IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-414

EDWARD RAGSDALE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

MARK S. GRUBER
ASSISTANT CCRC-MIDDLE
FLORIDA BAR NO: 0330541
OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
3801 CORPOREX PARK DRIVE
SUITE 210
TAMPA, FL 33609-1004
(813) 740-3544

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT ABOUT REFERENCES

This is an appeal of the circuit court's denial of Mr. Ragsdale's Rule 3.850 motion for postconviction relief.

The record on appeal comprises both the three volume record initially compiled by the clerk and a one volume supplement to the record, both successively paginated beginning with page one. References to the record include volume and page number and are of the form, e.g., (R. Vol. I 123). The supplemental record is cited in the form, e.g., (R. Supp.123). References are also made to the six volume record prepared in the direct appeal of the appellant's conviction and sentence and are of the form, e.g., (Dir. Vol. I 123).

Mr. Ragsdale, the defendant at trial, is sometimes referred to as such. Generally the use of the words “prosecution” or “the prosecutor” signals the State’s attorney at trial. The attorney who represented Mr. Ragsdale at trial was Robert E. Culpepper, III. He is sometimes referred to by name, sometimes as “defense” or “trial counsel.” Collateral and appellate counsel are referred to as such. The phrase “evidentiary hearing” refers to the evidentiary hearing conducted on Mr. Ragsdale’s motion for postconviction relief. “Trial court” generally means the judge at trial, while “lower court” refers to the judge who presided at the evidentiary

hearing.

REQUEST FOR ORAL ARGUMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

STATEMENT OF THE CASE AND THE FACTS

Procedural History and Issues Litigated

On January 16, 1986, the grand jury of Pasco County, Florida, returned an indictment charging Mr. Ragsdale and co-defendant Leon Illig with the first degree murder and armed robbery of Ernest Mace (Dir. Vol. V 775). On January 22, 1987, Mr. Ragsdale's appointed attorney filed a motion to withdraw which was granted on February 2, 1987 (Dir. Vol. V 842). This was followed by succession of at least four lawyers who were appointed and then successfully moved to withdraw citing conflicts of interest (Dir. Vol. V 856, 858, 860, 862). On August 21, 1987, the court appointed Robert Culpepper, III, who alone represented Ragsdale at trial (Dir. Vol. V 862).

Co-defendant Illig pled no contest in exchange for a life sentence prior to Ragsdale's trial. Mr. Ragsdale's trial was held on May 2-4, 1988. The jury found him guilty as charged (Dir. Vol. IV 632-33). The penalty phase was conducted the next day, May 5, 1988. The jury was instructed on the following aggravating circumstances: 1) Under sentence of imprisonment (parole), 2) In the course of a robbery, 3) Pecuniary gain, 4) Heinous atrocious and cruel, and 5) Cold, calculated and premeditated (Dir. Vol. IV 749-50). The jury

returned an advisory verdict recommending the death penalty by a vote of eight to four. (Dir. Vol. IV 765).

The court sentenced Ragsdale to death on May 13, 1988, finding all of the aggravating circumstances on which the jury was instructed except CCP, merging pecuniary gain and in the commission of robbery into one aggravator, and finding no mitigating circumstances "whatsoever." (Dir. Vols. IV, VI 663-68; 914-17). The court addressed and rejected defense counsel's relative culpability vis-a-vis the co-defendant argument in its findings of fact in support of the death sentence. Id. However, neither orally nor in its written findings did the court mention anything that could be construed as family or background mitigation. Id. On direct appeal Ragsdale claimed that: (1) the trial court erred by not allowing the defendant to question prospective jurors on voir dire as to their willingness to impose a similar penalty as that imposed upon a co-defendant if they found the defendant equally or less culpable; (2) the trial court erred by imposing the death penalty where the jury, although recommending death, indicated that Ragsdale was less culpable than his co-defendant, who was sentenced to life imprisonment; (3) the State is obligated to provide notice in the charging document of the aggravating circumstances intended to be used

in the penalty phase of the trial; (4) section 921.141, Florida Statutes (1987), is unconstitutional because it intrudes on the rule-making authority of the judiciary; (5) sections 782.04 and 921.141, Florida Statutes (1987), are unconstitutionally vague and overbroad; and (6) sections 782.04 and 921.141, Florida Statutes (1987), are unconstitutional in that they call for cruel and unusual punishment. This Court affirmed the judgment and sentence. Ragsdale v. State, 609 So.2d 10 (Fla. 1992). Appellate counsel did not file a petition for writ of certiorari to the United States Supreme Court.

Mr. Ragsdale filed a timely but incomplete motion for postconviction relief on March 24, 1994. After litigating various public records issues, Mr. Ragsdale filed an amended motion on July 12, 1996. The motion raised the following claims:[1] (1)denial of access to public records; (2) the trial judge should have recused himself in this case; (3) Ragsdale was deprived of an adversarial testing in the guilt phase; (4) he was deprived of an adversarial testing in the penalty phase; (5) he was denied effective mental health assistance; (6) the trial judge erred in summarily denying Ragsdale's

[1]As enumerated by this Court in Ragsdale v. State, 720 So.2d 203 (Fla. Oct 15, 1998).

competency claim; (7) Ragsdale was denied effective assistance due to his counsel's failure to object to allegedly improper argument; (8) his counsel was ineffective in presenting the closing argument; (9) the jury instructions improperly shifted the burden of proof; (10) the jury instructions were improper; (11) the trial judge improperly assessed alleged jury instruction error; (12) the jury's sense of responsibility was unconstitutionally diluted; (13) Florida's death penalty statute is unconstitutional; (14) Ragsdale was denied effective assistance by his attorney's alleged failure to assure his presence at all critical stages of the proceedings; (15) the trial court improperly found no factors in mitigation; (16) the trial judge was biased; (17) the aggravating circumstance of "committed while under sentence of imprisonment" was unconstitutional; (18) death by electrocution is cruel and unusual punishment; (19) Ragsdale was wrongly shackled throughout his trial; (20) he was denied his right to due process due to his inability to interview jurors; and (21) the cumulative nature of the errors in this case warrant relief. The motion was denied without an evidentiary hearing on September 30, 1996 (Post conviction record 399). A motion for rehearing was denied on October 24, 2996, and an appeal was taken to this Court.

On appeal, this Court upheld the denial of all claims except claims (4) and (5) and remanded the case for an evidentiary hearing on the allegation of ineffective assistance of counsel in the penalty phase. Specifically, this Court said:

> With regard to the penalty phase, however, we conclude that an evidentiary hearing was required. During the penalty phase, defense counsel put on only one witness, Ragsdale's brother, who provided minimal evidence in mitigation. That witness had also testified on behalf of the State during the guilt phase. Additionally, the witness, when cross-examined by the State during the penalty phase, testified that it did not surprise him that his brother committed the murder and he provided other derogatory information about Ragsdale.
>
> In Ragsdale's rule 3.850 motion, he states that testimony was available to show that Ragsdale's life was marked by poverty and deprivation and that he suffered from a lifetime of drug and alcohol addiction, yet no witnesses were called by the defense to present this testimony. More importantly, he contends that defense counsel never had him examined by a competent mental health expert for purposes of presenting mitigation. He asserts that he has now been examined by a mental health expert who has found that he suffers from organic brain damage; is mentally retarded; has severe language and listening comprehension difficulties; and has difficulties with concentration, attention, and mental flexibility. Additionally, he alleges the evidence will show that his ability to reason and exhibit appropriate judgment, as well as determine and assess the long-term consequences of his actions, is also

> substantially impaired.
>
> In finding that an evidentiary hearing was unwarranted on this issue, the trial court concluded that this issue was without merit because the record reflected that a motion to appoint a mental health expert was filed and an order appointing such an expert was issued. According to Ragsdale, however, that expert was appointed solely for the purpose of determining competency to stand trial, and no expert was appointed to evaluate Ragsdale for the purposes of presenting mitigation.
>
> We conclude that Ragsdale has stated sufficient allegations of mitigation that are not conclusively refuted by the record to warrant an evidentiary hearing to determine whether counsel was ineffective in failing to properly investigate and present this evidence in mitigation. Hildwin, 654 So.2d at 110 (failure of counsel to present testimony regarding substantial mitigating mental health evidence deprived defendant of reliable penalty phase proceeding).
>
> In his fifth claim, Ragsdale argues that he was deprived of an effective mental health expert. This claim necessarily overlaps the foregoing claim that his counsel was ineffective in failing to investigate and introduce evidence in mitigation and should also be considered at the evidentiary hearing.

Ragsdale v. State, 720 So.2d 203 (Fla. Oct 15, 1998).

The lower court conducted an evidentiary hearing which commenced on August 27, 1999. The hearing was adjourned and reconvened a number of times thereafter. At its conclusion on

December 20, 1999, the presiding judge orally stated a number of findings and said, “Based on these findings, the Court does recommend that the motion be denied.” (R. Vol. III(b) 491). This is an excerpt from the transcript of that hearing:

> [THE COURT]: The Court would further find that the absence by the attorney at that time – considering again the nature of the case, that the circumstances of the case were unreasonable. I do not find that he had abused his duties in any fashion. Obviously, in hindsight, perhaps other matters could have been brought up, but that from the standpoint of the defense counsel at that time, I cannot and do not find that his representation was inadequate or caused prejudice to the defendant that would have – could have been avoided by any other type of representation.
>
> I think there is no question about it, that Mr. Ragsdale had a rather difficult childhood. There’s no question about it that there was a lot of circumstances that could well have – based upon the present examination, could well have made perhaps – perhaps could have been presented.
>
> But the Court must, of necessity, find that based upon the circumstances at that time, the factors and much of the evidence that we’re now talking about were not available to counsel at that time, and there’s no evidence to have been effectively available to him at that time.

(R. Vol. III(b) 489, -90).

A final written order dated January 21, 2000 states in pertinent part:

> This Court recommends to the Supreme Court that petitioner's Motion for Post Conviction Relief be denied. This Court finds that EDWARD EUGENE RAGSDALE's trial counsel did not abuse his duties in any fashion, nor was his representation inadequate, nor did it cause prejudice to EDWARD EUGENE RAGSDALE which could have been avoided by any other type of representation. The mitigating evidence alluded to by EDWARD EUGENE RAGSDALE was not available to his trial counsel, and the psychological factors discussed during this hearing were considered by trial counsel.
>
> This Court further finds that even had this mitigating information been available, there is no reasonable possibility that the outcome of the original sentencing hearing would have been different."

(R. Vol. I 130, -31).

This appeal follows.

Defense Presentation at The Penalty Phase

In Ragsdale v. State, 720 So.2d 203 (Fla. 1998) this Court said:

> During the penalty phase, defense counsel put on only one witness, Ragsdale's brother [Terry Ragsdale], who provided minimal evidence in mitigation. That witness had also testified on behalf of the State during the guilt phase. Additionally, the witness, when cross-examined by the State during the penalty phase, testified that it did not surprise him that his brother committed the murder and he provided other derogatory information about Ragsdale. Id.

On direct examination during the penalty phase, Terry Ragsdale testified that he had shot Ragsdale in the eye with an arrow, that Ragsdale had a scar on his cheek from a car accident, and that Ragsdale was blind in one eye. (Dir. Vol. IV 691). The entire direct examination of Terry – in other words defense counsel's entire penalty phase evidentiary presentation – comprises only five and a half pages of trial transcript. (Dir. Vol. IV 686 – 691). On cross examination, Terry was reminded by the prosecutor that he had been questioned under oath "yesterday." (Dir. Vol. IV 691). Terry agreed with the prosecutor that his brother had "been mean all of his life." (Dir. Vol. IV 692). "He's hit a couple other boys with boards." Id. He agreed, "No question, he's a bully." (Id). He had a reputation as a "violent kind of guy." (Id., Dir. Vol. IV 693). Terry agreed that Ragsdale was a "dope pusher." (Dir. Vol. IV 693). "He was smoking it and pushing it and selling it some." (Dir. Vol. IV 695). Terry said "No, sir," when asked: "It doesn't surprise you that he killed a family friend, does it?" (Dir. Vol. IV 695, -96).

Except for a few generalities, Mr. Culpepper's penalty phase argument focused entirely on the relative culpability argument. There was virtually no argument about nonstatutory background mitigation and none at all about mental mitigation.

Defense counsel did not request and the court did not give an instruction pursuant to Jackson v. State, 502 So.2d 409 (Fla. 1986).[2]

During its penalty phase deliberations the jury asked two questions. First, the jury asked, "We would like a legal definition of no contest, nolo contendere." (Dir. Vol. IV 757). After discussion with counsel, the court read the definition provided in Black's Law Dictionary. The jury also asked, "Is it unjust-just to sentence the defendant to a greater sentence (death) than the accomplice, if based on the testimony heard by the jurors, the jurors believe the defendant may have had a lesser part in the murder?" (Dir. Vol. IV 762). The court responded by rereading the standard instruction that deciding a verdict was exclusively the jury's job. The record reflects an immediate follow up question by one of the jurors that was cut off by the judge:

> JUROR POLANSKY: On the wording of that first question you read, what if it were read, what if it were changed? Should the jury consider the fact that–
>
> THE COURT: I can't help you anymore on

[2]"The jury must be instructed before its penalty phase deliberations that in order to recommend a sentence of death, the jury must first find that the defendant killed or attempted to kill or intended that a killing take place or that lethal force be employed."

> that. That's your decision." (Dir. Vol. IV 763).

The jury then returned an advisory verdict recommending the death penalty by a vote of eight to four. (Dir. Vol. IV 765).

Trial Counsel's Testimony

This was Mr. Culpepper's first and last capital case. (R. Vol. III(a) 394). He was asked whether it was true that he was "not really very familiar at the time with law with regard to capital cases," and responded, "Somewhat, but not particularly." (R. Vol. III(a) 395). So, in preparation for the case, he said that "I did some reading, of course." Id. He also talked to some other lawyers in the area. (R. Vol III(a) 396). He was court appointed and unassisted by co-counsel. The only assistance he received was from his wife. (R. Vol. III(a) 394 et seq). He did not make contact with such associations as the Public Defender Association, Volunteer Lawyer's Resource Center, Collateral Capital Representative or the ACLU. (R. Vol. III(a) 396). When he got the case, all but one of the depositions of the state witnesses had already been taken. (R. Vol. III(a) 400). Predecessor counsel William Webb (now a circuit judge) had also retained a Dr. Delbeato to examine Mr. Ragsdale, and the resulting report had already been completed. (R. Vol. III(a)

400). Mr. Culpepper felt that, when he received the case, all the discovery had been done and that "it was a matter of learning the material and learning – you know, getting in the position to try it." (R. Vol III(a) 401). Mr. Culpepper also concluded that the chances of getting an acquittal were "extremely, extremely thin," and so his strategy from the start was to argue that Ragsdale was no more culpable than the co-defendant, who got a life sentence. (R. Vol. III(a) 392, -93).

With regard to the strategic relative culpability argument, the following exchange took place during the evidentiary hearing:

> MR. CULPEPPER: I felt like the best strategy was the strategy we took. It was an extremely difficult fact situation to fight against. I felt that was the best – the State had sort of set it up by having Mr. Illig plead very early in the process. I felt that was by far the best route to take.
>
> Q. Let me ask you this: If in fact you had developed evidence one way or the other that Ragsdale had been abused severely as a child, that his childhood was quite impoverished, that he suffered from mental impairment, do you see those items of evidence and similar items of evidence as contradicting in any way your strategy?
>
> A. Well, it would have required – I mean, I think it would have required more

investigation.

(R. Vol. III(a) 405, -06).

The sole witness for the defense at the penalty phase was Terry Ragsdale. Mr. Culpepper, said that he had reviewed Terry Ragsdale's pretrial deposition and knew that Terry Ragsdale's testimony "was negative toward his brother, but when I talked to him at the trial, what he told me was very helpful." (R. Vol. III(a) 402). Mr. Culpepper was not sure, but he did not think that he personally talked to Terry before the trial. (R. Vol. III(a) 402, -03). Mr. Culpepper said he believed he talked to Terry in the courtyard outside the courthouse during the trial for about ". . . five, 10, 15 minutes – I'm not sure." (R. Vol. III(a) 403). There is no record of that conversation other than a few notes in Mr. Culpepper's file. (R. Vol. III(a) 403). In any event, when Mr. Culpepper placed Terry Ragsdale on the stand, Terry completely reversed everything he said. "What he told me out there – he got up on the stand and said something completely different." (R. Vol. III(a) 403). Mr. Culpepper agreed that what Terry said on the stand was consistent with the negative testimony he had already given in his pretrial deposition. Id.

During the deposition, Terry said the defendant had " . . . cost me a lot . . . Eugene has cost me. . .See, I let him

borrow money. I signed a paper . . . where he bought him a car . . . And he left from here and went to Florida and left me with that nine hundred dollars to pay back, for me and Ernie to pay back . . . He had the car, And he sold it." (R. Supp. 8). Did Terry like that? "It made me mad a little bit." (R. Supp. 9). Terry knew the victim. "He was good close friends of all the family, the whole family." (R. Supp. 10). During the deposition, Terry was specifically questioned about his being a potential mitigation witness. (R. Supp. 24, 30). Terry said, "I know the man they killed. And he didn't harm nobody. So the one that killed him needs to be put in the electric chair or something." (R. Supp. 31).

Predecessor counsel to Mr. Culpepper, William Webb, retained the services of Dr. Delbeato as a confidential mental health advisor. Dr. Delbeato evaluated the defendant and reported that:

> [T]he patient was not trying to smooth over or fake. Validity scales reveal a profile which tends to be open and candid. The patient is a person with a lower self concept and lower self esteem and currently has a moderate to severe level of depression . . . Furthermore, the profile suggests some passive/aggressive traits and some general mild nonconformity. It does not suggest any significant level of antisocial behavior or what we used to call the psychopath. Frankly, I don't think the man is smart enough to be a 'good psychopath.' He is emotionally conflicted

> and tends to be somewhat immature, passive/aggressive and suspicious of others. . . With regard to the alleged for which he is charged, Mr. Ragsdale tells me that he is innocent of the murder of a Mr. Ernest Mace. He states that his co-defendant, a Mr. Leon Ellick,[sic] is the perpetrator of the crime. He states that he was indeed an accessory after the fact to the crime but did not murder the victim.

(R. Supp. 96, -97).

The report contains a detailed narrative of the facts of the offense provided by the defendant which is consistent with the paragraph quoted above. Id. The report also contains the statement: "By the way, he states that he can prove that he was using drugs and alcohol at the time of the alleged crime. He states to me that he told you that there are three witnesses to the effect that he did imbibe alcohol and take drugs." (R. Supp. 96, -97).

At the evidentiary hearing, Mr. Culpepper said that he reviewed Dr. Delbeato's report, but decided that there was not "sufficient mental mitigation to present to the jury." (R. Vol. III(a) 391). When asked whether he ever spoke with Dr. Delbeato, Mr. Culpepper said, "I don't think I did. I think – I don't think I did. I know I read his report." (R. Vol. III(a) 404, -05). Dr. Delbeato said, "I think the best I could or should say is that I have absolutely no recollection of that man [Culpepper] ever contacting me or talking with me

in any way." (R. Supp. 72).

Dr. Delbeato's testimony was introduced at the evidentiary hearing by way of a deposition to perpetuate testimony. He flatly said that the only information he could provide was what was contained within the report itself. All of his underlying data, tests, notes etc. had been destroyed. With regard to Ragsdale himself, he said: "I couldn't identify the man if you had him in the same room here." (R. Supp. 70). Dr. Delbeato had been retained by -- and had sent his report to -- predecessor counsel William Webb. When told that the case had been handed to a succession of attorneys until it finally reached Mr. Culpepper, Dr. Debeato said "I was not aware that there was any changes of attorneys nor did I ever hear Mr. Culpepper's name, as far as I can recall." (R. Supp. 71).

Based on his review of his own report, Dr. Delbeato described his work in the case as very preliminary and therefore incomplete. "[T]his was noted as a confidential evaluation. . .what that would mean is that I was probably the first doctor or expert-level person in my field to evaluate the person for the attorney . . . the defense attorney can then, I guess, hire the other two or three or whatever and I go from there." (R. Supp. 73). He agreed that his role was

to provide an initial confidential report and then it would be up to the attorney to take what further measures he saw fit. (R. Supp. 74). He said:

> I was basically doing a general evaluation, number one, competency, right from wrong, and if I noticed any mitigating factors. One that seemed to be, from a psychological point of view, was that I noted to the attorney that the person had stated that he was on alcohol and drugs at the time and that there were witnesses to this.
>
> And I just mentioned to the attorney that he might want to look for those witnesses or whatever. You know, I know that the attorney was smart enough to know that himself but basically if I didn't mention anything else or put any paragraphs in there, Hey, look, these are mitigating factors, then I didn't see any at that point in time.

(R. Supp. 74, 75). While admittedly a bit rambling, the following excerpt from Dr. Delbeato's deposition testimony explains his view of his role at the time:

> Q. Would you have been able to look further into the issue of mitigation and are there avenues for doing so that you can see here on the report?
>
> A. Yes, there are avenues. Basically, again, the first paragraph suggests to me that this was an initial confidential evaluation for me to give that attorney some basic information as to, Does he know right from wrong? Is he sane or not sane? And then if anything – if he saw anything then he would develop it further. I don't remember having anything developed further.

Now, there are cases where it does develop further and somebody will come back and say, I want you to go out and talk to them and do some mitigating factors. A lot of time we're just simply told, Go out there, do this, you know. Whether you spend two hours or 20 or 50 or a hundred you're going to get paid $400 and that's it.

And, you know, so basically, you know, we do a lot of what the attorney says in the initial letter and what he tells you on the phone. And very rarely has anybody said, Look, we've got the time or the money to have you go and see this guy 20 or 30 times, even though I have done this regardless of what I get paid.

I have gone out to see the person, especially if I've questions or whatever and – or come up with something that I think needs to be further tested or something I missed. I don't recall any – being told to do anything more than just give me some initial confidential information here.

Q. And, in fact, that's your interpretation of the first paragraph of this letter?

A. Yes, sir. Just a preliminary work-up for him. When I get – when I'm the first one like that I'm assuming that he's going to go for some – it's in my head, I may be wrong, that basically this might be a case where they might want big guns or more, you know, people with – experts who have more famous or wrote books or whatever and they're going for the bigger guns and I'm just – you know, a lot of guys might respect my opinion to begin with but they might want – and it's nothing personal, they might want somebody heavy when they go into court. So I don't know. Basically,

like I said, when I do the initial confidential it's to provide them with an opinion and then they usually get some other people too.

Q. Well, not so much the big guns aspect of it but you – as you indicated –

A. More comprehensive.

Q. You had a specific reference in here too to the attorney telling him, You might want to take a look at this issue for further mitigation, and I'm asking are there other issues you can see looking at the report that could very well have born fruit if they had been looked into a little bit further at the time? But it was your feeling that was not appropriate to do just then? That's the question.

A. Probably not. That was probably – yes.

(R. Supp. 87, 88).

Mr. Culpepper was questioned about his efforts to make contact with Mr. Ragsdale's family. Previous counsel had already deposed two of Ragsdale's brothers, Terry and Ernie Ragsdale. Mr. Culpepper did not recall whether he talked "on the phone or any other way" with any of Ragsdale's family members. (R. Vol. III(a) 404). What contact there was amounted to "some calls" to "some people" made by Mr. Culpepper's wife:

Q. Do you recall if you personally talked on the phone or any other way with any of Ragsdale's family members?

> A I don’t -- I don’t recall it. I may have, but I don’t recall it.
>
> Q. And is it your feeling that your wife, if there was any contact or any type of investigation into --
>
> A. She was the one who was contacting the people up in Alabama, which was his family, and she would have been the one who made the contacts with them.
>
> Q. And at this point you don’t know how much she actually worked on it or how much she didn’t? Is that a fair statement?
>
> A. Yeah. I know that she made some calls. I know that she talked some people up there. I don’t know exactly the content of it. I don’t recall it.

(R. 404).

Mr. Culpepper was asked, “You don’t know how many members? There may have been one, two, something of that sort?” He answered, “I didn’t – I don’t really know. I mean, I don’t recall.” (R. Vol III(a) 414). Based on these reports from his wife, Mr. Culpepper formed the subjective impression that Mr. Ragsdale’s family members didn’t care:

> Q. [P]resumably your wife was able to make some contact with [some family members].
>
> A Yes. She made some contacts with them . . . My understanding is, they weren’t particularly helpful or interested in him.
>
> Q. That’s your understanding?
>
> A. That’s my recollection, is that they weren’t particularly helpful or interested

one way or the other."

(R. Vol. III(a) 410).

Given this impression, Mr. Culpepper decided not to pursue the matter farther.

> Q. You made a decision to argue a relative culpability – well, to put forth a relative culpability argument; is that true?
>
> A. Sure.
>
> Q. Okay. And it was your choice not to do anything else in addition to that relative culpability argument in the penalty phase; is that true?
>
> A. Well, you know, the investigation we did didn't find anything else to hang – that would be serious enough to hang our hat on.
>
> Q. The investigation you did was to read Dr. Debeato's report and to have your wife make a few phone calls?
>
> A. She contacted members of the family, and we didn't get anywhere with them. So-."

(R. Vol. III(a) 413, -14).

During the evidentiary hearing, collateral counsel began to question Mr. Culpepper about an issue relating to the prosecutor's penalty phase closing argument. (R. Vol. III(a) 411). The State objected that this line of questioning was outside the scope of this Court's remand. Id. The lower court agreed and refused to permit any additional testimony

along those lines. Id. Collateral counsel moved a discovery deposition taken from Mr. Culpepper into evidence. The motion was denied. (R. 416, -17).

Mitigation Demonstrated atThe Evidentiary Hearing

Background Mitigation

Mr. Ragsdale's family comprised himself, his father, Clyde, his mother, Sybil, and three brothers. Both mother and father are now deceased. (R.Vol. II 204). For most of the defendant's childhood the family lived in Zephyrhills, apparently moving about from trailer to trailer. (R. Vol. II 205, -06).

The first witness to testify at the evidentiary hearing was Ernie Ragsdale, the defendant's younger brother. Ernie Ragsdale entered the army when he was seventeen and served four years in the regular army followed by nine and a half years in the reserves. He was an MP for about a year and was honorably retired early due to a wreck in '91. Thereafter he has worked as a trucker and a mill wright, is married and has a family of four children. (R. Vol. II 195 -- 197). Ernie Ragsdale said that he was the closest of the brothers to the defendant. (R. Vol. II 174). He said the family was poor. The father went on disability when Ernie Ragsdale was four years old. (R. Vol. II 161). The mother and the boys worked

picking oranges from “sun up, sun down” to help out. Id. The boys were at times held back from school so they could work in the orange groves. The mother’s relationship with the father was “More like a waitress to him, I reckon, if anything. Whatever he wanted done she done. No questions asked.” (R. Vol. II 162). The father “ruled the household. Whatever he said went . . . If he asked you to do something, you done it. No argument. And if you didn’t, you’d get a whoopin, a good whoopin.” Id. Ernie Ragsdale saw the father pull a gun on the mother once. Id. The father carried a pistol with him wherever he went. (R. Vol. II 176). The father beat the boys with anything he could get his hands on, using a water hose, a slat, a switch (R. Vol. II 166), leaving bruises and drawing blood. (R. Vol. II 163). Of the four brothers, the defendant got the most beatings. (R. Vol. II 198). The mother “was there but she didn’t say a whole lot because she was scared of him, scared he’d jump on her.” (R. Vol. II 169). A “switch” was a tree limb, and the father would go up and down with it, “head to your feet.” (R. Vol. II 166). The father made the boys fist fight as a form of punishment. “If you didn’t he’d whoop you again.” (R. Vol. II 164). Ernie remembered seeing the father beat the defendant on the legs, back and head, bringing out blood with a water hose. (R. Vol. II 165). He

remembered seeing the father shoot at the defendant. Id. He remembered seeing the defendant handcuffed to a pole for "ten minutes to an hour, hour and a half." (R. Vol. II 166). The defendant ran away from time to time because he could not take the beatings. (R. Vol. II 167).

The father was on pain pills and nerve pills. Ernie Ragsdale remembered the names Impirim and Valium. (R. Vol. II 184). When the father took them, he became even more violent. (R. Vol. II 170). The defendant used to sneak the pills out of the boxes when he was eight or nine years old. Id. "Later on he got on pot, coke, acid. I guess he about tried it all . . . He started taking pills like eight, nine. And started going to bigger stuff . . . Gas, glue. Paint. If it would get him high he'd do it." (R. Vol. II 170, -71). He was on drugs, "Probably every day, if he could get it. At least two or three times a week." According to Ernie Ragsdale, the defendant exhibited a noticeable change in behavior connected with the drugs, alcohol, beatings, and injuries. (R. Vol. II 174, 185, 199). Ernie remembered where his older brother shot the defendant in the eye with an arrow, causing him to go blind in that eye, and another episode in involving a car accident. "He was out late one night and come home all bloodied. Hit a tree or something. Went through the

windshield." (R. Vol. II 172). The defendant was perhaps twelve or thirteen years old at the time. Id. Later, when the defendant was in around seventeen or eighteen (R. Vol. II 175), he got head in the head with a "steel pipe or something at a bar." (R. Vol. II 173).

Ernie Ragsdale was asked whether he would have been available to testify at the trial if asked to do so. He said, Well, I came down at the trial. I guess the State had me come down. Got here, they asked me a couple questions, said, 'We don't need you, you can go.'

> Q. But the defense never called you?
> A. Never did.
> Q. Never talked to them?
> A. No.
> Q. And if they would have called you, you would have been here at that time?
> A. Yes.
> Q. And what would you have said back during the trial would have been the same exact thing you're testifying to?
> A. Same thing I'm saying now.
> Q. Same thing?
> A. Yes.
> Q. But nobody ever contacted you?
> A. No." (R. Vol. II 178).

Darlene Parker was the second witness called to testify at the evidentiary hearing by the defendant. She also said that she would have testified on Ragsdale's behalf if anyone had contacted her, but that no one did. (R. Vol. II 220). She is the defendant's cousin on his father's side and for

about six years she lived next door to the defendant's family. (R. Vol. II 205, -13). She confirmed much of what had been said by Ernie Ragsdale. With regard to the relationship between the defendant's father and mother, she said, "[W]henever he told her to do something she jumped. It was just like that. I mean either she did it or else. You know . . . He could have hit her, or anything." (R. Vol. II 206). "The mother wouldn't do anything. Aunt Sibil, she wouldn't do anything, because she knew better. She knew that if she did it, that he might slap her down. There was no taking up for the kids at all." (R. Vol. II 219). The father regularly took some form of pain medication. Id. She said the father "didn't have any kind of relationship with Eugene. He never showed no love, no nothing toward him." (R. Vol. II 208). She said the father was abusive. (R. Vol. II 208). Among the brothers, the defendant got the worst of the beatings. (R. Vol. II 229). The father beat the defendant with sticks, clothes hangers, fishing poles, boards, anything. "[H]e would beat him so bad that blood would come down the legs. You know. And I could hear them yelling way over from their house to our house crying." (R. Vol. II 208). She said the father would beat the defendant "till all the switches ran out. Beat him till all the – there was nothing there but just the end of

where you hold the switch at, or belt. I've seen him break a belt over him." (R. Vol. II 209). She said, "He just didn't know when to quit." (R. Vol. II 210). She said, "I was terrified of him. He was scary. He looked mean. He was scary." (R. Vol. II 213). Darlene Parker remembered an incident where the father apparently "went crazy." "I know my aunt told me that they took my uncle to the hospital because he tore out all the insides of the vehicle and he went crazy. He was drinking, doing medications. And he went crazy and he tore all the insides of the car out, and they had to take him to the hospital . . . Nobody could handle him. He was like – put him in a straight jacket, you know, type thing." (R. Vol. II 215). She said, "He didn't know anything to – for him to be a role model. I mean, he didn't even be a dad, actually. Because he didn't know how to discipline the children. And I never heard him say, 'I love you,' or give them a hug, or take them anyplace and do anything with them. He took them to the orange grove, I know that, and make them work all day; kept them out of school sometimes. Make them work all day and pick oranges, and him take the money." (R. Vol. II 221).

Another cousin of the defendant's, Byron Ragsdale, also testified at the evidentiary hearing. He corroborated much of the previous testimony about the defendant's early family

life, including the arrow in the eye incident and the car accident. (R. Vol. II 248). With regard to the latter, when the defendant was about twelve, he was involved as a passenger when the car hit a tree. The driver left the scene because he was underage. (R. Vol. II 249). The defendant came to the Byron's house. "His eyes was messed up. Glass in his eyes. Glass was still in his head. He was still bloody. And he was messed up." (R. Vol. II 250). Byron also remembered an occasion where the defendant was hit on the head with a pipe in a bar fight. (R. Vol. II 250, -51). He also confirmed that the father "was very abusive towards the whole family, screaming, yelling, cussing. Physically and verbally." (R. Vol. II 238) the father held the boys back from school so they could work in the orange groves. The father took the money. He said the beatings were very severe at times. (R. Vol. II 240). "[W]hen I say severe, when he used the switch on him he would use it till there wasn't nothing left to use. . . .Anywhere he could hit, that's where he hit." (R. Vol. II 241).

After repeatedly running away to escape the beatings, the defendant "permanently" moved out at around age fifteen. (R. Vol. II 244). Byron Ragsdale spent a lot of time with the defendant around then. Id. The defendant was smoking "pot"

when he was eight years old, and used a variety of drugs thereafter. (R. Vol. II 247). After the head injuries, the defendant's behavior changed. (R. Vol. II 251). "[H]e complained about headaches, severe headaches. He would snap on you. Take pain medication for the headaches. And just continued getting worser." (R. Vol. II 251). Byron Ragsdale said he would have been willing to come to court, but no one contacted him. He was still living in Zephyrhills at the time. (R. Vol. II 252).

Collateral counsel introduced depositions taken to perpetuate testimony from family members. Rebecca Lockhart is the defendant's aunt on his mother's side. Her testimony is generally corroborative of the facts adduced from the other witnesses at the evidentiary hearing. The father never worked and the family mostly lived off "welfare." (R. Supp. 44). The mother "was just frightened, you know, and she wouldn't say anything to him. I think she was scared, too." (R. Supp.45) along with the "big, long switch" the father beat the children with a "leather strap." (R. Supp. 46). "If they back talked him or anything, he would handcuff them to the porch. . . And he would leave them out there long, not give them any water or anything." (R. Supp. 47). "He would use his fist. He would hit the boys with his fist. . . In the

face." (R. Supp. 48) the father would be yelling while administering the beatings, "very bad language, cussing awful." (R. Supp. 49). In Rebecca Lockhart's opinion, the father was mentally ill. (R. Supp 49). When she visited the Ragsdales, she was afraid for the safety of her own son. (R. Supp.53). The father taught the boys to fight. "And they would draw blood, too." Id. Ms. Lockhart was not contacted by anybody about testifying on behalf of the defendant. (R. Supp. 55).

Ms. Lockhart also said she thought that Terry Ragsdale, the brother who testified for the state and who was the only witness called by defense counsel in the penalty phase, was scared of authority. (R. Supp. 59). "My opinion is that Terry could be – could say what people wanted him to say, yes, because he would get that nervous and that scared." (R. Supp. 60).

As noted, her testimony was admitted at the evidentiary hearing by way of a deposition to perpetuate testimony, and she was interviewed by collateral counsel's mental health expert, Dr. Berland.

The deposition of another cousin, Sheila Adams, was introduced at the evidentiary hearing. She stayed with the Ragsdale family for about a year. (R. Supp. 107). She

provided some corroborative testimony, in particular she agreed that the father was physically abusive to the boys. He beat them with anything he could get his hands on and did so on any part of their bodies that was within reach. (R. Supp. 115). Twice that she saw, the father hit the defendant across the back of the head with a walking cane. (R. Supp. 115, 116). Sometimes the father would call out to the defendant and grab him and beat him when he responded to the call. (R. Supp. 116). Usually, the defendant did not deserve to get a beating. (R. Supp. 119). She recalled that the father once shot over the heads of the defendant and one of his brothers. (R. Supp. 109). There was a second shooting incident, but she had not seen it herself. Id. One time the father chased Ms. Adams' aunt with a gun for about two miles. (R. Supp. 111). She heard that the father handcuffed the boys to a pole. (R. Supp. 109).

When the defendant was about fifteen, she saw the father hit him on the jaw with a closed fist and "knock him across the room." (R. Supp. 110). She thought the father had a "mental disorder." (R. Supp. 119). Like Ms. Lockhart, Ms. Adams' testimony was admitted at the evidentiary hearing by way of a deposition to perpetuate testimony, and she was interviewed by to collateral counsel's mental health expert,

Dr. Berland.

Mental Mitigation

At the evidentiary hearing collateral counsel presented mental mitigation that could and should have been placed before jury at the penalty phase of Mr. Ragsdale's trial. This evidence was presented through the testimony of Dr. Robert M. Berland, a forensic psychologist. Dr. Berland holds a Ph.D. in psychology and is board certified in forensic psychology. He worked in various capacities with the Florida State Hospital at Chattahoochee from 1977 to 1985, and has maintained a private practice since then. He was accepted as an expert by the lower court as an expert witness, as he has been at least three hundred times before. (R. Vol. III(a) 281-286).

He spent 25 to 30 hours working on Ragsdale's case, over eight of them with the defendant. He conducted psychological testing, reviewed all relevant documentation, which included numerous police reports, witness statements and depositions, and records from the D.O.C. (R. Vol. III(a) 342), and interviewed lay witnesses. (R. Vol. III(a) 291). He also had available the report of Dr. Delbeato along with Dr. Delbeato's deposition, and he had the report and raw data of the evaluation conducted by an expert hired by the State, Dr.

Merin. Id.

Dr. Berland was questioned and testified at some length about the methodology and factual results of his clinical interview of the defendant. (R. Vol. III(a) 317 -- 322). The techniques he used were calculated to ferret out "fakers." Id. As a brief summary of his interview, Dr. Berland said that the defendant admitted to a number of hallucinations and "delusional paranoid beliefs,"episodes of depression and hypomania, but denied a long list of psychotic symptoms. (R. Vol. III(a) 319, -21).

Dr. Berland said that he got the information about Ragsdale's family environment mostly from family and friends. The main historical issue that he took up with the defendant concerned head injuries. Of significance to Dr. Berland the car accident where the defendant "went through the windshield," because "both he and some of his family and friends independently corroborated symptoms of brain injury." (R. Vol. III(a) 323). The accident occurred about when Ragsdale was sixteen, (R. Vol. III(a) 322), and "there was the onset of responses on his part consistent with delusional paranoid thinking after that incident, and episodes of depression."

The reports of four people contributed to Dr. Berland's

opinion about this incident. Another significant episode was the bar fight where Ragsdale was hit on the head with a pipe. Some of the "by-products" from this episode are associated with both brain injury and mental illness. (R. Vol. III(a) 325). This information was also independently confirmed. Id.

Dr. Berland recounted the information about the defendant's bad family life that he learned from speaking with all of the family members who eventually testified at the evidentiary hearing and a brother who did not. That information, particularly about the beatings, was consistent with the lay testimony presented at the hearing.

At this juncture, Dr. Berland was asked about the "legwork" he did in this case. He said that obtaining corroboratory evidence has been a standard since 1987. He said, "I would argue that it's a necessity." (R. Vol. III(a) 329). Dr. Berland acknowledged that there had been some difficulty contacting Sheila Adams and Rebecca Lockhart due to their poor health, but that eventually he was able to get the information he needed from them. (R. Vol. III(a) 330, -31). He said, "I think that there were family members who were ready and knowledgeable and capable of talking about the history of head trauma and how he changed afterward." (R. Vol. III(a) 331).

Dr. Berland was asked to comment on the tests used by him and by the psychologist hired by the State. (R. Vol. III(a) 291). Dr. Berland's testing gave evidence of brain injury. (R. Vol. III(a) 297). On IQ testing Mr. Ragsdale scored one point into the normal range (86), while the State's expert actually got test results considerably lower (75), which would have been only 5 points above the accepted level for retardation. Id. Dr. Berland is familiar with the concept of nonstatutory mitigation, and believed these results would have qualified as such. Id. In fact Dr. Merin's results would have supported a finding of retardation. (R. Vol. III(a) 300). It appears from the record of the evidentiary hearing that the results of various IQ tests, including subtests aimed at specific areas of functioning, ranged between a low of 67 to a high of 92 for right hemisphere performance. (R. Vol. III(a) 296 – 302). According to Dr. Berland, the variations in results indicated that "some parts of the cortex have lost functioning from injury." (R. Vol. III(a) 297).

Dr. Berland had reviewed Dr. Delbeato's report from 1986 and was aware that Dr. Delbeato had reported that he did not find evidence supporting brain damage. (R. Vol. III(a) 312). However, he noted that Dr. Delbeato had speculated in his deposition that he used the Bender Gestalt as a screening

measure for impairment from brain injury. Id. According to Dr. Berland, "If that's true, the Bender certainly can reflect brain injury, but it is very insensitive to brain injury. It is more right-hemisphere oriented, and I've seen cases myself where people had significant portions of their brain missing, and their Benders were not in any way distorted." Id. Dr. Berland said the Dr. Delbeato's report suggested a number of statutory and nonstatutory mitigators, including the issue of chronic drug and alcohol abuse, low IQ, learning disability, chronic depression, and intoxication at the time of the offense." (R. Vol. III(a) 332) He thought that the potential mitigation indicated in Dr. Delbeato's report "with a minimum of effort could have been followed up on." (R. Vol. III(a) 332).

With regard to the MMPI, Dr. Berland found no indication of exaggeration or faking. (R. Vol. III(a) 304). He described the results he got on the MMPI and said:

> He scores – on the important scales for this case, for this purpose, are his scales on Scale 6, the paranoia scale; Scale 8, what's called the schizophrenia scale – it actually measures psychotic symptoms in general, not just schizophrenia – and his score on the mania scale, which measures his energy levels. All of those are well above the cutoff.
>
> It's especially interesting, because Scale 9, the mania scale, is, in his case,

> a biologically driven, overactive, energized condition, which is part of the kind of mental illness that I think he has, part of the psychotic disturbance.
>
> Knowing that most inmates, once they've been in jail or prison for anywhere from three to five months, their 9, wherever it was when they were on the streets, will usually drop significantly. They become very sedentary and low in energy. This is a man who's in the most confined situation, and he's still highly energized, which clearly shows the biologically driven quality of his disturbance.
>
> Basically, he has delusional paranoid thinking, according to the outcome on this case, a broad range of other psychotic symptoms, including hallucinations, which are fairly reliably indicated by a sub scale, Scale 8, the schizophrenia scale.

(R. Vol. III(a) 305, -06). The MMPI also gave evidence of "character disturbance," and an "agitated chronic depression." Id. Dr. Berland was asked about the results from the MMPI administered under the direction of the State's witness, Dr. Merin. Dr. Berland said of those results:

> They're consistent with mine. They use a different cutoff. His was plotted on an old MMPI form, but it was plotted according to the T values. So it's plotted – it's at the height that it would have been above the cutoff on an official MMPI-2 form.
>
> And it shows an F, which is typical of a psychotic disturbance, well above the cutoff. It shows Scale 8, the schizophrenia scale, above the cutoff. It shows Scale 6, the paranoia scale, above

> the cutoff. Scale 9, at the time he saw him, was at the cutoff, again, not typical for someone who has been incarcerated for a long period.
>
> And the same thing is true for the depression. It was sort of at the cutoff. So it was of borderline clinical significance. I would consider it significant.
>
> And, of course, you have at least a modest amount of character disturbance reflected in here on Scale 4.

(R. Vol. III(a) 307).

Dr. Berland was asked to relate the results of his current evaluation back to the time of the offense and Ragsdale's trial. He said:

> The way I approach this is, I start from where we are now and then try to gather data to work my way backward in time. The principle behind that being, basically, for this kind of mental illness, once you have it, you have it for life. So, if a person doesn't have it now, the chances that there was going to be evidence of it in the past drop to a minimal percentage.
>
> It also gives me a picture of what aspects or what kinds of symptoms of mental illness I'm looking at when I test them currently, so that I know what I'm, at least, looking for when I work my way back in time.
>
> Part of that is covered – my attempt to find out whether he had these problems back at the time of his trial and at the time of the offense is based in information that I gather from him in the interview and symptom reports, if he admits to any, and

> dates of the onset that he gives me. But, also, that is why – the family and friends that I talk to who are familiar with him, why the information that I get from them is so critically important, because I have independent verification of whether or not symptoms of mental illness were evident back in the time frame that we're talking concerned with, which is back in the late – mid and late '80s.

(R. Vol. III(a) 308).

Dr. Berland said that he thought there were two statutory mitigating circumstances in the case. "I think that there's evidence that he suffered from extreme mental or emotional disturbance at the time of this offense, and I believe that he was substantially impaired in his capacity to conform his conduct to the requirements of law at the time of the offense." (R. Vol. III(a) 332). Dr. Berland was asked about the underlying factual basis for his opinion and he replied:

> All of the data that I have suggesting that he was psychotic at that time, notwithstanding any evidence which might be gathered about whether his psychosis was intensified or exacerbated because of drug or alcohol abuse at the time of the crime – I'm not even addressing that issue, but I have the testing. I have the information from Dr. Debeato. I have the information from Mr. Ragsdale, and I have the information from the family and friends, that all correspond in indicating that he was mentally ill then.
>
> And I think that mental illness was of great enough significance to, as I said,

> meet the criteria in Dixon[3] for whether it's extreme or not for extreme mental or emotional disturbance and substantial in terms of his capacity to conform his conduct.
>
> I don't think there's any evidence that he lacked a capacity to appreciate the criminality of his conduct. I'm not specifying that in here.

(R. Vol. III(a) 332, -33).

Dr. Berland also listed what he identified as nonstatutory mitigators:

> Well, my belief that there's evidence of brain injury is a nonstatutory mitigator and that this injury predates the offense. It's not a product of anything that's happened since his trial.
>
> In terms of nonstatutory Mitigators? There is significant evidence from a number of family and friends that I talked to that he came from a very difficult background, suffered physical and emotional abuse at the hands of his father throughout most of his childhood, basically until he left home, which has been considered, again as a

---

[3]State v. Dixon, 283 So.2d 1 (Fla. 1973) ("Extreme mental or emotional disturbance is a second mitigating consideration, pursuant to Fla.Stat. s 921.141(7)(b), F.S.A., which is easily interpreted as less than insanity but more than the emotions of an average man, however inflamed." "Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. Fla.Stat. s 921.141(7)(f), F.S.A. Like subsection (b), this circumstance is 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.")

> nonstatutory mitigator.
>
> He has a substantiated long and heavy history of alcohol and drug abuse, again, a substantial – an affirmed nonstatutory mitigator.
>
> There is at least some evidence of intoxication, which needs to be further developed, at the time of the offense, which would be a separate nonstatutory mitigator, and – let's see. Not as a result of my evaluation, but as a result of Dr. Delbeato's evaluation and supplemented recently by findings from Dr. Merin, there's evidence of borderline intellectual functioning, a nonstatutory mitigator.
>
> Dr. Delbeato referred to what he believed to be a developmental learning disability, which, certainly, if that was confirmed would be – has been endorsed as a nonstatutory mitigator.
>
> The other two that he refers to, the chronic depression, which was, of course, in his report from 1986, and the claim by the defendant, again reputedly verifiable, that he was using drugs and alcohol at the time of the crime, I've already alluded to as nonstatutory, or in the case of the depression, a statutory mitigator. And I think I've covered them all.

(R. Vol. III(a) 315).

The State called Dr. Sidney J. Merin, a clinical psychologist specializing in clinical psychology and neuropsychology, in rebuttal to the mitigation evidence introduced through Dr. Berland. Dr. Merin administered fifteen psychological tests, conducted a clinical interview of

the defendant, and reviewed records. (R. Vol. III(a) 362, -63). He did not interview family members or other lay witness. Dr. Merin did relate at length what Ragsdale told him of his personal history. (R. Vol. III(a) 363 – 368). This history was consistent with the other evidence introduced at the evidentiary hearing with regard to head injury, drug and alcohol abuse, and bad family environment. Id. He found evidence of a learning disability. (R. Vol. III(a) 364). This is so despite the fact that he had not read Dr. Debeato's report. (R. Vol. III(a) 379). He disagreed with Dr. Berland on a number of his clinical findings and conclusions. He did not find brain injury. On the other hand, he found evidence that Ragsdale had encephalopathy, which he defined as "impairment of the brain for some reason." (R. Vol. III(a) 375). Mr. Ragsdale fell within the borderline retarded range according to the IQ tests administered by Dr. Merin. (R. Vol. III(a) 377). On one of the tests, the Rey Complex Figure Examination, Ragsdale scored below a one percentile level. (R. Vol. III(a) 385). This result indicates "a significant impairment of those visual spatial skills." (R. Vol. III(a) 385, -86).

The State Attorney at the evidentiary hearing asked Dr. Merin whether Ragsdale "was under the extreme duress or under

the substantial domination of another person at the time that he was involved in the death of Mr. Mace?" Dr. Merin responded: "As I've indicated, I got no information from him concerning that. So it would be difficult for me to make that determination; however, on the basis of the sworn testimony of other individuals at depositions, I did not develop any opinion that he was insane or did not know what was going on at the time." (R. Vol. III(a) 370). He disagreed with the finding that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. (R. Vol. III(a) 371). He diagnosed Ragsdale as having an adjustment disorder (R. Vol. III(a) 371) and a "personality disorder not otherwise specified." He said features which would be pertinent were those associated with the antisocial personality disorder, with schizoid personality, and "paranoid features." (R. Vol. III(a) 373).

JURISDICTION AND STANDARD OF REVIEW

This is an appeal of the circuit court's denial of Mr. Ragsdale's motion for postconviction relief after remand. This Court has jurisdiction pursuant to article V, section 3(b)(1) of the Florida Constitution.

The lower court conducted an evidentiary hearing on the

issue of ineffective assistance of counsel at the penalty phase of the trial. The text of the written order denying the motion for postconviction relief and corresponding oral pronouncement are recited in the statement of facts ante. Ineffective assistance of counsel claims present mixed questions of law and fact subject to plenary review; this requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings. Occhicone v. State, 2000 WL 854263, 25 Fla. L. Weekly S529 (Fla. Jun 29, 2000) (NO. SC93343). The lower court's finding that "trial counsel did not abuse his duties in any fashion, nor was his representation inadequate, nor did it cause prejudice . . . which could have been avoided by any other type of representation," is simply a conclusion which tracks the language of Strickland. The same is true of the finding that, ". . .had this mitigating information been available, there is no reasonable possibility that the outcome of the original sentencing hearing would have been different." Both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact. Huff v. State, 762 So.2d 476 (Fla. 2000).

A finding entitled to deference is a "basic, primary, or historical fact." Huff; Stephens v. State, 748 So.2d 1028

(Fla.1999), The lower court's finding that the mitigating evidence presented at the evidentiary hearing "was not available to his trial counsel, and the psychological factors discussed during this hearing were considered by trial counsel" was not a finding of a basic, primary or historical fact "in the sense of a recital of external events and the credibility of their narrators...." White v. Estelle, 459 U.S. 1118, 103 S.Ct. 757, 74 L.Ed.2d 973 (1983); Townsend v. Sain, 372 U.S. 293, 309, n. 6, 83 S.Ct. 745, 755, n. 6, 9 L.Ed.2d 770 (1963), quoting Brown v. Allen, 344 U.S. 443, 506, 73 S.Ct. 397, 445, 97 L.Ed. 469 (1953) (opinion of Frankfurter, J.). It is also inconsistent with the court's oral pronouncements that: "I think there is no question about it, that Mr. Ragsdale had a rather difficult childhood. There's no question about it that there was a lot of circumstances that could well have – based upon the present examination, could well have made perhaps – perhaps could have been presented."

The judge who conducted the evidentiary hearing is not the same judge who presided at trial; consequently he had no better vantage over the trial than does this Court. Moreover, the judge's assertion that he was merely making a recommendation to this Court suggests rather strongly that he

did not expect his findings would receive much deference.[4]

[4]Fla. R. Crim. P. 3.850(d) requires the court to "determine the issues, and make findings of fact and conclusions of law with respect thereto."

SUMMARY OF ARGUMENT

This cause was remanded for an evidentiary hearing on the issue of ineffective assistance of counsel at the penalty phase of Mr. Ragsdale's trial. In doing so, this Court specified some of the apparent deficiencies in defense counsel's performance during the penalty phase. Defense counsel had called only one witness at the penalty phase, Terry Ragsdale, the defendant's brother. As this Court put it, Terry provided only "minimal evidence in mitigation. That witness had also testified on behalf of the State during the guilt phase. Additionally, the witness, when cross-examined by the State during the penalty phase, testified that it did not surprise him that his brother committed the murder and he provided other derogatory information about Ragsdale." As shown by the record on direct appeal, trial counsel's entire defense through both the guilt/innocence and penalty phases was geared to a "relative culpability" argument – that Ragsdale should not be sentenced to death when his co-defendant had pled out to a life sentence. Aside from Terry's testimony and the relative culpability argument, defense counsel presented no evidence and made no argument in mitigation. The trial court found no evidence of mitigation "whatsoever."

An evidentiary hearing was conducted pursuant to this Court's remand. The record of that hearing shows that there was a wealth of mitigating evidence available to defense counsel -- evidence that could have and should have been presented to the jury. In particular, evidence demonstrating the existence of background mitigation was consistent, detailed, specific, graphic, at times horrific and dramatic, and essentially undisputed. For example, witnesses said that the defendant's father beat him with anything he could get his hands on, using a water hose, a slat, tree limbs, a "leather strap," clothes hangers, fishing poles, boards, a walking cane and a broom handle. "Anywhere he could hit, that's where he hit." The beatings were so bad "that blood would come down the legs." One said, "I've seen him break a belt over him." Witnesses remembered seeing the father beat the defendant on the legs, back and head, bringing out blood with a water hose, seeing the defendant handcuffed to a pole for "ten minutes to an hour, hour and a half." One saw the father shoot at the defendant and hit him on the jaw with a closed fist and "knock him across the room." Frankly, this brief synopsis does not do the subject justice. The abuse was extreme.

The evidence of background mitigation was also relevant to the defendant's development, or misdevelopment, as a

person. The father, who some of the witnesses opined was mentally ill himself, used to lure the defendant close so he could grab him and beat him. The father held the defendant's mother in cowed submission. He taught the defendant and his brothers to fight until they drew blood as a form of discipline, and beat them if they did not fight hard enough. No one dared to challenge him, until the defendant grew big enough to do so. Along with providing the motivation for early escapism, the father also was taking various pain pills which the defendant had access to as early as the age of eight. The witnesses described the defendant abusing an assortment of drugs and other substances on pretty much of a continuous basis thereafter.

Dr. Berland testified at length in the evidentiary hearing. His conclusions were backed by thorough preparation which included extensive interviews of the defendant and family members, psychological testing, and review of all conceivably relevant documentation including the tests, raw data and report of the State's expert. He concluded that both the statutory mitigating circumstances of extreme mental or emotional disturbance and impairment of capacity to conform to the requirements of law were present in the case. Dr. Berland said that all the data he had indicated that the defendant was

psychotic at the time of the offense. He noted the evidence of drug and alcohol abuse at the time of offense, but did not rely on it because it had not been followed up on by counsel or counsel's expert at the time of trial. As nonstatutory mitigation he identified brain injury, physical and emotional abuse throughout his childhood, a substantiated long and heavy history of alcohol and drug abuse, drug and alcohol intoxication at the time of the offense, borderline intellectual functioning, a developmental learning disability, and chronic depression prior to the offense. A number of these nonstatutory mitigators were reported by Dr. Delbeato to predecessor defense counsel at the time of trial.

This testimony was challenged by the State to the extent that an expert was called in rebuttal. However, as discussed in the body of this brief, the State's expert also provided evidence of mental mitigation, just not as much. At the penalty phase of the trial, the jury was provided with precisely none.

Defense counsel testified at the evidentiary hearing. To sum up his testimony, he did essentially nothing to prepare for the penalty phase. His decision to call Terry Ragsdale was the result of a brief discussion in the courtyard during the trial. His entire investigation into the defendant's

background amounted to a few telephone calls made by his wife. He also read the report written by Dr. Delbeato, a psychologist who had been retained by predecessor counsel. The contentions offered by trial counsel and the state in response to the instant allegations of ineffective assistance of counsel, whether expressed or implied, seem to be: 1) The defendant's family members and the defendant himself were uncooperative or did not have anything to say, 2) defense counsel's decision to pursue a relative culpability strategy excused any further investigation into background mitigation, 3) Terry Ragsdale's negative testimony was a surprise and there was nothing counsel could do about it, 4) Dr. Delbeato's report showed that there was no need or reason to pursue mental mitigation further. These contentions are either factually or legally wrong and at times virtually ludicrous.

As regards any argument that the relative culpability argument means that counsel's acts and omissions were informed, strategic decisions, then why put on Terry Ragsdale at all? In any event, having one's spouse make a few telephone calls does not constitute an investigation. With regard to Terry Ragsdale, defense counsel said at the evidentiary hearing that Terry's "surprise" testimony was generally consistent with what Terry had said in his pretrial

deposition, which included among other things that “I know the man they killed. And he didn’t harm nobody. So the one that killed him needs to be put in the electric chair or something.”It was predictable that the negative things he had said in his deposition would be elicited by the State. With regard to Dr. Delbeato’s report, the report itself includes the defendant’s personal statement that he had told his lawyer that there were three witnesses who could testify about his drug and alcohol use at the time of the incident. Whatever the mitigating value of this information, the fact that this statement is there shows that the defendant was interested in pursuing such evidence and that Dr. Delbeato had consciously passed that message on to counsel. Moreover, the factual statement the defendant gave to Dr. Delbeato about the incident was wholly consistent with defense counsel’s relative culpability strategy. Dr. Delbeato’s report did contain some mitigating evidence, although the doctor made it clear in his testimony at the evidentiary hearing that his work was entirely preliminary in nature and that the only attention he gave to mitigation was secondary to his main task, which was to provide a preliminary evaluation and draw conclusions about competency and sanity. If he came across mitigation he noted it. Not only would Dr. Delbeato’s testimony have been helpful

in the penalty phase, presuming that competent counsel and the doctor followed up on the preliminary indications of mitigation, and not only would it have been entirely consistent with the relative culpability argument, it actually would have enhanced it by showing that it was not a recent fabrication.

Defense counsel implied a number of times that background mitigation was not really available at the time of trial because the family members his wife spoke to were not really cooperative or else did not have much good to say. The lead witness in the evidentiary hearing was Ernie Ragsdale. His testimony covered most of the background mitigation offered at the hearing, and his circumstances flatly contradict defense counsel's contentions. Ernie was a very credible witness. He is raising a family, working in a skilled trade, served four years in the regular army followed by nine and a half years in the reserves. He was an MP for about a year and retired early with an honorable discharge due to a wreck in 1991. What is more, he was a witness listed by the State and he had been deposed by predecessor counsel. He actually did come to the trial pursuant to the State's subpoena, but after the prosecutors talked to him they let him go. He said he would have testified to the extensive background mitigation he

provided at the evidentiary hearing if anyone had asked him to do so. Nobody contacted him. Two other family members testified at the evidentiary hearing, providing the same or similar evidence of background mitigation, both testifying that no one ever contacted them. One of them was living in the area at the time of trial. These witnesses were not transients, they were not hard to find, they were not uncooperative, and they did have extensive information that could have and should have been put before the jury. Two more family members who did have medical reasons for not coming to court gave evidence by way of depositions to perpetuate testimony. The expert called by the defense at the evidentiary hearing described his interviews of various family members and the use he mader of them in reaching his conclusions. All of this to highlights the lack of investigation by Mr. Ragsdale's trial counsel, who had his wife make a few telephone calls and then essentially gave up.

The evidence in this case conclusively shows that Mr. Ragsdale was denied the effective assistance in the penalty phase of his trial. This cause should be remanded for a new penalty phase trial before a jury.

ARGUMENT I

MR. RAGSDALE DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL OR THE ASSISTANCE OF

A COMPETENT MENTAL HEALTH EXPERT IN THE PENALTY PHASE OF HIS TRIAL IN VIOLATION OF FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Trial Counsel's Lack of Capital Case Experience

This was Mr. Culpepper's first and last capital case. (R. Vol. III(a) 394). He was court appointed and unassisted by co-counsel. The only assistance he received was from his wife. (R. Vol. III(a) 394 et seq). He did not make contact with such associations as the Public Defender Association, Volunteer Lawyer's Resource Center, Collateral Capital Representative or the ACLU. (R. Vol. III(a) 396). When he got the case, all but one of the depositions of the state witnesses had already been taken. (R. Vol. III(a) 400). Predecessor counsel had also retained Dr. Delbeato to examine Mr. Ragsdale, and the resulting report had already been completed. (R. Vol. III(a) 400). Mr. Culpepper felt that, when he received the case, all the discovery had been done and that "it was a matter of learning the material and learning – you know, getting in the position to try it." (R. Vol. III(a) 401).

This Court has made clear its concern about the experience level of lawyers handling capital cases. See In re Amendment to Florida Rules of Criminal Procedure-Rule 3.112

Minimum Standards for Attorneys in Capital Cases, 759 So.2d 610 (1999). Deciding that the case was ready for trial because discovery depositions had already been taken by predecessor counsel betrays at least a lack of any awareness of the need to prepare for the penalty phase. Cf. Blake v. Kemp, 758 F.2d 523, 533 (11th Cir. 1985), cert. denied, 474 U.S. 998, 106 S.Ct. 374, 88 L.Ed.2d 367 (1985) ("It should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness").

Ineffective Defense Presentation at the Penalty Phase

This Court has already noted some apparent deficiencies in the penalty phase presentation put on by defense counsel.

> During the penalty phase, defense counsel put on only one witness, Ragsdale's brother, who provided minimal evidence in mitigation. That witness had also testified on behalf of the State during the guilt phase. Additionally, the witness, when cross-examined by the State during the penalty phase, testified that it did not surprise him that his brother committed the murder and he provided other derogatory information about Ragsdale.

Ragsdale v. State, 720 So.2d 203(1998), is overwhelmingly clear from the evidentiary hearing that defense counsel's decision to call Terry Ragsdale as a penalty phase witness was an ill advised improvisation. Mr. Culpepper did not speak

with Terry himself before the trial. (R. Vol. III(a) 402, -03). He did, however, have Terry's pretrial deposition, which showed that Terry had a personal ax to grind against the defendant. Terry said the defendant had ". . .cost me a lot . . . Eugene has cost me. . . See, I let him borrow money. I signed a paper . . . where he bought him a car . . . And he left from here and went to Florida and left me with that nine hundred dollars to pay back, for me and Ernie to pay back . . . He had the car. And he sold it." (R. Supp. 8). Did Terry like that? "It made me mad a little bit." (R. Supp.9). During the deposition, Terry was specifically questioned about his being a potential mitigation witness. (R. Supp. 24, 30). Terry said, "I know the man they killed. And he didn't harm nobody. So the one that killed him needs to be put in the electric chair or something." (R. Supp. 31). The decision to put Terry on the stand was made on the basis of a brief chat "in the courtyard outside the courthouse during the trial." (R. Vol. III(a) 403). Evidently Mr. Culpepper liked what he heard at that time, but when Terry testified, "What he told me out there – he got up on the stand and said something completely different." (R. Vol. III(a) 403). Mr. Culpepper agreed that what Terry said on the stand was consistent with the negative testimony he had already given in his deposition.

Id.

Whatever minimal mitigation Terry provided was vitiated by his cross examination. On cross examination, Terry was reminded by the prosecutor that he had been questioned under oath "yesterday." (Vol. IV 691). Terry agreed that his brother had "been mean all of his life." (Dir. Vol. IV 692). "He's hit a couple other boys with boards." Id. He agreed, "No question, he's a bully." (Id). He had a reputation as a "violent kind of guy." (Id., Dir. Vol. IV 693). Terry agreed that Ragsdale was a "dope pusher." (Dir. Vol. IV 693). "He was smoking it and pushing it and selling it some." (Dir. Vol. IV 695). Terry said "No, sir," when asked: "It doesn't surprise you that he killed a family friend, does it?" (Dir. Vol. IV 695, -96).

At the evidentiary hearing a family member said that Terry Ragsdale was scared of authority, like prosecutors, defense lawyers and judges. (R. Supp. 60). "My opinion is that Terry could be – could say what people wanted him to say, yes, because he would get that nervous and that scared." Id. Mr. Culpepper had already been exposed to this characteristic when Terry testified for the state in the guilt phase of the trial. In fact, between his deposition, his trial testimony on direct examination, and cross examination Terry flip--flopped

like a fish out of water. He told the prosecution unequivocally that the defendant had admitted personally cutting the victim (Dir. Vol. II 310). On cross examination he confirmed his deposition testimony, that the defendant had never admitted which of the two co-defendants had done the actual cutting (Dir. Vol. II 313), and he agreed that his deposition testimony was correct, (Dir. Vol. II 314). On re-direct he confirmed what he had previously said on direct examination, and on re-cross he confirmed his prior testimony that "I can't recall what all they said except [the defendant] said that *they think they killed a man* in Florida." (Dir. Vol. II 321, emphasis added).

Terry's propensity to change his story at the drop of a hat makes defense counsel's decision to call him as the sole penalty phase defense witness based on a brief chat outside the courthouse during the trial even more inexcusable. It is one thing to call a witness who, despite a prior inconsistent statement, is now prepared to provide beneficial testimony and stick to his guns. Terry's vacillation meant that whatever helpful things he had to say now would have no more credibility than the negative things he had already said in his deposition, which the prosecutor was sure to bring out.

Except for a few generalities, Mr. Culpepper's penalty phase argument focused entirely on the relative culpability argument. There was virtually no argument about nonstatutory background mitigation and none at all about mental mitigation. None had been presented. In all fairness, this argument evidently bore some fruit. The jury asked, "Is it unjust-just to sentence the defendant to a greater sentence (death) than the accomplice, if based on the testimony heard by the jurors, the jurors believe the defendant may have had a lesser part in the murder?" (Dir. Vol. IV 762). The court responded by rereading instruction that deciding a verdict was exclusively the jury's job. The record reflects an immediate follow up question by one of the jurors that was cut off by the judge:

> JUROR POLANSKY: On the wording of that first question you read, what if it were read, what if it were changed? Should the jury consider the fact that–
>
> THE COURT: I can't help you anymore on that. That's your decision."

(Dir. Vol. IV 763). As it happened, the fact that a juror who was inquiring into the issue of relative culpability was cut off by the judge may well have denigrated what amounted to counsel's whole defense. Even so, the jury's verdict was split eight to four.

In Jackson v. State, 502 So.2d 409 (Fla. 1986) cert. denied,

482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 686 (1987)(Ragsdale's trial took place in May of 1988), this Court ruled:

> In Cabana[5] the Supreme Court recognized that instances may arise in which an appellate court's fact finding on the Enmund issue would be "inadequate." 106 S.Ct. at 698, n. 5. In order to ensure a defendant's right to an Enmund factual finding and to facilitate appellate review of this issue, we direct the trial courts of this state in appropriate cases to utilize the following procedure. The jury must be instructed before its penalty phase deliberations that in order to recommend a sentence of death, the jury must first find that the defendant killed or attempted to kill or intended that a killing take place or that lethal force be employed. No special interrogatory jury forms are required. However, trial court judges are directed when sentencing such a defendant to death to make an explicit written finding that the defendant killed or attempted to kill or intended that a killing take place or that lethal force be employed, including the factual basis for the finding, in its sentencing order. Our holding here mandating this procedure will only be prospectively applied. Past failures of trial courts to follow this procedure will not be considered reversible error.

Id. at 412, 413. Defense counsel did not request, nor did the court give, this instruction. Counsel also did not ask that the jury be reinstructed on the relative participation mitigating circumstance.

---

[5]Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986).

In short, defense counsel's entire penalty phase presentation was: 1) a witness who made matters worse, 2) an argument that had potential, 3) dropping the ball on that very argument in response to a jury question.

Defense Counsel's Failure to Investigate Available Mitigation

Defense counsel's entire investigation into possible mitigating evidence amounted to having his wife make a few telephone calls to Ragsdale's family members and reviewing Dr. Delbeato's report. Mr. Culpepper was asked, "You don't know how many [family] members? There may have been one, two, something of that sort?" He answered, "I didn't – I don't really know. I mean, I don't recall." (R. Vol. III(a) 414). He said she made "some" calls: "I know that she made some calls. I know that she talked to some people up there. I don't know exactly the content of it. I don't recall it." (R. Vol. III(a) 404). He did not recall talking to any family members himself, id. He did recall that this task had been delegated to his wife: "She was the one who was contacting the people up in Alabama, which was his family, and she would have been the one who made the contacts with them." Id. Compare Jackson v. Herring, 42 F.3d 1350, 1367 (11th Cir.1995) (trial counsel, who had a "small amount of information regarding possible mitigating circumstances regarding [petitioner's]

history, but ... inexplicably failed to follow up with further interviews and investigation" rendered constitutionally deficient performance); Blanco v. Singletary, 943 F.2d at 1500-01 (11th Cir.1991) (deficient performance where counsel left messages with relatives mentioned by defendant but neglected to contact them); Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir.1988) (deficient performance where counsel learned of mitigating personal history evidence from defendant but failed to investigate).

Based on these reports from his wife, Mr. Culpepper formed the subjective impression that Mr. Ragsdale's family members didn't care: "That's my recollection, is that they weren't particularly helpful or interested one way or the other." (R. Vol. III(a) 410). Given this impression, Mr. Culpepper decided not to pursue the matter farther.

> Q. Okay. And it was your choice not to do anything else in addition to that relative culpability argument in the penalty phase; is that true?
>
> A. Well, you know, the investigation we did didn't find anything else to hang – that would be serious enough to hang our hat on.
>
> Q. The investigation you did was to read Dr. Debeato's report and to have your wife make a few phone calls?

> A. She contacted members of the family, and
> we didn't get anywhere with them. So-.

(R. Vol. III(a) 413, -14).

This conclusion is flatly incredible given the record now before this Court. The first witness to testify at the evidentiary hearing was one of the defendant's brothers, Ernie Ragsdale. Ernie Ragsdale had been listed as a state witness and had already been deposed when Mr. Culpepper took the case. Ernie Ragsdale made a very credible witness. Ernie is presently married and has four children, he supports the family as a mill wright, he served in the army for a combined regular and reserves period of seventeen years, for a while as an MP, and left with an honorable discharge due to an accident. (R. Vol II 195 -- 197). He said that he was the closest of the brothers to the defendant. (R. Vol. II 174). He provided a wealth of mitigating evidence in great and concrete detail. When he was asked whether he would have been available to testify at the trial if asked to do so, he said:

> Well, I came down at the trial. I guess the State had me come down. Got here, they asked me a couple questions, said, 'We don't need you, you can go.'
>
> Q. But the defense never called you?
>
> A. Never did.
>
> Q. Never talked to them?

A. No.

Q. And if they would have called you, you would have been here at that time?

A. Yes.

Q. And what would you have said back during the trial would have been the same exact thing you're testifying to?

A. Same thing I'm saying now.

Q. Same thing?

A. Yes.

Q. But nobody ever contacted you?

A. No.

(R. Vol. II 178).

Darlene Parker was the second witness called to testify at the evidentiary hearing by the defendant. She confirmed much of what had been said by Ernie Ragsdale. She also said that she would have testified on Ragsdale's behalf if anyone had contacted her, but that no one did. (R. Vol. II 220). Another cousin of the defendant's, Byron Ragsdale, also testified at the evidentiary hearing. He corroborated much of the previous testimony about the defendant's early family life. Byron Ragsdale said he would have been willing to come to court, but no one contacted him. He was still living in Zephyrhills at the time. (R. Vol. II 252). This is significant in light of the fact that Mr. Culpepper described

his wife's telephone calls as being directed only to family members in Alabama. The testimony of Sheila Adams and Rebecca Lockhart was introduced at the evidentiary hearing by way of depositions to perpetuate testimony. Aside from substance of their testimony, its means of production demonstrates one technique that could have been used by counsel if he had problems securing the attendance of needed witnesses. Likewise, all of these witnesses spoke with Dr. Berland, again demonstrating a perfectly legitimate way of getting mitigating evidence before the court.

Mr. Culpepper's failure to follow up with Dr. Debeato is even more egregious. When asked whether he ever spoke with Dr. Delbeato, Mr. Culpepper said, "I don't think I did. I think – I don't think I did. I know I read his report." (R. Vol. III(a) 404, -05). Dr. Delbeato said, "I think the best I could or should say is that I have absolutely no recollection of that man [Culpepper] ever contacting me or talking with me in any way." (R. Supp. 72). Mr. Culpepper said that he reviewed Dr. Delbeato's report, but decided that there was not "sufficient mental mitigation to present to the jury." (R. Vol. III(a) 391).

Based on his review of his own report, Dr. Delbeato described his work in the case as very preliminary and

therefore incomplete. "[T]his was noted as a confidential evaluation. . .what that would mean is that I was probably the first doctor or expert-level person in my field to evaluate the person for the attorney . . . the defense attorney can then, I guess, hire the other two or three or whatever and I go from there." (R. Supp. 73). He agreed that his role was to provide an "initial confidential report and then it would be up to the attorney to take what further measures he saw fit." (R. Supp. 74). His testimony demonstrates that his primary purpose was to determine competency and insanity (i.e. guilt phase) issues. If he noticed avenues for mitigation, he would report them to the attorney with the expectation that the attorney would follow up on them. (R. Supp. 74). He said, "I noted to the attorney that the person had stated that he was on alcohol and drugs at the time and that there were witnesses to this. And I just mentioned to the attorney that he might want to look for those witnesses or whatever." Id. He agreed that the report suggested avenues of investigation of mitigation that could have been looked into, but that it was not appropriate for him to do that at the time. (R. Supp. 88). It also appears that money was an issue. " Whether you spend two hours or 20 or 50 or a hundred you're going to get paid $400 and that's it." (R. Supp. 86) Finally, although the

report mentions facts which indicate the existence of mitigation, such as the abuse of alcohol and drugs and the presence of depression, the report itself does not contain the word “mitigation,” and on its face does not speak to penalty phase, as opposed to guilt phase, issues. In short, Dr. Debeato’s report flatly told defense counsel that more work needed to be done in preparation for the penalty phase. It clearly reflects that neither the lawyer (at that point predecessor counsel William Webb) nor the doctor had even begun to contemplate the actual presentation of testimony and evidence at trial. According to Mr. Culpepper, it was on the basis of reading this report, and on that alone, that he abandoned any issues relating to mental mitigation.

Duty to Investigate Available Mitigation

In Williams v. Taylor, 120 S.Ct. 1495, 146 L.Ed.2d 389,13 Fla. L. Weekly Fed. S 225 (U.S. 2000), the United States Supreme Court, citing to the American Bar Association's Standards for Criminal Justice, specifically stated that a defense lawyer in a capital case is "obligat[ed] to conduct a thorough investigation of the defendant's background." 120 S.Ct. at 1514-15. The ABA standard recognizes the lawyer's substantial role in raising mitigating factors both to the

prosecutor initially and to the court at sentencing, that this task cannot be accomplished simply on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant, and that investigation is essential to discover facts about the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like. It concludes that, "without careful preparation, the lawyer cannot fulfill the advocate's role." 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1980).

This Court has “recognized that an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence. See [Rose v. State, 675 So.2d 567 (Fla.1996)] at 571 (citing Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994)). The failure to investigate and present available mitigating evidence is of critical concern along with the reasons for not doing so. See Rose, 675 So.2d at 571.” State v. Riechmann, 2000 WL 205094, 25 Fla. L. Weekly S163, 25 Fla. L. Weekly S242 (Fla. Feb 24, 2000) (NO. SC93236, SC89564).

Likewise the federal courts have held that an attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible

mitigating evidence. Porter v. Singletary, 14 F.3d 554, 557 (11th Cir.), cert. denied, 513 U.S. 1009, 115 S.Ct. 532, 130 L.Ed.2d 435 (1994).

> To investigate and develop available mitigating evidence is a basic and unshakable obligation of defense counsel in all capital cases. See, e.g., Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984) (holding that counsel must "make reasonable investigations or ... make a reasonable decision that makes particular investigations unnecessary"); Blanco v. Singletary, 943 F.2d 1477, 1500 (11th Cir.1991), cert. denied, 504 U.S. 943, 112 S.Ct. 2282, 119 L.Ed.2d 207 (1992), and cert. denied, 504 U.S. 946, 112 S.Ct. 2290, 119 L.Ed.2d 213 (1992); Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir.1991), cert. denied, 503 U.S. 952, 112 S.Ct. 1516, 117 L.Ed.2d 652 (1992); Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir.1988). At least since Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 2605, 57 L.Ed.2d 973 (1978), the importance of presenting mitigating evidence has been a prominent feature of the Supreme Court's Eighth Amendment jurisprudence. See, e.g., McKoy v. North Carolina, 494 U.S. 433, 444, 110 S.Ct. 1227, 1234, 108 L.Ed.2d 369 (1990) (quoting Penry v. Lynaugh, 492 U.S. 302, 327, 109 S.Ct. 2934, 2951, 106 L.Ed.2d 256 (1989)); Skipper v. South Carolina, 476 U.S. 1, 4-5, 106 S.Ct. 1669, 1670-71, 90 L.Ed.2d 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 110-12, 102 S.Ct. 869, 874-75, 71 L.Ed.2d 1 (1982). Making the sentencer aware of all relevant mitigating circumstances is necessary to give practical meaning to the bedrock Eighth Amendment principle that " 'respect for humanity ... requires consideration of the character and record of the individual offender' " in capital

> cases. Lockett, 438 U.S. at 604, 98 S.Ct. at 2964 (quoting Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976)). Reasonable investigation, therefore, (which includes making reasonable decisions not to pursue certain inquiries) is an absolute prerequisite for constitutional assistance of counsel. When counsel breaches the duty of reasonable investigation, even strategic or tactical decisions regarding the sentencing phase, which normally are entitled to great deference, must be held constitutionally deficient. See, e.g., Horton, 941 F.2d at 1462.

Bush v. Singletary, 988 F.2d 1082, 1094(11th Cir.1993)

Kravitch, Circuit Judge, concurring in part and dissenting in part.

Failure to Make an Informed Decision

Mr. Culpepper apparently felt that his pursuit of a relative culpability strategy excused his failure to investigate potential background and mental mitigation.

> Q. You made a decision to argue a relative culpability – well, to put forth a relative culpability argument; is that true?
>
> A. Sure.
>
> Q. Okay. And it was your choice not to do anything else in addition to that relative culpability argument in the penalty phase; is that true?
>
> A. Well, you know, the investigation we did didn't find anything else to hang – that would be serious enough to hang our hat on.

> Q. The investigation you did was to read Dr. Debeato's report and to have your wife make a few phone calls?
>
> A. She contacted members of the family, and we didn't get anywhere with them. So-.

R. Vol. III(a) 413, -14). Likewise, Mr. Culpepper said that he reviewed Dr. Delbeato's report, but decided that there was not "sufficient mental mitigation to present to the jury." (R. Vol. III(a) 391). As noted above, Dr. Delbeato repeatedly characterized his report as preliminary and incomplete. Moreover, Dr. Delbeato flatly told counsel in his report that there was more work to do. He said, "I noted to the attorney that the person had stated that he was on alcohol and drugs at the time and that there were witnesses to this. And I just mentioned to the attorney that he might want to look for those witnesses or whatever." (R. Supp. 74).

At one point in the evidentiary hearing, Mr. Culpepper in effect admitted that his investigation had been inadequate:

> MR. CULPEPPER: I felt like the best strategy was the strategy we took. It was an extremely difficult fact situation to fight against. I felt that was the best – the State had sort of set it up by having Mr. Illig plead very early in the process. I felt that was by far the best route to take.
>
> Q. Let me ask you this: If in fact you had

> developed evidence one way or the other that Ragsdale had been abused severely as a child, that his childhood was quite impoverished, that he suffered from mental impairment, do you see those items of evidence and similar items of evidence as contradicting in any way your strategy?
>
> A. Well, it would have required – I mean, I think it would have required more investigation.

(R. Vol. III(a) 405, -06). Likewise the judge in his oral pronouncement admitted as much:

> I think there is no question about it, that Mr. Ragsdale had a rather difficult childhood. There's no question about it that there was a lot of circumstances that could well have – based upon the present examination, could well have made perhaps – perhaps could have been presented.

(R. Vol. III(b) 489, -90).

Counsel's failure to conduct a thorough or complete investigation may be excused only where a preliminary investigation has reasonably informed counsel's determination that further investigation is not warranted. Rose, supra; "[T]he mere incantation of 'strategy' does not insulate attorney behavior from review; an attorney must have chosen not to present mitigating evidence after having investigated the defendant's background, and that choice must have been reasonable under the circumstances." Stevens v. Zant, 968 F.2d 1076, 1083 (11th Cir. 1992); Horton v. Zant, 941 F.2d

1449, 1462 (11th Cir. 1991)). ("[O]ur case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them"). Any decision not to investigate must be reasonable. Armstrong v. Dugger, 833 F.2d 1430, 1433 (11th Cir. 1987). A failure to investigate that is not the result of any trial strategy, however, is no decision at all. Harris v. Dugger, 874 F.2d 756, 762 (11th Cir. 1989). See Heiney v. State, 620 So.2d 171, 173 (Fla.1993); See State v. Riechmann, 25 Fla. L. Weekly S163 (Fla. Feb. 24, 2000); (“It seems apparent that there would be few cases, if any, where defense counsel would be justified in failing to investigate and present a case for the defendant in the penalty phase of a capital case.”).

The same point applies to any “dilution” or inconsistent defense argument. Any argument of that sort must be based on defense counsel’s investigation into available mitigation. Moreover, it is notable in this case that none of the mitigation that was available to defense counsel was inconsistent with his relative culpability strategy. Dr. Delbeato reported that:

> [T]he patient was not trying to smooth over or fake. Validity scales reveal a profile which tends to be open and candid. The patient is a person with a lower self

> concept and lower self esteem and currently has a moderate to severe level of depression . . . Furthermore, the profile suggests some passive/aggressive traits and some general mild nonconformity. It does not suggest any significant level of antisocial behavior or what we used to call the psychopath. Frankly, I don't think the man is smart enough to be a 'good psychopath.' He is emotionally conflicted and tends to be somewhat immature, passive/aggressive and suspicious of others. . . With regard to the alleged for which he is charged, Mr. Ragsdale tells me that he is innocent of the murder of a Mr. Ernest Mace. He states that his co-defendant, a Mr. Leon Ellick, [sic] is the perpetrator of the crime. He states that he was indeed an accessory after the fact to the crime but did not murder the victim.

(R. Supp. 96, -97). While not terribly flattering, this is not the portrait of an evil person. Moreover, it is entirely consistent with Mr. Culpepper's relative culpability strategy. In fact, it would have been a clever move to call Dr. Delbeato as a mitigation witness and perhaps let the prosecution elicit Ragsdale's statements on that topic. In any event, this testimony would have shown that the relative culpability argument was not the recent creation of defense counsel. It could not have hurt and might well have helped for that reason alone.

Finally, any argument that counsel's decisions not to investigate, prepare and present background mitigation was the

result of strategy is plainly belied by the fact that he did call Terry Ragsdale.

Relevance of Other Penalty Phase Issues

As noted above, this Court upheld the denial of a number of claims relating to the penalty phase. These claims include those numbered (7) counsel's failure to object to improper penalty phase argument; (8) ineffective assistance in closing argument; (9) an improper burden shifting instruction; (10) vague or otherwise improper aggravating circumstances instructions; (12) error under Caldwell v. Mississippi, 472 U.S. 3209 (1985). Except for claim (8), this Court found that they did not meet the two-prong Strickland standard. This Court upheld the denial of claim (8), which was that counsel failed to argue mitigation apparent on the record, because of failure to establish that "the additional argument of counsel in closing would have changed the outcome of the proceeding." Also, as noted above, counsel failed to request and the court failed to give an instruction pursuant to Jackson v. State, 502 So.2d 409 (Fla. 1986).

On the other hand, this case is now properly before this Court on review the lower court's denial of the claim of ineffective assistance of counsel for failure to investigate, prepare and present mitigation evidence. Although the claims

just mentioned may be barred as a basis for relief in and of themselves, the factual basis for them should be considered in assessing overall prejudice. Strickland, "[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." 466 U.S. at 695-96, 104 S.Ct. at 2069; Friedman v. United States, (5th Cir. 1979) 588 F.2d 1010, 1016 ("A review of Fifth Circuit law indicates that this Court's methodology involves an inquiry into the actual performance of counsel in conducting the defense and a determination whether reasonably effective assistance was rendered based on the totality of the circumstances and the entire record."); Griffin v. Wainwright, 760 F.2d 1505 (11th Cir.1985)(In resolving [ineffective assistance] claim, we must examine the totality of the circumstances and the entire record. Palmes v. Wainwright, 725 F.2d 1511, 1519 (11th Cir.1984) (citing Goodwin v. Balkcom, 684 F.2d 794, 804 (11th Cir.1982), cert. denied, 460 U.S. 1098, 103 S.Ct. 1798, 76 L.Ed.2d 364 (1983)).)

Although defense counsel did not object to numerous prosecutorial improprieties when he should have, those improprieties should now be considered in conjunction with the issues properly before this Court for review. Virtually the entirety of the State's penalty phase case, including the

closing argument, was either improper and objectionable or otherwise went a long way towards showing that Ragsdale received ineffective assistance of counsel. Defense counsel's failure to object to improper prosecutorial argument is itself an instance of ineffective assistance cognizable in a motion for postconviction relief. Mannolini v. State, 2000 WL 763764, 25 Fla. L. Weekly D1428 (Fla. App. 4 Dist. Jun 14, 2000) (NO. 4D99-4266); Jackson v. State, 711 So.2d 1371, 1372 (Fla. 4th DCA 1998); Davis v. State, 648 So.2d 1249, 1250 (Fla. 4th DCA 1995); Vento v. State, 621 So.2d 493, 495 (Fla. 4th DCA 1993). This Court commonly bases a finding of procedural bar on a finding on the merits. E.g. Sireci v. State, 2000 WL 1259723 n. 11 (Fla. Sep 07, 2000) (Claims procedurally barred because of failure to allege sufficient prejudice); Freeman v. State, 761 So.2d 1055, 25 Fla. L. Weekly S451 (Fla. Jun 08, 2000)("The [lower] court found *the merits of the claim* to be procedurally barred and the allegation of ineffective assistance insufficient to overcome the procedural bar.")(emphasis added).

Prosecutorial Improprieties at the Penalty Phase

During his penalty phase closing argument in this case, the prosecutor persistently argued nonstatutory aggravating circumstances and injected impermissible emotional factors

into the consideration of punishment. Penry v. Lynaugh, 492 U.S. 302 (!989); Bertolotti v. State, 476 So.2d 130 (Fla. 1985). "For twenty-two minutes, drop by drop, heartbeat by heartbeat, he bled to death." (Dir. Vol. IV 723). "It's time to let Ernie Mace rest in peace." (Dir. Vol. IV 732). Throughout the penalty phase he urged that Ragsdale was a "dope pusher." He called Ragsdale's Alabama parole officer, ostensibly for the purpose of establishing that Ragsdale was under a sentence of imprisonment, and then on redirect examination he elicited the following line of testimony: "[Prosecutor]: Mr. Ragsdale was a drug dealer?. . . Q. Do you know if he was a drug dealer, sir? A. He sold marijuana to an undercover officer and was subsequently convicted of it. Q. So you do know. A. Yes, sir." (Dir. Vol. IV 684, -85). And then on cross examination of Terry Ragsdale: "Q. He also sold it [drugs] all over town, didn't he? A. He smoked it and then he sold some of it. Q. He was a dope pusher, wasn't he? A. Uh-huh." (Dir. Vol. IV 693). And then in closing argument: "We know that he is a convicted drug dealer from Alabama. We know that he has served time in prison. He's been placed on parole. He's escaped from being on parole. And his brother, Terry, his own brother, tells you that he's been in trouble always. He's been, really, all of his life.

He’s always been in trouble.” (Dir. Vol. IV 725).

The prosecutor rather blatantly misinstructed the jury on the burden of proof and the jury’s obligations: “If you find that the aggravating circumstances outweigh any or all of the mitigating circumstances, your recommendation, under the law, should be death.” (Dir. Vol. IV 731). The prosecutor repeatedly argued his own personal opinion as to the existence of mitigating circumstances: “I submit to you that there are no mitigating circumstances. That’s my opinion. . .” Vol. IV 730). And, “ I submit that the aggravating circumstances far outweigh any mitigating circumstances, if you can find them. I have found none. . .” (Dir. Vol. IV 731).

The prosecutor minimized the jury’s role. “[The judge is] going to tell you that you must base the decision, which is your recommendation – now remember, that’s the key word. . .He’s going to tell you that that is merely a recommendation of which he must give great weight. He selects the punishment and he imposes the punishment.” (Dir. Vol. IV 718).

Whatever the current legal status of the claims arising from these facts, the facts themselves should be considered in any prejudice analysis. To put it tactfully, the prosecutor engaged in overreaching and defense counsel was unable to do anything about it.

Available Mitigation

As shown in the Statement of Facts ante, there was a wealth of background and mental mitigation available to defense counsel. Three family members testified at the evidentiary hearing and two more provided evidence by way of depositions to perpetuate testimony. All of this testimony was available one way or the other. Ernie Ragsdale, whose military, family and work history made him an especially credible witness, was actually at the trial as a state witness, but they told him to go home. (R. Vol. II 178). He and the other witnesses at the evidentiary hearing gave a rather horrific account of the defendant's early life. The family was impoverished. The father never worked and the family mostly lived off "welfare." (R. Supp. 44). The mother and the boys worked picking oranges from "sun up, sun down" to help out. (R. Vol. II 161). The boys were at times held back from school so they could work in the orange groves. Darlene Parker said the father would "Make them work all day and pick oranges, and him take the money." (R. Vol. II 221). The father "ruled the household." (R. Vol. II162). The father was also mentally ill. Darlene Parker described an incident where the father ". . . went crazy and he tore all the insides of the car out, and they had to take him to the hospital . . .

Nobody could handle him. He was like – put him in a straight jacket, you know, type thing." (R. Vol. II215). Sheila Adams, one of the defendant's cousins, thought the father had a "mental disorder." (R. Supp. 119).

The mother's relationship with the father was "More like a waitress to him, I reckon, if anything." Id. "[W]henever he told her to do something she jumped. It was just like that. I mean either she did it or else. You know . . . He could have hit her, or anything." (R. Vol. II206). As a result, "[S]he wouldn't do anything, because she knew better. She knew that if she did it, that he might slap her down. There was no taking up for the kids at all." (R. Vol. II219).

The father was viciously abusive, beating the children with anything he could get his hands on, using a water hose, a slat, a switch (R. Vol. II166), a "leather strap,"(R. Supp. 46), clothes hangers, fishing poles, and boards (R. Vol. II209), a walking cane and a broom handle (R. Supp. 115), from their "head to your feet," (R. Vol. II166)(R. Supp. 115), leaving bruises and drawing blood. (R. Vol. II163). "[H]e would beat him so bad that blood would come down the legs." (R. Vol. II208). Darlene Parker said, "He would use his fist. He would hit the boys with his fist. . . In the face." (R. Supp. 48).

Of the four brothers, the defendant got the most beatings. (R. Vol. II198). Darlene Parker said the father would beat the defendant "till all the switches ran out. Beat him toll all the – there was nothing there but just the end of where you hold the switch at, or belt. I've seen him break a belt over him." (R. Vol. II209). Byron Ragsdale said that "when he used the switch on him he would use it till there wasn't nothing left to use. . . Anywhere he could hit, that's where he hit." (R. Vol. II 241). Ernie remembered seeing the father beat the defendant on the legs, back and head, bringing out blood with a water hose. (R. Vol. II165). He remembered seeing the defendant handcuffed to a pole for "ten minutes to an hour, hour and a half." (R. Vol. II166). He remembered seeing the father shoot at the defendant. Id. Sheila Adams recalled when the defendant was about fifteen, she saw the father hit him on the jaw with a closed fist and "knock him across the room." (R. Supp. 110). She also recalled that the father once shot over the heads of the defendant and one of his brothers. (R. Supp. 109). There was a second shooting incident, but she had not seen it herself. Id. The father carried a pistol with him wherever he went. (R. Vol. II176).

The evidence of available mitigation presented at the

evidentiary hearing was not a mere shotgun blast of unconnected facts. Dr. Delbeato reported to trial counsel that the defendant was "emotionally conflicted and tends to be . . . suspicious of others. . . " (R. Supp. 96, -97). If trial counsel had pursued the matter adequately he would have learned from Sheila Adams that sometimes the father would call out to the defendant and grab him and beat him when he responded to the call. (R. Supp. 116). Usually, the defendant did not deserve to get a beating. (R. Supp. 119). The defendant was taught violence as a child. Defense counsel would have learned that the father made the boys fist fight as a form of punishment. "If you didn't he'd whoop you again." (R. Vol. II164). Darlene Parker said the father taught the boys to fight. "And they would draw blood, too." (R. Supp.53). The defendant was also taught to use drugs. The father took pain pills and nerve pills. (R. Vol. II184, 219). When the father took them, he became even more violent. (R. Vol. II170). The defendant used to sneak the pills out of the boxes when he was eight or nine years old. Id. "Later on he got on pot, coke, acid. I guess he about tried it all . . . He started taking pills like eight, nine. And started going to bigger stuff . . . Gas, glue. Paint. If it would get him high he'd do it." (R. Vol. II170, -71). Drugs are a

form of escape, the physically abusive situation created the need to escape, the availability of drugs provided the means, the father provided the example. Dr. Delbeato flatly told defense counsel to investigate this matter. "By the way, he states that he can prove that he was using drugs and alcohol at the time of the alleged crime. He states to me that he told you that there are three witnesses to the effect that he did imbibe alcohol and take drugs." (R. Supp. 96, -97). Counsel did not follow up on the matter.

At the evidentiary hearing collateral counsel presented mental mitigation that could and should have been placed before jury at the penalty phase of Mr. Ragsdale's trial. This evidence was presented through the testimony of Dr. Robert M. Berland, a forensic psychologist. He spent 25 to 30 hours working on Ragsdale's case, over eight of them with the defendant. He conducted psychological testing, reviewed records, which included numerous police reports, witness statements and depositions, and records from the D.O.C. (R. Vol. III(a) 342), and interviewed lay witnesses. (R. Vol. III(a) 291). He also had available the report of Dr. Delbeato along with Dr. Delbeato's deposition, and he had the report and raw data of the evaluation conducted by an expert hired by the State, Dr. Merin. Id.

Dr. Berland's psychological testing gave evidence of brain injury. (R. Vol. III(a) 297). Also of significance to Dr. Berland was the car accident where the defendant "went through the windshield," because "both he and some of his family and friends independently corroborated symptoms of brain injury." (R. Vol. III(a) 323). At the evidentiary hearing, Ernie Ragsdale testified about a car accident where the defendant "went through the windshield." (R. Vol. III(a) 172). According to Dr. Berland, the accident occurred about when Ragsdale was 16 (R. Vol. III(a) 322), and "there was the onset of responses on his part consistent with delusional paranoid thinking after that incident, and episodes of depression." According to Ernie Ragsdale, the defendant exhibited a noticeable change in behavior connected with the drugs, alcohol, beatings, and injuries. (R. II 174, 185, 199).

Dr. Berland also spoke of a bar fight where Ragsdale was hit on the head with a pipe. He said that some of the "by-products" from this episode are associated with both brain injury and mental illness. (R. Vol. III(a) 325). Ernie confirmed that, when the defendant was in around seventeen or eighteen (R. Vol. II 175), he got head in the head with a "steel pipe or something at a bar." (R. Vol. II 173).

On IQ testing Ragsdale scored one point into the normal range (86), while the State's expert actually got test results considerably lower (75), which would have been only 5 points above the accepted level for retardation. Id. Dr. Berland is familiar with the concept of nonstatutory mitigation, and believed these results would have qualified as such. Id. It appears from the record of the evidentiary hearing that the results of various IQ test, including subtests aimed at specific areas of functioning, ranged between a low of 67 to a high of 92 for right hemisphere performance. (R. Vol. III(a) 296 – 302). According to Dr. Berland, he variations in results indicated that "some parts of the cortex have lost functioning from injury." (R. Vol. III(a) 297).

Dr. Berland recounted the information about the defendant's bad family life that he learned from speaking with all of the family members who eventually testified at the evidentiary hearing and a brother who did not. That information, particularly about the beatings, was consistent with the lay testimony presented at the hearing.

Dr. Berland said that he thought there were two statutory mitigating circumstances in the case. "I think that there's evidence that he suffered from extreme mental or emotional disturbance at the time of this offense, and I believe that he

was substantially impaired in his capacity to conform his conduct to the requirements of law at the time of the offense." (R. Vol. III(a) 332). Dr. Berland was asked about the underlying factual basis for his opinion and he replied:

> All of the data that I have suggesting that he was psychotic at that time, notwithstanding any evidence which might be gathered about whether his psychosis was intensified or exacerbated because of drug or alcohol abuse at the time of the crime – I'm not even addressing that issue, but I have the testing. I have the information from Dr. Debeato. I have the information from Mr. Ragsdale, and I have the information from the family and friends, that all correspond in indicating that he was mentally ill then.
>
> And I think that mental illness was of great enough significance to, as I said, meet the criteria in Dixon for whether it's extreme or not for extreme mental or emotional disturbance and substantial in terms of his capacity to conform his conduct.
>
> I don't think there's any evidence that he lacked a capacity to appreciate the criminality of his conduct. I'm not specifying that in here.

(R. Vol. III(a) 332, -33).

Dr. Berland also listed what he identified as nonstatutory mitigators:

> Well, my belief that there's evidence of brain injury is a nonstatutory mitigator and that this injury predates the offense. It's not a product of anything that's happened since his trial.

> In terms of nonstatutory Mitigators? There is significant evidence from a number of family and friends that I talked to that he came from a very difficult background, suffered physical and emotional abuse at the hands of his father throughout most of his childhood, basically until he left home, which has been considered, again as a nonstatutory mitigator.
>
> He has a substantiated long and heavy history of alcohol and drug abuse, again, a substantial – an affirmed nonstatutory mitigator.
>
> There is at least some evidence of intoxication, which needs to be further developed, at the time of the offense, which would be a separate nonstatutory mitigator, and – let's see. Not as a result of my evaluation, but as a result of Dr. Delbeato's evaluation and supplemented recently by findings from Dr. Merin, there's evidence of borderline intellectual functioning, a nonstatutory mitigator.
>
> Dr. Delbeato referred to what he believed to be a developmental learning disability, which, certainly, if that was confirmed would be – has been endorsed as a nonstatutory mitigator.
>
> The other two that he refers to, the chronic depression, which was, of course, in his report from 1986, and the claim by the defendant, again reputedly verifiable, that he was using drugs and alcohol at the time of the crime, I've already alluded to as nonstatutory, or in the case of the depression, a statutory mitigator. And I think I've covered them all.

(R. Vol. III(a) 315).

Dr. Berland said the Dr. Delbeato's report suggested a

number of statutory and nonstatutory mitigators, including the issue of chronic drug and alcohol abuse, low IQ, learning disability, chronic depression, and intoxication at the time of the offense." (R. Vol. III(a) 332). He thought that the potential mitigation indicated in Dr. Delbeato's report "with a minimum of effort could have been followed up on." (R. Vol. III(a) 332).

The State called Dr. Merin in rebuttal to the mitigation evidence introduced through Dr. Berland. Dr. Merin disagreed with many of Dr. Berland's conclusions; in essence Dr. Merin said the defendant's mental condition was not as severe as Dr. Berland thought. Nevertheless, both the underlying data obtained by Dr. Merin as well as many of his ultimate conclusions established that background and mental mitigation did exist. Dr. Merin related at length what Ragsdale told him of his personal history. (R. Vol. III(a) 363 – 368). This history was consistent with the other evidence introduced at the evidentiary hearing with regard to head injury, drug and alcohol abuse, and bad family environment. Id. Interestingly, Dr. Merin, like Dr. Debeato more than ten years earlier, found evidence of a learning disability. (R. Vol. III(a) 364). This is so despite the fact that Dr. Merin had not read Dr. Debeato's report. (R. Vol. III(a) 379). Dr. Merin did not

brain find brain injury. On the other hand, he found evidence that Ragsdale had encephalopathy, which he defined as "impairment of the brain for some reason." (R. Vol. III(a) 375). On one of Dr. Merin's tests, the defendant scored below a one percentile level. (R. Vol. III(a) 385). This result indicates "a significant impairment of those visual spatial skills." (R. Vol. III(a) 385, -86). He diagnosed Ragsdale as having an adjustment disorder (R. Vol. III(a) 371) and a "personality disorder not otherwise specified:" He said features which would be pertinent were those associated with the antisocial personality disorder, with schizoid personality, and "paranoid features." (R. Vol. III(a) 373).

There obviously was a wealth of background and mental mitigation available at the time of the defendant's trial. The background mitigation offered at the evidentiary hearing was undisputed. The defendant was essentially tortured both mentally and physically as a child, and the testimony about this abuse was consistent, detailed, specific, graphic, and at times horrific. He was introduced to drugs, through parental neglect if nothing else, at around the age of eight. The defendant's father, mentally ill himself, deliberately twisted his son's mind by teaching him to be violent and luring him close enough so that he could seize him and beat him. At the

evidentiary hearing, the main thrust of the state attorney's argument against consideration of this background mitigation was along the lines that the defendant and his family members were not cooperative. (R. Vol. III(b) 479, -80). Absolutely the only support for this argument was defense counsel's testimony that his wife made a few telephone calls to some of the defendant's family members in Alabama and had unimpressive results. That may be, but it overlooks the fact that Ernie Ragsdale gave a pretrial deposition and was actually present at the trial ready to testify (pursuant to the State's subpoena) until the prosecutors told him to go home. It also conflicts with Byron Ragsdale's testimony that he was living in the area at the time. The State's argument just does not wash: the family members who provided mitigation testimony at the evidentiary hearing all testified that they would have testified at the penalty phase if asked to do so, but they were never contacted. They were not transients, they were not hard to find. Collateral counsel obtained depositions to perpetuate the testimony of those family members who could not be present at the evidentiary hearing because of health problems; trial counsel could have done the same. Any attempt to blame the absence of mitigation evidence at trial on the defendant has two problems. One is Dr. Delbeato's report:

“By the way, he states that he can prove that he was using drugs and alcohol at the time of the alleged crime. He states to me that he told you that there are three witnesses to the effect that he did imbibe alcohol and take drugs.” (R. Supp. 96, -97). This is not the report of an uncooperative client. The other is the law. An attorney has a duty to investigate possible mitigating evidence even where a defendant has specifically said to his lawyer that he does not want to present any mitigating evidence. Dobbs v. Turpin, 142 F.3d 1383, 1387-88 (11th Cir. 1998). "Although the decision whether to use mitigating evidence is for the client, this court has stated, 'the lawyer first must evaluate potential avenues and advise the client of those offering possible merit.' " Id. (quoting Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986)); see also Blanco v. Singletary, 943 F.2d 1477, 1503 (11th Cir.1991)(finding ineffective assistance where "[t]he ultimate decision that was reached not to call witnesses was not a result of investigation and evaluation, but was instead primarily a result of counsels' eagerness to latch onto [the defendant's] statements that he did not want any witnesses called"); Johnston v. Singletary, 162 F.3d 630, 644 (11th Cir. 1998)(“It is well-established in our circuit that counsel has a continuing responsibility to represent and

advise a non-cooperative client, particularly when counsel knows or has reason to know that his client is mentally unstable”). Defense counsel’s failure to investigate and develop the wealth of mitigating evidence that was shown to be available at the evidentiary hearing constituted prejudicial ineffective assistance of counsel both as a matter of fact and as a matter of law. The mitigating evidence was consistent with counsel’s relative culpability defense. Even if it were not, counsel’s failure to learn of its existence clearly refutes any argument that he made a reasoned and informed strategic decision not to use it. So does the fact that he did call a witness for that very purpose.

ARGUMENT II

THE LOWER COURT COMMITTED REVERSIBLE ERROR IN ITS CONDUCT OF THE EVIDENTIARY HEARING.

A. The lower court erred by making a recommendation instead of entering a final order.

As noted above, the lower court did not enter an order on the evidentiary hearing. Rather, the court made a "recommendation" to this Court. This fact strongly indicates that the lower court did not expect its findings to carry much weight on review. What is more, it deprives this Court of the benefit of the lower court's full attention to the resolution of the matter. The lower court diminished the sense of its own responsibility.

B. The lower court erred by refusing to admit the deposition of trial counsel.

At the conclusion of the evidentiary hearing collateral counsel moved the deposition of trial defense counsel into evidence. The motion was denied. (R. 416, -17). The deposition was more detailed in some respects than the testimony taken at the evidentiary hearing. See, e.g. R. 401, -02, where Mr. Culpepper was confronted with a "summary" of what was discussed at the deposition. The deposition would have had some probative value and it could not have caused prejudice to any party. If the lower court only intended to

issue a recommendation to this Court, which is what it did, then it should not have prevented the introduction of this evidence.

C. The lower court erred in limiting collateral counsel's cross examination of trial counsel.

The lower court sustained an objection when collateral counsel asked Mr. Culpepper a question relating to the prosecutor's penalty phase closing argument. (R. Vol. III(a) 411). There ensued a discussion about the scope of this Court's remand. The lower court ruled that it would "not permit" further questioning in that direction. (R. 411, -12). Collateral counsel specifically argued that such evidence would at least be relevant to trial counsel's overall expertise. Also, as argued above, an enquiry into defense counsel's failure to object to improper argument would be relevant to any prejudice analysis.

D. The lower court erred in its application of the law to the facts.

While the lower court's recommendation was not very clear in some respects, it does appear that the court used a subjective rather than an objective test of defense counsel's performance. The court said: "Obviously, in hindsight, perhaps other matters could have been brought up, but from the standpoint of the defense counsel at that time . . . There's

no question about it,that there was a lot of circumstances that could well have – based upon the present examination, could well have made perhaps – perhaps could have been presented. . . . But the Court must, of necessity, find that based upon the circumstances at that time, the factors and much of the evidence that we're now talking about were not available to counsel at that time . . . ." (R. Vol. III(b) 489, -90). It would appear from this language that the court was influenced by trial defense counsel's impression that Ragsdale's family members were uncaring. Strickland requires that counsel's performance be measured against an objective standard of reasonableness. Id. 466 U.S., at 688, 104 S.Ct. 2052. The negative, subjective impression formed by trial counsel based on some telephone calls made by his wife does not meet that standard.

CONCLUSION AND RELIEF SOUGHT

Mr. Ragsdale did not receive the effective assistance of counsel or the assistance of a competent mental health expert in the penalty phase of his trial in violation of Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. This cause should be remanded with directions to vacate the sentence of death and to conduct a new penalty phase before a jury. As a minimum alternative, this cause

should be remanded to the lower court to conduct a new hearing on the issue of ineffective assistance of counsel due to the errors which occurred during the evidentiary hearing.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant, which has been typed in Courier 12 Font, has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this ____ day of September, 2000.

MARK S. GRUBER
ASSISTANT CCRC
FLORIDA BAR NO. 0330541
CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE
3801 CORPOREX PARK DRIVE
SUITE 210
TAMPA, FL 33619-1136
(813) 740-3544

Copies furnished to:

Carol M. Dittmar
Assistant Attorney General
Office of the Attorney General
Westwood Building, Seventh Floor
2002 North Lois Avenue
Tampa, FL 33607