were a key part of Detective Smith's rebuttal testimony, having him read portions into the record. (R. 670-89). The testimony of Detective Smith and the state's mental health experts essentially supported the State's position that Mr. Phillips was a cunning and street smart manipulator, the very antithesis of a mentally retarded person, and was premised on the evidence from the jailhouse witnesses and documents.

During the cross-examination Dr. Toomer indicated some familiarity with the "Brother White" letter but testified that he had never seen the alibi notes before the assistant state attorney showed them to him on the witness stand. (T. 653, 660). The state also asked him about

Malcolm Watson and he had to reply that he didn't know the context of the incident. (T. 649). The lack of defense preparation of Dr. Toomer was devastating to Mr. Phillips' case. If Dr. Toomer had been prepared properly, he would have known how to respond. He should have been provided well in advance by resentencing counsel with all the evidence from the 1988 evidentiary hearing that called into grave question the credibility of the state's hearsay jailhouse witnesses, and as an expert Dr. Toomer have been able to testify about it at the resentencing penalty phase after the state opened the door, in spite of Judge Snyder's prior rulings over defense objection.

Resentencing counsel surely was aware of Larry Hunter's affidavit which concerned the creation of the "alibi letters" because he introduced and used it in examining Detective Smith. The State had filed a Memorandum of Law regarding the admissibility of hearsay at a capital resentencing that was made part of the record. (R. 71-81). There is no reason why impeachment evidence concerning the credibility of the hearsay

declarants involved in the state's case could not have come in through a properly prepared expert defense witness at the penalty phase. As the State's memorandum filed on August 23, 1993 noted, Fla. Stat. 921.141(i) then stated regarding the admissibility of hearsay evidence at the penalty phase:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and **shall include matters relating to any of the aggravating or mitigating circumstances** enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, **provided the defendant is accorded a fair opportunity to rebut any hearsay statements**.

(R. 75)(emphasis added). Since much of the testimony of Detective Smith and Drs. Miller and Haber went directly to rebuttal of the mitigation findings of the defense experts, resentencing counsel's failure to prepare Dr. Toomer for cross was disastrous for his credibility. Dr. Miller actually testified first, out of order. Dr.

Toomer's testimony that he didn't know the "context" of what he was being asked by the state was right on point. He had been deficiently prepared to the substantial prejudice of Mr. Phillips. The jury in Mr. Phillips' resentencing case never knew that William Farley and Larry Hunter had **both** recanted in 1988, and that Farley did testify in person. Neither did the jury know that William Scott was a police agent for Detective Smith in the Phillips' case.

Lingering doubt about Mr. Phillips' guilt was not the issue here. Rather the issue was that resentencing counsel's deficient performance in preparing Dr. Toomer resulted in bolstered reliability in both the state's case in aggravation and the state's unfair rebuttal of the defense's mitigation case. The unrebutted hearsay testimony of the jailhouse witnesses through Detective Smith was the foundation of the State's case.

F. TESTIMONY OF DR. LLOYD MILLER

The State called Dr. Lloyd Rich Miller, a psychiatrist, as a rebuttal witness at the 1994

resentencing. (T. 482). He testified that he had first interviewed and examined Mr. Phillips in January 1988 for a total of two and a half hours. (T. 483). Miller described this contact as a "diagnostic interview...to assess Mr. Phillips in terms of whether he does or does not have mental disorder and mental illness." (T. 483). He testified that he found no evidence of organic brain damage, although he agreed he had performed no written testing, brain wave scan or MRI scan of Mr. Phillips. (T. 484). Dr. Miller then testified, over defense objection, that he had seen Mr. Phillips again six days before, for about an hour, on March 31, 1994. (T. 481, 488-491).

Mr. Phillips had refused to see Dr. Miller without counsel present after Miller was appointed for competency purposes in January 1994, but did see him after a second order was entered appointing Miller on March 24, 1994. (T. 30-31). At a pre-trial hearing the State indicated that since Dr. Toomer had found Mr. Phillips to be competent, there was no need for another competency evaluation by Dr. Miller, so instead the State asked the

court to appoint Dr. Miller to evaluate Mr. Phillips for purposes of rebutting the defense case in mitigation. (T. 30-31). This the lower court did over defense objection. (T. 31, 39). Resentencing counsel renewed that objection at the resentencing and asked for a standing objection to testimony by Dr. Miller based on his 1994 evaluation. (T. 488).

Dr. Miller testified that based on the recent contact he did not believe that Mr. Phillips was suffering from any mental illness but indicated he was uncertain as to any finding regarding his intelligence. ("His mind was even. His intelligence was -- I didn't know it from testing. If it was less than average I would inquire about it. He was aware of what was going on in general, the world around him, some news and events.") (T. 493).

Dr. Miller's ultimate conclusion was that Mr. Phillips did have the ability to know right from wrong. (T. 499). While this is a concept that might be relevant in the context of a sanity determination or a competency

evaluation, but does not necessarily have any relationship to a diagnosis of mild mental retardation. On cross-examination Dr. Miller agreed that he had previously relied on Dr. Carbonell's IQ testing during his 1988 testimony, (T. 510), and he accepted resentencing counsel's representation that Dr. Miller's January 9, 1988 evaluation of Mr. Phillips had taken place jointly with Dr. Leonard Haber. (T. 500, 509). He also agreed that he had been supplied with very little background information about Mr. Phillips. (T. 501-503, 506). He agreed that he had performed no formal psychological testing, and although he was prepared and qualified to perform the Bender Gestalt Test as a "quick assessment" for brain damage or organicity, he failed to do so with Mr. Phillips. (T. 503-504). Finally, Dr. Miller agreed that Mr. Phillips' "less than average intelligence" was mitigation. (T. 513). Dr. Miller, a psychiatrist, was the only medical doctor who opined in any of the prior proceedings regarding mitigation. Neither the defense nor the state consulted a neurologist concerning the presence

or absence of organic brain damage or on any other subject.

G. TESTIMONY OF DR. LEONARD HABER

Dr. Leonard Haber, a psychologist, also testified as a rebuttal witness for the state. (T. 689). He testified that other than personally doing a screening test, competency evaluation, sanity evaluation and Bender Gestalt on Mr. Phillips in 1988, he relied on the testing of Mr. Phillips performed by Dr. Carbonell and Dr. Toomer, (T. 692, 694). He reported that the IQ scores obtained by Drs. Carbonell and Toomer were in the "range of approximately 75 and 84 roughly." (T. 695). Yet he later testified, "I have not suggested that Mr. Phillips' IQ would be higher than the borderline or below an average individual category who is obviously adequate to formulate good ideas and communicate ideas quite well." (T. 699). Evidently Dr. Haber was assuming that Mr. Phillips' IQ score could not be outside the range for Borderline Intellectual Functioning, 71-84. See DSM-III-R at 359. This opinion simply ignores the error range described by

Dr. Carbonell and in the DSM, noted **supra**, concerning her full scale 1988 WAIS-R score of 75 for Mr. Phillips and gives far too much weight to Dr. Toomer's Revised-Beta IQ test score of 76, itself contradicted by the DOC Beta scores of 73 and 83. Dr. Haber testified that his opinion was that there was **insufficient evidence** for him to conclude that Mr. Phillips suffered from an extreme mental or emotional disturbance. (T. 701).

Dr. Haber testified that "[a] person can be street wise or street smart and do poorly on an IQ test or even do poorly in school." (T. 711). Dr. Haber testified in some detail about documents that he examined that had been authored by Mr. Phillips. (T. 693). These included the four "alibi notes" provided to the authorities by Larry Hunter and the so-called "Brother White letter."

These documents were introduced by the state as evidence of Mr. Phillips ability to threaten jailhouse witnesses and to conspire with another inmate to fabricate an alibi. The essential goal was rebutting the defense's mitigation case that Mr. Phillips is according to Mr.

Waksman "supposedly retarded." (T. 654-56). During Detective Greg Smith's rebuttal testimony, resentencing counsel did introduce a copy of Larry Hunter's November 1987 recantation affidavit during cross-examination. (T. 163-167, T. 686-87). But he only asked Detective Smith about paragraphs four and thirteen of the affidavit, which contained Hunter's sworn statement that Mr. Phillips' did not confess to him, that "the only knowledge that I have about the events that I testified to was provided to me by Detective Smith and Mr. Waksman," and a description of the favors he received in return for testifying. (T. 686). Resentencing counsel failed to ask Detective Smith any questions about the sections of the affidavit concerning the "alibi notes" in which Hunter stated that he lied to Phillips and told him that he had seen Phillips at the Winn-Dixie and would testify for him and "I asked him to write me a note with his attorney's phone number on it, the day and time that he was in the store, what he was wearing and things like that." (T. 165-66). Nowhere in the affidavit is there any statement about Mr. Phillips'

guilt or innocence.

Resentencing counsel never asked Drs. Haber and Miller about whether they considered Hunter's affidavit or any of the other impeachment evidence involving the jailhouse witnesses and related documents in reaching their conclusions about Mr. Phillips. The State adopted this testimony of Detective Smith and Drs. Haber and Miller and at closing argued, without objection, that Mr. Phillips' I.Q. scores were "not uncommon in people with lower society status":

> This man is very street smart, very cunning. The I.Q. test as we all know deals with your ability to read and write and do well in school. This is present of a person who reads and writes well and does fine in the outside world. He had become street smart. He knows how to deal with the cops.

(T. 751). Dr. Miller agreed on cross-examination that he had first seen Mr. Phillips in Dr. Miller's presence in 1988 when they performed simultaneous evaluations. (T. 717). Haber also testified that while based on his examination he "ruled out" the possibility of brain damage

in Mr. Phillips he admitted it was "a possibility for anybody." (T. 702, 705, 719).

Resentencing counsel Wax also solicited psychologist Haber's testimony that the Revised Beta and the Wechsler (WAIS) were both "very good" IQ tests, and that he himself had used the Beta in the past. (T. 719).

We must assume in this setting that Mr. Phillips is guilty, as did the lower court in 1994. But undersigned counsel pleads that he is mentally retarded and the hearsay jailhouse testimony was virtually untested at the 1994 resentencing, thus unreliable. The context of the events that made up the state's rebuttal would have taken on a completely different hue before the jury if resentencing counsel had properly prepared his expert for direct and cross-examination and properly cross-examined the state witnesses. The jury should have known that Larry Hunter said in 1988 that the four alibi notes were prepared by Mr. Phillips at his request because Hunter told Phillips he had seen him at the Winn-Dixie and Hunter recognized that Phillips was easy to manipulate (R. 163-

67); that the Brother White letter was a pitiful attempt at trying to look tough and in control not a document showing an ability to plan and calculate; that the jobs of dishwasher and garbage man can be performed by a mildly mentally retarded person and were the best Mr. Phillips could do; that going three blocks across the county line to a Publix store might not be perceived as a parole violation by a mentally retarded man; that wanting a kiss from your female parole officer is not intelligent and clever behavior; that losing one's shoe during an armed robbery and having it used to identify you is not an example of masterful planning; that telling the investigative detective the number of shots fired or the fact that the murder weapon was missing when neither of those facts were known outside of law enforcement is not evidence of planning, or that the jailhouse witnesses were not good citizens doing their duty. (T. 282, 291, 292, 418, 435). Resentencing counsel squandered a critical opportunity to undermine the state's case by presenting all the statements of the jailhouse witnesses, but failed

to do so through deficient performance and as a result of unfavorable rulings by the lower court over objection by Mr. Phillips.

H. PREJUDICE TO MR. PHILLIPS

Resentencing counsel was unprepared to put available evidence that Mr. Phillips was both brain damaged and mentally retarded. That was precisely the evidence that postconviction counsel was prepared to present at an evidentiary hearing. It was evidence that far from being refuted and disproved from the files and records in Mr. Phillips' case, was strongly supported and red flagged. And, as has been shown in some detail, resentencing counsel's selection, preparation, and use of the mental health experts in Mr. Phillips' case was almost inexplicable under the circumstances. In addition to deficient performance, Mr. Phillips must also establish prejudice, that is, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different A reasonable probability is a probability sufficient to

undermine confidence in the outcome." Strickland, 466 U.S. at 694. If "the entire postconviction record, viewed as a whole and cumulative of []evidence presented originally, raise[s] 'a reasonable probability that the result of the [] proceeding would have been different' if competent counsel" had represented the defendant, then prejudice is demonstrated under Strickland. Williams v. Taylor, 120 S.Ct. 1495, 1516 (2000). The jury recommendation in Mr. Phillips' case was only seven (7) to five (5) for death. With credible expert testimony that Mr. Phillips is mentally retarded, suffers from organic brain damage, and that both statutory mental health mitigating factors were present at the time of the offense, based in part on mental retardation and organic brain damage, there is a reasonable likelihood that the one of the seven (7) death voters would have been persuaded to vote for life.

Undersigned counsel retained a medical doctor specializing in neurology to examine Mr. Phillips. As a result of the examination he diagnosed organic brain

damage. Undersigned counsel also retained a psychologist specializing in mental retardation to determine if Mr. Phillips suffers from mental retardation. A proper analysis of prejudice also entails an evaluation of **the totality of available mitigation**--both that adduced at re-sentencing and the evidence that could have been presented at an evidentiary hearing. Williams, 120 S. Ct. at 1515. As noted in Mr. Phillips' 3.850 motion, the experts retained by postconviction counsel were prepared to testify at an evidentiary hearing as to the presence of mental retardation and organic brain damage. No expert at any prior proceedings explicitly testified that Mr. Phillips suffered from mental retardation and organic brain damage. In addition, both the neurologist and the mental retardation expert were prepared to testify that both statutory mental health mitigating factors were present at the time of the offense, based in part on the findings of mental retardation and organic brain damage. These same two experts are professionally qualified to rebut the state experts, the psychologist Dr. Haber and

the psychiatrist, Dr. Miller. Mr. Phillips was diligent in attempting to develop his claims in state court and remains determined to preserve his right to an evidentiary hearing.

ARGUMENT II -- RETROSPECTIVE APPLICATION OF § 921.137 FLORIDA STATUTES

Mr. Phillips deserves an opportunity to prove in circuit court that he meets the criteria for mental retardation described in Fla. Stat. § §921.137. Pursuant to §921.137 (8), the new statute specifically denies to Mr. Phillips or any other "defendant who was sentenced to death prior to the effective date of this act", which was signed by Governor Bush in June 2001, the opportunity to benefit from the relief available. Such an interpretation denies the equal protection of the laws of the State of Florida to one of the most vulnerable and disabled segments of the population, mentally retarded death row inmates. In the alternative, Mr. Phillips submits that use of the death penalty as a sanction directed to any

mentally retarded convict would be cruel and/or unusual punishment under the laws of and the Constitution of Florida. See Fleming v. Zant, 259 Ga. 687, 386 S.E. 2d 339 (Ga. 1989)(although prospective only application of statutory amendment prohibiting imposition of the death penalty of the mentally retarded does not deny due process and equal protection, execution of the mentally retarded constitutes cruel and unusual punishment under the Georgia Constitution). Also, the United States Supreme Court has accepted on certiorari a case, McCarver v. North Carolina, 121 S. Ct. 1401 (2001), in which briefing and oral argument will take place in the Fall Term on the issue of the Federal Constitutionality of the execution of the mentally retarded, last reached in Penry v. Lynaugh, 492 U.S. 302 (1989). Mr. Phillips' 3.850 motion cited Penry for the proposition that the jury in his resentencing was not aware that he suffered from organic brain damage and mental retardation, a violation of his constitutional rights. (PCR. 64). Resentencing counsel's deficient performance as outlined in Argument I is in part

responsible for this violation of Mr. Phillips' rights.

Mr. Phillips meets the definition for mental retardation that is outlined in the new statute prohibiting the imposition of the death penalty on mentally retarded persons:

> As used in this section, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his of her age, cultural group, and community. The Department of Children and Family Services shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

Fla. Stat. §921.137(1)(2001). The new law also requires

that the trial court appoint "[t]wo experts in the field of mental retardation who shall evaluate the defendant and report their findings to the court and all interested parties prior to the final sentencing hearing." Id. Fla. Stat. §921.137 (5). Mr. Phillips should be allowed the opportunity to present his expert neurologist and mental retardation expert at an evidentiary hearing. This is even more obvious given the unresolved allegations of Mr. Phillips mental retardation made in his summarily denied 3.850 motion in light of the new Fla. Stat. §921.137, which provides that"[i]mposition of [a] death sentence upon a mentally retarded defendant [is] prohibited." See DSM III-R and DSM IV references in Argument I. Mr. Phillips also seeks to have his rights as a mentally disabled person under international human rights instruments protected by the courts of Florida.

ARGUMENT III -- PUBLIC RECORDS

Mr. Phillips sought public records disclosure pursuant to chapter 119, Florida Statutes, Fla. R. Jud. Admin.

2.051, and Amendments to Florida Rules of Criminal Procedure-Rule 3.852 (Capital Postconviction Public Records Production) and Rule 3.993 (Related Forms), 23 Fla. L. Weekly S478 (Fla. Sept. 18, 1998). See Ventura v. State, 673 So. 2d 479 (Fla. 1996). Mr. Phillips' public records claim, number II in his 3.850 motion, was denied by the lower court as facially insufficient. (PCR. 142, 42-48). He was never allowed to request supplemental records or to file affidavits with the court and receive a hearing upon them. (PCR. 127-141)

This Court denied Mr. Phillips' Petition for Extraordinary Relief, for a Writ of Prohibition, and for a Writ of Mandamus. Phillips v. State, Case No. SC00-31 (January 27, 2000). The petition was based on the lower court's denial on January 6, 2000 of Defendant's Motion to Disqualify Judge filed on November 29, 2000. (Supp. PCR. 10-18). Additionally, undersigned counsel filed a Motion to Withdraw Due to Conflict of Interest on December 2, 1999, simultaneously with the 3.850 motion that the lower court required to be filed by that date. A copy of that

motion does not appear in the record but is being provided today as Attachment 1. The conflict motion was denied by the lower court on January 6, 2000. (Supp. PCR. 27).

Mr. Phillips' judicial bias/conflict of interest claim, XXIV in Mr. Phillips' 3.850 motion, was denied as facially insufficient by the lower court. (PCR. 142, 114-123). Undersigned counsel incorporates by reference Argument I of this Brief regarding the pleading requirements necessary for an evidentiary hearing.

Judge Ferrer commented, more than two months before the pleading had been filed, "[i]f there is an evidentiary hearing. I don't expect you to have a hearing." (PCR. 318). Judge Ferrer's comments and actions during the public records hearings on September 13, 1999 and November 17, 1999, at the Huff hearing in February 2000, and his response of sua sponte cancellation of a scheduled hearing on Mr. Phillips' motion for rehearing and simultaneously filed affidavit for additional records (based on the representation by counsel that the records "appear reasonably calculated to lead to the discovery of

admissible evidence in that counsel has been informed that Mr. Phillips was found unconscious earlier this year at Union Correctional Institution and may have been treated for neurological complications") certainly were "sufficient to warrant fear on [Mr. Phillips'] part that he would not receive a fair hearing by the assigned judge, Suarez v. Dugger, 527 So. 2d 191, 192 (Fla. 1988)(PCR. 318-20, 326-330, Supp. PCR. 219-221, 39-41, 37, 42-43). Even the appearance of partiality or prejudgment is sufficient to warrant disqualification. Id. Mr. Phillips was not afforded due process because his trial court was not an impartial tribunal.

ARGUMENT IV -- JURY ISSUES

Defense counsel failed to use all his peremptory challenges. Counsel had three challenges left when he accepted the panel. (T. 224-25). He failed to use those challenges to strike either Juror Melendez or Juror Finney, both of whom expressed an eager desire to serve on a capital jury (T. 181, 184). Counsel also failed to strike Juror Howard, who advised that his brother was a

Metro-Dade police officer. This was deficient performance at jury selection of Mr. Phillips' resentencing. This claim was denied without a hearing as facially insufficient by the lower court. (PCR. 142). During voir dire opening and closing argument, counsel for the State proffered arguments which urged the jury to apply aggravating circumstances in a manner inconsistent with this Court's narrowed interpretation of those circumstances (T. 67, 68, 263-65, 739, 742, 751, 758, 760, 764). These citations to the record are only examples of improper argument. The record of the resentencing hearing shows that the instructions to the jury were misleading and diminished the jury's sense of responsibility in presenting their advisory sentence which the judge must give great weight. The record reveals that Judge Snyder informed the jury that "**[I]t's not your duty to advise the court as to what punishment should be imposed upon the defendant for his crime of First Degree Murder. As you were told I will decide what punishment shall be imposed. Its the responsibility of the Judge."**

(R. 787)(emphasis added).

These instructions were confusing and the jury could have easily misunderstood the significance of their advisory recommendation. The court also reinstructed the jury about voting procedures after agreeing on the record that his instructions had been confusing and improper (R. 803).

Resentencing counsel objected to the instructions given to the jury on the CCP aggravator and regarding premeditation. (T. 707, 799). Such arguments urged the jury to apply these aggravating factors in a vague and overbroad fashion. As a matter of law, the Eighth Amendment was violated. Richmond v. Lewis, 506 U.S. 409 (1992); Espinosa v. Florida, 505 U.S. 1070 (1992).

The record reveals that the trial judge improperly instructed the jury that "feelings of prejudice, bias, or mere sympathy are not legally reasonable doubts and they should not be discussed by any of you in any way." (T. 795). Although prejudice and bias are certainly improper considerations for the jury, mercy and sympathy for the

defendant are proper and could be understood as mitigating circumstances. Trial counsel's failure to object was unreasonable and amounted to ineffective performance.

Postconviction counsel moved by written motion for leave of the lower court to interview the jurors in Mr. Phillips's resentencing case prior to the Huff hearing. (R. 204-205). This motion was filed simultaneously with Mr. Phillips' 3.850 motion on December 2, 1999. Claim XIII of the 3.850 motion outlined the events at his resentencing that were the basis for the motion to interview jurors. (PCR. 76-79). The State filed a response. The motion was denied by Judge Ferrer in open court immediately **before** the Huff hearing. (Supp. PCR. 219). Mr. Phillips was never given the opportunity to develop his juror misconduct claim by interviewing the jurors, yet he was denied an evidentiary hearing on this issue based on procedural bar per the lower court's summary denial order. (PCR. 143).

Although resentencing counsel failed to ask for juror interviews, he did object to the instructions given to the

jurors concerning voting and also objected to the lower court's re-instruction of the jury. (T. 800-814). Additionally, the record reveals that just prior to the Judge ordering Mr. Phillips' death sentence, he advised that he had received a letter from one of the jurors who had previously initially refused to vote for a life or death recommendation (T. 810-11, 824-25). The letter is not a part of the record. An interview with the jurors is essential to the post-conviction investigation of Mr. Phillips' case. The prejudice to Mr. Phillips is self-evident in consideration of postconviction counsel's responsibility to investigate juror misconduct or reliance by the jurors upon extraneous information during sentencing deliberations in a capital case where the death recommendation was by a seven (7) to five (5) margin (T. 812).

ARGUMENT V -- BURDEN SHIFTING

During voir dire opening and closing argument, counsel for the State proffered arguments which urged the jury to apply aggravating circumstances in a manner inconsistent

with this Court's narrowed interpretation of those circumstances (T. 67, 68, 263-65, 739, 742, 751, 758, 760, 764). The court and the state both advised the jury that they had to find that sufficient mitigating circumstances existed to outweigh any aggravating circumstances they found to exist.

It is improper to shift the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances. Mullaney v. Wilbur, 421 U.S. 684 (1975). Thus, the court injected misleading and irrelevant factors into the sentencing determination. Caldwell v. Mississippi, 472 U.S. 320 (1985); Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); and Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

ARGUMENT VI -- NON-STATUTORY AGGRAVATING CIRCUMSTANCES

Assistant state attorney David Waksman repeatedly compared Harry Phillips with his brother and sister, claiming they had similar backgrounds, and drawing the conclusion that Harry Phillips was deserving of death because of the good citizenship of his Vietnam veteran

brother and the positive work experience of his sister, a librarian. (T. 749).

In his closing argument the prosecutor raised and argued the non-statutory aggravating factor of future dangerousness when he ridiculed the notion of life sentences, one of the two alternate recommendations that the jury in Mr. Phillips case would consider. (T. 744). Resentencing counsel filed a pre-trial motion regarding non-statutory aggravating factors concerning a large door-sized chart that laid out the alleged behavior of Mr. Phillips during the period of November 1980 - August 31, 1982. (R. 110-115, T. 238-39). The court allowed a standing objection but denied the motion. (T. 239, 289). This issue was preserved on direct appeal.

ARGUMENT VII -- INNOCENT OF THE DEATH PENALTY

Based on the arguments in this brief, Mr. Phillips can show either innocence of first degree murder or innocence of the death penalty and is entitled to relief for constitutional errors which resulted in the conviction or sentence of death. Sawyer v. Whitley, 112 S. Ct. 2514

(1992).[9] At an evidentiary hearing Mr. Phillips can present evidence that he lacks the mental capacity to support the heightened level of premeditation required to sustain the cold, calculated and premeditated aggravating circumstance (CCP) or the intent to disrupt or hinder the governmental function aggravating circumstance. (T. 707).

ARGUMENT VIII -- INSANE TO BE EXECUTED

Mr. Phillips is insane to be executed. In Ford v. Wainwright, 477 U.S. 399 (1986). This claim is not ripe for consideration but it must be raised for preservation purposes. Stewart v. Martinez-Villareal, 118 S. Ct. 1618 (1998).

ARGUMENT IX -- JOHNSON V. MISSISSIPPI

It was a violation of the Fifth, Eighth, and Fourteenth Amendments for either the jury or the trial court to consider Mr. Phillips' prior convictions.

[9]According to Sawyer, where a death sentenced individual establishes innocence, his claims must be considered despite procedural bars.

Resentencing counsel objected to moving into evidence of Mr. Phillips' 1962 conviction. (T. 275). The court and the jury improperly relied upon the prior invalid convictions as part of the sentencing calculus. See Johnson v. Mississippi, 108 S. Ct. 1981 (1988).

ARGUMENT X -- DEFENDANT'S ABSENCE FROM PROCEEDINGS

There are numerous unrecorded bench conferences and sidebars throughout the proceeding. (T. 241, 363, 376, 398, 404, 447, 487, 491-92, 574, 706). Deficiencies in pleading this issue below were based in problems outlined in Argument III.

ARGUMENT XI -- CUMULATIVE ERROR AT RESENTENCING WAS GROUNDS FOR AN EVIDENTIARY HEARING ON PENALTY PHASE ERRORS

The state argued and the lower court found that Mr. Phillips' 3.850 claim VII that an evidentiary hearing should be granted in part on the basis of cumulative error at the resentencing was procedurally barred. (R. 143). In Jones v. State, 569 So. 2d 1234 (Fla. 1990) this Court vacated a capital sentence and remanded for a new

sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added). See also Kyles v. Whitley, 115 S. Ct. 1555 (1995).

CONCLUSION

Mr. Phillips submits that on the basis of the argument presented to this Court, as well as on the basis of his Rule 3.850 motion, he is entitled to 3.850 relief, and respectfully urges that this Honorable Court remand his case back to circuit court so that full consideration can be given to all his claims.

I HEREBY CERTIFY that a true copy of the foregoing AMENDED INITIAL BRIEF has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 19, 2001.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this

brief complies with the font requirements of rule 9.210(a)(2), Fla. R. App. P.

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