IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1185

STATE OF FLORIDA,

Appellant,

v.

JIMMIE LEE CONEY,

Appellee/Cross-Appellant.

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

ANSWER/CROSS-INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal by the State of the circuit court's grant of penalty phase Rule 3.850 relief, as well as a cross-appeal by Mr. Coney of various rulings made pursuant to Rule 3.850, including but not limited to, the failure by the circuit court to grant him a new trial. The following symbols will be used to designate references to the record in this appeal:

"DAR." -- record on direct appeal of 1992 trial to this Court;

"DAT." -- transcript of 1992 trial;

"R" -- record on instant postconviction appeal;

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

REQUEST FOR ORAL ARGUMENT

Mr. Coney has been sentenced to death. The resolution of the issues in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through

oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Coney, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND OF THE FACTS

The Circuit Court of the Eleventh Judicial Circuit, Miami-Dade County, Florida, entered the judgments of convictions and sentences under consideration.

Mr. Coney was indicted on April 25, 1990 by the grand jury on two counts; first degree murder, on the alternate theories of felony murder and premeditated murder, and arson (DAR. 1-2).

After a jury trial, Mr. Coney was found guilty of first-degree murder and related offenses.

On March 10, 1992, the jury recommended a death sentence for the first degree murder conviction by a vote of seven (7) to five (5) after deliberating for twenty-four minutes (DAT. 2888).

The trial court imposed a death sentence for the First Degree Murder conviction on March 27, 1992, finding no statutory or non-statutory mitigation (DAR. 412-17).

On direct appeal, the Florida Supreme Court affirmed Mr. Coney's convictions and sentences. Coney v. State,

653 So. 2d 1009 (Fla. 1995), cert. denied, 116 S. Ct. 315 (1995).

Mr. Coney filed an initial motion for post-conviction relief on March 24, 1997. He filed his final motion for post-conviction relief on August 5, 1999. On January 31, 2000 and on March 29, 2000, the lower court held hearings pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993). (DAR. 344-46, 372-73).

Following the two Huff hearings, the lower court entered an order on April 12, 2000 granting a limited evidentiary hearing on Claims IV, V, and XIV (Supp.R. 851). An evidentiary hearing was held on December 13-15, 2000. (R. 560-1271).

The first witness called by Mr. Coney at the evidentiary hearing was Manny Casabielle, trial counsel for Mr. Coney at the 1992 trial (R. 448). He testified that he graduated from the University of Florida School of Law in 1982 and was admitted as a member of the Florida Bar that same year (R. 449). Mr. Casabielle testified that after graduation he worked for about as year for a

civil law firm, then joined the State Attorney's Office in Dade County In August 1983, where he was employed for about three years (R. 450). He left the State Attorney in January 1986 and worked as a non-partner doing primarily criminal defense work at the law firm of Barry Halpern and Harvey Shenberg until about December 1989 (R. 450).

Casabielle testified that he left Halpern and Shenberg to form a partnership with Frank Quintero, which lasted for about a year, after which time he formed a solo professional association sometime in 1990 (R. 451). His recollection was that he was appointed to Mr. Coney's case shortly after he began his solo practice (R. 451).

Casabielle testified that he could not recall if he had tried any capital cases through to the penalty phase in May 1990 when he was appointed to Mr. Coney's case (R. 451). Upon further questioning he testified that it was possible that he had never tried a capital case through to the penalty phase before Mr. Coney (R. 452). He stated that he did not request a second chair lawyer to work with

him on the Coney case and that one was not appointed to assist him (R. 454). Casabielle testified that Circuit Judge Roy Gelber appointed him in May 1990 to represent Mr. Coney due to a conflict of interest by the public defender (R. 460).

Mr. Casabielle testified that as to preparing for the penalty phase in a capital case, "I don't believe I had a lot of experience" (R. 460). He also testified that there had been "a number" of problems during his legal career with bar disciplinary proceedings (R. 462). He also testified that he had never been found ineffective by any court (R. 463).[1]

Mr. Casabielle testified that he did not have a clear recollection of what he did to prepare for Mr. Coney's trial in 1992 (R. 464). He then testified that he had no recollection of ever seeing a **pro se** 3.850 motion in the

[1]On May 12, 1992, the trial court found that Mr. Casabielle's failure to timely file notice of appeal following Mr. Coney's capital murder trial and sentence "constituted ineffective assistance of counsel" (DAR. 339).

court file filed by Mr. Coney concerning his 1976 prior violent felony conviction (R. 469). He then testified that he did not recall speaking with Mr. Coney's 1976 trial counsel, Louie Beller, or with appellate counsel Paul Morris, or reviewing the appellate opinion from Mr. Coney's 1976 case as part of his preparation for the 1992 trial (R. 475-76).

Casabielle reviewed the appellate opinion which was introduced as Defendant's Exhibit H and reiterated that he was not familiar with it at the time of Mr. Coney's trial (R. 477). He also reviewed the May 21, 1976 defense motion for psychiatric evaluation of Mr. Coney signed by Mr. Beller, later admitted into evidence as Defendant's Exhibit I, and then testified that to the best of his recollection he had not seen the document before (R. 479, 481). He agreed that based on this record he should have been on notice in 1992 that there were possible psychiatric or psychological concerns involving Mr. Coney (R. 480).

Mr. Casabielle reviewed a colloquy between himself and

Judge Smith that took place at a pre-trial hearing on January 31, 1992 during which he advised the court that Mr. Coney had been evaluated by a mental health expert (R. 484-86). He testified that he remembered "that there was a psychiatrist that did evaluate Mr. Coney," but he did not remember the time frame as to when that was done (R. 484). After reviewing a document later entered into evidence as Defendant's Exhibit K, Mr. Casabielle identified the document as his April 1, 1991 motion for a psychological examination of Mr. Coney (R. 488). He further testified that based on a review of Defendant's Exhibit L, a copy of a hearing transcript of April 8, 1991, the motion was granted and a specific expert, Dr. Castiello was mentioned (R. 489). He then identified an April 23, 1991 order signed by Judge Roy Gelber, Defendant's Exhibit M, authorizing a $500 payment for a psychological examination (R. 490). He identified and read into the record his letter addressed to Dr. Castiello dated May 1, 1991 (R. 494-95). The letter, introduced as Defendant's Exhibit O, states that a certified copy of

Judge Gelber's order is attached and that Mr. Casabielle "asked to you perform a psychological evaluation of Mr. Coney for the purposes of aiding the undersigned in preparation of Mr. Coney's defense" (R. 495).

Mr. Casabielle testified that he did not know if Dr. Castiello ever saw Mr. Coney and he had no recollection of whether Castiello had prepared a report, and further testified that if Dr. Castiello had prepared a report, it should be in the trial attorney file (R. 496).

After reviewing his billing records, Casabielle testified that other than the entry connected to preparing the letter on May 1, 1991, the only other charge he billed for contact with Dr. Castiello was for a .3 hour telephone conversation on February 27, 1992 (R. 497).

He then reviewed a note, later admitted into evidence as Defendant's Exhibit P, from his Coney trial file, that he identified as being in his own handwriting (R. 498). Casabielle then read the note into the record, stating that it read: "[n]ext to a notation that appears to be February 27th I write: Spoke to Dr. Castiello slash won't

do it because the county won't pay...[w]on't do it because county won't pay or will pay only $150" (R. 498-99).

Mr. Casabielle next testified that his billing records indicated that he billed for 14.7 hours of total time with Mr. Coney, including two telephone calls, during the time period from his initial appointment in May 1990 until the trial began in February 1992 (R. 500). He agreed that the billing records reflected no meetings with Mr. Coney during two periods of time, from July 19, 1990 - October 22, 1990 and from March 25, 1991 - January 10, 1992. (R. 501).

He then reviewed a July 12, 1990 letter from Jimmie Coney addressed to Judge Gelber that was admitted into evidence as Defendant's Exhibit Q (R. 501-503). He then testified that he did not recall if he discussed Mr. Coney's letter to the Judge or whether there was a hearing before the Judge on Mr. Coney's petition (R. 503). He then reviewed Defendant's Exhibit R, Mr. Coney's October 12, 1990 Pro Se Motion for Change of Counsel, after having testified that he did not recall reviewing the document

when he met with the State the day before his testimony (R. 504). He also testified that he did not recall if there was a hearing before Judge Gelber on Mr. Coney's October 12 motion (R. 505).

The witness then reviewed what was admitted as Defendant's Exhibit T, a May 22, 1991 letter from Mr. Coney to Mr. Casabielle asking to see him or his investigator (R. 515). He testified that he did not recall receiving the letter in 1991 (R. 515).

Mr. Casabielle testified that in June 1991 he learned about an investigation into alleged corruption in the Dade County circuit courts called Operation Court Broom from articles in the newspapers, including the June 13 and 15, 1991 Miami Herald articles, marked for identification as Defendant's A-21. (R. 517). He testified that he saw articles in the newspapers about Operation Court Broom that included his name (R. 517). He then testified that an FBI and FDLE agent attempted to interview him concerning Operation Court Broom, but he did not speak with then in 1991 or at any time since then (R. 518).

He stated that he never testified in federal court concerning Operation Court Broom (R. 519). He testified that he never discussed Operation Court Broom with Mr. Coney, with the qualification that "[d]uring the trial there was an issue during voir dire. There was, I believe a juror whose husband was with the FBI, and that was brought to the Court's attention. And I believe we asked questions of that juror separate from the rest of the panel" (R. 520).

In response to the question as to whether he was under investigation for alleged kick-backs during 1991 and 1992, Mr Casabielle testified that based on what he read in the newspaper "it appeared that I was somehow being investigated" (R. 521-22). The lower court then sustained the State's objections to subsequent questions as to (i) whether Mr. Casabielle believed he had any ethical responsibility to reveal to Mr. Coney that he was under investigation and; (ii), if he was involved from 1988-1991 in a scheme to pay a percentage of his final fees on circuit court appointments back to Judge Roy

Gelber in return for the appointments (R. 522, 526, 531).

Following the court's ruling, the direct examination of Mr. Casabielle moved into the area of the post guilt phase appointment of experts for the penalty phase. Mr. Casabielle identified Defendant's composite Exhibit U as his motion for costs for a neurological evaluation of Mr. Coney and an associated order signed by Judge Smith appointing Dr. Noble David, and he then testified that Dr. David did in fact examine Mr. Coney (R. 533-34). He testified that he could not recall if he had previously seen Dr. David's report, Defendant's Exhibit V, but that he did review it before testifying (R. 535). He acknowledged that the report indicated that Dr. David's neurological examination was performed with Mr. Coney in manacles and shackles (R. 536). He testified that he did not personally observe the examination and relied on Dr. David to perform it appropriately (R. 536).

Mr. Casabielle testified that Dr. David's report mentions that Mr. Coney reported to Dr. David that he had

polio as a child, but Casabielle stated that he did not know if polio can have neurological complications (R. 537). He testified that he did not call Dr. David as a witness because "he basically told me there was nothing wrong with Mr. Coney" (R. 537). In response to the question as to why he retained Dr. David, he stated that he was looking for "physiological brain damage" that he could use in mitigation (R. 537). He was unable to explain the final paragraph in Dr. David's report referring to potential neuropsychological testing to be done by the psychiatrist, Dr. Mutter (R. 538).

He then testified that Mr. Coney "probably did not read this particular report" (R. 538). He testified that he asked for the report to be sealed in the appellate record and that his rationale today for this action was "because I would want there to be no question that an examination was done and what the results were" (R. 540). He agreed that it would be consistent that if Dr. Castiello had done a report for him he would have done the same thing as to that report (R. 540). He testified that

he had never destroyed an expert report rather than retaining it in his trial file or filing it in the appellate record (R. 541).

Mr. Casabielle testified that he was not sure that in 1992 he could distinguish among a neuropsychologist, a psychiatrist and a neurologist (R. 541). He then identified Defendant's Exhibit X, motion to appoint a psychiatrist for a psychiatric evaluation, and an order appointing Dr. Charles Mutter (R. 543). He stated that Dr. Mutter also evaluated Mr. Coney, but again, he had failed to personally attend the evaluation (R. 543-44). Mr. Casabielle testified that he reviewed the report, introduced into evidence as Defendant's Exhibit W, after Dr. Mutter completed it in 1992 and had reviewed it again prior to his testimony (R. 544). He stated that his review of the report indicated to him that "it appears that Dr. Mutter is saying that there's nothing wrong with Mr. Coney" (R. 545).

Mr Casabielle agreed that the last paragraph of Dr. Mutter's report was inaccurate, in that it indicated that

Mr. Coney's profession of innocence precluded any consideration of mitigation at the penalty phase (R. 547). And he also testified that his understanding of the case law in 1992 supported the position that evidence of good behavior in prison of the kind noted in Dr. Mutter's report could have been mitigating evidence (R. 547). He said his opinion about whether Mr. Coney had read Dr. Mutter's report was the same as that expressed about Dr. David's report (R. 548). He also testified that part of the reason that he had the reports of both Dr. David and Dr. Mutter sealed in the Court file was "to protect myself" (R. 548). He agreed that his billing records, Defendant's Exhibit N, reflected that all his work with the experts took place during the week prior to the beginning of the penalty phase before the jury which commenced on March 9, 1992 (R. 550-51).

Mr. Casabielle testified that he did not recall whether the investigator that he retained on Mr. Coney's case, Al Fuentes, had done any investigation for the penalty phase (R. 552). He stated that if he had done

so, he would have billed for such work (R. 328-29, 552).

Mr. Casabielle then testified that he did not see it as part of his responsibility to explain to the experts that he retained what the Florida statutory mitigating circumstances were or what they meant (R. 555). Mr. Casabielle testified that after Mr. Coney was found guilty, his plan was "to speak to the family and get some experts to see if they could help" (R. 557). He stated that he could not recall what background materials he provided to either Dr. Mutter or Dr. David (R. 557). He testified that he could not remember if he acquired Mr. Coney's Department of Corrections records in preparation for the trial, although he stated he recalled some parts of Mr. Coney's prison record (R. 558-59). He agreed that prison records could be a source of mitigation evidence (R. 565). He testified that when he met with the State the day before his testimony, he reviewed transcripts of former Judge Roy Gelber's testimony in federal court (R. 566).

Mr. Casabielle testified that he created handwritten notes, Defendant's Exhibit Z, when he interviewed some of Mr. Coney's relatives prior to the penalty phase (R. 569-70). After reviewing his notes, he agreed that they included reports that Mr. Coney had been punished by his grandparents with a switch and a belt, that there had been a childhood head injury inflicted on Mr. Coney by Jessie Coney, that Mr. Coney's stepfather had attacked him with a knife, that Mr. Coney had "imagined" the presence of a casket in the yard when it was not there at age 12, and that Mr. Coney smelled gasoline when he was age seven or eight to the point of intoxication (R. 571). Mr. Casabielle stated that he never tried to arrange a meeting between the experts he retained and the family members of Mr. Coney (R. 572). He testified that he could not recall if he passed along the information memorialized in his handwritten notes to the experts. (R. 572).

On cross-examination, Mr. Casabielle testified that he "had interviewed" all the inmates who were on the floor of Dade Correctional where the homicide took place (R. 585).

He stated that during his guilt phase investigation Mr. Coney professed his innocence and did not want to talk to him about the death penalty (R. 585). He stated that as a client, Mr. Coney "was not easy" and that it appeared from the correspondence he had reviewed that Mr. Coney had tried to fire him (R. 588). He agreed with the State's characterization that Mr. Coney wanted him to concentrate on Phase one. He testified that after Mr. Coney was convicted, he got two weeks to prepare for phase two, the penalty phase (R. 592).

He testified that during the course of his investigation in Mr. Coney's case, he learned that Mr. Coney had been accused of raping other inmates (R. 599). He testified that the prison records found in his trial file, Defendant's Exhibit 2A, did not include any account of these accusations (R. 600).

After reviewing a colloquy between Judge Smith and Mr. Coney from the trial record, the witness testified that it appeared that he had "shared the findings," though not the written reports, of Drs. Mutter and David with Mr. Coney

(R. 610). He testified that "[t]here's absolutely nothing that I didn't do for any reason other than that what I fully believe to be in the best interest of my client" (R. 616). He testified that he thought he did a good job for his client when he obtained a seven to five death recommendation (R. 617).

On redirect Mr. Casabielle testified that he could not remember the names of any inmates that he interviewed at Dade Correctional Institution (R. 618). He then testified that Al Fuentes, his investigator, had interviewed inmates (R. 619). The lower court sustained the State's objection to the question as to whether Mr. Fuentes had prepared written reports as to the substance of the interviews of any of the inmates (R. 328-29, 619). He testified that he did not recall telling postconviction counsel that he believed one of the factors in the jury recommendation was residual doubt about Mr. Coney's guilt (R. 620).

He testified that he did not recall ever seeing any information that indicated that Mr. Coney had been

adjudicated guilty of raping other inmates (R. 625). He testified that it was not strategy when he failed to visit Mr. Coney for nine months in 1991-1992 (R. 625-26). He testified that he believed that he had an independent responsibility as counsel to do penalty phase investigation (R. 627). He testified that as an attorney, he, not the witnesses, would be in the best position to understand what testimony and evidence would be potentially mitigating (R. 629). Dr. Noble David was then called as a witness by Mr. Coney (R. 631). Dr. David testified that he was a physician specializing in the field of clinical neurology and the State stipulated to his qualifications (R. 632). He testified that he was practicing in Miami in March 1992 at the time of Mr. Coney's penalty phase (R. 633). He further testified that he examined Mr. Coney on March 5, 1992 "according to the letter of my examination" (R. 634). He stated that attorney Casabielle contacted him after the verdict and "wanted me to examine [Mr. Coney] to see what I thought his neurologic status was" (R. 634).

He also testified that what historical data he got, came from his interview with Mr. Coney at the time of the examination and that "I don't find in my folder or recollect reviewing any medical records pertaining to the defendant" (R. 635). He testified that in his opinion, following the examination, he "could find no evidence of neurologic disease or history that would suggest an important neurologic impairment" (R. 636).

He testified that during the neurological evaluation Mr. Coney was restrained, in that "[h]e was wearing manacles and his lower extremities were shackled" (R. 637). Dr. David agreed that these conditions constrained his examination, although he "tried to get around this by doing the examination that I could that were manageable within that framework" (R. 638). He then testified that he had reviewed a March 15, 2000 report of a neurological examination of Mr. Coney by Dr. Thomas Hyde and a June 20, 2000 report of a neuropsychological evaluation by Dr. Hyman Eisenstein (R. 639). He then testified that "another examiner might come to the different conclusion

and place a different total value on one or another observation" (R. 642). He also stated that had been in favor of neuropsychological testing being performed on Mr. Coney in 1992 (R. 643). On cross-examination Dr. David agreed that his conclusion in 1992 was that there was no evidence of any neurological disease or history that would suggest important neurological impairment, and that he found no evidence of brain injury (R. 650).

Dr. Charles Mutter was then called by Mr. Coney (R. 651). Dr. Mutter testified that he was a physician specializing in the practice of psychiatry and forensic psychiatry (R. 652). He stated that he performed an evaluation of Mr. Coney at the Correctional Center on March 6, 1992 and generated a report on March 9, 1992 (R. 652). He testified that the purpose of his examination was to determine if there were aggravating or mitigating circumstances (R. 653). He testified that he went into semi-retirement in 1996 and many of his files were destroyed, so that the only indication of what background materials or records that he had access to at the time of

Mr. Coney's evaluation would be his original report (R. 654). He testified that based on Mr. Coney's profession of innocence, he thought a polygraph should be considered (R. 654). He also indicated that he thought that Mr. Coney's putative description of his attempts to conform his conduct to the prison system were notable (R. 654). He testified that a passed polygraph and/or good prison behavior could both be mitigation (R. 656). He affirmed that his 1992 report indicated Mr. Coney's history of short term anti-depressants while in prison and suicidal ideation, both probably based on Mr. Coney's self-report (R. 656). Dr. Mutter testified that at the time of his examination of Mr. Coney he did not detect any signs of clinical depression (R. 656). He testified that to the best of his knowledge he did not communicate with Mr. Casabielle after Mr. Coney's evaluation. (R. 657). After examining Defendant's Exhibit 2C, a letter from Dr. Mutter to Judge Smith dated March 9, 1992, he confirmed that the letter indicated that he did have a conference before the evaluation of Mr. Coney with Casabielle (R. 658, 662).

He then testified that he did not review Dr. Noble David's report prior to preparing his own report nor did he speak with Dr. David (R. 659).

On cross-examination Dr. Mutter testified that he had performed evaluations involving issues of aggravation or mitigation ten to twelve times during his career (R. 660). He testified that an incident when Mr. Coney was treated with anti-depressants could be important because "there are people that have emotional disturbances that are undiagnosed or unrecognized that can exist" (R. 666). He testified that in 1992 he saw no indication of frontal lobe dysfunction, major mental disorder or brain damage (R. 669).

On redirect, Dr. Mutter stated that he did never performed neuropsychological testing himself, other than sometimes administering the MMPI (Minnesota Multiphasic Personality Inventory), and he testified that it was not indicated with Mr. Coney (R. 670). He testified that Mr. Casabielle did not ask him to administer neuropsychological tests (R. 670-71). He also testified

that if there were records or medical reports made available to him that were contrary to the findings he made after a "cold" evaluation he would reconsider his opinion (R. 772-73). Dr. Thomas Hyde was then called as a witness for Mr. Coney (R. 699). Dr. Hyde testified that he is a behavioral neurologist, has been board certified since 1990 as a neurologist, and is employed at the National Institutes of Mental Health (R. 700). The State stipulated to his qualifications (R. 701). He testified that diagnosis of psychiatric and neurological illnesses are an established part of his practice (R. 702).

He testified that he examined Mr. Coney in March 1999 and produced a report, Defendant's Exhibit 2E, which he identified on the witness stand (R. 702-03). He identified a package of background materials, Defendant's Exhibit 2F, that had been supplied to him by Mr. Coney's postconviction counsel (R. 704-705). He then testified that based on his neurological evaluation of Mr. Coney, along with the background materials he reviewed, he had

formed an opinion as to presence of mitigation (R. 706). He then explained that "[m]y opinion is that Mr. Coney has evidence of neurological abnormalities and major psychiatric illness" (R. 706). He also noted that Mr. Coney's records indicated numerous instances of psychotropic drugs being prescribed to him in prison, including Sinequan and Thorazine (R. 706).

Dr. Hyde testified that after he formed his opinion and wrote his report he reviewed two reports, Defense Exhibits 2G and 2H, that had been prepared by defense neuropsychologist Dr. Hyman Eisenstein and state neuropsychologist Jane Ansley (R. 710). Dr. Hyde testified that he has relied on the findings of neuropsychologists as part of the basis of his medical opinions (R. 711). He then testified that he found nothing inconsistent with Dr. Eisenstein's findings and his own findings, "with the caveat... that I was surprised that Mr. Coney did as poorly as he did" (R. 712). He testified that he was surprised that Dr. Ansley didn't find more abnormalities and that he "found her explanation

for Dr. Eisenstein's finding of right hemispheric dysfunction unconvincing," specifically her report that Mr. Coney had a significant peripheral injury to the left hand (R. 713). He explained that he found no evidence based on his own neurological evaluation that Mr. Coney had upper extremity weakness, sensory loss or reflex change on either side (R. 714). He noted that Dr. David's evaluation also failed to note any such loss (R. 715). He also testified that Dr. Eisenstein's findings of right hemispheric dysfunction along with the 20 point spread between Mr. Coney's verbal and performance IQ scores were indicia of brain damage (R. 716-17).

On cross-examination, Dr. Hyde testified that he was personally opposed to the use of the death penalty in the United States (R. 718). He testified that he was not opposed to the use of the death penalty in cases of genocide (R. 720). He stated that he interviewed Mr. Coney for an hour and fifteen minutes, and then did neurological testing for forty-five minutes (R. 723). In response to the lower court's question, Dr. Hyde testified

that "[g]iven [Mr. Coney's] history and given his relative normality of neurologic examination, and I think the presence of the gabellar reflex is most likely due to long standing developmental frontal lobe dysfunction, not complete obliteration of the front lobes by any standpoint, but some degree of frontal lobe dysfunction" (R. 755). He also opined that Mr. Coney "has had long standing impulse control problems and behavior problems...mediate[d] by frontal lobe dysfunction" (R. 755). He testified that his opinion concerning the presence of right hemisphere brain damage was based on Dr. Eisenstein's work (R. 758). He later testified that his opinion was that the most likely diagnosis would be congenital brain abnormality (R. 762).

Dr. Hyde testified that Mr. Coney's prison records indicate that the defendant suffers from anti-social personality disorder (R. 763). He stated that he believed that his neurological examination of Mr. Coney was more thorough than Dr. David's examination (R. 766). He agreed that Dr. Mutter's report was inconsistent with

his own report and with Dr. Eisenstein's report (R. 767). He was surprised that Dr. David didn't recognize that Mr. Coney's history of polio was a fairly significant neurological find (R. 769).

On redirect, Dr. Hyde testified that a June 9, 1976 prison report indicated that Mr. Coney's tested IQ was 78 and his reading level was between the 6th and 7th grade level (R. 776). He further testified that Mr. Coney's IQ scores have "gotten steadily better over the years which is not unusual given his socio-economic background" such that his review of the records indicated that when Mr. Coney first left school he could barely read and write and the initial IQ testing placed him at 70, "right at the boundary" of mental deficiency (R. 777). He explained that Mr. Coney's verbal IQ has improved over the years because of "[b]etter nutrition; actually learning how to read, and reading; and probably his brain has grown and developed over the years so he has better verbal scores than when he started; and he's progressed over the years in those verbal domains. At least from Dr. Eisenstein's

testing of his performance IQ his right hemisphere has not progressed as much as his left which happens sometimes" (R. 777). He testified that his review of the records supported a finding that Mr. Coney showed signs of mild to moderate mental or emotional impairment (R. 779).

The next witness called by the defense was Dr. Hyman Eisenstein (R. 835). Dr. Eisenstein testified that he is a clinical psychologist with a specialty in neuropsychology (R. 855). He testified that he was board certified in neuropsychology in 1996 (R. 837). He testified that he saw Mr. Coney on March 22, 1999, conducted a comprehensive neuropsychological examination, and produced a report including his opinions about Mr. Coney (R. 841). He testified that he reviewed a considerable amount of background material provided by CCRC (R. 844). He testified that he also reviewed the reports of Dr. Hyde and Dr. Ansley (R. 845). He then opined that Mr. Coney was operating under the presence of extreme mental or emotional impairment at the time of the offense (R. 847). He testified that the "main part of my

opinion" was based on the neuropsychological testing that he performed (R. 847).

He stated that his report, Defense Exhibit 2G, outlined the results of the different tests he administered to Mr. Coney (R. 848). He then explained the significance of the various tests as to his opinion regarding the presence of extreme mental or emotional disturbance (R. 848-75). He explained that his results on the WAIS III, the Weschler Adult Intelligence Scale, Third Edition, test performed on Mr. Coney revealed a verbal score of 100, a performance score of 75 and a full scale IQ of 88 (R. 849). He agreed that the 25 point difference between the performance score and verbal score was a "red flag" for possible right hemisphere problems (R. 854).

He testified that the results of Quality Extinction Test, QET, were also indicative of a finding of right brain impairment (R. 857). He testified that the results that he obtained on the Wisconsin Card Sort test were consistent with frontal lobe impairment (R. 866). He

testified that he spent a total of about twelve hours with Mr. Coney, including interviewing him and testing him (R. 869). He testified that he administered an MMPI to Mr. Coney and stated that his analysis of the results of that test and the others he administered did not indicate that Mr. Coney was malingering (R. 875). He testified that his review of Mr. Coney's prison mental health records provided numerous examples of information that was useful in forming his opinions (R. 885-921). Dr. Eisenstein testified that the 1970's prison Bender Gestalt results had significance in supporting his opinion as to the presence of brain damage, "because the Bender Gestalt is considered to be a test of right hemispheric visual constructional graphic abilities" (R. 895). He also testified that he had reviewed a March 1, 1967 psychological screening report that indicated Mr. Coney had completed the 7th grade and had an IQ of 68 which the report described as "mentally defective intelligence" (R. 920). He testified that in his opinion there were also other factors that he considered to be mitigating,

particularly regarding evidence of physical, emotional and sexual abuse and neglect suffered by Mr. Coney (R. 925-26).

On cross-examination, Dr. Eisenstein testified that Mr. Coney's prison records revealed behavior that was not inconsistent with a diagnosis of anti-social personality disorder (R. 1033-37). On re-direct, Dr. Eisenstein testified that he had recently reviewed affidavits from three of Mr. Coney's relatives, Isaac Coney, Bonny Coney and Jessie Coney, Defendant's Exhibits marked for identification as A-44, A-45 and A-46 (R. 1069). He testified that the most important basis for his findings of mitigation in Mr. Coney's case was the neuropsychological testing he performed (R. 1070). He then testified that the information in the affidavits was the kind of information that he normally relied on in forming an opinion as to the presence of mitigation (R. 1072). Dr. Eisenstein testified that the affidavits indicated that Mr. Coney suffered from physical and emotional abuse, that he suffered a severe head trauma as

a first grader, that at the age of six was sniffing gasoline and drinking moonshine, and that he was sexually molested on a regular basis (R. 1079-1082).

On continued cross-examination Dr. Eisenstein testified that Mr. Coney's brain damage "effects his behavior because when it comes to fine tune thinking, planning, executing, or feedback, the ability to control his impulses or the ability to stop and say and say this is right, this is wrong, this is inappropriate...[h]h doesn't have a red light. There's no red light up there to stop him and say no I can't do this. That's what happens. There's that threshold, that floodgate of emotions or feelings or thinking the complex planning" (R. 1151).

The final witness at the evidentiary hearing was called by the State in rebuttal. Dr. Jane Ansley testified that she is a clinical psychologist, specializing in clinical neuropsychology, although she testified that she is not board certified in neuropsychology (R. 1161, 1233). She testified that she

had no question that Dr. Eisenstein administered his neuropsychological testing properly, scored the testing properly, and had the full cooperation of Mr. Coney performing to the best of his ability (R. 1180). She also testified that she had no disagreement with the fact that there is a 25 point discrepancy between Mr. Coney's verbal and performance IQ scores on the WAIS III and that the finding is significant (R. 1181-82).

Dr. Ansley testified that Mr. Coney's self-report to her of an incident as a teenager when a cement bench fell on his left hand caused her to question the link reported by Dr. Eisenstein in the results of his QET testing and his finding of right hemisphere impairment (R. 1194-97). She also testified that her review of Dr. David's report did indicate that he was in favor of a neuropsychological examination in 1992 (R. 1230). The witness testified that she had no opinion one way or the other about the presence of either statutory mental health mitigating factor (R. 1231-32).

On cross-examination Dr. Ansley testified that she was

only asked by the State to make a diagnostic finding related to the presence or absence of brain damage (R. 1232). She testified that she relied on Dr. Eisenstein's data in reaching her conclusions and writing her report (R. 1238). She further testified that none of the three neurologists who examined Mr. Coney found any problem with his left hand or peripheral extremities (R. 1238, 1245). She testified that she chose not to give an MMPI because Dr. Eisenstein had given that test (R. 1242).

Dr. Ansley testified she did not administer the block design test despite the fact that Mr. Coney's scale score of seven on the block design test administered by Dr. Eisenstein did not rule out brain damage (R. 1243). She testified that she did not recall if an EEG was indicated in Mr. Coney's 1975 prison neurological report (R. 1245-46). She testified that the Wisconsin card sort test is not specifically diagnostic for either right hemisphere damage or frontal lobe damage (R. 1248). She testified that Mr. Coney's performance was impaired on the Matrix test and trail making tests that she administered (R.

1259).

The lower court entered an order on Mr. Coney's Amended Motion to Vacate Judgments of Conviction and Sentence on May 2, 2001. The order denied all of Mr. Coney's 3.850 guilt phase claims, but granted relief in the form of a new penalty phase based on ineffective assistance of counsel at the penalty phase at the 1992 trial (R. 1325-44). On May 17, 2001, the State filed Notice of Appeal (R. 1368-69). On that same date, Mr. Coney filed a Motion for Rehearing (Supp.R. 1134-42).

On May 29, 2001, Mr. Coney filed Notice of Cross-Appeal and a Notice to the Court (Supp.R. 1153-57). On June 6, 2001, following a telephonic hearing on May 29, 2001, the lower court entered an order denying the Mr. Coney's Motion for Rehearing on jurisdictional grounds (Supp.R. 1158).[2]

[2]Mr. Coney requests that this Court return jurisdiction of this case to circuit court for a decision on the merits as to Mr. Coney's timely motion for rehearing.

SUMMARY OF THE ARGUMENTS

1. The court below properly found, following a limited evidentiary hearing, that Mr. Coney was entitled to a new penalty phase due to ineffective assistance of trial counsel at the penalty phase of Mr. Coney's 1992 trial.

2. Mr. Coney was denied a full and fair hearing on his claim that trial counsel had an unrevealed conflict of interest which operated to the detriment of Mr. Coney in regards to trial counsel's preparation for his 1992 trial.

3. Mr. Coney was denied an adversarial testing at the guilt phase of his capital trial. Trial counsel failed to properly question potential jurors and failed to properly use his jury challenges. Trial counsel also failed to communicate the law of dying declarations to Mr. Coney and to effectively prepare for the dying declarations pretrial hearing. Trial counsel failed to obtain a pretrial mental health evaluation despite having an order allowing him to do so. Trial counsel failed to challenge the State's case in numerous ways, including failure to investigate the background of witnesses and to be prepared to impeach their testimony, failure to request a Frye hearing, and failure to call necessary witnesses. Trial counsel also negligently failed to have Mr. Coney present at several critical stages of the proceedings.

4. Mr. Coney was denied access to certain public records based on the findings of the lower court following in camera inspections and this Court should independently review all the sealed documents in the appellate file.

5. Mr. Coney was denied an adversarial testing at portions of the penalty phase of his 1992 capital trial upon which he was not granted an evidentiary hearing.

These areas include but are not limited to: the unconstitutionality of the Florida death penalty statute; the failure by the trial court to find non-statutory mitigation; the failure of the trial court to bar consideration by the jury of Mr. Coney's 1965 and 1976 prior violent felonies; the use of felony murder as an automatic aggravating factor; dimunition of the jury's role in sentencing; and prosecutorial misconduct.

6. Mr. Coney was found guilty of first degree murder and sentenced to death but is actually innocent of first degree murder and innocent of the death penalty.

7. Mr. Coney is insane to be executed

8. The cumulative effect of the errors in Mr. Coney's case, coupled with the errors found on direct appeal by this Court but found to be harmless, establish that Mr. Coney is entitled to both a new trial and a resentencing.

ARGUMENT I - THE LOWER COURT PROPERLY FOUND THAT MR. CONEY WAS ENTITLED TO A NEW PENALTY PHASE PURSUANT TO STRICKLAND

A. DEFICIENT PERFORMANCE

The lower court's factual findings on deficient performance support Mr. Coney's legal claim. In a post-evidentiary hearing order granting penalty phase relief, the lower court explained that Mr. Coney had been allowed to present evidence on two claims that had been raised in his 3.850 motion:

> (1) that he was not afforded the effective assistance of counsel because trial counsel failed to have him examined by a mental health professional before trial, and (2) that trial counsel failed to adequately investigate and prepare mitigating evidence in the penalty phase. Further, to the extent that it could bear on these issues, the defendant was permitted to offer evidence that trial counsel had a conflict of interest which prevented him from appropriately representing the defendant, as was alleged in a separate ground for relief

(R. 1325-26). The order then established that the lower court's analysis of the evidence presented below to support these claims is governed by the two-step analysis set forth in Strickland v. Washington, 466 U.S. 668 (1984); to establish a Sixth Amendment violation, a defendant must establish (1) deficient performance, and (2) prejudice (R. 1328). In its order, the lower court found that trial counsel Casabielle's performance had been deficient pursuant to Strickland:

> As outlined above, trial counsel's performance was plainly deficient. He failed to obtain competent medical evaluations of his client sufficiently in advance of trial so that expert

> opinions could be properly analyzed and the experts furnished with background material from past court proceedings and prison records regarding the defendant's mental deficiencies and poor impulse control. He failed to devote the time necessary to do a thorough investigation of the defendant's background. And, he failed to remedy these shortcomings by seeking additional time and resources from the court in preparation for the penalty phase.

(R. 1332-33) The State now says that the findings of the lower court regarding deficient performance by trial counsel are "illusory" and even if true, were "never connected to any prejudice accruing to [Mr. Coney]" State's Brief at 26.

As a starting point, Mr. Coney agrees with the State that the lower court's findings of fact are subject to deference by this Court. Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999).

Further, Mr. Coney submits that the findings as to deficient performance, rather than illusory, are fully supported by unrefuted evidence presented below.

The State separates out the lower court's affirmative

findings that Casabielle performed deficiently into six areas: (1) failure by Casabielle to discuss the death penalty with Mr. Coney; (2) failure to talk to prior counsel or to review court records from Mr. Coney's prior cases to determine if relevant mental status information was available; (3) failure to adequately investigate family background; (4) failure to have Mr. Coney examined by a mental health expert prior to trial; (5) failure to attend the evaluations of Mr. Coney by Drs. David and Mutter or to explain mitigation to the doctors; and (6) failure to provide the experts with background materials. The fact that the State's Brief attempts to divide out the lower court's findings into six discrete categories fails to do justice to the cogency or the order. The multiple findings of deficient performance, many more than six, are closely interrelated to one another as the lower court's order plainly sets forth. In the interest of consistency, this argument will generally track the State's six areas.

Mr. Coney's counsel had a duty to conduct a

"requisite, diligent investigation" into Mr. Coney's background for potential mitigation evidence. Williams v. Taylor, 120 S.Ct. 1495, 1524 (2000). See also id. at 1515 ("trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); State v. Riechmann, 777 So. 2d 342, 350, 351 (Fla. 2000).

(1) FAILURE TO "DISCUSS THE DEATH PENALTY" WITH MR. CONEY

The performance of trial counsel regarding the penalty phase can be summed up in four words: too little, too late. Mr. Casabielle testified at the evidentiary hearing that after the guilt phase was over, "My plan was to speak to the family and get some experts to see if they could help" (R. 557). He also testified that he did not speak to Mr. Coney about the death penalty and preparing mitigation before the trial or during the guilt phase because Mr. Coney did not wish to discuss the death penalty (R. 589-90). The lower court's acknowledgement of this testimony in the order below is not, as the State

claims, an acknowledgement by the lower court that Mr. Coney was at fault. State's Brief at 26. Rather, the testimony was one of the factors that the lower court considered when making a finding that trial counsel "failed to devote the time necessary to do a thorough investigation of the defendant's background" (R. 1333).

Casabielle also testified that Mr. Coney did not truly want to discharge him, despite Mr. Coney's attempts to fire him on July 12, 1990, October 12, 1990, and arguably on September 9, 1991 (R. 588)(Defendant's Exhibit's Q, R, T). Mr. Casabielle asserted that the motions for discharge may have actually been a strategy on Mr. Coney's part for his later appeals (R. 591-92).

Casabielle implied that it was Mr. Coney's fault that no real penalty phase occurred at his trial. Rather, the opposite is true, Mr. Casabielle is at fault. He testified at the evidentiary hearing that his own billing records indicated that he had failed to meet with Mr. Coney during the period March 25, 1991 through January 10,

1992, a period of ten (10) months (Defendant's Exhibit N)(R. 501-02).

Casabielle surely was not discussing the death penalty, experts, mitigation, or anything else with Jimmie Coney during that period because he was not meeting with him. In the middle of that period, on May 22, 1991, Mr. Coney wrote trial counsel a letter begging that either Casabielle or the investigator come to visit him, stating

> [B]ecause there is still a lot that haven't been did in preparing for trial that I feel we should talk about simple because there is things to be investigated that we haven't discussed that should be discussed. Nor did you ever bring the depositions you promised to drop off four or five months ago so I could read them

(Defendant's Exhibit T).

Trial counsel ultimately misrepresented to the lower court at a hearing on January 31, 1992 that Mr. Coney had already been examined by a mental health professional (Defendant's Exhibit J)(R. 484-87). Mr. Coney was not at this hearing, only 15 days before the beginning of his trial, because Mr. Casabielle had waived his presence

without his knowledge. Coney at 1012.[3] At the same hearing, Casabielle complained about Mr. Coney being a recalcitrant client. Of course he failed to advise the trial court that he had seen Mr. Coney for the first time in ten months only three weeks before.[4]

There is little justification for the State's reliance on Porter v. State, 26 Fla. L. Weekly S321 (Fla. May 3, 2001) and Waterhouse v. State, 26 Fla. L. Weekly S375 (Fla. May 31, 2001) for the proposition that the holdings of same provide support for the State's position that Casabielle's performance was not deficient in regards to his "failure to discuss the death penalty" with Mr. Coney.

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[3]This Court held that Mr. Coney's presence would not have assisted the defense in any way, therefore the error was harmless. Coney at 1013. Mr. Coney requests that this Court review the harmless error finding in light of the lower court's order and Arguments II and III in this brief.

[4]It is this hearing that the lower court footnotes in the order granting penalty phase relief, making the finding that "Mr. Casabielle affirmatively stated that a psychological evaluation of the defendant had been conducted. It appears that this statement was not true." (R. 1329).

In Porter, the defendant was tried for a double murder, the jury recommendations for death were 12-0 and 10-2, no mitigation was found, and trial counsel testified that he became counsel for penalty phase purposes only when the defendant chose to represent himself pro se at the guilt phase. Porter at S321, S322. Porter's counsel further testified that the defendant's failure to cooperate consisted of his refusal to be examined by a medical doctor and his instruction to counsel not to speak with family members. Id. In contrast, Mr. Coney allowed Casabielle to represent him throughout the proceedings, agreed to be evaluated by two experts, and allowed eight family members and friends to testify at his penalty phase. Waterhouse was an appeal from summary denial without an evidentiary hearing on a failure to present mitigation claim. This Court held that "the only reason why mitigating evidence was not presented was entirely due to Waterhouse's own conduct," specifically "the evidence in support of mitigation had already been investigated and accumulated as part of Waterhouse's previous collateral

and habeas proceedings" Id. at S376. This evidence included an affidavit from an expert finding both mental health mitigators at the time of the offense, investigation and preparation by counsel to bring the defendant's brother to testify, and the appointment by the trial court of an expert to examine the defendant for organic brain damage. Id. Waterhouse refused to see the expert or to allow his brother to testify and this Court held that his conduct, not deficient performance of counsel, was the reason the evidence was not presented below. Id. In contrast, Mr. Coney cooperated with the evaluations that were arranged after the guilt phase and allowed family members to testify at the penalty phase.

Based on the actual performance of counsel in the year prior to the penalty phase, Mr. Coney was almost entirely in the dark, when the trial court attempted to solicit a waiver from him on the record at the penalty phase concerning the findings of Dr. Mutter and Dr. David (DAT. 2845-46). Trial counsel testified that Mr. Coney relied on his representations about the evaluations of Drs. David

and Mutter made to him, since Mr. Coney never saw their reports that were only later prepared (R. 538, 547-48). Mr. Coney cooperated with the evaluations by agreeing to be evaluated by both Dr. David and Dr. Mutter. Coney simply did not know that Casabielle had failed to provide these experts with background material about him, had failed to use the appointed investigator to do any work on the penalty phase, and had failed to provide the appointed experts with the family history from Casabielle's own notes which indicated that he knew about the corporal punishment, family violence, and substance abuse suffered by Mr. Coney, evidence that contradicted the testimony of the family members that Casabielle presented as defense witnesses at the penalty phase (Defendant's Exhibit Z)(R. 567-571). Mr. Coney has established deficient performance under Strickland and Williams.

(2) FAILURE TO CONTACT PRIOR COUNSEL OR TO REVIEW COURT RECORD

Defense counsel should have been on notice as to Mr. Coney's history in light of Mr. Coney's prior legal

history. In 1976 Mr. Coney was tried and convicted on four felony counts: involuntary sexual battery with the use of actual physical force likely to cause serious injury, robbery with the use of a deadly weapon, burglary while being armed with a deadly weapon and the commission of an assault therein, and attempted premeditated murder while engaged in the perpetration of involuntary sexual battery, robbery, or burglary. Coney v. State, 348 So.2d 672 (Fla. App. 1977).

The appellate opinion details how trial counsel in 1976 unsuccessfully sought on the eve of trial to move for psychiatric examination of the defendant, and later, prior to sentencing, was equally unsuccessful in obtaining a hearing on Mr. Coney's competency to be sentenced. Id at 673, 674. The argument by defense counsel for his motion for psychiatric evaluation on May 24, 1976 is revealing. Id at 674.[5] During the 1976 proceeding, defense counsel

[5]"I have discussed this case several times with the Defendant, Informed one time, both by the Defendant and his mother that the case would be dismissed and then also was informed that the complaining witness was not, in

noted his doubts about Mr. Coney's mental status. As trial counsel testified at the evidentiary hearing, he should have been on notice that there had been significant problems with client communication with counsel in Mr. Coney's 1976 prior (R. 480). Yet he testified that he did not think he was familiar with the appellate opinion or the motion below in the 1976 case (R. 477-80).

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fact, raped. Was told by the Defendant that she was not raped which is contrary to the evidence as submitted at the various depositions.
On the evaluations of the Defendant there is a strong case against the Defendant and I have talked to the Defendant. He exhibited an attitude of euphoria with regard to his chances. he seems to have - he is a quiet man. He seems to be consistent in talking; seems to be coherent in talking. But in evaluation of the situation he seems to be very out in space as far as the evaluation as to what the various situations that occur as to what happened and as to his chances before the Court, as to the fact that the case might be dismissed. Nobody has ever told me that this case would be dismissed and I am sure Mr. Woodard has never made any type of recommendation. But, there has been - I have been told by the Defendant that the case will be dismissed; that the case was weak. Even after he had an evaluation of some of the factual situations which leads me to believe that he may be suffering from a - I am no psychiatrist. I am basing my representations to the Court in regard to my opinion as to this fact."

Mr. Casabielle testified that he did not recall reviewing prior to the 1992 trial a 3.850 motion filed by Mr. Coney in connection with his 1976 prior (R. 469). He also stated that he was not familiar with the information the motion contained (R. 474). He also testified that he never talked with Mr. Coney's trial or appellate counsel about the 1976 case (R. 476).[6] The State contends that Mr. Coney's pro se 3.850 motion attacking his 1976 conviction, introduced at the evidentiary hearing as Defendant's Exhibit R, "did not pertain to any issue related to Defendant's mental health" State's Brief at 28.

In fact, the motion contains an explicit account by Mr. Coney of his arrest in 1976 and several vicious beatings by the police that ensued (Defendant's Exhibit G). In the motion, Mr. Coney describes being beaten into unconsciousness by law enforcement officers, being

[6]Both the victim in the 1976 case and her mother testified for the State at Mr. Coney's 1992 penalty phase hearing before the jury (DAT. 2710-16, 2728-32).

subjected to racial slurs and threatened at gunpoint, being choked and beaten a second time for more than an hour, then being taken to jail in Perrine and beaten a third time. The motion also alleges that as a result of this police beating, Mr. Coney was hospitalized at Jackson Memorial for 16 days after the arrest (R. 473-475). The State's position is refuted by the record. The allegations of being beaten into unconsciousness have relevance as to head injury and neurological and neuropsychological issues in Mr. Coney's case.

As noted supra, Ms. Casabielle also testified that he had not reviewed the May 21, 1976 Motion for Psychiatric evaluation (R. 479-80). The motion requested that the court appoint three experts to determine Mr. Coney's mental condition based on concerns about his competency, consideration being given to an insanity defense, and indications that "the defendant may not have complete possession of his faculties" (Defendant's Exhibit G). Counsel's failure to do the most basic form of research concerning the prior crimes that were used as aggravators

in Mr. Coney's penalty phase is impossible to explain away. Again, Mr. Coney has established deficient performance pursuant to Strickland and Williams.

(3) FAILURE TO PROPERLY INVESTIGATE AND PRESENT FAMILY EVIDENCE

The State takes the position that Mr. Coney "presented absolutely no evidence pertaining to his childhood at the evidentiary hearing" State's Brief at 31. In fact, Mr. Coney presented such evidence in at least three ways: (i) trial counsel's own testimony about the trial file notes he recorded during his limited post guilt phase investigation with family members of Mr. Coney, notes which contradicted the testimony he presented from eight family members and friends at Mr. Coney's 1992 penalty phase (R. 569-72); (ii) substantial family and childhood information contained in Mr. Coney's prison records that was presented at the hearing through the testimony of experts Hyde and Eisenstein, and testimony from these experts about their own clinical interviews with Mr. Coney (R. 704-06, 885-921); and, (iii) testimony from expert

neuropsychologist Dr. Eisenstein about new affidavits from Mr. Coney's family members that he reviewed after completing his report, and that he testified were the kind of material he relied on in forming opinions as to the presence of non-statutory mitigation of deprivation, poverty, substance abuse, sexual abuse and family abuse (R. 1069-82).

The State claims in its brief that undersigned counsel "disingenuously denied" knowing the identity of any of the family members of Mr. Coney who were present in the courtroom at the evidentiary hearing. State's Brief at 32. This is not true. Undersigned counsel identified Mr. Coney's mother, Pearlie Mae Sanford, and another relative, Larry Coney, to the State on the record (R. 955-56). Ms. Sanford was the only Coney family member present at the evidentiary hearing who had been listed as a defense witness (Supp.R. 864). Ms. Sanford testified in the 1992 trial and counsel chose not to call her at the evidentiary hearing (DAT. 2735-65).

Mr. Casabielle's apparent failure to acquire any more

than 61 pages of Mr. Coney's prison records crippled his ability to review the written record of his client's life in the 27 years before the 1992 trial (R. 563). This lapse mirrors the negligence he displayed in both failing to obtain a pre-trial evaluation and failing to review Mr. Coney's prior court files. Mr. Coney had been confined since 1965. A review of the testimony of Drs. Hyde and Eisenstein citing their review of Mr. Coney's prison records and Dr. Eisenstein's review of the affidavits provides some insight into the available information that should have been woven into a coherent and persuasive mitigation presentation for Mr. Coney in 1992 in combination with expert witnesses and family testimony.

The information in the affidavits of Bonny Coney and Jessie Coney, two uncles of Mr. Coney who had testified in 1992, and the affidavit of another relative from Georgia, Isaac Coney, simply provide additional support for the findings of the experts below. The affidavits were marked for identification but were not admitted into evidence (R. 1069)(Defendant's A-44, A-45, A-46). However, the

lower court allowed Dr. Eisenstein to testify about the affidavits predicated on his reliance on them as an expert psychologist in forming an opinion about the presence of mitigation (R. 1072-75).[7]

Eisenstein testified that his opinions regarding the presence of developmental neurological disorder, the presence of head trauma, and the presence of physical, emotional and sexual abuse in Jimmie Coney's background were supplemented by the information in the affidavits, including information from Bonnie and Jessie that Mr. Coney had been beaten and horse whipped by his father Floyd Coney, had suffered a head injury in the first grade, at the age of six was sniffing gasoline, drinking moonshine and suffering seizures, and had been sexually abused by two older men in the community who also supplied Mr.Coney with drugs and alcohol (R. 1079-82). The affidavits of Bonnie Coney, Isaac Coney, and Jessie Coney

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[7]Dr. Eisenstein's testimony about the affidavits was permitted by the lower court pursuant to Florida Rules of Evidence § 90.704. See Barber v. State, 576 So. 2d 825, 831 (Fla. 1st DCA 1991); Fla. R. Crim. P. 921.141.

that Dr. Eisenstein relied on and testified about expand on but generally corroborate the material concerning Mr. Coney's social history collected by Casabielle in 1992, memorialized in his notes, but never heard by the jury (DAT. 2735-2816, 2848-53).[8] Casabielle's notes indicated that he knew about corporal punishment, family violence, hallucinations, and substance abuse suffered by Mr. Coney, evidence that contradicted the testimony of most of the family members that Casabielle presented as defense witnesses at the penalty phase (Defendant's Exhibit Z)(R. 567-571). The order of the lower court found "[t]his testimony supplied no evidence of mitigating circumstances" (R. 1332). The substance of Casabielle's notes should have been provided to Drs. Mutter and David along with all the relevant prison records at the time of

[8]The 1992 testimony of Bonnie and Jessie Coney is devoid of any testimony about the family abuse, neglect, violence and substance abuse suffered by Mr. Coney and noted in trial counsel's notes. Only his mother's testimony makes any mention of her neglect of Mr Coney and Mr. Sanford's (Mr. Coney's stepfather) striking Mr. Coney in the head and drawing blood (DAT. 2743, 2748).

their evaluations of Mr. Coney in order for the experts to have a more complete picture of his background. Dr. Mutter testified at the evidentiary hearing that background material about the person being evaluated is helpful (R. 671-73).

This Court should rely on the findings of the order of the lower court that at the penalty phase trial counsel Mr. Casabielle "with only hastily obtained, fragmented testimony from family members and friends of Mr. Coney" painted a rosy picture of Mr. Coney's family life in which "several witnesses said the relationship between the defendant and his stepfather was not good, they noted only one incident in which the step-father struck the defendant" (R. 1332). Mr. Casabielle's testimony at the evidentiary hearing and his preparation for the penalty phase in 1992 demonstrated that he did not understand mitigation (R. 553-54, 556). His deficient performance has been established for purposes of Strickland and Williams.

(4) FAILURE TO HAVE MR. CONEY EVALUATED PRE-TRIAL

There was abundant information from prior proceedings available to actually place trial counsel on notice that Mr. Coney had mental health issues and a history of head injuries (R. 472-74, 478). A reasonable review of Mr. Coney's prison records and court files would have provided trial counsel with a history of Mr. Coney's mental health diagnoses and treatment, low IQ scores and head injuries. Trial counsel himself testified that after the guilt phase he interviewed Mr. Coney's family members and learned from them about abuse, gasoline huffing, head injury and a history of hallucinations involving Mr. Coney (R. 570-72).

Without relying on any of this information, Mr. Casabielle had moved for a psychological evaluation of Mr. Coney on April 1, 1991, a motion which was granted by Judge Roy Gelber (R. 488-90). This was many months before the trial. Mr. Casabielle testified that he requests such evaluations when he sees something that concerns him "or just to be safe," so one would assume that Mr. Casabielle felt that an evaluation was necessary,

even though he now claims otherwise (R. 479, 481). Even if Mr. Casabielle's goal was "just to be safe," it defies logic that he failed to then have any evaluation performed until Mr. Coney was found guilty of first degree murder.

Mr. Casabielle misled the lower court prior to trial regarding what he had done to prepare Coney's case (R. 410-11). He then retained Drs. Mutter and David after the guilt phase to do what amounted to drive-by evaluations (1.5 hours each) to continue to cover-up from the Court and Mr. Coney his own negligence during the preceding year. He retained Drs. Mutter and David, but testified that he "strategically" kept background information from them (R. 597-601).

Mr. Casabielle testified that he did this because he did not want "additional testimony about Mr. Coney raping people . . .", from Department of Corrections records, to come out before the jury or the trial court (R. 599). Yet trial counsel was forced to admit that the limited prison records that were in his trial file had no such

information in them (R. 600). He could not recall where he learned there were allegations that Mr. Coney had raped other inmates (R. 600). Yet Mr. Coney was never tried, much less adjudicated guilty, for any alleged prison sexual assaults, as Casabielle acknowledged in his testimony (R. 627).

Mr. Casabielle failed to provide any background information about Mr. Coney to Dr. David and could only have supplied the 61 pages that he had acquired of Mr. Coney's voluminous prison records to Dr. Mutter (R. 561-66, 597). Dr. David performed his neurological evaluation of Mr. Coney with Mr. Coney shackled and handcuffed and with guards present (R. 637-38). Mr. Casabielle attended neither evaluation. If he had, perhaps he could have passed along some of his knowledge about Mr. Coney, asked about neuropsychological testing, requested an order that his client not be chained during the neurological examination, or have explained what mitigation was all about. The set and setting in which Drs. David and Mutter formed their conclusions was created by trial counsel's

negligence.

Trial counsel's failure to ever have Dr. Castiello, the psychiatrist appointed pre-trial as a defense confidential expert by Judge Gelber, to evaluate Mr. Coney pre-trial was a failure to obtain adequate mental health evaluations of Mr. Coney under Ake v. Oklahoma, 470 U.S. 68 (1985). Strategy requires a plan, careful thought as to the kind of mental health or other experts that should be retained, provision of background materials to the experts, consideration to the types of testing, background investigation, interviews with family members and friends, client involvement, and adequate preparation time for witnesses. The order of the lower court found that Mr. Casabielle's "strategic decision" to wait until Mr. Coney had been found guilty of first degree murder to begin preparing for the penalty phase was deficient performance.[9]

[9]"[I]t is clear that Mr. Casabielle was not planning to investigate the defendant's background until it became necessary, that is, until after a jury would find the defendant guilty of a capital offense." (R. 1329).

"[M]erely invoking the word strategy to explain errors [is] insufficient since `particular decision[s] must be directly assessed for reasonableness [in light of] all the circumstances.'" Horton v. Zant, 941 F. 2d 1449, 1461 (11th Cir. 1991) (quoting Strickland v. Washington, 466 U.S. at 691) (footnote omitted). "[C]ase 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." Horton, 941 F.2d at 1462.

An attorney cannot make a strategic decision not to present a potentially viable issue at the guilt phase or at the penalty phase of a capital trial absent a diligent investigation. Despite self-serving language to the contrary in the State's brief, the parties stipulated that Dr. Castiello had no recollection of ever examining Mr. Coney and had no case file or other record of Mr. Coney (R. 928). The order of the lower court found that trial counsel himself testified that he did not recall if Castiello had ever examined Mr. Coney (R. 1349). The

lower court also found that there is no record of any report by Dr. Castiello and no bill submitted by him or evidence of payment (R. 1350). By failing to follow through and have Dr. Castiello or some other expert evaluate Mr. Coney pre-trial, Casabielle forfeited any opportunity to consider alternative defenses at the guilt phase. He also gave up any opportunity to begin developing his penalty phase case until after Mr. Coney was convicted. Again, as the lower court found, Mr. Coney has established deficient performance.

(5) FAILURE TO ATTEND EVALUATIONS/EXPLAIN MENTAL MITIGATION

This Court has described extreme mental or emotional disturbance as "less than insanity but more than the emotions of an average man, however inflamed." State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). Based on his testimony at the evidentiary hearing, Mr. Casabielle was not familiar with this case law either in 1992 or in 2000 and could hardly have passed along to his experts knowledge he did not have himself (R. 555). Dr.

Eisenstein testified at the evidentiary hearing that it was his opinion that Mr. Coney met this standard at the time of the offense (R. 847). In failing to attend either Dr. David's neurological evaluation or Dr. Mutter's psychiatric evaluation, trial counsel forfeited his best opportunity to provide the experts with background information about Mr. Coney and the benefits of his own personal knowledge about Mr. Coney. He could have told Dr. David that he had not asked Dr. Mutter to do neuropsychological testing, something that Dr. David's testimony and report reveal he believed was to take place (Defendant's Exhibit V).[10] He could have made arrangements for Mr. Coney to be examined without shackles and chains by the neurologist, a situation that Dr. David admitted was problematic (R. 637-38). He could have explained to the psychiatrist, Dr. Mutter, that he was looking for mitigation evidence and then explained that Mr. Coney's

[10]The order of the lower court found that Dr. David's mistaken belief that Mr. Coney was scheduled to undergo neuropsychological testing was attributable to trial counsel's deficient performance. (R. 1332).

profession of innocence did not foreclose the finding of mitigation by an expert, something that Dr. Mutter did not understand (Defendant's Exhibit W). He could have met with Dr. Mutter after the examination of Mr. Coney, something he did not do (R. 657). He could have provided each of the two experts in 1992 with copies of the other's report before making a decision about not calling them to testify (R. 659).

At the evidentiary hearing Dr. David could not fault the findings of Drs. Hyde and Eisenstein, admitting that "another examiner might come to the different conclusion and place a different total value on one or another observation" (R. 642). Mr. Casabielle's testimony at the evidentiary hearing demonstrated that he did not understand mitigation (R. 553-54, 556). His failure to attend the evaluations or to insure that the two experts performed competent and fully informed evaluations was deficient performance for purposes of Strickland and Williams.

(6) FAILURE TO PROVIDE MR. CONEY'S PRISON RECORDS TO THE

EXPERTS

Evidence concerning Mr. Coney's extensive history of mental health issues and impulsivity from 1965-1990, documented by Department of Corrections records available at the time of the 1992 trial, was presented at the 2000 evidentiary hearing (Defendant's Exhibit 2-F, Tabs 8-12)(R. 704-05). These records supported the findings and opinions of Dr. Thomas Hyde, the defense neurologist, and Dr. Hyman Eisenstein, the defense neuropsychologist, who both testified at the evidentiary hearing (R. 699-780)(R. 835-1157). Specific examples from the prison records of the many "red flags" indicating potential psychological issues regarding Mr. Coney were introduced through the testimony of Dr. Eisenstein (R. 884-922). A complete copy of all the prison records of Mr. Coney in possession of postconviction counsel was filed with the court after the evidentiary hearing (Supp.R. 1106). The State presented no evidence to show that trial counsel had any more than a scant 61 pages of Mr. Coney's prison records from 1965-1992 (R. 558-65, 599-600). An invoice in the

court file shows that trial counsel received 61 pages of records from DOC on January 22, 1992 (R. 332). None of the prison records in his trial file contained any information about alleged sexual assaults by Mr. Coney on other inmates (R. 600).

The testimony of the experts speaks for itself, but examples of relevant prison records that were available to Mr. Casabielle in 1992 include: a pre-sentence investigation report prepared in connection with Mr. Coney's November 24, 1965 Dade County conviction for the then capital crime of rape. Included in the section entitled "Health" are comments about mental and emotional issues: "School records reveal that the subject has an IQ of 70 and he can barely read or write." The summary that concludes the report states that "[t]his 18 year old Negro male was born out of wedlock in Georgia and he was raised by his maternal grandparents. In 1957 the family moved to Miami but the subject began having trouble at school. He began to be absent frequently and testing revealed that he was of limited mental ability and this

explained his lack of interest in school. In 1962 he withdrew for good, after completing only the seventh grade and he can barely read and write" (R. 885-86)(Defendant's Exhibit 2-F, Tab 8). Other examples of relevant records raised at the hearing are: a May 31, 1972 treatment note states that Coney is reporting "dizzy spells" (R. 887); a 6/26/78 note states "Patient claims he has been hearing voices calling his name all the time," and "Psychological testing to rule out organicity." 6/26/78 "auditory and visual hallucinations" and medication with an anti-psychotic, Haldol (R. 898); records of a 7/18/86 suicide attempt, thorazine prescribed (R. 906-07); and a March 7, 1990 Individual Written Treatment Plan for Mr. Coney, signed by Senior Psychiatrist Miguel A. Mora, reporting an Axis I diagnosis of depression, but no Axis II diagnosis (R. 915).[11]

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[11]The lower court's order granting relief notes that some of the information in the prison records relied on by Drs. Hyde and Eisenstein included information "which likely would be harmful to Mr. Coney " if it had been available for review by the jury. In footnote 9 of the order, the lower court specifically noted: "the records

Even a cursory review of Mr. Coney's prison records would have provided a wealth of material of interest to a prospective pre-trial mental health expert and certainly trial counsel should have requested the complete file and been fully familiar with the contents. Since Mr. Coney had been incarcerated continuously since 1965, the prison medical, mental health and conduct records were, of necessity, the single most critical source of background material for **any** sort of expert to review. They were the written record of the 27 years of his life from 1965-1990.

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include assessments by prison psychologists that the defendant suffers from an anti-social personality disorder [ASPD], and include several disciplinary reports for sexual assaults upon other inmates." (R. 1335). Counsel would note that Dr. Mora's 1990 DSM diagnosis was made weeks before the death of Southworth and specifically did not include a diagnosis of anti-social personality disorder on Axis II. Counsel notes that the ASPD diagnosis is not consistently found in Mr. Coney's prison records by any means. Additionally, none of the experts, including Dr. David, Dr. Mutter, Dr. Eisenstein, Dr. Hyde or Dr. Ansley made a definitive diagnosis of Mr. Coney with this condition. Dr. Hyde testified his opinion was that prisoners in the corrections systems who are guilty of their crimes are anti-social (R. 763). In addition, Mr. Coney was never tried or convicted of any of the alleged sexual assaults noted in disciplinary reports.

Casabielle's failure to obtain and review Mr. Coney's complete prison records, and to then provide them to an expert both pre-trial and before the penalty phase was deficient performance pursuant to Strickland.

B. DISCUSSION

The State alleges that Dr. Mutter testified that Mr. Coney admitted he was guilty of the 1976 rape during his psychiatric interview with Mr. Coney. State's Brief at 43. This is not true. Dr. Mutter's testimony was that Mr. Coney told him he was guilty of the 1964 rape charges but not guilty of the 1976 rape charge (R. 663).

The State contends that trial counsel "offered a cohesive and detailed portrait of Defendant's background" at the penalty phase in 1992. State's Brief at 46. This conclusion flies in the face of the evidence presented at the evidentiary hearing and the order of the lower court (R. 1332). The evidence included Mr. Coney's prison medical and mental health records, the content of trial counsel's own investigative notes prior to the penalty phase, the opinions of experts who testified at the

evidentiary hearing, and Dr. Eisenstein's opinions about non-statutory mitigation based on his review of the affidavits of Bonnie, Isaac and Benny Coney compared and contrasted to the 1992 family testimony at the penalty phase and Casabielle's 1992 notes. The picture trial counsel painted of Mr. Coney in 1992 at the penalty phase was false and incomplete at best.

As to the prejudice regarding trial counsel's failure to have Mr. Coney examined by competent mental health experts pre-trial or at any time, the lower court's order found that both defense experts called at the evidentiary hearing, Dr. Hyde and Dr. Eisenstein, were credible (R. 1334-35). Further, the lower court found that their conclusions that Mr. Coney "suffers from brain dysfunction and psychiatric illness" would likely result in a jury "recommend[ing] a penalty other than death" (R. 1334). It also bears consideration by this court that the State's rebuttal witness at the hearing, Dr. Ansley, testified that she had no opinion about the presence or absence of mitigation, testified that she accepted Dr. Eisenstein's

testing, and found Mr. Coney's performance to be impaired on several of the tests that she administered (R. 1180, 1231-32, 1259). The State simply ignores the specific finding of the lower court that the evaluations of Dr. David and Dr. Mutter were inadequate, thus failing to meet the Ake standard and supporting the finding of deficient performance by trial counsel.[3]

The State's suggestion that Dr. Mutter "understood the nature of the mitigating evidence" that he was retained to look for is refuted by his report, his testimony, and trial counsel's testimony at the evidentiary hearing, as the order of the lower court found (R. 1330-31). The lower court's order stated definitively that trial counsel was on notice that he should have clarified the issues concerning mitigation with Dr. Mutter or sought "an evaluation from a more knowledgeable expert" (R. 1331).

[3]"Both [Dr. David and Dr. Mutter] testified at the post-conviction hearing. Their testimony reflects the inadequacy of their cursory and misguided evaluations, an inadequacy caused in large part by the inadequacy of trial counsel's hurried preparation for these evaluations" (R. 1330).

The State criticizes the lower court for what it describes as a failure to carry out its judicial post-conviction function pursuant to Porter v. State, 26 Fla. L. Weekly S321 (Fla. May 2001). However, the selective quotations relied on by the State are misleading. A jury at a new penalty phase will hear the evidence in Mr. Coney's case if the order of the lower court is upheld by this Court. The lower court's grant of penalty phase relief to Mr. Coney is based on credibility findings that, at the end of the day, accrue in Mr. Coney's favor. As the order below stated, "[t]he court cannot conclude that the evidence presented by the defendant, if heard by a jury, would not have tilted the balance in favor of a recommendation of life" (R. 1335). Thus, the lower court's order simply contradicts the State's position that "Dr. Hyde and Dr. Eisenstein's testimony failed to illustrate a reasonable probability that had the jury or judge been presented with their opinions at trial, the outcome...would have been different" State's Brief at 59.

The State's assault on the opinions of Dr. Hyde and Dr. Eisenstein ignores the lower court's order finding Dr. Hyde to be "a highly qualified behavioral neurologist" (R. 1334).

The State's claim that Dr. Eisenstein is biased because 98% of his psychological practice derives from death row work is a misquotation of the record. State's Brief at 61. Dr. Eisenstein actually testified on cross-examination that 60% of his practice involved forensic neuropsychology, and that 98% of that forensic work came from working with defense lawyers (R. 968). His personal opposition to the death penalty, claimed as bias by the State, was shared by the State's rebuttal witness Dr. Ansley (R. 1260). An entirely frivolous and false claim by the State that undersigned counsel was "coaching" Dr. Eisenstein during his testimony with some sort of signal was specifically denied by counsel on the record and the lower court made no findings (R. 1044).

Dr. Eisenstein's testimony at his nine hour deposition prior to the hearing concerned his evaluation and the

information that he had reviewed prior to the deposition (R. 1013). He had reviewed the 1992 penalty phase testimony, prison records and a social history derived from the 3.850 motion, but otherwise had not been provided any additional family history (R. 993, 1013, 1024). He testified that the primary source for his findings of mitigation were the results of the neuropsychological test battery he administered to Mr. Coney (R. 847-48).

The State's brief failed to mention that Dr. Ansley administered her own Rey Osterreith test to Mr. Coney (R. 1243). She testified that Mr. Coney performed more poorly when she administered the test (R. 1243). She also failed to mention in her testimony that the Rey Osterrieth Figure raw data from Dr. Eisenstein's administration of the test revealed that on the delayed recall portion of the test, Mr. Coney's performance on the Rey indicated only 55% recall, 20 of 36 correct (State's Exhibit 3). She also testified that she could not opine that a good performance on the Rey translated into a real life ability to plan things (R. 1189-90). Thus the relevance of the

respective Rey results in no way impeaches the findings of Dr. Eisenstein.

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

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

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

Mr. Coney has established that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. In Mr. Coney's case, the prejudice is

apparent. Mr. Coney's sentencing jury was entitled to know the reality of Mr. Coney's background, as it "might well have influenced the jury's appraisal of his moral culpability." Williams, 120 S.Ct. at 1515. "Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990) (citing Lockett v. Ohio, 438 U.S. 586 (1978)). Moreover, "[m]itigating evidence ... may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death eligibility case." Williams, 120 S.Ct. at 1516.

The trial court found no mitigation at trial (DAR. 415-16). The same court has now entered a detailed post-evidentiary hearing order finding that "[t]he court cannot conclude that the evidence presented by the defendant, if heard by the jury, would not have tilted the balance in favor of a recommendation of life" (R. 1335). The lower court was well aware of the aggravation found at trial

because she wrote the sentencing order (DAR. 412-16). The prejudice to Mr. Coney is patent in this case, where the jury recommendation for death was by the narrowest of margins, seven (7) to five (5) (DAR. 396). The lower court's order specifically acknowledged the prejudicial impact of trial counsel's deficient performance:

> In this case, by the thinnest margin allowable, seven to five, the jury recommended the imposition of the death penalty. If only one of the seven jurors voting for death had been persuaded to change her or his vote, the recommendation would have been for a life sentence and, in view of the law requiring the presence of compelling evidence to override a jury's recommendation of life, **the court would likely have followed the jury recommendation and sentenced the defendant to life in prison**

(R. 1333-34)(emphasis added). Mr. Coney's case in similar to the situation in State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987)("A new sentencing hearing is mandated in cases which entail psychiatric examinations so grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage.") Based on

the evidence presented below, Mr. Coney submits that he has established prejudice. State v. Lara, 581 So. 2d 1288 (Fla. 1991); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Rose v. State, 675 So. 2d 567 (Fla. 1996). The evidence presented at Mr. Coney's hearing is identical to that which established prejudice in these cases, and Mr. Coney is similarly entitled to relief under the standards set forth in Strickland and Williams.

A proper analysis of prejudice also entails an evaluation of the totality of available mitigation--both that adduced at trial and the evidence presented at the evidentiary hearing. Williams at 1515. The law does not require that Mr. Coney establish the existence of mitigating circumstances beyond a reasonable doubt. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1991)("when a reasonable quantum of uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved").

During the evidentiary hearing, Mr. Coney presented a wealth of unrebutted mitigation, both statutory and

nonstatutory, that was fully available and could have been presented had counsel not performed deficiently. The compelling and unrebutted mitigation presented below "might well have influenced the jury's appraisal of [Mr. Coney's] moral culpability." Williams at 1515. This is precisely what the lower court's order found (R. 1333-34). In Mr. Coney's case, "counsel's error[s] had a pervasive effect, altering the entire evidentiary picture at [the penalty phase]." Coss v. Lackwanna County District Attorney, 204 F.3d 453, 463 (3d Cir. 2000).

In 1992, The trial court found no mitigation (DAR. 415-16). Now, that same court has found that "[t]he court cannot conclude that the evidence presented by the defendant, if heard by the jury, would not have tilted the balance in favor of a recommendation of life" (R. 1335). Under these circumstances, Mr. Coney has established prejudice. See Rose v. State, 675 So. 2d 567, 572 (Fla. 1996); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992);

Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991). The lower court's order granting penalty phase relief to Mr. Coney should be affirmed by this Court.

ARGUMENT II - CONFLICT OF INTEREST

Mr. Coney was prejudiced by the lack of a full and fair hearing on his conflict of interest claim. Additionally, the lower court acquiesced to the State's eleventh hour oral motion in limine on December 13, 2000, requesting that former circuit court Judge Roy Gelber's testimony be deemed inadmissible "until such time that the defense points to some course of action taken or not taken as a result of the alleged conflict" (R. 432-35, 531, 533, 686-92). The State had six months after Gelber was listed as a witness on June 7, 2000 to object to his appearance, and failed to do so until the evidentiary hearing began (Supp. R 864-65). The State never made a request to depose Gelber pursuant to State v. Lewis, 656 So. 2d 1248 (Fla. 1995).

The lower court entered a post-evidentiary hearing order denying Mr. Coney's conflict of interest claim:

> The defendant sets forth in claim XIV of his amended motion that trial counsel "was burdened by an actual conflict of interest adversely affecting counsel's representation." The conflict alleged is not the typical one of an attorney representing conflicting interests of two clients. Rather, the defendant claims there was a conflict between the attorney's self-interest in continuing to receive appointments from the trial judge and his duty to represent his client. The defendant does not explain how these two interests are antithetical. But even assuming they are, the question remains whether the client's interest was compromised, that is, was the representation afforded the defendant deficient. See Cuyler v. Sullivan, 446 U.S. 335 (1980); Buenoano v. Dugger, 559 So. 2d 1116 (Fla. 1990). Since this is precisely the question addressed in the defendant's other claims of ineffective assistance, the question need not be answered again. The court has already concluded that counsel's performance was deficient in the penalty phase and was adequate in the guilt phase. Counsel's motivation is not relevant

(R. 1340-41). The lower court included a footnote to her order on this matter as well:

> While in his written motion the defendant refers to the appointment of trial counsel as being part of a judicial patronage system, at the evidentiary hearing, the defendant implied that trial counsel may have participated in an illegal "kick-back" scheme. Mr. Casabielle testified that he was contacted by the FBI during the "court-broom" investigation, but declined to give an interview. Apparently no further action was taken against him

(R. 1341). Mr. Coney required former Judge Gelber's testimony to set up the parameters of his conflict claim, one of the issues that he had been granted an evidentiary hearing on. Without Gelber, there was no other witness available to support the allegation of a conflict of interest. Neither Mr. Casabielle nor former judge Harvey Shenberg, a federal convict, were going to do so. Gelber's testimony, if allowed, would have supported the existence of an actual conflict of interest between Mr. Coney and Mr. Casabielle that was never revealed to Mr. Coney by Mr. Casabielle or anyone else. The purpose of calling Mr. Gelber was not to assassinate the character of Mr. Casabielle, but to present credible testimony in

support of the existence of an actual conflict of interest. The Eleventh Circuit has set forth the test for distinguishing between actual from potential conflicts of interest:

> We will not find an actual conflict of interest unless appellants can point to specific instances in the record to suggest an actual conflict or impairment of their interests...Appellants must make a factual showing of inconsistent interests and must demonstrate that the attorney made a choice between possible alternative causes of action ... If he did not made such a choice, the conflict remain(s) hypothetical.

Reynolds v. Chapman, 253 F. 3d 1337, 1343 (11th Cir. 2001), citing Smith v. White, 815 F. 2d 1401, 1404 (11 Cir. 1987).

Mr. Coney's 3.850 conflict claim was plead generally, but even so, the 3.850 motion laid out the areas that Mr. Coney was prepared to present testimony about at a hearing (R. 133-35). The claim anticipated the impact of the conflict on trial counsel's failure to investigate both defenses at the guilt phase and mitigation at the penalty phase. By the time of the evidentiary hearing, counsel

was prepared to present testimony that went beyond the allegations in Claim XIV.

Counsel was prepared to provide testimony from former Judge Gelber establishing an actual conflict between trial counsel and Mr. Coney, and then to show how the conflict adversely affected Casabielle's representation of Mr. Coney.[4]

There were five areas where the conflict influenced Mr. Casabielle's performance as trial counsel to Mr. Coney's detriment: (1) his utter failure to investigate Mr. Coney's mental health pre-trial despite having an expert appointed by Judge Gelber in April 1991 to assist him in doing just that; (2) his resulting inability to consider alternate defenses based in any way on Mr. Coney's mental status; (3) Casabielle's negligent failure

[4]"To prove adverse effect, a defendant needs to demonstrate: (a) that the defense attorney could have pursued a plausible alternative strategy, (b) that this alternative strategy was reasonable, and (c) that the alternative strategy was not followed because it conflicted with the attorney's external loyalties." Reynolds at 1344, citing Freund v. Butterworth, 165 F. 3d 839, 860 (11th Cir. 1999).

to meet with or to discuss the case with Mr. Coney during two significant chunks of time: from July 19, 1990-October 22, 1990 (a period framed by Mr. Coney's unsuccessful motions to discharge Casabielle on July 12, 1990 and October 12, 1990) and a second period of no meetings from March 25, 1991-January 10, 1992 (a period inclusive of the appointment of Dr. Castiello on April 23, 1991, a May 21, 1991 letter from Mr. Coney to Casabielle asking to see Casabielle or the investigator, and the press announcement of Operation Court Broom on June 13, 1991), (R. 501); (4) his waiver of Mr. Coney's appearance at the January 31, 1992 pre-trial hearing three weeks after he met with Mr. Coney for the first time in nearly ten months, a waiver that served to cover up the fact that Mr. Coney had never been examined by Dr. Castiello or any other expert pre-trial with the result that Casabielle was unprepared to proceed; and (5) his failure to reveal to Mr. Coney his corrupt relationship with Judge Roy Gelber and Judge Harvey Shenberg, which if revealed, would certainly have resulted in Mr. Coney acquiring another

lawyer.

Roy Gelber was a key witness supporting the conflict because, as counsel proffered below, he would have testified that he was the judge: (i) who appointed Mr. Casabielle to Mr. Coney's case in return for a 25% kickback of Casabielle's special public defender fee to be paid at the end of the case through middleman Judge Harvey Shenberg as part of an on-going corruption scheme implicating Casabielle from 1988-1991; (ii) who refused to give a fair hearing to Mr. Coney's pro se attempts to discharge Casabielle; (iii) who appointed the psychiatrist Dr. Castiello, an expert who never saw Mr. Coney or prepared a report, who was the only defense mental health expert pre-trial; and, (iv) who presided over the process of keeping Mr. Casabielle on the case in order to maximize the financial advantage for both Gelber and Casabielle (R. 527-33).

Given this background, counsel should have been allowed to question trial counsel at the evidentiary hearing to attempt to establish the corrupt relationship

that was the background for Casabielle's appointment to Mr. Coney's case by Roy Gelber, facts that set up the conflict of interest. Counsel asked Casabielle, "During 1988 through 1991 were you involved in a scheme to pay a percentage of your final fees on cases back to Judge Roy Gelber in return for appointments?" (R. 526). He never answered that question because the lower court sustained the state's objection on relevancy grounds before and after a proffer of relevancy (R. 526-533).

Roy Gelber should have been allowed to testify in his own right or to rebut whatever Casabielle said if he had be required to answer Mr. Coney's questions over the State's objections. The State did not move to exclude Gelber's testimony, but objected to it as inadmissible until "the defense points to some course of action taken or not taken as a result of the alleged conflict." (R. 434). This was done at the hearing on proffer. (R. 526-533). Mr. Casabielle also testified that although he "never received a target letter" from the state or federal government, it appeared to him from newspaper articles in

June 1991 that he was "somehow" under investigation in Operation Court Broom in 1990-91 (R. 516-18, 522). Two Miami Herald articles were proffered at the evidentiary hearing, Defendant's A-21 for identification, dated June 13 & 15, 1991.[5] The first article indicated that Mr. Casabielle was one of six defense lawyers doing court-appointed work in Dade County who had been named in federal search warrants in Operation Court Broom. The second article detailed that two lawyers, Willie Castro and Manuel Casabielle, had received 25% of Dade circuit Judge Roy Gelber's total appointments from September 1989 until May 1991. Statistics noted in the articles indicated Casabielle had been appointed to 16 cases for which he had been paid $15,000 as of May 1991. Mr. Coney also proffered charts and tables, used by the government in the federal Court Broom cases, that indicated during 1988-1991, Roy Gelber appointed Casabielle to 30 of

[5]These articles were already part of the appellate record having been attached to the direct appeal brief filed by Howard Blumberg in April 1993. (R. 319-21).

Casabielle's total 85 court appointments in Dade County, with his remaining 55 appointments split among 18 other judges. The charts indicate that Casabielle was paid $28,221.73 for the Gelber appointments, 27% of his total county payments of $103,608.23 for court appointments in 1988-1991. (Defendant's A-23, A-24 for Identification).

At the evidentiary hearing, Mr. Casabielle testified that an FBI agent and an FDLE agent attempted to speak with him regarding Court Broom, but he refused to cooperate (R. 518). Casabielle also testified that he **never** spoke directly with the defendant, Jimmie Lee Coney, about the fact that he was under investigation concerning Operation Court Broom (R. 520).

Mr. Casabielle was appointed to Mr. Coney's case on May 1, 1990 (Defendant's Exhibit A)(R. 454-55). In order to receive the full special public defender fee for representing Mr. Coney, Mr. Casabielle had to continue to represent Mr. Coney through the trial and sentencing. The fee Casabielle was ultimately paid in 1992 was $15,938 (Defendant's Exhibit N at R. 492)(DAR. 323). To get his

25% kickback, Gelber needed to keep Mr. Casabielle on Mr. Coney's case until Mr. Casabielle got his final fee. In other words, both Mr. Casabielle and former Judge Gelber had a significant financial interest in Mr. Casabielle continuing to represent Mr. Coney in spite of Coney's efforts to discharge him. As Mr. Casabielle testified, this was his first capital case to go to a penalty phase (R. 452), and as special public defender cases went, it turned into a big payday.

These circumstances support a per se conflict of interest between Mr. Coney and Mr. Casabielle. Mr. Casabielle testified that he failed to communicate to his client that he had been named in the papers in connection with Court Broom (R. 520). He failed to reveal to Mr. Coney the nature of the corrupt financial arrangement that had lead to Casabielle's appointment to Mr. Coney's case. See Rules Regulating the Florida Bar Rule 4-1.4, Communication.

Simultaneously, Mr. Casabielle violated his duty of loyalty to Mr. Coney. See Rules Regulating the Florida

Bar Rule 4-1.7, Conflict of Interest. Mr. Casabielle's independent professional judgment was compromised by the personal financial incentives that he had based on both the corrupt and secret appointment agreement with Judge Gelber and his personal financial incentive to remain on Mr. Coney's potentially lucrative case once he was appointed. His 25% of fee liability to Judge Gelber was unethical and illegal. He violated his duty of loyalty to Mr. Coney when he failed to explain this arrangement to Mr. Coney, making it impossible for Mr. Coney, who was already trying to fire him to make a knowing, intelligent and voluntary decision about whether to pursue new counsel (Defendant's Exhibits Q and R)(R 502-04). Comment to Rules Regulating the Florida Bar, Rule 4-1.7, bears on precisely this problem:

> Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client.

Judge Gelber was prepared to testify that his initials were on one of the rejected motions to discharge Mr. Casabielle, supporting the nexus of activities supporting the conflict claim. Mr. Coney submits that Gelber abused his discretion by failing to satisfy the Nelson requirement when considering Mr. Coney's **pro se** motion to Discharge Court-Appointed Counsel due to incompetency:

> If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable bias appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute.

Hardwick v. State, 521 So. 2d 1071, 1074-75 (Fla. 1988)(quoting Nelson V. State, 274 So. 2d 256, 258-59

(Fla. 4th DCA 1973)(citation omitted). The October 12, 1990 motion filed by Mr. Coney stated that he "was requesting a change of Court appointed attorney Mr. Manual Casabielle based upon his lack of preparation, competency and effective assistance in preparation of my defense" (DAR. 39-40). Mr. Coney withdrew the motion after a very brief hearing and off-the-record conversation with Casabielle, but as in the penalty phase when Mr. Coney was unable to make a waiver about use of experts because he didn't have sufficient knowledge to do so, he was also not given a fair and ample opportunity by Gelber to explain his reasons for wanting to discharge Casabielle. And he did not know the most important reason of all, the conflict set up by the kick-back arrangement, because no one had told him. Gelber failed to question defense counsel as to the merits of Mr. Coney's complaints or Casabielle's alleged incompetency. Finally, Gelber failed to make an adequate ruling as to the sufficiency of any of Mr. Coney's claims of ineffectiveness. (DAR. __)(Hearing of 11/09/90).

Postconviction counsel initially proffered the content of testimony of Roy Gelber, and ultimately offered on proffer Gelber's testimony in multiple Court Broom cases and related documents that were marked for ID concerning Court Broom (R. 527-31, 686-87, 689-92). The State made a procedural bar argument at the evidentiary hearing (R. 531). The lower court's failure to allow witness testimony that explained the context of Casabielle's appointment denied Mr. Coney a full and fair hearing (R. 518-533).

The record of Mr. Coney's trial and direct appeal reveals that Operation Court Broom was mentioned during voir dire, but that Mr. Coney was not present at sidebar when Mr. Casabielle informed the Court that he was a target of the Court Broom investigation. (R. 1081-85).

At the evidentiary hearing, Casabielle testified that he had never discussed Operation Court Broom with Mr. Coney (R. 520). During voir dire Mr. Coney was not privy to the discussions at sidebar concerning whether the

a potential juror, Schopperle, whose husband was an FBI agent involved in the Operation Court Broom investigation, might have been aware that trial counsel Casabielle's name had come up in connection to the investigation (R. 520-26). The trial record reflects the fact that the substantive sidebar discussion took place "outside the hearing of the defendant and the prospective jury" (DAR. 1081-85). The relevant sidebar exchange as to Court Broom is as follows:

> Mr. Casabielle: There is a third one, which is a little more delicate for me personally, that is the FBI agent's wife. Her husband works in -- my name appeared in the papers associated with that investigation. She's the only one that mentioned Courtbroom and I'm not -- that's a signal. I think it's only fair that further inquiry be had in that area.
>
> The Court: Again, how can we do that?
>
> Mr. Casabielle: Your Honor, maybe ask her what she has heard about the operation, and if there's anything about what she's heard that might affect this case, how closely she's followed the investigation, something along those lines, without suggesting that my name

> has come up in that investigation, but it's an area that, again, should be addressed.
>
> The Court: I'll certainly let you question her on that and ---
>
> Mr. Casabielle: Would the court entertain a -- I haven't established cause yet, so I'm not sure I have.
>
> The Court: We'll have her stay in here.

(DAT. 1083-84). Thus, the record is clear that this occurred outside of Mr. Coney's hearing. Casabielle did later individually voir dire juror Schopperle with Mr. Coney present (DAT. 1087-90, 1092-94). However, Mr. Coney would have to have been a mind reader to have figured out what this exchange with the potential juror was all about. The relevance of the line of inquiry to the conflict of interest now being claimed by Mr. Coney was concealed in the confidential exchange at sidebar that Mr. Coney plainly did not hear. Casabielle thereafter used a peremptory challenge to remove Ms. Schopperle from the venire (DAT. 1112). This Court's opinion on direct appeal is completely silent as to the voir dire bench

conference involving Ms Schopperle.[6]

The State argued at the evidentiary hearing that this area of inquiry failed to address what it described as the lower court's grant of a "very limited exploration of the claim of conflict as it relates to the failure to investigate the family background and mental mitigation and present a more complete or thorough mitigation penalty phase" (R. 524). The State's argument below ignores those aspects of Claim IV having to do with guilt phase ineffective assistance. The lower court then sustained the State's pending objection to the question posed to Mr. Casabielle, "Did you feel then that you had any ethical responsibility to reveal [being named in Court Broom] to your clients or potential clients?" (R. 522, 526).

At the hearing Mr. Coney unsuccessfully moved for the

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[6]If the intention of this Court was to apply harmless error analysis to Mr. Coney's absence from the Schopperle bench conference, surely this Court should now undertake a de novo review of that analysis in light of the fact that Mr. Coney would never have made a knowing, intelligent and voluntary waiver of his right to be aware of the content of that conference, which trial counsel had every reason to keep secret from him.

admission into evidence of excerpts from the testimony of former circuit court Judge Roy Gelber in the case of United States v. Castro, et. al. No. 91-0708 CR, United States District Court, Southern District, and for the admission of his testimony in the case of United States v. Shenberg, No. 91-0708 CR, United States District Court, Southern District, with the result that both were marked for identification as Defendant's A-49 and proffered for the appellate record (R. 686-691). In the Castro proceeding, which involved the prosecution of several lawyers in the Court Broom kickback scheme, Gelber testified as follows:

> Q And did Agent Becker ask you whether Mr. Luongo had paid any kickbacks to you for court appointments?
>
> A Yes, he did.
>
> Q And what did you answer?
>
> A No.
>
> Q Was that the truth?
>
> A No.
>
> Q Okay. Was one of the lawyers

he asked you about named Manny Casabielle?

A Yes.

Q Okay. And did Agent Becker ask you whether you had received any kickbacks from Manny Casabielle --

A Yes.

Q -- in return for court appointments?

A That's correct.

Q And what did you answer?

A I said, no.

Q And was that the truth?

A No, it was not.

Q Okay. You had received kickbacks from Manny Casabielle?

A He was a former partner of Judge Shenberg and a very close friend of his, and he was the first person who I was involved in any corruption with. Harvey Shenberg asked me if I wanted to give him some appointments and get some of the money back, because Harvey was intimately involved in my problems and knew my financial problems. And I said okay. So Manny was the first person that I gave some appointments to involved in a kickback situation.

Q Okay. And did you receive money back from Manny Casabielle?

A I received money from Harvey -- from Manny through Harvey.

Q Harvey Shenberg?

A Yes.

(Defendant's Exhibit Marked for Identification A-49), U.S. v. Castro, No. 91-0708-CR-Gonzalez, U.S. District Court, Southern District of Florida, October 28, 1993, Vol. 4 at 15-16. In the Shenberg proceeding, a prosecution of former Judge Shenberg and others on RICO charges, former Judge Gelber testified as follows:

Q Did there ever come a time when you discussed with Harvey Shenberg kickbacks from court appointments?

A Yes.

Q When was that?

A Again, all of the kickback situations came about in late summer, early winter of '89.

Q What if any conversations did you have with Harvey Shenberg about this matter?

A Well, I had told him of what I

was doing with others, just to kind of get some feedback if I was doing something overtly stupid, other than the acts itself, that would give away what was going on. At some point in time, he indicated that he had a former partner who could probably use some court appointments and was I interested in including or putting him on my list of court appointments.

Q Who was that ex-partner?

A That was Manny Casabielle.

Q Did you discuss with Harvey Shenberg what percentage you would receive back for appointing Manny Casabielle?

A It was the same, twenty-five percent.

Q Did you personally know Manny?

A I knew him from around the courthouse. I knew he was Harvey's ex-partner. I knew him from the building. I knew that he was a good, competent lawyer.

Q Did you have any discussions with Harvey Shenberg as to how you would receive this kickback?

A He said it would just go through him.

Q He being who?

A Harvey, Harvey Shenberg.

Q Did you begin appointing Manny Casabielle, I say Manny Casabielle, is it Manny Casabielle?

A I'm from Brooklyn, so how I pronounce it, I am not sure.

Q Could you spell it?

A No, I wouldn't take a shot at that either. C-A-S-A-B-I-E-L-L-E. That would be a guess.

Q Thank you. Did you start appointing him to cases?

A Yes, I did.

Q Did you receive any money from Harvey Shenberg as a result of these appointments that were made to Manny?

A Yes.

Q How would he pay you?

A Every couple of months he would just say I have, you know, some money for you, I have something for you from Manny. And he would have money for me. I would either take it from him or tell him to hold it for me.

Q About how many times did you receive money from Harvey Shenberg that had purportedly come from Manny Casabielle?

A Maybe four or five, six at the most.

Q How much money are we talking about?

A I'd say the smallest he ever gave me was five hundred dollars and the most a thousand or twelve hundred dollars.

***

Q Following August or September of '89 when you gave the five thousand dollars to Harvey Shenberg, did he continue to hold money for you?

A Yes.

Q When and what types of money?

A At various times when he had money for me from Manny, occasionally I would just tell him to put it on my account. When I would receive some of the funds from Ray Takiff, I gave him some of those funds as well.

Q And when did Harvey Shenberg cease holding money on your behalf?

A June 8, 1991.

(Defendant's Exhibit Marked for Identification A-49), United States vs. Shenberg, et. al., No. 91-0708-CR-Gonzalez, U.S. District Court, Southern District of

Florida, December 22, 1992, Vol. 41 at 6503-6505, 6541.

The lower court allowed the State's objection to the admission of the testimony and noted that she would not review the Gelber testimony if it was proffered (R. 692, 1267-68). Additionally, the lower court sustained the State's objection to the admission of Defendant's A-50, a copy of the opinion in Unites States v. Harvey N. Shenberg, et. al., 89 F. 3d 1461 (11th Cir. 1996).

The Shenberg opinion affirmed the conviction on RICO charges in federal court of former Judge Shenberg. Id. at 1481. According to the opinion, Roy Gelber had agreed to cooperate with the government in its investigation of corruption in the Dade County Circuit Court shortly after the government ended "Operation Court Broom" and executed search warrants in the homes and offices of Gelber, Shenberg and others on June 8, 1991. Id at 1468. In a recitation of undisputed facts and factual inferences the jury was entitled to draw in the "Operation Court Broom" cases, the Eleventh Circuit laid out aspects of corruption in the Dade County Circuit Court relevant to the conflict

alleged by Mr. Coney:

> In November 1988, the citizens of Dade County, Florida, elected judicial candidate Roy T. Gelber to the Circuit Court of the Eleventh Judicial Circuit of Florida. Gelber, prior to taking office, arranged with his former law partner, Stephen Glass, to appoint Glass as special assistant public defender (SAPD). In return for SAPD appointments, Glass agreed to give Gelber one-third of the fees received. Gelber made similar kickback arrangements with other lawyers in Miami while in office. Also in 1988, Gelber became close friends with Dade County Court judicial candidate Harvey N. Shenberg. Shenberg, who also won his bid for election, advised Gelber regarding the acceptance of kickbacks and other illegal schemes. During one of Shenberg's conversations, Shenberg suggested that Gelber add one of Shenberg's former law partners, Manny Casabielle, to the court appointment list in exchange for kickbacks of twenty-five percent. Gelber agreed. Thereafter, Shenberg periodically gave Gelber money in amounts ranging from $500 to $1,200 on Casabielle's behalf. Oftentimes, Gelber directed Shenberg to hold the money for safekeeping.
>
> ***
>
> State and federal officials (the government) eventually learned of the kickback scheme, and in 1989, the government launched a sting operation

> called "Operation Court Broom" to investigate corruption in the Circuit Court of Dade County.

Id at 1465-66.

This information supported the proffered representation by undersigned counsel at the evidentiary hearing that Gelber would have testified at the evidentiary hearing that he had a kickback arrangement with Mr. Casabielle at the time Gelber appointed him to Jimmie Coney's case. And, the opinion in Shenberg stands for the proposition that Roy Gelber's credibility as a witness was established in federal court.

Evidence at the hearing set out the various points in time when Mr. Coney tried to fire Mr. Casabielle. (Defendant's Exhibits Q and R at R. 502-04). Q was a petition filed by Mr. Coney with Judge Gelber on July 12, 1990 alleging ineffective assistance by trial counsel. R is an October 12, 1990 Motion Requesting Change of Counselor filed by Mr. Coney that alleging that "[c]ounselor for the defense has failed to investigate, obtain depositions from anyone other than those provided

to him through discovery by state agencies. Even though he have been given names and other detail information more favorable to the defense he has failed to investigate or file the necessary pre-trial motions." It goes on to request a "competent, effective and experienced attorney in dealing with capital offenses." Also entered into evidence as Defendant's Exhibit T is a May 22, 1991 letter to Casabielle from Mr. Coney complaining in some detail about case preparation and lack of meetings.

The fact that Casabielle ultimately presented a defense that Mr. Coney was innocent and that someone else, perhaps Southworth's cellmate Santerfeit, set the fire did not relieve defense counsel of the responsibility to have fully investigated alternate defenses. The State is not in a position to claim that it is unreasonable to assume that the conflict contributed to Mr. Coney's conviction because the conflict did influence Casabielle's preparation of the guilt phase case in the ways noted supra that operated to Mr. Coney's detriment.

Mr. Coney's situation is also the situation set up in

Cuyler v. Sullivan, 446 U.S. 335 (1980). Here, as there, the actual conflict of interest set out supra adversely affected Mr. Casabielle's performance in Mr. Coney's case. The multifaceted conflict set up by Mr. Casabielle's kickback arrangement with Judge Gelber, the judge who appointed him and who presided over the case for fourteen months, demonstrates that Mr. Coney was denied the effective assistance of counsel.

Mr. Coney's situation is not a potential conflict of interest, but an actual conflict of interest. Prejudice to Mr. Coney can and should be presumed. The testimony of former Judge Gelber was the crucial element supporting the existence of the actual conflict. Mr. Casabielle actively represented conflicting interests during the course of his appointment as a special public defender: his own corrupt financial interests and Mr. Coney's legal interests. The conflict between these interests adversely affected Mr. Casabielle's performance as counsel for Mr. Coney. See Neelley v. Noyle, 138 F.3d 917 (11 Cir. 1998).

Substantial additional testimony of Gelber in federal

court supporting the earlier proffers was filed in the court file after the hearing, as counsel promised to do on the record. (R. 845). A Notice of Filing of this material dated January 8, 2001 appears in the supplemental record, but the attachments themselves do not. (Supp.R. 1100-04). Simultaneously with this brief, a motion to supplement is being filed with the relevant materials attached.

ARGUMENT III - NO ADVERSARIAL TESTING AT THE GUILT PHASE.

The lower court's order demonstrates a failure to use the record or files in this case when summarily denying the guilt phase claims in Mr. Coney's case. As his motion demonstrated, the records and files do not show conclusively that Mr. Coney is not entitled to relief. Thus, the order of the lower court ignores the express requirements of Rule 3.850 and the substantial and unequivocal body of case law from this Court holding that courts must comply with the Rule. As to the sufficiency of the pleadings of ineffectiveness of trial counsel, Mr. Coney met the burden under Fla. R. Crim. P. 3.850. As

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

A. JURY SELECTION ISSUES

Mr. Coney's motion below claimed that counsel for Mr. Coney was ineffective in ascertaining the effect of past publicity on the prospective jurors who had read the book "Maximum Morphonious" about Dade Circuit Court Ellen Morphonious, a book that included prejudicial statements by the Judge about Mr. Coney's prior convictions (DAT. 39-44). The order of the lower court found that "[n]othing Moore said necessitated further questioning or provided a basis for excusing him from serving" (R.

1336). Trial counsel failed to ask specific questions about the substance of the contents of the book which were extremely prejudicial to Mr. Coney. The Supreme Court emphasized in Morgan v. Illinois, 504 U.S. 719 (1992), in regard to questions about capital punishment, "general inquiries" about a juror's ability to be fair are insufficient. It is trial counsel's duty to ask more directed questions about a potential juror's beliefs to detect bias. Counsel also failed to ask Juror Stokes about "Maximum Morphonious, even though she had stated that she had a "lifetime friend" named Shirley Lewis, who was a former Judicial Assistant for Judge Morphonious (DAT. 1023). At an evidentiary hearing counsel would have offered the section on Mr. Coney from the book into evidence.

Counsel also failed to challenge for cause, or to use available peremptory challenges to strike prospective jurors Bury, Griffin, and Sears, despite their obvious bias towards the State (DAT. 772, 818, 823, 1074-75). And defense counsel exhibited unreasonable and ineffective

trial performance when he failed to challenge for cause Juror Griffin. Griffin served as foreman of the jury, had a son who was a correctional officer, and expressed a bias or prejudice in favor of testimony from corrections officers as opposed to testimony from convicted criminals, and advised that he had relatives who had been badly burned (DAT. 793, 1054-55, 1075-76).[7] Jurors Bury and Griffin were accepted by the defense without any attempt to challenge for cause or to use an available peremptory challenge (DAT. 1101, 1110. Failure to challenge these jurors for cause or to use an available peremptory challenge was unreasonable on the part of defense counsel, with the resulting prejudice to Mr. Coney being the

[7]Juror Griffin expressed great concern on the record about scheduling for the case in the event he was chosen as a juror (DAT. 1080). Juror Griffin indicated that he was scheduled to go to Tallahassee on March 11th for a high school basketball game that he went to every year (DAT. 1080). He also indicated that "a man's life is more important than me watching basketball" and that he would change his schedule "if it went that far" (DAT. 1081). The sentencing hearing ended on March 10th, with the jury leaving the courtroom for deliberations about life and death at 3:20 P.M. and returning with a seven to five decision for death at 3:44 P.M. (DAT. 2888).

impanelment of an unconstitutionally biased jury that convicted Mr. Coney and voted seven (7) to five (5) to recommend death. One fewer vote for death and the result would have been a life recommendation.

On direct appeal Mr. Coney claimed that the trial court erred in conducting in his absence two conferences, including a voir dire bench conference where jury strikes were discussed Coney v. State, at 1011. This Court discussed this issue in the opinion denying relief, and although the state conceded error, the Court found it to be harmless error. Id. at 1013. All the jury selection errors noted above should be considered within the context of ineffective assistance of trial counsel, as well as in the context of all errors found on appeal, but determined to be harmless.

The lower court also found that Mr. Coney's claim concerning juror interviews and the ethical rule preventing postconviction counsel from undertaking them is procedurally barred because not raised on direct appeal. (R. 1341). The ethical rule that prevents Mr. Coney from

investigating any claims of jury misconduct or bias that may be inherent in the jury's verdict is unconstitutional. Under the Fifth, Sixth, Eighth and Fourteenth Amendments, Mr. Coney is entitled to a fair trial and sentencing. His inability to fully explore possible misconduct and biases of the jury prevent him from fully showing the unfairness of his trial. Misconduct may have occurred that Mr. Coney can only discover through juror interviews Cf. Turner v. Louisiana, 379 U.S. 466 (1965); Russ v. State, 95 So. 2d 594 (Fla. 1957).

Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, is invalid because it is in conflict with the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Relief should issue from this Court.

B. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT THE PRE-TRIAL MOTIONS HEARING CONCERNING DYING DECLARATIONS

The order of the lower court summarily denied without hearing any evidence the claim that trial counsel was ineffective when he failed to communicate to Mr. Coney prior to or during the pre-trial dying declarations

hearing that he could have testified during the hearing or otherwise could have challenged the credibility and truthfulness of Southworth's statements by impeaching their source, Southworth himself. (R. 1338).

At the conclusion of two days of pre-trial hearings in February 1992, the trial court allowed all the statements of Southworth into evidence as dying declarations (DAT. 957-61). The evidence that had been introduced at the hearing concerning the admissibility of Patrick Southworth's out-of-court statements concentrated on the time period beginning with the discovery of Southworth at the scene of the fire at about 5:00 a.m. on April 6, 1990, and ending when Southworth lost consciousness at Jackson Memorial Hospital about 2 hours later.

Counsel was evidently unaware that in Florida, the dying declaration exception to the hearsay rule "does allow evidence to be admitted in the absence of cross examination and confrontation of the declarant, but under justifications of public necessity and manifest justice, pronounced and approved since early common law, and by the

United States Supreme Court and state courts throughout the nation" State v. Weir, 569 So.2d 897, 902 (4th DCA Fla. 1990) (Decision adopted on the merits in Weir v. State, 591 So. 2d 593, 594 (Fla. 1992)). It was a rule of law that Mr. Casabielle should have been familiar with:

> If evidence is available to impeach the declarant's reputation for truth and veracity, or to question the accuracy or basis for the statement, it may be admitted. Also, the party against whom a dying declaration is used has the right to testify on his own behalf to refute the dying declaration, to present corroborative witnesses and any other evidence. It still remains the state's burden to prove the guilt of the accused beyond a reasonable doubt.

State v. Weir at 902-03. The entire range of impeachment options was available to defense counsel. However, trial counsel failed to either inform his client that an attack on Southworth's character was possible under the law or to inform Mr. Coney that he could testify at the pretrial hearing as an impeachment witness. Some of the factors concerning Southworth that the court and jurors never were able to consider when weighing the dying declarations that

the court allowed into evidence included: Southworth's HIV positive status (DAR. 64); information from Inspector Callahan's pre-trial deposition that revealed that Dade Correctional was a special psychiatric institution[8]; records concerning Southworth's prior crimes, convictions and course of incarceration and psychological treatment; expert testimony about pain and shock from the burn injuries, perhaps even post-traumatic shock, and the fact that Southworth was suffering from these physiological

[8]Southworth's roommate, Lawton Byrel Santerfeit, was not asked during his testimony at trial about the medication that he and Southworth were both taking. However, during an interview by Inspector Callahan at 5:45 a.m. on April 6, 1990, forty-five minutes after the fire incident, Santerfeit explained that Southworth took the same medication that he took: "And I think he takes 50 mg. more than me, I'm not sure but he doesn't always take it. And when he does take it, it has us both the same way. We talk about it whenever we start feeling goofy and stuff, you know. It makes us forgetful, you know. When we go to look for our stuff, we're pondering, you know. It just does." In a later deposition, dated November 30, 1990, he described the medication he was taking as Acendum (phonetic) and described a long personal history of mental health treatment, psychiatric inpatient treatment and eleven (11) suicide attempts. He also described Inspector Callahan as "a crook." (R. 62).

injuries in conjunction with his existing mental health problems and medication; and Southworth's prison records including his transfer to DCI for psychiatric care and his history of Disciplinary Reports (DRs). (R. 60-61).

Counsel unreasonably failed to investigate and prepare impeachment of Southworth with the resulting prejudice to Mr. Coney from the admission of statements and the likelihood that the jury relied on their accuracy. Mr. Casabielle should not have focused his efforts solely on trying to impeach the State's witnesses to Southworth's dying declarations in an attempt to prove that there was a Department of Corrections conspiracy that used inmate testimony along with testimony through third parties of the alleged dying declarations to frame Mr. Coney through perjured testimony about what Southworth said (DAT. 2575-99).

By failing to attack the credibility of Southworth himself, defense counsel played into the hands of the State and rendered deficient performance to his client, with the resulting prejudice being the admission of the

dying declarations and their bolstered credibility to the jury.

There is sound authority for an attack by defense counsel on the dying declarant who is deceased:

> Impeachment is allowed based on bad testimonial character, by conduct showing a revengeful or irreverent state of mind, by conviction of a crime, or prior or subsequent inconsistent statements. 5 Wigmore, Evidence, § 1445-46, (Chadbourn rev.1974). The reasoning articulated for allowing impeachment is that inasmuch as dying declarations are allowed based largely on public policy grounds to prevent crime from going unpunished, the accused should not be prevented from impeaching them by any lawful means, where cross-examination of the declarant is obviously impossible. The courts uniformly agree in allowing impeachment of dying declarations where the impeachment is directed to a living witness. 16 A.L.R. at 422-23.

State v. Weir at 900. There should have been an attempt to impeach the late Mr. Southworth both at the pre-trial hearing on dying declarations before the court and during the trial itself. Trial counsel should also have explored and presented other witnesses, including but not

limited to Inspector Marvin Callahan and other inmates who knew Southworth, including inmate Smith. Florida Department of Corrections Inspector Marvin Callahan was deeply involved in the initial investigation of the fire at DCI, and although he was deposed by Casabielle, **he was never called as a witness by the State of the defense**. The order of the lower court denying a hearing on Mr. Coney's adversarial testing claim noted that Inspector Callahan had doubts about the truthfulness of Southworth's roommate Byrel Santerfiet and acknowledged that Callahan was deposed (R. 1339). In his deposition Callahan testified about discrepancies in the statement he took from Southworth's roommate, Byrel Santerfeit, and some of the evidence he found (Deposition of Marvin Callahan, July 16, 1990, Pgs. 17-20)(R. 69-71). Of course Mr. Coney plead that someone else had seen Mr. Santerfeit run from the cell and close the door, inmate Donald Smith. (R. 85). Santerfeit himself testified that the only injury he suffered during the fire was an injury to an ankle sustained in jumping down from his top bunk (DAT. 2194).

He also commented that he singed his hair (DAT. 2236). Santerfeit also testified that he believed that he was a suspect in the murder of Southworth (DAT. 2216).

These areas should have provided significant ammunition for an attack by the defense on the reliability of Southworth's statements inculpating Mr. Coney. In these circumstances, counsel should have been preparing an all out assault on Southworth for the jury. An evidentiary hearing should have been granted on this claim.

C. FAILURE TO OBTAIN AN EXPERT EVALUATION PRE-TRIAL

Without a reasonable strategic decision, trial counsel failed to have his client examined by a mental health professional prior to the guilt phase of the trial. This was true despite overwhelming evidence of serious mental health issues in Mr. Coney's background, much of which is documented in Mr. Coney's prison records. In 1976 he was convicted of several felonies and sentenced to more than 400 years in the Florida prison system. At he time of that conviction he had been an inmate since 1965.

Mr. Casabielle was appointed to represent Mr. Coney on

May 9, 1990. The record reveals that he filed a motion on April 1, 1991 that was granted in a hearing on April 8, 1991 to have Jimmie Coney examined by a doctor for purposes of preparing a defense, and further that he advised Judge Roy T. Gelber in that hearing that "I'm going to speak to Dr. Castiello" (DAT. 348-49, 359-61).[9] An order signed by Judge Gelber and entered on April 23, 1991 read in pertinent part, "ORDERED AND ADJUDGED: 1. The defendant is hereby authorized to hire a psychological expert to examine the defendant in the preparation of the defense of this case. 2. Costs in the amount of $500 will be approved for the payment of the psychological examination (DAR. 49).

Dr. Castiello apparently never saw Mr. Coney. (R. 1329). Dr. Castiello is a medical doctor practicing psychiatry in Coral Gables. The billing information in the court file memorializes Mr. Casabielle's contact with

[9]The motion stated that "[t]he preparation of an adequate defense to the accusations made against the defendant by the State will require a psychological examination of the defendant."

Dr. Castiello, but the court file and trial attorney file do not document any examination, report, billing or invoices by Dr. Castiello (DAR. 325-28). The stipulation entered into by both parties at the evidentiary hearing was that Dr. Castiello had no recollection of evaluating Mr. Coney and had no record of Mr. Coney's case in his office files (R. 928).

There are three references to Dr. Castiello in trial counsel's billing documentation: 04-30-91 Telephone conversation w/Dr. Castiello .40 (this was seven days after the appointment order was entered by Judge Roy Gelber); 05-01-91 Dictate letter to Dr. Castiello .40 (the following day to memorialize the telephone conversation); and, 02-27-92 Telephone conference with Dr. Castiello .30. (DAR. 2654). This is a total of one hour and forty minutes, with forty minutes simply being letter dictation. In addition, defense counsel described on the record on February 25, 1990 how he attempted to contact Dr. Castiello through a mental health worker with the goal of getting a recommendation of a neurologist (DAR. 2492).

The guilt phase of Mr. Coney's trial ended at 4:40 P.M. on February 26, 1990.

The order of the lower court denying guilt phase relief on the ineffective assistance claim concerning trial counsel's negligence in having mental health experts evaluate Mr. Coney prior to the trial contends that Mr. Coney "failed to clarify this argument in his motion or at the evidentiary hearing." (R. 1327). Mr. Coney believes that the argument could hardly be more clear. The responsibility to adequately investigate the case is not limited to penalty phase or mitigation issues. "[M]erely invoking the word strategy to explain errors [is] insufficient since `particular decision[s] must be directly assessed for reasonableness [in light of] all the circumstances.'" Horton v. Zant, 941 F. 2d 1449, 1461 (11th Cir. 1991) (quoting Strickland v. Washington, 466 U.S. at 691) (footnote omitted). "[C]ase 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." Horton, 941 F.2d

at 1462.

In Mr. Coney's case, counsel failed to provide his client with "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.", Ake at 1096. Mr. Coney's judge and jury were not able to "make a sensible and educated determination about the mental condition of the defendant at the time of the offense." Ake at 1095.

In order to make a decision as to what guilt phase defense to use, trial counsel needed all the facts about the crime, about his client and about all the players involved. Failure to thoroughly prepare any of these areas is deficient performance. The fact that the ultimate defense presented at the guilt phase by Casabielle was that Mr. Coney was not the perpetrator of the murder of Patrick Southworth in no way obviates his responsibility to have investigated all aspects of the case, including Mr. Coney's mental status.

D. TRIAL COUNSEL'S FAILURE TO CHALLENGE THE STATE'S CASE

Strickland requires that defense counsel challenge the State's evidence so that the State is held to its burden of proving the defendant's guilt beyond a reasonable doubt. In Mr. Coney's case, the adversarial testing envisioned by Strickland did not occur because trial counsel ineffectively failed to challenge the State's evidence against Mr. Coney. Mr. Coney was prejudiced by his counsel's failure because the jury had an incomplete picture of the facts, and the State's case was never subjected to the crucible of adversarial testing.

The lower court summarily denied an evidentiary hearing on Mr. Coney's adversarial testing at guilt phase claim including that portion concerning trial counsel's failure to investigate and call as witnesses numerous inmates and prison officials (R. 1338-39). Mr. Coney believes the files and records in his case do not conclusively refute the allegations in his 3.850 motion. Gaskin. Mr. Coney plead in his motion that defense counsel unreasonably failed to call as a witness at trial, inmate Donald Smith, who witnessed the events on the

morning of the fire at DCI (R. 85). As a result of postconviction counsel's investigation, it was discovered that inmate Smith saw a puff of smoke from Southworth's cell and then saw a white man who he identified as Southworth's roommate coming out of the cell and **closing the door** behind him with Southworth afire inside the cell. Smith did not see Jimmie Coney near the cell area. This exculpatory evidence is consistent with the defense case at trial. (R. 85). The only other witness to these events at trial was Southworth's roommate, Byrel Santerfeit. There is no written interview with Mr. Smith anywhere in the files and records of Mr. Coney's case, yet the lower court denied an evidentiary hearing on this claim.

Officer Jose Lugo-Sanchez was another very important witness at the guilt phase of Mr. Coney's trial (DAT. 1527-1611). In an incident report that he wrote on the day of the fire, he stated that "inmate Coney was waiting in the hallway" when another officer, Pesante, walked into the officer station shortly after he entered Dorm B at

4:57 a.m. He confirmed during cross-examination that he wrote in the log that "Jimmie Coney was standing in front of the officers' station when Officer Pesante walked in" at 4:57 a.m. The same log indicated that the screaming about the fire was heard at 4:58 a.m. (DAT. 1577-78).

The State attempted to rehabilitate Lugo-Sanchez with two prior consistent statements, without any defense objection **the attempt** to bolster his testimony, which conflicted with the written incident report (DAT. 1597-1600).

On re-cross, defense counsel Casabielle skipped some of his planned re-direct, saying on sidebar that he is "too tired to remember" (DAT. 1608). The result was an ineffective cross-examination of one of the most important guilt phase witnesses, one that should have provided an alibi to Jimmie Coney.

Trial counsel failed to call important prison staff as witnesses, including DOC Inspector Callahan, DOC Inspector Paul French, and former Dade Correctional bodyshop manager Evangelista Torres as a witness. Again, Mr. Coney's

motion below explains in detail the rationale for his failure to do so being deficient performance. For example the motion notes that Torres was never even deposed much less called as a witness despite the existence of a sworn statement by Torres stating that bodyshop worker inmate James Young's account of getting lacquer thinner for Mr. Coney from the shop run by Torres would be impossible (R. 67).

Mr. Coney's motion below detailed the rationale for what should have been an aggressive defense investigation and preparation for impeachment and attack of a host of inmate witnesses who either testified or were deposed and listed (R. 72-85). They included Southworth's roommate Santerfeit, James Young, Daries "Chicken Wing" Barnes, Hasan Jones, Archie McKnight, Chris Rushaw, and James Young.

There were also a significant number of inmates that Casabielle unreasonably failed to interview, depose or to investigate by acquiring prison records. They included Samuel Sapp aka "Cherry Red", Sharod Tarver, Francisco

Ramon Herrada, Adam Hyde Trushin, and Donald Smith. (R. 72-85). Mr. Coney submits that trial counsel's contradictory testimony at the limited evidentiary hearing concerning whether he or his investigator interviewed inmate witnesses as part of the guilt phase investigation supports an evidentiary hearing on guilt phase ineffective assistance of counsel (R. 328-29, 585, 618-19).[10]

Trial counsel also deficiently mishandled Vincent McBee, a lab technician with Metro-Dade Police, who was called by the State to testify as "an expert on arson evidence examination" (DAT. 1865-66). On cross-examination, McBee admitted that although his tests did not reveal the substance Toluene to be present in a standard control sample obtained by Detective Odio from the DCI bodyshop drum, which according to inmate James Young's testimony was the source of the material he provided to Mr. Coney, Toluene was present in the three

[10]A January 13, 1992 invoice from Casabielle's investigator indicates that the investigator interviewed inmates on 12/27/91, 1/02/92 and 1/09/92, including 50 inmates on 1/02/92

items of evidence with accelerant traces secured from the crime scene (DAT. 1922). He then testified that the liquid used as the standard sample could not be the source of "all compounds" that were found in the items of evidence (DAT. 1929). Lab tech Vincent McBee was then improperly used to attempt to establish the scientific basis for this testimony (DAT. 1864-1933). Defense counsel asked for a sidebar after the court noted that before the witness would be allowed to answer any question that called for his opinion, the court would entertain objections (DAT. 1866). The lower court then allowed McBee to opine about the lacquer thinner in spite of defense counsel's argument that the testimony was "highly prejudicial and corroborates a convicted felon's testimony when there is absolutely no connection between the chemical that was drawn by Detective Odio and the chemical allegedly used in this case" (DAT. 1871-72). The court's ruling contributed to defense counsel's ineffectiveness.

However no Frye hearing was requested by trial counsel.[11] This was deficient performance.

It was also unreasonable and prejudicial for trial counsel to fail to retain an expert to refute the testimony of technician McBee concerning the composition of the lacquer thinner sample. It was also unreasonable and prejudicial for trial counsel to fail to object to testimony from inmate witness Hason Jones about plastic bags that were not in evidence and were never shown to

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[11]Trial counsel should have known that a Frye hearing was required before scientific evidence can be admitted. See Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)("while the court will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."). This Court formally adopted the Frye test in 1989 when it reversed a conviction that had been obtained partially on the basis of hypnotically induced testimony. See Stokes v. State, 548 So. 2d 188 (Fla. 1989). Had a Frye hearing been requested by Casabielle, the State would have been unable to meet its burden in order to establish the admissibility of this scientific evidence. Thus, Mr. Coney can establish prejudice resulting from counsel's failure to challenge the State's "scientific evidence." The lower court's order denied Mr. Coney a hearing on this claim without an evidentiary hearing (R. 1339-40).

have existed (R. 85-86). The State lost the bags if they ever existed and as such failed to preserve evidence.[12]

Trial counsel was ineffective for failure to object to improper prosecutorial argument at the conclusion of the guilt phase (DAT. 2526, 2549, 2560, 2604, 2610, 2611)(R. 86-88). The prosecutor's closing arguments were improper, and defense counsel unreasonably failed to object, to Mr. Coney's prejudice. See Ruiz v. State 24 Fla. L. Weekly S157 (Fla. 1999)(Where prosecutors engaged in egregious misconduct during closing argument in both guilt and penalty phases of trial)(Prosecutor invites the jury to

[12]Mr. Coney plead in his 3.850 motion that several handwritten notes from Major John Richard Thompson that were drafted after his interview with Southworth in the treatment room at DCI indicate that Southworth told him that Santerfeit had to have been involved in opening the door to the cell when he was burned (R. 86). The motion also claims that a second note with more details also indicates Santerfeit's involvement. However, the final typewritten report of the investigation fails to mention Santerfeit, and names Coney as the guilty party. These notes should have been disclosed to trial counsel pursuant to Brady v. Maryland, 373 U.S. 83 (1963), yet the state failed to disclose them. They were clearly material both as to guilt and punishment.

convict [Coney] of first degree murder because he is a liar).

Defense counsel was also ineffective when he failed to object to guilt phase instruction "Rules for Deliberation 2.05" Number 5, including the language "[i]t is the judge's job to determine what a proper sentence would be if the defendant is guilty" (DAR. 236 & 2632). The jury is co-sentencer in Florida.[13]

The order of the lower court summarily denying a hearing on these claims found that trial counsel's guilt phase "performance at trial fell within the 'broad range of reasonably competent performance under prevailing professional standards' Maxwell v. Wainwright, 490 So. 2d 927 (Fla. 1986) at 932." (R. 1340).

E. ABSENT FROM CRITICAL STAGES OF THE PROCEEDINGS

The lower court's order found that Mr. Coney's claim that he was absent from critical stages of the proceedings is procedurally barred (R. 1341). The lower court's

[13]See: Apprendi v. New Jersey 530 U.S. 466 (2000).

finding of a procedural bar is incorrect, as the claim was premised on the failure to object, which is cognizable in postconviction proceedings. Mr. Casabielle repeatedly waived Mr. Coney's presence during significant events in the trial and pre-trial period (DAT. 389, 409-411, 691, 694-96, 721-28, 1081-85). Mr. Coney was absent during a long discussion between the State, the trial court and Mr. Casabielle, concerning the lack of preparation for a potential penalty phase (DAT. 389-420).[14] Mr. Coney was also absent from other critical phases of his capital trial proceedings, to his substantial prejudice. This Court held on direct appeal that although Mr. Coney was improperly kept from participating in bench conferences during jury selection, any error in this regard was harmless. Coney v. State 653 So. 2d 1009 (Fla. 1995). In light of Argument II concerning the conflict of interest claim and the failure of Casabielle to inform Mr. Coney

[14]The lower court found that "At that time, Mr. Casabielle affirmatively stated that a psychological evaluation of the defendant had been conducted. It appears that this statement was not true" (R. 1329).

about his involvement in Operation Court Broom during voir dire or at any other time, counsel respectfully suggests that this Court review that harmless error analysis. This Court's failure to undertake a proper harmless error analysis was error on numerous levels. Mr. Coney had a right to meaningful direct appellate review by this Court of his conviction and sentence of death. Parker v. Dugger, 498 U.S. 308 (1992).

All the information discussed in this claim goes not only to the guilt-innocence phase, but also undermines the jury's 7 to 5 death recommendation. Under this analysis, relief is required if confidence in the outcome of the case is undermined.

ARGUMENT IV - PUBLIC RECORDS

Mr. Coney sought public records disclosure pursuant to chapter 119, Florida Statutes, and Fla. R. Crim. P. 3.852. The lower court summarily denied this claim (R. 1344). On January 22, 1999, by written order, the lower court sustained the objections of the Office of the State Attorney, Eleventh Judicial Circuit, to production of

certain documents in spite of a valid claim by Mr. Coney that the State had waived the right to object due to a late filed response. (Supp. R. 746-48, 768-69). The order states that the lower court sealed the records in the court file for appellate review in two large envelopes marked as Exhibits A & B after an in camera inspection. Attached to this order was a copy of a letter from the State Attorney to CCRC dated October 2, 1998, describing the material which the lower court's order ordered sealed for appellate purposes.[15] The letter states that the documents submitted by the State Attorney included 436 pages of material concerning the instant case, 75 pages concerning Mr. Coney's 1976 prior and 45 pages of material concerning his 1965 prior. This Court should independently review these materials to determine if Mr. Coney is entitled to them.

[15]Although the order references the attached letter, it is apparently not part of the supplemental record provided to undersigned counsel on April 8, 2002. By separate motion counsel is moving to supplement the record with this document.

Also sealed in the record for appellate purposes following in camera inspections are documents from the Brevard County State attorney concerning a hospital admission in January 1989 of witness Gregory Hoover; documents from the State Attorney, Sixth Judicial Circuit, concerning inmate Chris Rusaw; and documents from the Florida Department of Corrections medical and psychological records concerning inmate trial witnesses Santerfeit, Barnes, Hoover, Jones and Young (Supp. R. 770), (Supp. R. 821-23, 828), (Supp. R. 360-66, 778-80, 824). This Court should independently review these materials to determine if Mr. Coney is entitled to them. Any documents contained in these sealed records which could form the basis of a claim on behalf of Mr. Coney should be disclosed and Mr. Coney should be permitted to amend.

ARGUMENT V - NO ADVERSARIAL TESTING AT THE PENALTY PHASE

A. THE FLORIDA STATUTE IS UNCONSTITUTIONAL

Florida's capital sentencing scheme denies Mr. Coney

his right to due process of law and constitutes cruel and unusual punishment on its face and as applied in this case. The Supreme Court has held that the death penalty may not be imposed under sentencing procedures that create a substantial risk of arbitrary and capricious application. Furman v. Georgia, 408 U.S. 238 (1972). Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. Florida's statute fails to adequately channel the jury's discretion as required by Supreme Court precedent. Because of the arbitrary and capricious application of Florida's death penalty, the statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution. See Callins v. Collins, 510 U.S. 1141 (1994)(Blackmun, J., dissenting) ("despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness,

discrimination, caprice, and mistake."). Mr. Coney's death sentence violates the Eighth Amendment.

B. FAILURE BY THE LOWER COURT TO FIND NON-STATUTORY MITIGATION

During his 1992 capital sentencing hearing Mr. Coney presented evidence of mitigation which the trial court refused to find. The jury and judge, acting as co-sentencers, were required to weigh these mitigating factors against the aggravating circumstances. According to her sentencing order the judge did not weigh this mitigation, stating that evidence presented by Mr. Coney "certainly in no way bears upon or mitigates the depravity of the defendants acts" (DAT. 315). The judge erred as a matter of law in not considering and weighing the unrefuted mitigation presented at the trial below through defense witnesses Pearl Mae Sanford, Bonny Coney, Virginia Lee Coney, Jessie Coney, Elaine Sanford Harrell, Fred Lee Thomas, Barbara Fontenot, and Rev. Wellington Ferguson, Sr. (DAT. 2735-2853).

Mr. Coney was deprived of the individualized

sentencing required by the Eighth and Fourteenth Amendments and is entitled to a new sentencing hearing. Skipper v. South Carolina, 476 U.S. 1 (1986); see also Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-112 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

C. JOHNSON V. MISSISSIPPI

It was a violation of the Fifth, Eighth, and Fourteenth Amendments for either the jury or the trial court to consider Mr. Coney's prior convictions, as they were unconstitutionally obtained. See Johnson v. Mississippi, 108 S. Ct. 1981 (1988). This reversible error committed infected the penalty phase of the instant case resulting in an unreliable jury recommendation and death sentence, and further resulted in cruel and unusual punishment. The lower court held that this claim cannot be raised for the first time on collateral review pursuant to Henderson v. Dugger, 522 So. 2d 835 (Fla. 1988). (R. 1342).

D. AUTOMATIC AGGRAVATOR

Mr. Coney's jury was unconstitutionally instructed to consider an automatic aggravating factor: "The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of or in an attempt to commit the crime of arson" (DAT. 3830). Mr. Coney was indicted on alternate theories of felony (arson) murder and premeditated murder (DAR. 1-2). The jury's consideration of this aggravating circumstance violated Mr. Coney's Eighth and Fourteenth Amendment rights because it allowed the jury to consider an aggravating circumstance which applied automatically to Mr. Coney's case once the jury had convicted Mr. Coney under the theory of felony murder during the guilt phase of the trial.

The use of the underlying felony -- arson -- as a basis for any aggravating factor, rendered the aggravating circumstances "illusory" in violation of Stringer v. Black, 112 S. Ct. 1130 (1992). Due to the outcome of the guilt phase, the jury's consideration of automatic aggravating circumstances served as a basis for Mr.

Coney's death sentence. This was error and Mr. Coney is entitled to relief.

To the extent that this issue was inadequately preserved by trial counsel Mr. Coney was denied effective assistance of counsel. Mr. Coney's sentence of death is the resulting prejudice. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989).

E. CALDWELL CLAIM

Mr. Coney's jury was repeatedly and unconstitutionally instructed by the Court that its role was merely "advisory." See, e.g., (DAR. 236, DAT.2883, 2884). The jury's sense of responsibility was diminished by the misleading comments and instructions regarding the jury's role. This diminution of the jury's sense of responsibility violated the eighth amendment. Caldwell v. Mississippi, 472 U.S. 320 (1985). To the extent counsel failed to object and litigate this issue, request curative instructions, and move for mistrial, counsel rendered deficient performance. Confidence in the outcome is undermined. This Court must order a new sentencing

proceeding.

F. PROSECUTORIAL MISCONDUCT

In Mr. Coney's trial during closing argument at both the guilt and penalty phases the State made impermissible and inflammatory arguments based on the impact to the victims of the crimes that resulted in Mr. Coney's prior convictions (DAT. 2861-62). The State also argued improperly at the penalty phase, comparing victim Patrick Southworth to a self-immolating monk in 1960s Vietnam (DAT. 2865); Band also argued lack of remorse (DAT. 2864) and future dangerousness (DAT. 2868), and improperly implied that it was the jury's duty as community representatives to impose the death penalty (DAT. 2868). The jury were misled by Mr. Band's improper, impermissible and inflammatory comments. See Ruiz v. State 24 Fla. L. Weekly S157, 1999 WL 176049 (Fla.). The State was also allowed to introduce over defense objection gruesome photographs, including autopsy photos of the deceased and photos of the victims of Mr. Coney's prior violent felonies in 1965 and 1976 during the penalty phase. (DAT.

2664, 2665-66, 2679-87, 2723-24). The lower court held that this issue was resolved on direct appeal and is procedurally barred (R. 1343).

The trial court's error in admitting these photographs cannot be considered harmless beyond a reasonable doubt. Chapman v. California, 87 S. Ct. 824 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). To the extent that trial counsel failed to adequately raise this issue, Mr. Coney was denied the effective assistance of counsel.

ARGUMENT VI - INNOCENT OF THE DEATH PENALTY

Based on the arguments in this brief, Mr. Coney can show either actual innocence of first degree murder or innocence of the death penalty and is entitled to relief for constitutional errors which resulted in the conviction or sentence of death. Sawyer v. Whitley, 112 S. Ct. 2514 (1992).[16]

ARGUMENT VII - INSANE TO BE EXECUTED

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

Mr. Coney is insane to be executed. In Ford v. Wainwright, 477 U.S. 399 (1986), the United States Supreme Court held that the Eighth Amendment protects individuals from the cruel and unusual punishment of being executed while insane. This claim is not ripe for consideration. However, it must be raised to preserve the claim for review in future proceedings should that be necessary. See Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998).

ARGUMENT VIII - CUMULATIVE ERROR

It is Mr. Coney's contention that the process itself failed him because the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive. This Court must consider the cumulative effect of all the evidence not presented to the jury whether due to trial counsel's ineffectiveness, the State's misconduct, or because the evidence is newly discovered. Kyles v. Whitley, 514 U.S. 419 (1995); State v. Gunsby, 670 So. 2d 920 (Fla. 1994); Swafford v. State, 679 So. 2d 736 (Fla.

1996).

CONCLUSION

Mr. Coney submits that relief is warranted in the form of a new trial and/or a resentencing proceeding, and to that end the lower court's grant of a new penalty phase is appropriate. To the extent that relief was not granted below on issues on which the lower court did rule, Mr. Coney requests that the case be remanded so that full consideration can be given to all his other claims at an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer/Cross-Initial Brief has been furnished by United States Mail, first class postage prepaid, to Sandra Jaggard, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, FL 33131, on April 18, 2002.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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