

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SCOI-1469
Lower Tribunal No.: 94-537-CF

FLOYD DAMREN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR CLAY COUNTY, STATE OF FLORIDA

AMENDED
INITIAL BRIEF OF APPELLANT

Jefferson W. Morrow, P.A.
Florida Bar No.: 369136
1301 Riverplace Boulevard
Suite 2600
Jacksonville, Florida 32207
Telephone: (904) 399-5626
Facsimile: (904) 399-5980

Attorney for Appellant

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Damren's motion for

post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.851. The circuit

summarily denied some of Damren's claims without an evidentiary hearing, and denied the

remaining claims following an evidentiary hearing.

The following symbols will be used to designate references to the record in this instant cause.

"Trial" - trial;

"R" - record on 3.851 appeal to this Court;

"Ex." - exhibits submitted at the evidentiary hearing;

"App." - appendix to Rule 3.851 motion.

REQUEST FOR ORAL ARGUMENT

Damren has been sentenced to death. The resolution of the issues involved in this action

will therefore determine whether he lives or dies. This Court has not hesitated to allow argument

in other capital cases in a similar procedural posture. A full opportunity to air the issues through

oral argument would be more than appropriate in this case, given the seriousness of the claims

involved and the gravity of the penalty. Damren, through counsel, accordingly urges that the

Court permit oral argument.

TABLE OF CONTENTS

PRELIMINARY STATEMENT.....i

REQUEST FOR ORAL ARGUMENT.....ii

TABLE OF CONTENTS.....ii
i

TABLE OF AUTHORITIES.....iv

STATEMENT OF THE CASE.....1

SUMMARY OF ARGUMENT.....3

ARGUMENT.....4

ARGUMENT

I.....4

No Guilt Phase Adversarial Testing Occurred at Trial

A. SCIENTIFIC TESTIMONY NOT ADMITTED 4

B. FAILURE TO OBTAIN EXPERT FOR BRAIN DAMAGE EVIDENCE..... 5

ARGUMENT II

No Penalty Phase Adversarial Testing Occurred at Trial

A. TRIAL COUNSEL’S INVESTIGATION FOR PENALTY PHASE EVIDENCE PRESENTATION WAS DEFICIENT, AND THIS DEFICIENCY RESULTED IN PREJUDICE TO THE DEFENDANT UNDER **STRICKLAND VS.**

WASHINGTON.....14

1. What kind of penalty phase investigation should have been done to discover mitigating circumstances and mental health mitigators to provide effective

assistance of counsel for penalty phase evidence?.....	15
2. A reasonable probability that the outcome would be different does not require a finding of "more likely than not" or greater than fifty percent(50%).....	24
B. MENTAL HEALTH MITIGATING EVIDENCE WAS AVAILABLE AND THE FAILURE TO PRESENT THE SAME PREJUDICED DEFENDANT'S CASE.....	28
C. DIMINISHED CAPACITY AND BRAIN DAMAGE WAS AVAILABLE TO TRIAL COUNSEL DISCOVERABLE THROUGH REASONABLE INVESTIGATION.....	29
ARGUMENT	
III	32
PUBLIC RECORDS	
ISSUE	33
CONCLUSION	33
CERTIFICATE OF SERVICE.....	33

TABLE OF AUTHORITIES

Armstrong v. Dugger,
883 F.2 1430 (11th
cir.1987).....18

Asay v. State,
769 So.2d 974 (Fla.2000).....

5

Barrett v. State,
649 So.2d 219, 223 (Fla.1994)21,
25

Bassett v. State,
541 So.2d 596 (
Fla.1989).....20

Beach v. Blackburn,
631 F.2d 1168 (5th Cir. 1980)
.....8

Bevers v. Balkcom,
636 F.2d 114, 116 (5th Cir.
1981).....8

Blake v. Kemp,
758 F.2d, 523 (11th cir.
1985).....12

Blanco v. Singletary,
943 F.2d 1477 (11th Cir.
1991).....

29

Brady v. Maryland,
373 U.S. 83 (1963)
.....

..... 32

Breedlove v. State,
692 So.2d 874 (Fla. 1997)

.....
..... 14

Brewery. Aiken,

935 F.2d 850 (7th Cir. 1991)
.....
.....
..... 19

Brown v. Wainright

392 So.2d 1327, 1331 (Fla. 1981)
.....
.....
..... 54

Buenoano v. Singletary,

74 F.3d 1078 (11th Cir.1996)
.....
..... 17

Bush v. Singletary,

988 F.2d 1082 (11th Cir. 1993)
..... 17

Caldwell v. Mississippi,

472 U.S. 320 (1985)
.....

Cannady v. State,

620 So.2d 165, 170 (Fla. 1993)
..... 30

Caraway v. Beto, 421 F.2d 636, 637 (5th Cir.

1970).....

Caruso v. State,
 645 So.2d at 397 (Fla.
 1994)..... 21

Cave v. Singletary,
 971 F.2d 1513 (11th Cir. 1992)
 18

Cheny v. State
 659 So.2d 1069 (Fla. 1995)
 4

Coleman v. Kemp,
 778 F.2d 1578 (11th Cir. 1986)
 12

Cunningham v. Zant,
 F.2d 1006 (11th Cir. 1991)
 25

Davis v. Alabama,
 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot,
 446 U.S. 903 (1980)
 8

Deaton v. Singletary,
 635 So.2d 4 (Fla. 1994)
 20

Delap v. Dugger,
 890 F.2d 285 (11th Cir. 1989)
 15

Dixon v. State,
 283 So.2d at 10

Douglas v. Wainwright,
714 F.2d 1531 (11th Cir. 1983)
.....
..... 27

Eddings v. Oklahoma,
455 U.S. 104, 114-15 (1982)
.....
..... 24

Emerson v. Granlay,
91 F.3d 898 (7th Cir. 1996)
.....
.....

Francis v. State,
413 So.1d 1175, 1177 (1982)
.....
.....

Furman v. Georgia,
408 U.S. 238 (1972)
.....
..... 31

Gaines v. Hooper,
575 F.2d 1147, 1148-50 (5th Cir. 1978)
.....
..... 8

Goodwin v. Balkcom,
684 F.2d 794 (11th Cir. 982)
.....
..... 8

Grossman v. State,
525 So.2d at 840-41
.....
.....

Hallman v. State
560 S.2d 233, 227 (Fla.
1990).....
..... 22

Harris v. Dugger
874 F.2d 756 (11th Cir. 1989)
.....
..... 20

Hayes v. Lockhart,
766 F.2d 1247, 1251 (8th Cir.)
.....
..... 8

Heiney v. State,
620 So.2d 171 (Fla. 1993)
.....
..... 20

Herring v. State,
446 So.2d 1049 (Fla. 1984)
.....
..... 8

Herring v. Estelle,
491 F.2d 125, 129 (5th Cir. 1974)
.....
.....

Hildwin v. Dugger,
654 So.2d 107 (Fla. 1995)
.....
..... 20

Hill v. State,
473 So.2d 1253 (Fla. 1985)
.....
..... 30

Holloway v. State
361 S.E.2d 794, 796 (Fla. 1987)
.....
..... 11

House v. Balkcom
725 F.2d 608 (11th Cir. 1984)
.....
..... 12

James v. State,
489 So.2d 737 (Fla.1986)
.....
..... 6

Johson v. State,
769 So.2d 990 (Fla. 2000)
.....
..... 4

Manning v. State,
378 So.2d 274 (Fla.1979)
.....
..... 13

Neary v. State,
384 So.2d 881, 885-887 (Fla. 1980)
.....
..... 21

Nero v. Blackburn,
597 F. 2d 991 (5th Cir. 1979)
.....
..... 8

Norris v. State,
429 So.2d 688 (Fla. 1983)
.....
..... 26

Pait v. State,
112 So.2d 380 (Fla.)
.....
.....

Pentacost v. State,
545 So.2d 861, 863 (Fla. 1989)
.....
..... 21

Perry v. Lynaugh,
109 S.Ct. 2934 (1989)
.....

.....

Perry v. State,
522 So.2d 817, 819 (Fla. 1988)

.....
..... 21

Phillips v. State,
608 So.2d 778 (Fla. 1992)

.....
..... 20

Proffitt v. State, 428 U.S. 242 (1976)

.....
.. 31

Pope v. Wainwright,
496 So.2d 798, 801 n.1 (Fla. 1986)

.....
.....

Reilly v. State,
601 So.2d 222, 223 (Fla. 1992)

.....
..... 13

Rideau v. Louisiana,
383 U.S. 723 (1963)

.....
..... 12

Roberts v. Louisiana,
428 U.S. 325 (1976)

.....
.....

Robinson v. State,
574 So.2d 108, 112 (Fla. 1991)

.....
.....

Rose v. State,
675 So.2d 567 (Fla. 1995)

.....
..... 20

Rummel v. Estelle,
590 F.2d 103, 104-105 (5th Cir. 1979)
.....
.....

Rummel v. Estelle, 590 F.2d 104 (5th Cir. 1979)
..... 41

Smith v. Dugger,
911 F.2d 494 (11th Cir. 1990)
.....
.....

Smith v. Kemp,
664 F.Supp. 500 (M.D. Ga.1987)
.....
..... 11

Smith v. Wainwright,
741 F.2d 1248 (11th Cir. 1984)
.....
.....

Stanley v. Zant,
697 F.2d 955 (11th Cir. 1983)
.....
..... 11

State v. Dixon,
283 So.2d 1 (Fla. 1973)
.....
.....

State v. Groover,
489 S.2d 15 (Fla. 1986)
.....
..... 30

State v. Lara,
581 So.2d 1288 (Fla. 1991)
.....
..... 22

State v. Michael,
530 So.2d 929, 930 (Fla. 1988)
.....
..... 22

State v. Sireci,
536 So.2d 231 (Fla. 1988)
.....
.....

Stephnes v. State,
846 F.2d 642 (11th. Cir. 1988)
.....
..... 26

Stevens v. State,
552 So.2d 1082 (Fla. 1989)
.....
..... 19

Strickland v. Washington,
466 U.S. 668, 694 (1984)
.....
..... 4,5,11,
19, 17,
19 21,2
2

Reilly v. State,
557 So.2d 1365 (Fla. 1990)
.....
.....

Thomas v. Kemp,
796 F.2d 1322, 1324 (11th Cir. 1986) cert. denied, 479 U.S.
996 (1986) 27

Thompson v. Wainwright,
787 F.2d 1447 (11th Cir. 1986) cert. denied, 481 U.S. 1042
(1987) 18

Thompson v. Wainwright,
787 F.2d 1447 (11th Cir. 1986) cert. denied, 481 U.S. 1042,
S.Ct. 1986
95 L.Ed. 261 825 (1987)
.....

Turner v. State,
645 So. 2d 444, 448 (Fla. 1992)
.....
.....

Tyler v. Kemp,
755 F.2d 741, 745 (11th Cir. 1985)
.....
..... 12

United States v. Davis,
583 F.2d 190 (5th Cir. 1978)
.....
..... 13

United States v. Gray,
878 F.2d 702 (3d Cir. 1989)
.....
..... 8

United States v. Holman,
680 F.2d 1340, 1347 (11th Cir. 1982)
.....
..... 13

Williams v. State,
574 So.2d 136, 138 (Fla. 1991)
.....
.....

Wournos v. State, 676 So.2d 966, 968 (1995)
.....

Woodson v. North Carolina,
428 U.S. 280, 304 (1976)

.....
..... 27

OTHER AUTHORITIES:

A.B.A. Standards, Relating to Fair Trial and Free Press,
(1978),
Sec. 3.4(a)

.....
.....

Bonnie and Slobogin, The Role of Mental Health professionals
in the
Criminal Process: The Case for Informed Speculation,
66 Va L.Rev. 427 (1980)

.....
.....

Bruce A. Green, Lethal fiction: The Meaning of "counsel" in
the Sixth Amendment,
78 Iowa L. Rev. 433, 491-99 (1993)

.....
.....

Jeanne Cummings, Bad Lawyers Tip the Scales of Justice
Toward Death Row, ATLANTIC J. CONST., Apr.1, 1990, at A1

.....

Ruth E. Friedman & Bryan A. Stevenson, Solving Alamama's
Capital Defense Problems: It's a Dollars and Sense Thing,
44 ALA L. Rev. 1,32-37 (1992)

.....
.....

Tom Wicker, Defending the Indigent in Capital Cases,
2 CRIM. JUSTICE ETHICS 2 (1983)

.....

.....

H. Davidson, Forensic Psychiatry 38-39 (2d ed. 1965)

.....

Pollack, Psychiatric Consultation for the Court, 1 Bull Am. Acad.

Psych. & 267,274 (1974)

.....

.....

STATEMENT OF THE CASE

On May 17, 1995, the Defendant, Floyd Damren, was convicted by a jury in Clay

County, Florida for First Degree Murder. On May 18, 1995, the same jury recommended by

vote of 12-0 that the Trial Court sentence the Defendant to death. That sentence was imposed

by the Trial Court on May 25, 1995. A conviction and sentence was upheld by the Florida

Supreme Court. Damren v. State, 696 So.2d 709 (Fla.1997). The Defendant filed a Motion

to Vacate Judgement and Sentence pursuant to Rule 3.851. That motion was amended on

July 20, 2000.

An evidentiary hearing was held on the amended motion by the Trial Court on

April 10, 2001. Prior to this evidentiary hearing, a Huff hearing was conducted pursuant

to Huff v. State, 622 So. 2d 982 (Fla. 1983), for a determination as to which matters raised

by the defendant's motion require an evidentiary hearing on November 1, 2000.

The motion before the Trial Court attacked the competency of the trial counsel as it

relates to both the penalty phase and the guilt phase of the jury trial.

At the post conviction, expert and lay witnesses testimony was presented to the Trial

court in behalf of the Petitioner, and the State called no witnesses in their behalf. The basic

thrust of the evidentiary hearing was that Dr. Miller had an opinion based on scientific

evidence that DAMREN was brain damaged at the time of the

crime. The Trial Counsel did

not call Dr. Miller as an expert witness in the guilt phase or the penalty phase for the purpose

of proving brain damage, but did call him at the trial below only to answer hypothetical

questions about intoxication.

Petitioner proved the existence of a non-statutory mitigator that the Petitioner had

sustained brain damage combined with the effects of alcohol that diminished his capacity. The

Defense contended that he was entitled to a new penalty phase because the penalty imposed

here was based only on the finding that statutory aggravating factors existed. The medical

opinion of brain damage was based in part on those medical records of seizure diagnosis

which causes brain damage.

The trial court should have made a finding that the trial lawyer's overall preparation of

the penalty phase of the trial "fell below that expected of reasonably competent counsel."

However, the trial court went on to analyze the two prong test of **Strickland v. Washington**,

466 U.S. 668, 694 (1984), and found that the first prong was not proven and the second prong

was not proven. At the second prong, the petitioner must show that he was prejudiced by any

failure to prepare . This was proven.

SUMMARY OF THE ARGUMENT

The trial counsel was ineffective by failing to present evidence of brain damage and

diminished capacity to the jury in the guilty penalty phase. At the evidentiary hearing, the

Petitioner proved the mitigating factor of brain damage was available to the defense that was

not presented at trial. The medical doctor who actually was called to testify at the trial, would

have offered a non-statutory mitigating factor of brain damage at the time of the crime. Trial

Counsel's investigation was so deficient that this deficiency resulted in prejudice to the

Defendant that there existed a reasonable probability the outcome would have been different.

The failure to present mental health mitigating evidence was

available and the failure to present the same prejudiced the Defendant's case. This evidence of diminished capacity and brain damage, was discoverable through reasonable investigation.

ARGUMENT I

NO GUILT PHASE ADVERSARIAL TESTING OCCURRED AT TRIAL

A. SCIENTIFIC TESTIMONY NOT ADMITTED

Obviously the state has no burden to prove that Damren's trial counsel was effective. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and Defendant bears burden of proving that the representation was unreasonable under the

prevailing professional norms and that the challenged action was not strong strategy. Johnson v. State, 769 So.2d 990 (Fla 2000). On the other hand the Defense has to prove that the trial counsel rendered ineffective assistance by demonstrating; (1) that the trial counsel's performance was deficient and; (2) the deficient performance prejudiced him, i.e., "counsel's errors were so serious as to deprive the Defendant of a fair trial"... Strickland vs. Washington, 466 US 668 (Fla. 1984). Damren must make both showings, i.e., both deficient performance and prejudice. Cherry v. State, 659 So 2.d 1069 (Fla. 1995).

A fair assessment of the trial counsel's performance requires that every effort be made to eliminate the distorting effects of hindsight, or to reconstruct the circumstances of the trial counsel's challenge conduct or to evaluate the conduct from the trial counsel's perspective at the time.

The fact that Damren's trial counsel was an experienced capital litigator bodes against the state in this case because of the serious error involved. The trial counsel actually called Dr. Miller as an expert witness to put on evidence of a hypothetical issue regarding intoxication. No scientific basis for brain damage evidence was admitted and it was available.

B. FAILURE TO OBTAIN EXPERT FOR BRAIN DAMAGE

EVIDENCE

Dr. Miller testified that he was available and could have given an opinion regarding brain damage if the trial counsel had simply presented that evidence. In fact Damren's trial counsel admitted that evidence of brain damage is extremely important and that he should have put that evidence before the jury(R 000390-000395). The State claims that Damren has not demonstrated the trial counsel's strategic decisions fell below the wide range of reasonably effective assistance because the trial counsel consulted two qualified expert witnesses about the possibility that Damren had brain damage. The State also argues those experts failed to find any indication of brain damage. The state also confuses the fact that the trial counsel's concern that had he put on evidence of brain damage it would clearly open the door to damaging cross examination about Damren's criminal history. The State's position is completely without merit. Evidence of brain damage may be put on without opening the door to the accused criminal history.

Finally, the State argues that the trial counsel did conduct a reasonable investigation into mental health litigation and he therefore is not rendered incompetent merely because the defendant has secured the testimony of a

more favorable mental health expert citing to Asay v. State, 769 So 2.d 974 (Fla. 2000). That case is clearly distinguishable from the case before this court. The Defendant has not now secured the testimony of a more favorable mental health expert rather the Defendant has called the exact same mental health expert that was called at the trial below for the post-conviction hearing who testified that there was powerful evidence of brain damage. A trial counsel admitted that such evidence would be powerful before the jury particularly as it relates to the penalty phase. Therefore the State's position completely misses the point.

The State next argues the position under James v. State, 489 So. 2.d 737(Fla. 1986) that states " the possibility of organic brain damage... does not necessarily mean that one is incompetent or that may one may engage in violent, dangerous behavior and not be held accountable. There are many people suffering from varying degrees of organic brain disease who can and do function in today's society." That position also begs the question. The evidence was available in the guilt phase as a non- statutory litigator that was powerful evidence. It also could be used during the penalty phase as powerful evidence. Therefore the confidence in the outcome is undermined by the fact that the jury never heard the evidence of brain damage.

The trial counsel could have called Arlene DeLong who was a long time friend of Damren. While she did have negative evidence of cocaine abuse, she did put on compelling evidence of litigation that Damren was a good friend to her and helped her.

The State next argues that in view of the aggravation prevented in this case (CCP, HAC, prior violent felony, and murder committed during a burglary) and the jury's unanimous sentencing recommendation it would be clear that Damren has presented no reasonable probability of a different sentence had he presented Dr. Miller's testimony about the brain damage. That clearly is an invasion of providence of the jury and even as the trial counsel who is an experienced capitol litigator admits the evidence of brain damage is very powerful and could sway a jury into recommending a life sentence.

The State continues to argue against the brain damage evidence in that trial counsel met with another medical expert named Dr. Phillips who did have the 1989 medical records but did not find any indication of brain damage. That argument completely misses the point in that Dr. Phillips was never used as an expert and Dr. Miller was used as an expert at the trial below. Therefore the issue of Dr. Phillips is completely moot.

More significantly, the State attempts to use the attorney/client conversations as the key to their case. They argue that Damren admitted to his involvement in the crime to his trial counsel although he blames his co-defendant to a greater degree (R000405).

The State next argues that the trial counsel would have elicited Dr. Miller's testimony about brain damage if it strengthened the defense of intoxication and did not open the door to prior convictions. That's pretty obvious because the testimony regarding intoxication defense was simply hypothetical but Dr. Miller could have given strong evidence regarding the brain damage evidence to the jury.

Next, the State argues the cocaine abuse can be mitigating but the jury is not impressed by the evidence and the trial counsel's strategy was to portray Damren as a drunk rather than a cocaine addict. The State's position here also is not strong in that the evidence of brain damage is more powerful than indeed overwhelming when matched up against whether or not the jury hears evidence of drinking or cocaine abuse.

Next, the State tries to make the argument that the neuro-psych exam did not show any evidence of organic brain damage. However it is clear from the evidence presented at the post-conviction hearing a complete neuro-psych exam was not given to Damren by Dr. Sherry Risch (R000370).

Dr. Miller testified at the post-conviction hearing that the brain damage was mild or minimal but that he estimated a 90-95% probability that Damren was brain damaged when crime occurred (R 000365). It is clear from the scientific literature that seizures resulting from cocaine overdose cause brain damage. That would be evidence that would impact the jury.

The medical records from June, 1989 were presented into evidence and have been made as part of this record on appeal (TR-00237-00280).

The State also argues that Damren is a smart and intelligent person, therefore any brain damage would be meaningless to the jury. That also begs the question in that trial counsel admitted that any evidence of brain damage no matter what the circumstances would be powerful evidence before the jury both in the guilt and (particularly) in the penalty phase where it represents a non-statutory mitigating factor that is strong enough to sway some jurors into recommending a life sentence.

Courts have repeatedly pronounced that "an attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense".

Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated

as moot, 446 U.S. 903 (1980). See also: Bevers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981); Rummel v. Estelle, 590 F.2d 103, 104-105 (5th Cir. 1979); Gaines v. Hooper, 575 F.2d 1147, 1148-50 (5th Cir. 1978). See also: Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982) ("at the heart of effective representation is the independent duty to investigate and prepare"); United States v. Gray, 878 F.2d 1248 (11th Cir. 1984). Likewise, a number of Courts have recognized that to render reasonably effective assistance, an attorney must present "an intelligent and knowledgeable defense" on behalf of his client, Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Thus, an attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. See e.g., Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); Beach v. Blackburn, 631 F.2d 1168 (5th Cir. 1980); Herring v. Estelle, 491 F.2d 125, 129 (5th Cir. 1974); Rummel v. Estelle, 590 F.2d at 104; Loett v. Florida, 627 F.2d 706, 7709 (5th Cir. 1980).

Because the sentence of death is the ultimate penalty, counsel must be even more vigilant and better prepared to

represent is client than in other cases. The National Legal aid and defender Association adopted a set of standards to be applied to attorneys representing capital defendants at all stages of the process. For trial the NLADA standard for attorney eligibility is as follows:

- A. Lead trial counsel assignments should be distributed to attorneys who:
 1. are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice and
 2. are experienced and active trial practitioners with at least five years litigation experience in the field of criminal defense and
 3. have prior experience as lead counsel in **no fewer than nine jury trials of serious and complex cases which were tried to completion**, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney would have been lead counsel in at least three cases in which the charge was murder or aggravated murders; or alternatively, of the nine jury trials, at least one was a murder or aggravated murder trial and an additional five were felony jury trials; and

4. are familiar with and experienced in the utilization of expert witnesses and evidence; and
5. are familiar with the practice and procedure of the criminal courts of the jurisdiction; and

6. have attended and successfully completed, within one year of their appointment, a training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought; and
7. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

(Standards for the Appointment and Performance of Counsel in death penalty cases, 1987, Standard 5.1 Attorney Eligibility).

The American Bar Association Standards and Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guidelines 8.1 states:

The legal representation plan for each jurisdiction should provide counsel appointed pursuant to these guidelines with investigative, expert and other services necessary to prepare

and present an adequate defense.

Arbitrary results, which are all too common in death penalty cases, frequently stem from inadequacy of counsel. The process of sorting out who is most deserving of society's ultimate punishment does not work when the most fundamental component of the adversary system, competent representation by counsel, is missing. Essential guarantees of the Bill of Rights may be disregarded because counsel failed to make reliable determinations of guilt or punishment. The result is a process that lacks fairness and integrity.

For instance, the failure of defense counsel to present critical information is one reason that Horace Dunkins was sentenced to death in Alabama. Before his execution in 1989, when newspapers reported that Dunkins was mentally retarded, at least one juror came forward and said she would not have voted for the death sentence if she had known of his condition.

Nevertheless, Dunkins was executed.

This same failure of defense counsel to present critical information also helps account for the death sentences imposed on Jerome Holloway—who has an IQ of 49 and the intellectual capacity of a 7-year-old—in Bryan County, Georgia, Holloway v. State, 361 S.E.2d 794, 796,

(Fla. 1987), and William Alvin Smith—who has an IQ of 65—in Oglethorpe County, Georgia. Smith v. Kemp, 664 F.Supp. 500 (M.D. Ga. 1987) (setting aside death sentence on other grounds), *aff'd sub nom. Smith v. Zant*, 887 F.2d 1047 (11th Cir. 1986) (en banc). It helps explain why Donald Thomas, a schizophrenic youth, was sentenced to death in Atlanta, where the jury knew nothing about his mental impairment because his lawyer failed to present any evidence about his condition. Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986), *cert. denied*, 479 U.S. 996 (1986). In each of these cases, the jury was unable to perform its constitutional obligation to impose a sentence based on “a reasonable moral response to the defendant’s background, character and crime,” Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring)), because it was not informed by defense counsel of the defendant’s background and character.

AMERICAN Bar Ass’n, *supra* note 9, at 16. the ABA’s report illustrates the pervasiveness of the problem:

Georgia’s recent experience with capital punishment has been marred by examples of inadequate representations ranging from virtually no representation at all by counsel, to representation by inexperienced counsel, to failures to investigate basic threshold questions, to lack of knowledge of governing law, to lack of advocacy on the issue of guilt, to failure to present a case for life at the penalty phase...

...Defense representation is not necessarily better in other death penalty states. In Tennessee, for another example, defense lawyers offered no evidence in the mitigation in approximately one-quarter of all death sentences

affirmed by the Tennessee Supreme Court since the Tennessee legislature promulgated its current death penalty statute.

Id. at 65.67. Among the cases cited by the ABA in support of its description of the inadequate representation are:

Thomas v. Kemp, 796 F.2d 1322, 1324-25 (11th Cir. 1986) (counsel failed to present any evidence in mitigation), *cert. denied*, 479 U.S. 996 (1986); **Blake v. Kemp**, 758 F.2d 523 (11th Cir. 1985) *cert. denied*, 474 U.S. 998 (1985) (counsel failed to present any evidence in mitigation); **Tyler v. Kemp**, 755 F.2d 741 (11th Cir. 1985) (counsel has been a member of the bar for only six months prior to his appointment), *cert. denied*, 474 U.S. 1026 (1985); **House v. Balkom**, 725 Fd.2d 608 (11th Cir. 1984) (counsel not even present during portions of capital trial), *cert. denied*, 469 U.S. 870 (1984); **Francis v. Spraggins**, 720 F.2d 1190 (11th Cir. 1983) (counsel conceded guilt at closing argument of guilt phase).

Witnesses before an ABA Task Force studying the capital punishment system described the current state of affairs for indigent criminal defendants as "scandalous," "shameful," "abysmal," "pathetic," "deplorable," and "at best, exceedingly uneven." "American Bar Ass'n, *supra* note 9, at 69, see also Ruth E. Friedman & Bryan A. Stevenson, Solving Alabama's

Capital Defense Problems: *It's a Dollars and Sense Thing*, 44 ALA. L. Rev. 1, 32-37 (1992); Bruce A. Green, *Lethal Fiction: The Meaning of "counsel" in the Sixth Amendment*, 78 Iowa L. Rev. 433, 491-99-(1993); Tom Wicker, *Defending the Indigent in Capital Cases*, 2CRIM. JUSTICE ETHICS 2 (1983); Jeanne Cummings, *Bad Lawyers Tip the Scales of Justice Toward Death Row*, ATLANTIC J.- CONST., Apr. 1, 1990, at A1.

A defendant in a criminal case is entitled to a fair trial by an impartial jury which will render its verdict based upon the evidence and argument presented in court without being influenced by outside sources of information. See: Irvin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 383 U.S. 723 (1963), Coleman v. Kemp, 778 F. 2d 1578 (11th Cir. 1986).
Where a

community is "so pervasively exposed to the circumstances on the incident that prejudice, bias, and preconceived opinions ate the natural result," the court is obligated to grant a motion for venue change. See: Manning v. State, 378 So.2d 274, 276 (Fla. 1979). DAMREN'S jury was neither fair nor impartial due to unreasonable omissions by the defense counsel.

Counsel also failed to request individual sequestered voir dire, a commonly used device for insulating prospective

jurors from the contaminating effect of other jurors' prejudicial comments. **See:** A.B.A. Standards Relating to Fair Trial and Free Press (1978), Sec. 3.4(a). Had counsel moved for such examination, the motion should have been granted. Here, there was far more than the "significant possibility of prejudice" which mandates individual voir dire. **United States v. Davis**, 583 F.2d 190 (5th Cir. 1978); **United States v. Holman**, 680 F.2d 1340, 1347 (11th Cir. 1982). As a result of the use of **en masse** voir dire, **every** venire person became exposed to the collective pretrial knowledge and opinions of the entire venire.

ARGUMENT II

NO PENALTY PHASE ADVERSARIAL TESTING OCCURRED AT THE TRIAL

It is clear that the first prong of Strickland v. Washington, 466 U.S. 668, 694 (1984), has been proven in this case. The critical issue is whether or not the second prong of the Strickland v. Washington, supra for ineffectiveness of counsel was proven. In order to do prove the second prong, he must show that he was prejudiced by any failure to prepare. He met this burden with regard to the Medical testimony by showing the evidence of brain damage. See: Breedlove v. State, 692 S. 2d 874 (Fla. 1997). The strategic decision not to use a mental health expert cannot ordinarily form the basis for collateral relief. However, it is clear that professionally competent counsel would have provided background information to the medical doctor. If that was accomplished, the brain damage would have been proven. Therefore, the second prong of the test has been clearly met and this court should reverse and remand this case for a new sentencing hearing.

At the Collateral 3.851 Evidentiary Hearing, the defendant presented evidence from Dr. Ernest Miller that the defendant was brain damaged at the time of the murder. Dr. Miller testified that evidence was objective because of the seizure. (R00042). In Breedlove, supra, the Court found that Breedlove failed to meet the prejudice prong since his psychologists testified their opinions were unchanged even considering the additional information. In our case, the

Petitioner has shown the medical doctor's opinion had supported the medical diagnosis of brain damage. Evidence is clearly a probability sufficient to undermine the confidence in the outcome.

Therefore, a fortiori the evidence of brain damage should have been admitted. Trial counsel's duty was to ferret out mental health mitigators.

A. TRIAL COUNSEL'S INVESTIGATION FOR PENALTY PHASE EVIDENCE PRESENTATION WAS DEFICIENT, AND THIS DEFICIENCY RESULTED IN PREJUDICE TO THE DEFENDANT UNDER **STRICKLAND VS. WASHINGTON**.

- 1) What kind of penalty phase investigation should have been done to discover mitigating circumstances and mental health mitigators to provide effective assistance of counsel for penalty phase evidence?

It is clear that under the standards of the DAMREN trial, the trial counsel in a first degree murder case where the death penalty is sought should do a separate and comprehensive penalty phase investigation prior to the guilt phase in order to discover evidence that may present issues of statutory mitigating circumstances, mental health mitigators, and non-statutory circumstances.

Post conviction counsel provided testimony from one

expert witness and one lay witness. The State produced no witnesses in their behalf. Post conviction counsel also provided exhibits and medical records, and affidavits of various witnesses. The Trial Court's order denying the post conviction hearing was founded on the incorrect premises. At no time did the trial counsel apprise the jury of petitioner's brain damage or mental disability. Trial counsel raised the intoxication defense on opening statements but made only a few ineffectual gestures in that direction during the trial. At no time did the counsel present the wealth of available experts and documentary evidence, making it undeniably clear that Damren was brain damaged.

The second prong of prejudice is clearly shown because prejudice existed. Here, since some mitigation existed in the record, the error cannot be found to be harmless beyond a reasonable doubt. Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989).

The Trial Counsel failed to investigate and prepare for the penalty for the phase at trial. Specifically, two types of evidence in mitigation were available. Evidence concerning his brain damage as diagnosed by Dr. Miller and the evidence concerning his substance abuse. Either or both of these

mitigating factors could have been a statutory mitigator or nonstatutory mitigator and would have provided a reasonable basis for a life sentence. In Strickland v. Washington, 467 U.S. 668. 104 S.Ct. 2052, 80 L.Ed. 2d, 674 (1984), the United States Supreme Court articulated the appropriate test for determining whether the assistance of counsel is so defective as to require reversal of a death sentence;

First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defendant. This required a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said... the death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Assessment of the effectiveness of counsel is a mixed question of law and fact. Strickland v. Washington, at p. 27. In evaluating effective assistance of counsel, we are guided by the presumption that trial counsel should do a proper penalty phase investigation at the beginning of his representation in accordance with the prevailing standard of professional responsibility.

This is not the type of case where the trial counsel specifically decided not to investigate or present evidence regarding family background under certain circumstances may be legitimately the product of a reasoned tactical choice. **See:**

Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983). Trial Counsel desired to present and did present the defendant's family background.

Trial counsel for the defendant argued that the penalty phase investigation should commence after the guilt phase trial. This proposition clearly illustrates his ineffectiveness because he failed to investigate and present mitigating evidence at sentencing. Counsel must investigate the defendant's background before sentencing. Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986), *cert. denied*, 41 U.S. 1042 (1987). The adequacy of the scope of an attorney's investigation is to be judged by the standard of reasonableness. After an adequate investigation, counsel may reasonably decide not to present a mitigating character at sentencing. Stanley v. Zant, supra at p. 961. The State argues that trial counsel did not believe, nor did he have reason to believe, that Damren was mentally deficient or brain damaged and that the contention that his failure to investigate and present evidence of brain damage is without merit. Also in evaluating ineffective assistance of counsel on issues of specific performance, the court should consider whether the counsel acted outside of the wide range of reasonable

professional judgement. Bush v. Singletary, 988 F.2d 1082 (11th. Cir. 1993). It is clear from the expert witness that the wide range of reasonable professional conduct in investigating for penalty phase was to begin the investigation and do a comprehensive background investigation well in advance of the guilt phase which trial counsel admits he did not accomplish. The resulting prejudiced was an uninformed jury deciding the ultimate penalty.

At the evidentiary hearing, the defendant put on evidence of brain damage mitigating factors through Dr. Miller. The State presented no experts to contradict this contention. In Buenoano v. Singletary, 74 F.3d 1078 (11th Cir. 1996), the State presented an expert who contradicted Buenoano's contention that she was under extreme emotional disturbance and

unable to conform her behavior to the essential requirements of law. In fact, in that case, the State's witness testified there was no evidence or past records indicating Buenoano suffered from organic personality disorder or bi-polar disorder as Buenoano's expert had suggested. Here, no expert testified for the State in the case at bar and

no evidence contradicts the evidence of brain damage. The absence of witnesses and evidence at the penalty phase hearing is the result of lack of preparation rather than any particular strategy or because witnesses were available. Trial Counsel's performance was constitutionally inadequate. Therefore, there is a reasonable probability that the outcome of the penalty phase would have been different if counsel had presented available expert and character witnesses and introduced the mental health mitigating evidence.

In Cave v. Singletary, 971 F.2d 1513 (11th cir. 1992), the court held that the counsel's failure to prepare for the sentencing portion of the trial resulted in prejudice to the defendant and required new sentencing. In that case, she hired an investigator to find character witnesses but could not recall what the investigator had done or what he had found.

It is clear from the records that this is a case where counsel failed to make an investigation altogether into brain damage. Thompson v. Wainwright, 787 f.2d 1447 (11th Cir. 1986), *cert. denied*, 481 U.S.1042, 107 S.Ct. 1986, 95 L.Ed. 2d 825 (1987). In the Thompson case the counsel failed to conduct any investigation of defendant's background for possible mitigating evidence. In the case at bar, trial counsel made only a desultory or cursory effort to find mitigating evidence. This case is similar to the Armstrong v. Dugger case where the counsel's investigation consisted of consultation only with a

probation officer and one interview with the defendant and parents. Armstrong v. Dugger, 883 F.2d 1430 (11th Cir. 1987).

On the other side

of the coin is Lambrix v. Singletary, 72 F. 3d 1500 (11th Cir. 1996), where the counsel undertook substantial effort to find mitigating evidence, enlisting the aid of an independent investigator, and interviewing Lambrix and at least five members of Lambrix's immediate family. Counsel consulted a mental health professional who conducted a psychological evaluation of Lambrix to determine Lambrix's competence to stand trial. Counsel also reviewed various prison records and uncovered evidence of Lambrix's alcohol and drug dependence.

It is true that after a reasonable tactical decision has been made that further investigation into a particular matter is unnecessary an attorney is not deficient in his duty to make a "*reasonable investigation*" by failing to further investigate that matter. Strickland v. Washington, supra at p.2066.

However, here there was not even enough time to make further investigation.

The trial counsel's almost complete lack of investigation into the defendant's mental and family history, and thus a lack of knowledge regarding it, as well as failure to argue

mitigating factors to the jury, constituted ineffective assistance of counsel during the death penalty phase of capital murder in the case of Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991). This case is similar to the case at bar since Damren's counsel did not properly investigate the defendant's medical history and therefore, his lack of knowledge regarding it, as well as his failure to argue mitigating facts to the jury, constituted ineffective assistance of counsel.

It is true the purpose of the rule against presenting false evidence is to protect the integrity of the truth finding function of courts rather than the rights of the defendant. However, the fact that trial counsel knowingly called the defendant to the stand and argued that his testimony was true did not satisfy the objective standard of reasonableness. The court's confidence in the penalty phase is undermined by the effects of the trial counsel's misconduct.

The performance prong of the Strickland standard requires that defense counsel provide "*reasonable effective assistance*" Strickland v. Washington, *supra* at p. 2064 which are simply representations that evidence "*reasonableness under prevailing professional norms*" at page 2065. It is important to note that judicial scrutiny of an attorney's performance is appropriately

highly deferential because of the craft of trying the case is far from an exact science.

Failure to investigate available mitigation constitutes deficient performance. Rose v. State, 675 So.2d 567 (Fla. 1995); Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995); Deaton v. Singletary, 635 So.2d 4 (Fla. 1994); Heiney v. State, 620 So.2d 171 (Fla.1993); Phillips v. State, 608 So.2d 778 (Fla. 1992); Mitchell v. State, 595 So.2d 938 (Fla. 1992); State v. Lara, 581 So.2d 1288 (Fla. 1991); Stevens v. State 552 So.2d 1082 (Fla. 1989); Bassett v. State, 541 So.2d 596 (Fla. 1989). Despite the uncontroverted evidence that Damren's counsel did no penalty phase investigation, the lower court found his deficient performance was not prejudicial. Trial counsel never went beyond these preliminary steps. The lower court also appears to have relied upon trial counsel efforts to develop penalty phase evidence, but ignored the fact that these efforts did not even begin until the trial had started! The lower court also appears to have relied upon the attorney's testimony that he would bring out negative things about Damren. However, the court ignored the trial attorney's testimony that he was unaware of most of the evidence developed in post conviction and therefore made no strategic decision not to use it.

In Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989), the two defense attorneys each thought the other was preparing for penalty phase; consequently neither investigated Harris'

background, neither obtained school and military records, and neither traveled from Miami to Jacksonville, to meet with relatives, employees and neighbors to learn whether they could provide

beneficial mitigation evidence. The State argued that the proffered "good character" evidence would have provided a "spring-board for the prosecutor to inquire into Harris' numerous prior crimes. the Eleventh Circuit acknowledged that an attorney is not obligated to present mitigation evidence if after reasonable investigation, he determines that the evidence would do more harm than good. But, he has to investigate first:

However, such decision must flow from an informed judgement. Here, counsel's failure to present or investigate mitigation evidence resulted not from an informed judgement, but from neglect. Each lawyer testified that he believed that the other was responsible for preparing the penalty phase of this case. Thus, prior to the day of sentencing, neither lawyer had investigated Harris' family, scholastic, military and employment background, leading to their total and admitted ignorance about the type of mitigation evidence available to them. Such ignorance precluded Williams and Echarte from making strategic decisions on whether to introduce testimony from Harris' friends and relatives. We conclude, therefore that the lawyers rendered inadequate assistance of counsel. 874.F.2d at 763.

In Heiney v. State, 620 So.2d 171 (Fla. 1993), a unanimous court held that Heiney's trial attorney could have made a reasonable strategic choice not to present mitigation because

he did not investigate his client's background and did not even know that mitigation existed in the form of testimony about drug and alcohol abuse, a personality disorder, and physical and emotional abuse as a child. Counsel was the same position in the instant case. He did not investigate Damren's past, and thus did not know what evidence was available and was in no position to make strategic decisions.

Had trial counsel conducted a reasonably competent investigation and penalty phase presentation the jury would have learned of these recognized mitigating factors: no significant history of violent behavior prior to the offense (Pentacost v. State, 545 So.2d 861, 863 (Fla. 1989); his history of drug and alcohol use (Caruso v. State, 645 So.2d at 397); the fact that the

offense was not planned (Reilly v. State, 601 So.2d 222, 223 (Fla. 1992)); and the mental and emotional stress upon Damren at the time of the offense, which was compounded by the speed with which the events took place (Hallman v. State, 560 So.2d 233, 227 (Fla. 1990); Perry v. State, 522 So.2d 817, 819 (Fla. 1988.))

Defense counsel's ineffective assistance prejudiced Damren. Strickland's prejudice standard requires showing a

"reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." **Strickland v. Washington**, 466 U.S. 668, 694 (1984).¹ Confidence in the outcome is undermined when the court is unable "to gauge the effect" of counsel's omissions. **State v. Michael**, 530 So.2d 929, 930 (Fla. 1988). Prejudice is established when trial counsel's deficient performance deprives the defendant of "a reliable penalty phase proceeding." **Deaton v. Singletary**, 635 So.2d 4 (Fla. 1994). Damren was not provided with a reliable penalty phase proceeding due to trial counsel's failure to investigate, and present brain damage as a mitigating factor.

The mitigation presented in post-conviction establishes prejudice. **See: Hildwin v. Dugger**, So.2d 107 (Fla. 1995) (prejudice established by "substantial mitigating evidence") **Phillips v. State**, 608 So.2d 778, 783 (Fla. 1992); (prejudice established by "strong mental mitigation" which was "essentially rebutted"); **State v. Lara**, 581 So.2d 1288, 1289 (Fla. 1991); prejudice established by evidence statutory mitigating factors and abusive childhood) **Bassett v. State**, 541 So.2d 596, 597 (Fla. 1989) ("this additional mitigating evidence does not raise a reasonable probability that the jury recommendation would have been different").²

1 A defendant is not required to show that counsel's deficient performance "[m]ore likely that not altered the outcome in this case." Strickland, 466 U.S. at 693. The Supreme Court specifically rejected that standard in favor of a showing of a reasonable probability. A reasonable probability is one that undermines confidence in the outcome.

In Phillips v. State, 608 So.2d 778 (Fla. 1992), the only mitigation witness presented was the defendant's mother who testified that Phillips was a good son who tried to help her when he was not in prison. In post conviction, Phillips presented the testimony of other relatives and friends of the family who testified that Phillips grew up in poverty, his parents were migrant workers who often left the children unsupervised, and his father physically abused him. The Court rejected the State's argument that this childhood evidence was entitled to little weight, even though Phillips was thirty-six years old at the time of the homicide. The Court commented that the evidence was relevant and admissible, and should have been presented to the jury, saying "It cannot be seriously argued that the admission of this evidence could have in any way affirmatively damaged Phillips' case. 608 So.2d at 782. The Court held there was a reasonable probability that but for counsel's deficient performance in failing to present the available mitigating evidence the jury's decision would have been different.

The lower court's apparent conclusion that prejudice was not established because the defense presented some witnesses at the penalty phase, is also contrary to law. In Hildwin v.

Dugger, 654 So. 107 (Fla. 1995), the court reviewed a death sentence imposed after a 12-0 jury recommendation of death. The trial court had refused to find prejudice in the defense attorney's inadequate penalty phase performance because the trial court could not fathom how newly discovered mitigation could convince six jurors to vote differently, especially in light of the four aggravating circumstances. This Court, however, found that counsel's sentencing investigation deprived the defendant of a sentencing phase which was a reliable adversarial testing process. The court held this way in spite of the fact that trial counsel had presented five witnesses at penalty phase, including Hildwin's father, a couple who periodically cared for Hildwin when he was abandoned by his father, a friend, and Hildwin himself.

Prejudice was found in these cases despite the existence of numerous aggravating factors. See: Hildwin v. Dugger, 20 Fla. L Weekly at S39 (four aggravating factors); Phillips v. State, 476 So.2d 194 (Fla. 1985) (four aggravating factors) Mitchell v. State, 527 So.2d 179 (Fla. 1988) (three aggravating factors); Lara v. State, 464 So.2d 1173 (Fla. 1985) (same); Bassett v. State, 449 So.2d 803 (Fla. 1984) (same).

Those witnesses testified that Hildwin's mother died before he was three, that his father abandoned him on several occasions, that Hildwin had a substance abuse problem, and that Hildwin was a pleasant child and a nice person. However, that testimony was not complete. At post-conviction it was shown that additional testimony could have been presented about Hildwin's mental or emotional disturbance, his history of abuse and neglect as a child and the fact that he performed well in a structured environment such as prison. The case was remanded

for re-sentencing .

A Reasonable Probability that the outcome would be different does not require a finding of "more likely than not" or greater than fifty percent (50%).

If the defendant can show that there is a reasonable chance the outcome would have been different, a new phase hearing should be ordered. This Court should focus on what reasonable probability means. What it means is less than is required by the standard "more likely than not". The word probability means greater than 50% but coupled with the word reasonable means less than 50%. The evidence of brain damage could have been easily discovered and this evidence would have a reasonable probability of convincing a reasonable jury that a life sentence would be appropriate under the circumstances. The primary purpose of the penalty phase is to assure that the sentence is individualized by focusing a particularized characteristic of the defendant. Armstrong v. Dugger, supra at p. 1433 (Citing Eddings. v. Oklahoma, 455 U.S. 104 (1982)). By failing to provide such mitigating evidence to the jury, though readily available and discoverable, trial counsel's deficient performance prejudiced DAMREN. , 421 F.2d 636, 637 (5th Cir. 1970). Thus an attorney is charged with the responsibility of presenting legal argument in accord with

the applicable principles of law. See e.g. Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); Beach V. Blackburn, 631 F.2d 1168 (5th Cir. 1980). Herring v Estelle, 491 F.2d 125, 129 (5th Cir. 1974) See: Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988). (Holding that when trial counsel knew that the defendant had previously been admitted into a mental hospital for a few days the failure to present any evidence regarding the defendant's mental capacity or counsel is ineffective). The resulting prejudice was clear to Damren. The trial counsel in a similar case was held ineffective in the case of Cunningham v. Zant, F.2d, 1006(11th Cir. 1991) where the trial counsel asked the neurosurgeon to consider medical records for the purposes of mitigation and his failure to present and argue readily available additional evidence regarding Cunningham's head injury, his socio-economic background, or his reputation as a good father and worker, fell outside the range of professionally competent assistance. See: Cunningham v. Zant, supra, at p 1018.

There were prevailing professional norms for the handling of death penalty cases.

As an advocate,... defense counsel as the related but distinct function of attempting to persuade the jury to exercise mercy. Defense counsel therefore has both the opportunity and the

duty to present potentially beneficial mitigating evidence and to attempt to convince the sentencer that, notwithstanding the defendant's guilt, he or she is a person who should not die. Once the defendant has been found guilty of a capital crime, a life sentence is counsel's only remaining advocacy goal. As an advocate for life, counsel must attempt to demonstrate that mitigating facts outweigh aggravating factors and must present the sentencer with the most persuasive possible case for mercy.

Goodpaster, "The Trial for Life: Effective Assistance of counsel in Death Penalty Cases," 58 *N.Y.U.L. Rev.* 299 (1983) at 318. (Emphasis added).

In that article, Prof. Goodpaster goes on to outline the steps an attorney handling a capital case should follow, starting with the development of an effective relationship with the client.

Id. at 322. The author points out further the **absolute duty** of trial counsel **"to investigate the client's life history, and emotional and psychological make-up, as well as the substantive case and defenses."** He urges "the importance of

this investigation, and the thoroughness and care with which is it conducted, cannot be overemphasized". *Id.* At 324 (emphasis added). In describing the nature of such an investigation, Prof. Goodpaster emphasizes both its difficulty and time-consuming nature:

Such investigations present more obstacles than those conducted in furtherance of ordinary criminal defense, primarily because of the difficulty in locating relevant witnesses. Over the years, the witnesses who are acquainted with the defendant are likely to have become dispersed and are difficult to trace than guilt-phase witnesses. Indeed, constructing a mitigating base on the basis of the life-history investigation is perhaps best viewed as a successive winnowing process: the attorney's investigator tracks down all mitigating leads. The attorney next interviews the most promising contacts and then chooses to call some of them at the penalty phase of the trial in accordance with a coherently developed strategy.

The failure to investigate and present mitigation evidence was ineffective assistance of counsel as required by the United States Constitution and the Constitution of the State of Florida. In Gregg v. Georgia, and its companion cases, the Court emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." *Id.* at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Penry v. Lynaugh, 109 S.Ct. 2934 (1989); Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1988) (ineffectiveness for failing to investigate and present mitigating evidence).

The State and Federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a **duty to investigate and prepare** available mitigating evidence for the sentencer's consideration, object to inadmissible evidence or improper jury instructions, and make an adequate closing argument. Tyler v. Kemp, 755 F.2d 741,745 (11th Cir. 1985); King v. Strickland, 714 F.2d 1482, 1491-92 (11th 1983); vacated and remanded, 467 U.S. 1211 (1984) adhered to on remand, 714 F.2d 1462, 1463-64 11th Cir. 1984), cert. denied, 741 U.S. 1016 (1985); Douglas v. Wainwright, 714 F.2d 1531 (11th Cir. 1983), vacated and remanded, 468 U.S. 1206 (1984), adhered to on remand, 739 F.2d 531 (1984), cert. denied, 469 U.S. 1207 (1985); Goodwin v.

Balkcom, 684 F.2d 794 (11th Cir. 982); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986), cert. denied, 107 S.Ct. 602 (1986). In Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991), even though counsel had put on evidence in mitigation, counsel was held ineffective at the penalty phase for failing to put on readily available evidence from family members regarding the defendant's work history, peaceful nature and evidence of injuries in a car accident. In Cunningham, counsel had stated at the evidentiary hearing that they had chosen to put on quality witnesses, *Id.* at 1017, yet because of the other evidence in

mitigation that was readily available and not adequately investigated, the court held counsel's performance deficient. See also: Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991).

Counsel's neglect cannot be seen as strategic. His investigation, even by his own description, was cursory at best. Counsel's omissions were not reasonable and the resulting prejudice to Damren was that the jury had no "defense", no case for life on which to base a recommendation. His investigation, into brain damage showed he did not understand that it would not open the door to Damren's criminal record. Counsel's omissions were not reasonable and

the resulting prejudice to Damren was that the jury had no "defense", no case for life on which to base a recommendation. Such omissions simply cannot be seen as strategic. Defense counsel is expected "to exercise the customary skills and diligence that a reasonably competent attorney would exhibit under similar circumstances." Hayes v. Lockhart, 766 F.2d 1247, 1251 (8th Cir.).

The basis concerns of counsel during a capital sentencing proceedings are to **neutralize** the aggravating circumstances advanced by the State, **and to present mitigating evidence.**

Therefore, this Court should remand this case for a new penalty phase trial.

B. MENTAL HEALTH MITIGATING EVIDENCE WAS AVAILABLE AND THE FAILURE TO PRESENT THE SAME PREJUDICED DEFENDANT'S CASE.

Dr. Miller testified that the defendant was brain damaged and the combination of the substance abuse resulted in a mitigating factor.

Damren's jury never heard this evidence. If this evidence was presented to the jury, there is reasonable probability that the outcome would have been different.

There is a great difference between failing to present

evidence sufficient to establish incompetency at trial and failing to pursue mental health mitigating evidences at all. **Blancko v. Singletary**, 943 F.2d 1477 (11th Cir. 1991). One can be competent to stand trial and yet still suffer mental health problems that the sentencing judge and jury should have had an opportunity to consider. It is clear there existed a reasonable probability that Damren's jury would have recommended a life sentence absence these errors. This court does not have to consider whether or not there was a strategic decision for not presenting such evidence since trial counsel stated that had he found brain damage, he would have presented that evidence. [R.559-562]. The question is whether or not the trial counsel conducted a reasonable investigation into the availability of mitigating evidence. It was clear that simply talking to the defendant was not adequate investigation.

In the case of **State v. Michael**, 530 so.2d 929 (Fla.1988), the Florida Supreme Court upheld the trial court's granting of a new sentencing hearing for the defendant. The Supreme Court held that evidence supported a finding of ineffective assistance of counsel in the sentencing phase based upon failure to obtain expert opinions on applicability of statutory mental health mitigating factors. This case applies to the case at bar since the trial counsel failed to present these mental health mitigators to the jury.

C. DIMINISHED CAPACITY AND BRAIN DAMAGE WAS AVAILABLE TO TRIAL COUNSEL DISCOVERABLE THROUGH REASONABLE INVESTIGATION.

There were blatant and glaring indicia of brain damage, diminished capacity and mental health mitigators that went unrecognized or undiscovered by the trial counsel.

1. The failure of trial counsel to obtain any prior medical records for Dr. Miller.

A claim that a defendant was denied professionally adequate mental health assistance due to ineffective assistance of counsel is cognizable in a Rule 3.850 motion. See: Mason V. State, 489 So. 2d 734 (1986); State V. Sireci, 536 So. 2d 231 (Fla. 1988); State v. Grover, 489 So. 2d 15 (Fla. 1986); Jones v. State, 478 So. 2d 346 (Fla. 1985); Hill v. State, 473 so. 2d 1253 (Fla. 1985). The State did not dispute that this issue was properly raised. Thus, the issue of procedural default is waived. See: Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993).

Trial counsel hired Dr. Miller to conduct a mental health evaluation of Damren. However, because trial counsel did not conduct any investigation of Damren's background or history of mental problems, he did not provide any background information

to the examining physician.

It is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject.

Mason, 489 So. 2d at 736; Bonnie and Slobogin, **The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation**, 66 Va L.rev.427 (1981); Pollack, **Psychiatric Consultation for the Court**, 1 Bull Am. Acad. Psych. & L. 267, 274 (1974); H. Davidson, **Forensic Psychiatry** 38-39 (2d ed. 1965). Here, no independent history was obtained by trial counsel and provided to the mental health expert.

The penalty of death differs from all other forms of criminal punishment. Not in degrees, but in kind. It is unique in its total irrevocability. It is unique in its reaction of rehabilitation of the convict as a basic purpose of criminal justice, and that is unique, finally, in its absolute

pronunciation of all that is embodied in our concept of humanity. **Furman v. Georgia**, 408 U.S. 238 (1972). The respondent and the trial counsel complain that the trial

counsel's performance was put under the appellate microscope. The petitioner contends that his performance should be put under the appellate microscope because death is different. The penalty of death differs from all other forms of punishment. Various courts have held that death is different and therefore, fairness requires that proffered testimony and hearsay evidence, and other evidence should be admitted. Therefore, it should be seen that strict evidentiary standards that apply to other cases cannot be blindly followed in the penalty phase where a defendant can be sentenced to death. The procedural history of the Charles Williams Proffitt is a case in point. Proffitt v. State, 428 U.S. 242 (1976). On two occasions, this Court declared its appeals from denials of his post-conviction motions "legally frivolous", however, in his last appeal to this Court in 1987, this Court stated that "Our present capital sentencing law mandates that we reduce Proffitt's sentence to life imprisonment without the possibility of parole for 25 years." Proffitt v. State, 510 So.2d 896 (Fla. 1987). Why should the trial counsel be placed under the appellate microscope? Because the death penalty is indeed different.

ARGUMENT III

PUBLIC RECORDS ISSUE

The circuit court ordered the State Attorney's office to provide the defense with a copy of all documents which had been requested. Where an exemption had been raised, the State was to provide the court with those records for in camera inspection.

While the circuit court reviewed the exempt documents and determined the records were in fact exempt under F.S. § 119.07 (3) (n), there is no indication in the court's order that the work product documents were reviewed for exculpatory information under Brady v. Maryland, 373 U.S. 83 (1963). Certainly, interview notes and particularly "investigative interviews" may contain exculpatory information and must be reviewed in camera. Relief is warranted.

CONCLUSION

Based upon the record and the arguments presented herein, Damren respectfully urges the Court to reverse the circuit court's order, order a new sentencing and guilt hearing, and vacate his unconstitutional conviction and sentence, and that this Brief is also on the enclosed DOS diskette in Word Perfect, and that it is in Courier Font size 12.

JEFFERSON W. MORROW, P.A.

Jefferson W. Morrow, P.A.
Florida Bar No.: 369136
1301 Riverplace Boulevard, Suite

2600

Jacksonville, Florida 32207
Telephone: (904) 399-5626
Facsimile: (904) 399-5980
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the forgoing has

been furnished to the
Office of the Attorney General, The Capitol, Tallahassee,
Florida, and to Floyd Damren by U.S. Mail, this ___ day of
December, 2001.

JEFFERSON W. MORROW, P.A.

Jefferson W. Morrow, P.A.
Florida Bar No.: 369136
1301 Riverplace Boulevard, Suite

2600

Jacksonville, Florida 32207
Telephone: (904) 399-5626
Facsimile: (904) 399-5980
Attorney for Defendant

Copies furnished to :

Assistant Attorney General
Office of the Attorney General
The Capitol
Tallahassee, Florida
Floyd Damren