IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 01-166

DANIEL BURNS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR MANATEE COUNTY, STATE OF FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

I. Procedural history

On August 25, 1987, the Manatee County Grand jury indicted Daniel Burns for the first degree murder of Jeffrey Young on August 18, 1987, and for trafficking in cocaine (R 7–8). Mr. Burns was tried and convicted as charged, and sentenced to death for the murder and to 30 years imprisonment for trafficking (R 10-19). On December 24, 1992, this Court affirmed Mr. Burns conviction but vacated the death sentence, and remanded for a new penalty phase trial with a new jury. Burns v. State , 609 So.2d 600 (Fla. 1992).

The new penalty phase was conducted before the Honorable Paul E. Logan, Circuit Judge, and a jury on April 4-14, 1994 (R 214). The jury unanimously recommended a sentence of death (R 220). The court heard additional testimony and argument of counsel on May 27, 1994 (R 264). The court sentenced Mr. Burns to death on July 6, 1994 (R 264-274).

The court found three statutory aggravating circumstances were proved beyond a reasonable doubt and were merged: the murder of a law enforcement officer engaged in the performance of his official duties, committed to prevent a lawful arrest or escape from custody, and to disrupt the enforcement of laws relating to cocaine trafficking (R 269-272).

The court found five mitigating circumstances were established by a preponderance of the evidence: (1) Burns was 42 years old at the time of the offense. (2) He had no significant prior criminal activity, but the weight of this factor was reduced by evidence that he had delivered cocaine to two of his employees in the months before the murder. (3) He was raised in a poor, rural environment in Mississippi as one of 17 children in an honest, hard working, but disadvantaged family. He is intelligent and was continuously employed after high school. (4) Burns had contributed to his community and to society. He was a good student, graduated from high school, worked hard to support his family, and was honorably discharged from the military, but for excessive demerits after one month and 17 days active duty. (5) Burns had shown some remorse, and has shown some spiritual growth since his original sentencing. But the court found that Burns had never been completely truthful about the details of the crime, having consistently said it was an accident for which he was sorry, so the court found it "difficult to conclude" whether he had truly grown spiritually and was remorseful or his conviction and attitudes were only self-serving (R 272-73). This Court affirmed the sentence of death. Burns v. State , 699 So.2d 646 (Fla. 1997).

On March 2, 2000, Mr. Burns filed his Amended Motion to Vacate Judgment and Sentence (PC-R 327). On May 11, 2000, the lower court held a hearing on this

matter pursuant to Huff v. State , 622 So.2d 982 (Fla. 1993). The evidentiary hearing was held November 20, 2000. Thereafter, the lower court entered an order denying Mr. Burns' 3.850 in its entirety (PC-R 395-589). This appeal follows.

II. STATEMENT OF THE FACTS

State's Evidence at the Resentencing Trial

Sarah Hopkins testified that in August of 1987 she was employed as a dispatcher with The Florida Highway Patrol. (R. 1128). At 7:22 p.m. she received a request from Trooper Jeffrey Young for a registration and wanted check on a Michigan tag. (R. 1132). She told him the car was registered to Oliver Burns (R. 1132). Trooper Young then requested a wanted check on Samuel Williams (R. 1133). Mr. Williams was not wanted. (R. 1133). At 7:47 p.m. Trooper Young requested a backup. (R. 1134). He was extremely distressed and she could hear scuffling etc. (R. 1135). She alerted other Troopers and about two minutes after Trooper Young's last transmission she received word that he had been shot. (R. 1138).

William Johnson testified that he was traveling on Interstate 75 on August 18, 1987 (R. 1199). As he was heading north he saw a State Patrol car had pulled someone over. Down in the embankment he could see the person had the Trooper in a bear hug and was throwing him around (R. 1201). He pulled over and got out

of his car where he started down the embankment but the Trooper told him to stay back (R. 1205). He then saw the person on his knees throwing punches at the Trooper (R. 1206). He then saw the man stand up with a gun in his hand and he pointed the gun at the Trooper (R. 1208). He could see the man moving his lips then the Troopers hands went up and then he heard the shot (R. 1209). There were about ten people standing around at that time (R. 1209). After the shooting the man just nonchalantly walked off into some trees (R. 1210).

William Macina testified that on August 18, 1987 he was having his car towed down Interstate 75 (R. 1214). He noticed a police car had pulled someone over and they were starting to scuffle (R. 1215). He described the scuffle as a shoving match (R. 1216). They went down in the grass next to the road and the man came up with the gun in his hand (R. 1218). The man looked up at the people who had gathered, then pointed the gun back down at the Trooper (R. 1220). He then saw the man shoot the Trooper (R. 1222). The man then calmly walked into the woods (R. 1222).

Lawrence Ballweg testified that he was towing a car on I-75 on the day of the homicide (R. 1235). He noticed a Highway Patrol car with flashing lights on the side of the road and then saw a black man on the ground with a Trooper underneath him (R. 1238). They were wrestling (R. 1238). He started to run down

the hill and the Trooper told him to stop because the man had a gun (R. 1241). He noticed the man had a gun pointed at the trooper as the Trooper was on the ground (R. 1242). The Trooper then said "look you can give me back my gun and we can start this all over again. We don't have to do it like this. The man then shot the Trooper (R. 1245). The man then put the gun alongside him and casually climbed over the fence into the field (R. 1245). On cross examination he admitted that he had initailly told the police that he could not hear what was being said between the man and the Trooper (R. 1251).

Lieutenant David Sterman testified that he searched the area in his airboat and found Mr. Burns in a canal about .25 miles from the shooting (R. 1272). He told Mr. Burns to raise his hands and he did so (R. 1276). He found the service revolver the next day near the area where they apprehended Mr. Burns (R. 1277). On cross examination he stated that Burns was stripped naked in the boat and strip searched, and he had an odor of alcohol on his breath (R. 1278).

Dennis Trubey of FDLE testified he found a pouch bag at the pavement next to I-75 (R. 1327). The substance inside the bag was cocaine (R. 1333).

Samuel Williams testified that he had known Mr. Burns for about six years prior to August 18, 1987 (R. 1335). In Detroit, Burns told him that he was going down to Florida to buy $10,000.00 worth of cocaine (R. 1341). About one week

later he left with Mr. Burns to come down to Florida (R. 1341). They were heading back up north on I-75 with Burns driving when they looked for an exit to use the restroom (R. 1346). At that point a patrol car started following them (R. 1347). They went down a dirt road and relieved themselves and started heading back toward the Interstate (R. 1347). The Trooper followed and Mr. Burns said "He's still following us" (R. 1348). Eventually, the Trooper turned his lights on and pulled them over (R. 1349). The Trooper asked for identification, which both he and Mr. Burns gave, and said everything had checked out (R. 1349). The Trooper then wanted to search the car (R. 1349). He was not sure if he was given permission by Burns (R. 1349). The Trooper then stated he wanted to search the trunk because there was a lot of drug traffic coming through that area and he asked permission to search the trunk, and Mr. Burns gave Mr. Williams permission (R. 1350). The Trooper went back toward the trunk and the witness heard him say "this looks like cocaine to me" and Burns say "Let me see that" and then he heard a scuffling (R. 1351). He turned around and saw them wrestling and he heard the Trooper say "you can all go" (R. 1352). After he sat back in the car he heard a gunshot and Burns said "Doc get the car out of here. Get the car out of here" (R. 1353). He took off in the car, drove about 30 miles and the car started giving him trouble and he pulled into an orange grove and left it (R. 1354). He was offered

immunity to testify in the case (R. 1355). On cross examination, Mr. Williams stated that before the incident he and Mr. Burns had about a pint of Crown Royal and a six pack of beer (R. 1356).

Defense evidence at the Resentencing Trial

Mr. Burn's mother, Ethel Burns, testified that she had 17 children, 11 boys and 6 girls (R. 1431). They all grew up on a plantation with hogs, potatoes, and chickens (R. 1432). Mr. Burns paid for his sisters funeral plot after she died of meningitis (R. 1434-36). Mr. Burns always worked hard at the plantation where they lived (R. 1442). He worked at a chemical plant to help support the family (R. 1443). Mr. Burns' brother, James Earl Burns, became crippled with polio (R. 1445). She tried to teach the children to read but did not get very far (R. 1447). The children did not have very many clothes (R. 1449). Mr. Burns provides some support for his brother Charles, who suffers from Downs Syndrome (R. 1450-52). After Mr. Burns left Mississippi and moved up north he tried to help the family by buying them a hog farm, and by sending money and gifts (R. 1452, 53). She visits Mr. Burns in prison and feels he still loves her (R. 1454).

Ellis Rance testified that he was born and raised in Yazoo County, Mississippi (R. 1469). He lived near the Burns family (R. 1470). He stated that Dan is a good man and good worker (R. 1472). On cross examination the witness

admitted it had been 27 years since he had day-to-day contact with Mr. Burns (R. 1476).

Albert Rance testified that he owns and operates a taxi service in Yazoo County, Mississippi (R. 1477). While growing up he knew the Burns family (R. 1479). Mr. Burns was a quiet person who behaved himself (R. 1482). Mr. Burns worked in the cotton field and also chopped wood (R. 1484). He never knew Mr. Burns to have any ill-temper or character flaws (R. 1486). On cross examination Mr. Rance admitted that after Mr. Burns left Yazoo County in 1967 he had very little contact with him and did not know what kind of person he became after he left (R. 1488, 89).

Delores Jones testified that she is from Yazoo City, Mississippi and Mr. Burns was her classmate (R. 1492, 93). Mr. Burns was quiet in high school and was always pleasant and very mannerable (R. 1496). On cross examination Ms. Jones admitted that she had only seen Mr. Burns about three times since 1967 (R. 1497). She did not know what kind of person he had become after graduation from high school (R. 1498).

Janie Mae Creeks testified that she went to school with Mr. Burns in Mississippi (R. 1499, 1500). Mr. Burns was quiet and never disobedient (R. 1502). On cross examination Ms. Cheeks admitted that she had not had any contact with

Mr. Burns after he graduated high school (R. 1505). She did not know the type of person he became after he left Yazoo City and moved to Detroit (R. 1506).

Gladys Barnes testified that she was born and raised in Mississippi (R. 1506). She went to high school with Mr. Burns in Yazoo City (R. 1508). Mr. Burns was always a very nice person (R. 1509). Mr. Burns wrote a sympathetic letter to her, from prison, after her husband died .

Johnny Spearman testified that he was born and raised in Mississippi (R. 1518). He met Mr. Burns in 1967 and they have been friends ever since (R. 1520). Since Mr. Burns moved away from Ohio, he would see him two or three times a year when Mr. Burns would visit (R. 1521). He had never seen Mr. Burns display any violent temper (R. 1522).

Mary Spearman testified she met Mr. Burns in 1965 after he had just graduated high school (R. 1529). Her sister was married to Mr. Burns' brother Edward (R. 1529). She stated that Mr. Burns is a very quiet person and had never seen him get in an argument (R. 1530). She never saw him display a temper (R. 1531).

Betty Allison testified that she is the mother of Mr. Burns' second oldest daughter (R. 1533). Mr. Burns asked her to marry him but she declined (R. 1534). Mr. Burns provided financial support to his daughter (R. 1535). Mr. Burns was a

nice young man (R. 1536). On cross examination Ms. Allison testified that Genava, Mr. Burns daughter, was born in 1970 (R. 1542).

Frances Rayford testified that she met Mr. Burns in Ohio after he had just graduated from high school (R. 1552). Mr. Burns was kind to her and her son (R. 1552).

Ernistine Burns testified she had known Mr. Burns for 25 years and first met him in 1968 in Mississippi (R. 1555). Mr. Burns was a nice and pleasant person (R. 1555).

Shirley Burns testified that she is Mr. Burns' niece (R. 1557). She moved up to Detroit at age 15 and Mr. Burns was a big help to her (R. 1558). Mr. Burns is a friendly person (R. 1559).

Michael Burns testified that he is Mr. Burns' nephew (R. 1563). Mr. Burns is a good uncle and had taken him fishing and shopping (R. 1564). He removed a fish hook from his finger once (R. 1565).

Mary Burns testified she is Mr. Burns' niece and works in a bank in Detroit (R. 1566). In 1979 she moved to Detroit and Mr. Burns helped her (R. 1567). He provided financial support (R. 1567). Mr. Burns has never been a violent person and is a very mild, good person (1568).

Barbara Burns testified that she is Mr. Burns' niece. (R. 1570). When she

moved to Detroit, Mr. Burns helped her financially (R. 1572). He acted as surrogate father (R. 1572). He was a hard worker (R. 1573). She stated her uncle is a wonderful person and a fantastic role model (R. 1574).

Diane Burns testified that she is Mr. Burns' sister (R. 1578). She stated that Mr. Burns was a role model back in Mississippi and provided financial support to the family (R. 1579). He drove her kids to school (R. 1584). Mr. Burns is a loving brother and giving person (R. 1585).

Earnest Burns testified she is Mr. Burns sister (R. 1592). She has had to call on Mr. Burns for financial assistance (R. 1594). When her sister died, Mr. Burns paid for the funeral plot (R. 1595). She has never seen Mr. Burns display any violent temper (R. 1595). He is a very quiet person (R. 1596).

Herbert Johnson testified that he is from Mississippi (R. 1597). He knew Mr. Burns when he came to Detroit and he was always nice to him, and was a pretty nice man (R. 1603). He has never seen Mr. Burns angry or mad (R. 1603). On cross examination Mr. Johnson stated that while Mr. Burns was living in Detroit he would see him once or twice a year (R. 1604).

May Johnson testified she first met Mr. Burns in 1967 (R. 1607). He was a kind, gentle and loving person (R. 1607). She visited Mr. Burns in jail and he received the Lord (R. 1608). He has remorse about what happened to the Trooper

(R. 1609).

Herbert Burns , Mr. Burns' brother, testified as to growing up in Yazoo city picking cotton and working in a meat packing company (R. 1618). Mr. Burns is supportive, a hard worker, and has never been violent (R. 1619).

Vera Laboa , Mr. Burns' sister, testified as to the very poor conditions growing up in Yazoo City and described picking cotton (R. 1622). Mr. Burns has helped support the family, sending boxes of clothes, and providing transportation (R. 1624). She saw Mr. Burns in jail and he was extremely sorry about the shooting (R. 1626). Mr. Burns has been a father figure and was loved by everyone (R. 1627).

James Burns, Mr. Burns' brother, testified that Mr. Burns was a role model while they were growing up (R. 1648). He described the poor conditions in Yazoo city, lack of running water and clothing (R. 1649). There were nights without enough food to eat (R. 1649). He has visited Mr. Burns in prison and he is very sorry for what happened (R. 1652). He has never known him to be violent (R. 1652).

Julia Blount, Mr. Burns' sister, testified as to the conditions growing up in Yazoo City (R. 1666). Mr. Burns always gave support to the family while she was growing up (R. 1667). Mr. Burns is a fantastic guy with a good heart (R. 1668).

On cross examination she stated that after Mr. Burns left Yazoo City in 1967 she had contact with him only when he would come visit in the summer (R. 1669).

David Burns, Mr. Burns' brother, testified described the conditions growing up in Yazoo City (R. 1675). Mr. Burns provided him with financial support and was a male leader in the family while he was growing up (R. 1677).

Minnie Burns, Mr. Burns sister, testified as to the living conditions growing up in Yazoo City, Mississippi (R. 1681). Everyone worked in the fields (R. 1681). She described Mr. Burns as a hard worker and a good provider for the family (R. 1682). After Mr. Burns left Yazoo City, he continued to send support to the family (R. 1684). She stated Mr. Burns has been like a father figure to her (R. 1686).

Mary Stafford , Mr. Burns' sister, testified as to the poor living conditions in Yazoo City, Mississippi (R. 1691). She described how the family picked cotton (R. 1691). She described Mr. Burns as smart, loving, and caring (R. 1693).

Jean Burns, Mr. Burns' niece, testified that Mr. Burns would come visit her in Ohio (R. 1695). He told her that she should "graduate and do something good with her life " (R. 1696).

Norman Gibson a minister, testified that he went to visit Mr. Burns in prison at the request of one of his sisters (R. 1704). Mr. Burns told him that he felt sorrow for what had happened (R. 1705). He saw changes and spiritual growth in

Mr. Burns (R. 1706).

Michael Radelet, a sociology professor at the University of Florida, testified based upon the prior record, characteristics of the crime charged, age at release, age at time of offense, history of alcoholism or drug abuse, institutional adjustments, and social support outside the family, Mr. Burns would "make a satisfactory adjustment to life in prison, and he would do so without threatening the guards or being at all disruptive" (R. 1737)

Diana Allen, Mr. Burns' counsel at the first trial, testified she never had any difficulties with Mr. Burns on the occasions she visited him in jail (R. 1818). He also always acted appropriately in court (R. 1818). Mr. Burns wrote her a letter thanking her for representing him and praying everything went well for her (R. 1825). In another letter Mr. Burns stated he was sorry about her accident and hoped she got better soon (R. 1827).

Debbie Scofield testified she started corresponding with Mr. Burns while he was in prison through an organization called Life Lines , a company who match up people who support prisoners (R. 1830). Initially, Mr. Burns literally skills were very poor but improved over time (R. 1831).

Kathleen Lawson testified that she became a pen pal with Mr. Burns after he came to prison (R. 1838). She stated Mr. Burns is very religious, concerned about

his parents, and uncomplaining (R. 1840).

Johnie Olifphant, testified she grew up in Yazoo City, Mississippi and related the poor conditions there (R. 1849). Mr. Burns worked in the fields (R. 1851). During the time they attended school together, Mr. Burns was a nice, quite person, and did not bother anyone (R. 1852). Mr. Burns continued to send support to her and her daughter after he left Yazoo City (R. 1854). Mr. Burns is her daughter Laura's natural father (R. 1855). She has never noticed any bad character traits in him and he has never been violent or mistreated her in any fashion (R. 1857).

Geneva Hamilton, Mr. Burns' daughter, testified she is 24 years old and lives in Arcola, Mississippi (R. 1862). She did not have much contact with her father growing up (R. 1865). Since Mr. Burns' incarceration in 1987, she has developed a relationship with him (R. 1867). She receives letters from Mr. Burns and visits him in prison (R. 1968). She thinks her father is the "best person in the world" R. 1873). On cross examination, she admitted she did not know her father well prior to the homicide (R. 1875).

Laura Evans, Mr. Burns' daughter, testified Mr. Burns visited her over the years when she was living in Mississippi and has been a great help and inspiration to her (R. 1878). He also provided financial support (R. 1881). On cross examination she stated that she first remembered meeting her father when she was

five (R. 1886). She was raised by her mother Olifphant and stepfather, not by Mr. Burns (R. 1886).

Evidentiary Hearing Facts

Counsel Adam Tebrugge:

Mr. Tebrugge represented Mr. Burns at the resentencing and was assigned to do investigation into potential mitigating circumstances and conduct the penalty phase (PC-R 435). He met with Dr. Berland about half a dozen occasions in preparation for the penalty phase (PC-R 436). It was his intention to call Doctor Berland (PC-R 436). Doctor Berland had related to him that Mr. Burns had brain damage (PC-R 438). There was no strategic reason associated with not calling Doctor Berland and/or another mental health expert (PC-R 438).

Counsel Tebrugge stated his collection as to why Doctor Berland was not called in the penalty phase was that he received a phone call from Doctor Berland that something had happened in Doctor Berland's personal life involving a death in the family that was going to make it difficult for Doctor Berland to appear at the penalty phase (PC-R 439). He further stated there was no strategic reason associated with not presenting any evidence or testimony from Doctor Berland at the Spencer hearing (PC-R. 440).

Counsel Tebrugge further stated that he did not advise the trial judge that he

had a essential witness who had a family emergency because he was "a bit overwhelmed by the entire proceedings" (PC-R 442). He said he "probably didn't understand what a Spencer hearing was" (PC-R 456). None of the other mitigation evidence presented in the case was a reason for not calling Doctor Berland (PC-R 458). He felt he could deal with potential state rebuttal witness Doctor Merin, on cross examination (PC-R 464).

COUNSEL ELLIOTT METCALFE:

Mr. Metcalfe testified that he is the elected Public Defender for the 12th Judicial Circuit and was so at the time of Mr. Burns' resentencing proceeding (PC-R 467). His primary responsibilities were handling the testimony of family members while counsel Tebrugge would handle any psychological or psychiatric part of the defense (PC-R 469). It was his understanding that Doctor Berland would be called as a witness (PC-R 469). It was his opinion that any mitigation evidence dealing with the mental health issue would be of benefit to Mr. Burns (PC-R 470). He was not aware of any strategic reason associated with the failure to call Doctor Berland (PC-R 470). He recalled that the reason Doctor Berland was not called at the resentencing was that during the sentnecing phase Doctor Berland had a family crisis involving a death or sickness (PC-R PC-R 471). He stated there was nothing inconsistent with the testimony of the family members of Mr. Burns and the

testimony of Doctor Berland (PC-R 471, 472). He felt Doctor Berland's testimony would be beneficial to Mr. Burns even if Doctor Merin were called by the state in rebuttal (PC-R 473). It was his understanding that Doctor Berland would have testified that Mr. Burns suffered from paranoia and brain damage (PC-R 482).

DOCTOR ROBERT BERLAND:

Doctor Berland testified that he is a forensic psychologist (PC-R 484). In 1988 he administered the WAIS and MMPI tests to Mr. Burns (PC-R 487). Doctor Berland readministered both tests to Mr. Burns in 1993 (PC-R 487). Based on the testing, Doctor Berland found that Mr. Burns was under the influence of extreme mental and emotional disturbance at the time of the homicide and suffered from brain damage and "chronic ambulatory psychotic disturbance"(PC-R 496, 509-511). Doctor Berland also stated that Mr. Burns' reaction to the Trooper's actions "would be significantly inflamed by the existence of this mental illness" (PC-R 497).

DOCTOR HENRY DEE:

Doctor Henry Dee is a Neuropsychologist (PC-R 538). He interviewed Mr. Burns on February 5, 2000, and administered the WAIS III, the Denman Neuropsychology Memory Scale, the Wisconsin Card, the Halstead-Reitan Battery, and the Asphasia Screening test (PC-R 540-542). Based on these tests,

Doctor Dee concluded that Mr. Burns was brain damaged and has been his entire life (PC-R 547). Doctor Dee testified that Mr. Burns' capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired at the time of the homicide (PC-R 552).

The state did not present any live testimony at the evidentiary hearing, but instead relied upon the 1988 trial testimony of Doctor Merin.

DOCTOR SYDNEY MERIN (1988 Trial Testimony):

Doctor Merin, a psychologist, testified that Doctor Berland was incorrect in his assessment of Mr. Burns because: (1) Doctor Berland gave the old version of the WAIS (R. 1895); (2) Doctor Berland did not administer all the sub-tests of the WAIS (R. 1845); (3) Doctor Berland erroneously stated that a 10 point difference between a verbal IQ score and a performance IQ score is indicative of brain damage (PC-R 1847); The MMPI test administered by Doctor Berland did not establish that Mr. Burns was psychotic, but only had some symptoms of paranoid personality disorder (R. 1859).

SUMMARY OF THE ARGUMENTS

(1). The lower court erred in denying Mr. Burns' claim that his resentencing counsel were ineffective for failing to present available mental mitigation evidence.

(2). The lower court erred in denying Mr. Burns' claim that resentencing counsel were ineffective for failing to present the non-statutory aggravating circumstances that the initial traffic stop of Mr. Burns was without probable cause

and more likely than not was the result of “racial profiling”.

(3). The lower court erred in denying Mr. Burns claim that the lower court committed fundamental error by failing to address and weigh each mitigating circumstance in the final sentencing order.

(4). The lower court erred in denying Mr. Burns’ claim that his sentence of death is invalid because the jury instructions shifted the burden to Mr. Burns to prove death was inappropriate and in the process employed a presumption of death in violation of his constitutional rights.

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING MR. BURNS' CLAIM THAT HIS RESENTENCING COUNSEL WERE INEFFECTIVE FOR FAILING TO PRESENT AVAILABLE MENTAL MITIGATION EVIDENCE

In his first amended 3.850 motion, Mr. Burns alleged his resentencing counsel was ineffective for failing to present available mental mitigation evidence to the resentencing jury and the resentencing judge (PC-R 277-282). Mr. Burns also alleged ineffective assistance of his resentencing counsel for failing to present mental mitigation evidence to the resentencing judge at the Spencer hearing (PC-R 282-285). These claims concern resentencing counsels failure to present available psychological findings of brain damage and chronic ambulatory psychotic disturbance and paranoia, and also objective neuropsychological findings of significant brain damage. Mr. Burns' 3.850 motion alleged that had counsel presented this available mental health mitigation, the jury and the court would have found statutory and nonstatutory mental mitigators. When weighed against the single aggravator proven by the state, that the victim was a law enforcement officer, the mental health mitigation would have mandated a sentence of life imprisonment (PC-R 286).

The lower court denied Mr. Burns' claims of ineffective assistance of

resentencing counsel for failing to present available mental health mitigation evidence for the following reasons:

1. Resentencing Counsel were not deficient for failing to present mental mitigation evidence because they made a "tactical choice" not to present the evidence (PC-R 406).

2. The failure to present the mental mitigation evidence was not prejudicial to Mr. Burns because there was no showing of a "reasonable probability that, but for counsels unprofessional errors, the result would have been different". (PC-R 407 *quoting* Strickland 466 U.S. at 695, 104 S.Ct. At 2069).

As will be demonstrated below, the lower court erroneously denied this claim based upon findings of fact which are not supported by substantial competent evidence in the record and by incorrect conclusions of law in assessing the prejudice prong of Strickland.

A . The finding by the lower court that resentencing counsel's decision not to present mental mitigation evidence was a "tactical choice" is not supported by substantial competent evidence in the record.

THE STANDARD OF REVIEW

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

In concluding that counsel's failure to present mental health mitigation was a "tactical decision" the court noted:

1. Neither defense counsel or Doctor. Berland could "recollect" why no mental health expert was called (PC-R 402).

2. During the resentencing proceedings counsel Tebrugge told the court " Doctor Berland, if he is called would not be called until Monday" and "I don't know at this point whether we plan to call Doctor Berland or not"(PC-R 404).

3. In a letter written to Dr. Berland by counsel Tebrugge following the jury advisory sentence of death he stated " we are considering calling you as a witness for that hearing" and "I will try and decide within the next two weeks whether you will be called"(PC-R 405).

4. Since the "theme" of the resentencing was to "humanize" Mr. Burns, presentation of mental mitigation would have been inconsistent (PC-R 407).

5. If the defense had called Doctor Berland then counsel would have had to "negate" the testimony of Doctor Merin who testified for the state at the initial trial that there was no evidence that Mr. Burns was psychotic and that he was not under an extreme emotional or mental disturbance at the time he shot Trooper Young (PC-R 407).

(i) The lower court's finding that neither defense counsel could "recollect"

why no mental mitigation evidence was presented at the resentencing proceedings is not supported by substantial competent evidence.

Contrary to the finding by the lower court, counsel testified extensively regarding recollections of why Doctor Berland did not testify:

> COUNSEL TEBRUGGE
>
> Q. Do you have any recollection as to why Doctor Berland was not called as a witness at the resentencing hearing?
>
> A. My recollection is that while the penalty phase was in progress, that I received a phone call from Doctor Berland that something had happened in Doctor Berland's personal life ; and I believe that it involved a death in the family. And my recollection was that was going to make it difficult for Doctor Berland to appear at the penalty phase.
>
> I believe he was out of town when I received the call. And I also believe the phone call was very close in time to the point where Doctor Berland was going to testify.

PC-R 438 (*emphasis added*)

> Q. Was there any **strategic reason** associated with not calling Doctor Berland and/or another mental health expert at the resentencing?
>
> A. **No**.

PC-R 437 (*emphasis added*)

> Q. And at the Spencer hearing in the case did you

present any evidence or testimony from Doctor Berland in regard to mental mitigation issues on Mr. Burns' behalf?
A. No

Q. And was there any **strategic reason** associated with that?
A. **No**

PC-R 440 (*emphasis added*)

Q. All right can you offer any explanation as to why you wouldn't advise the judge that you had a witness with a family emergency that you felt like was necessary to present?
A. No, I think, really, **I was just a bit overwhelmed by the entire proceedings.**

PC-R 442 (*emphasis added)*

Q. Mr. Tebrugge, just so we're clear, at any time during your representation of Mr. Burns at the resentencing proceeding, **did you ever make a decision in your mind not to call Dr. Berland for asubstantive reason that you did not believe it would be helpful to Mr. Burns' case?**
A. **No.**

Q. At all times did you hold the opinion that you thought calling Doctor Berland would be helpful to Mr. Burns' case?
A. Yes.

PC-R 457,458 (*emphasis added)*

COUNSEL METCALFE

> Q. Do you know why Doctor Berland was not called as a witness in the case?
>
> A. My recollection during the sentencing phase, that at some point Doctor Berland had some family crisis, whether it was somebody was dying or ill, and I was surprised that he wasn't presented quite frankly .
>
> Q. Was there any **strategic reason** associated with not presenting any psychological or mental mitigation evidence at the sentencing hearing.
>
> A. **Not that I know of.** My impression was that we were going - at some point, testimony was going to be presented about his psychological history, profile. It never happened and I don't know why it didn't happen at the sentencing hearing. I don't recall discussing it any further after that, that first portion of the trial.

PC-R 474(*emphasis added)*

The above unequivocal statements by resentencing counsels demonstrate that both could clearly recollect that the decision not to call Doctor Berland was due to a death, or illness in his family and was not strategic. The lower court improperly ignored the direct testimony of counsel and attributed it's own reasons for counsel's failure to call mental mitigation experts.

(ii) **The lower court improperly relied on statements of counsel at the resentencing proceedings in finding that the decision not to produce expert testimony in the area of mental mitigation was "tactical".**

In support of it's finding that the decision not produce mental mitigation

evidence was "tactical", the lower court cited portions of the trial record wherein counsel Tebrugge told the court "I don't know whether we plan to call Dr. Berland or not"(PC-R 404). This statement by counsel Tebrugge at the resentencing proceedings is not inconsistent with his testimony at the evidentiary hearing. Counsel Tebrugge testified at the evidentiary hearing that, during the resentencing procedure, he received word from Dr. Berland about a death in his family that would make it difficult for him to appear (PC-R 438, 439). The fact that he told the lower court that he wasn't sure that Mr. Berland would be called is completely consistent with his testimony. The lower court erred in concluding, in direct contradiction to the affirmative statements of both resentencing counsel at the evidentiary hearing, that, because counsel was "thinking" about calling Doctor Berland, the ultimate decision not to call Doctor Berland was strategic. That conclusion is fundamentally unfair and wholly unsupported by the record.

(iii) The lower court erred in relying on a letter from counsel Tebrugge to Doctor Berland, after the advisory sentence of death for it's finding that the decision not to call Doctor Berland at the Spencer was a "tactical choice".

Counsel Tebrugge sent a letter to Doctor Berland stating that they were considering calling him at the sentencing hearing. Counsel Tebrugge stated at the evidentiary hearing that he did not realize that, under the Spencer decision, he could have presented the testimony of Doctor Berland (PC-R 405). He also stated

that the decision not to call Doctor Berland at the Spencer hearing was not strategic (PC-R 440). Here again the lower court ignores the direct testimony of counsel at the evidentiary hearing and finds because counsel wrote a letter to Doctor Berland stating he was "considering" using Doctor Berland at the sentencing hearing, that meant he made a strategic decision not to call him. This evidences a pattern of the lower court throughout the order denying 3.850 relief of bypassing direct testimony of counsel at the evidentiary hearing and creating tactical decisions out of whole cloth. The finding that counsel made a "tactical" choice in not calling Doctor Berland at the Spencer hearing is not supported by substantial competent evidence in the record and is refuted by the independent recollections of counsel at the evidentiary hearing.

(iv) The lower court erroneously found that because the "theme" of the resentencing was to "humanize" Mr. Burns, presentation of mental mitigation would have been inconsistent.

This finding by the lower court is not supported by substantial competent evidence in the record and is another attempt by the lower court to impute tactical decisions to counsel that never existed in this case. No one ever testified, at any proceeding in this case, that counsel representing Mr. Burns at the resentencing ever believed that the presentation of mental health mitigation would be "inconsistent" with the introduction of other mitigation evidence. The testimony

from resentencing counsel at the evidentiary hearing directly contradicts this finding by the lower court :

> COUNSEL TEBRUGGE
>
> Q. The fact that you did present some evidence of mitigation in this case, was in any way a reason for not calling Doctor Berland in this case?
>
> A. **No**

PC-R 458 (*emphasis added*)

> COUNSEL METCALFE
>
> Q. Was there anything about the testimony you presented in the way of mitigation that was inconsistent with Doctor Berlands opinions concerning the mental condition of Mr. Burns at the time of the homicide?
>
> A. No. None. In fact, there was a strong indication that living in Mississippi, being a black person during that time, was not an easy thing, that there was tremendous general fear among not only Daniel but other members of his family about police; fear of police. Just was a - - they talked about it.

PC-R 472 (*emphasis added*)

The lower court's factual finding of the "inconsistency" of presenting family members and other mitigation, with the unused mental health mitigation that counsel had at their disposal, is directly contradicted by the testimony at the

evidentiary hearing. The idea that presentation of evidence of brain damage and chronic ambulatory psychotic disturbance, in order to establish statutory and nonstatutory mental mitigation, is somehow "inconsistent" with efforts to "humanize" Mr. Burns is nonsensical. This court has repeatedly held that mental health mitigation is of the weightiest order See Rose v. State, 675 So.2d 567 (Fla. 1996); Hildwin v. State, 654 So.2d 110 (Fla. 1995); Santos v. State, 629 So.2d 838, 840, (Fla. 1994). This is due to the impact of mental mitigation evidence which explains, or mitigates, the actions of the accused. In the present case, Mr. Burns was convicted of shooting a helpless and unarmed law enforcement officer in the head in front of several eye-witnesses, then walking into a nearby swamp . No counsel, in their right mind, would abandon use of statutory and nonstatutory mental mitigation evidence of brain damage and severe psychosis to explain these actions in favor of an attempt to "humanize" Mr. Burns. The "tactical" reason that the lower court imputed to counsel for failing to present mental mitigation evidence , with no supportive evidence in the record, is completely unreasonable in light of the facts and circumstances of this case. Even if, from a total lack of evidence, strategy is assumed, the strategic decision must be objectively reasonable. Strickland, 406 U.S. 688.

(v) The lower court erred in finding that the failure to call a mental health

expert was a "tactical choice" because counsel would have had to "negate" the testimony of Doctor Merin who testified at the initial trial that there was no evidence that Burns' was psychotic and that he was not under as extreme emotional or mental disturbance at the time he shot Trooper Young.

Once again, the lower court has seized upon an alleged "tactical choice" based upon a reason that is not within the record and is contrary to the testimony of resentencing counsel at the evidentiary hearing. Testimony was presented at the evidentiary hearing on the issue of whether the defense failed to call Doctor Berland because Doctor Merin would be called as a rebuttal witness by the state :

> COUNSEL TEBRUGGE
>
> Q. In light of the testimony of Doctor Merin did you feel like perhaps Doctor Berland would not be all that beneficial ?
> A. I think I was prepared for Doctor Merin, but I would acknowledge that Doctor Merin had some contrary things to say to Doctor Berland's testimony.

PC-R 447 (*emphasis added)*

> Q. And did you reach the conclusion that Doctor Berland would be helpful to Mr. Burns despite the fact that you were aware that Doctor Merin would be called by the state if he did testify?
> A. Yes

PC-R 458 (*emphasis added*)

> Q.(from the court) As a lawyer and your ability to evaluate witnesses did you feel that Doctor Merin was

a pretty strong rebuttal witness to your Doctor Berland if you had called him?
A. Thats sort of a yes or no answer your honor. Doctor Merin has excellent qualifications, and Doctor Merin offers effective courtroom testimony. On the other hand, I've dealt with Doctor Merin in the past before, and I felt like I have had some effective cross examination of Doctor Merin in the past.
So, yes, I respect Doctor Merin, but I also felt I could deal with him if he came up.

PC-R 464 (*emphasis added*)

Q. And in almost all cases where you've contemplated calling a mental health expert, would it be fair to say that in most cases the state is going to call a rebuttal mental health expert?
A. Yes in most cases.

Q. So in your evaluation process of whether to call Doctor Berland, you anticipated that there would be a rebuttal witness called?
A. Yes.

PC-R 466

COUNSEL METCALFE

Q. Were you aware that the state had listed a Doctor Sidney Merin to testify possibly as a rebuttal witness if Doctor Merin had been called as an expert?
A. I recall that Doctor Merin was on the states witness list.

Q. And you and Mr. Tebrugge were aware that had Doctor Berland been called, that Doctor Merin would have been called in rebuttal?
A. That was my understanding.

> Q. And was it your opinion at the time that the sum total of that testimony - - meaning Doctor Berland testifying and then Doctor Merin testifying in rebuttal - - would still be beneficial to Mr. Burns?
> A. It was my opinion that Doctor Berlands testimony was very relevant, pertinent to Mr. Burns case.

PC-R 472-473 (*emphasis added*)

The above testimony clearly establishes the fact that Doctor Merin would be called in rebuttal was not the reason that mental mitigation was not presented on Mr. Burns' behalf at the resentencing trial. In addition to the fact that the finding by the lower court is directly refuted by the record, the "tactical reason" imputed by the lower court to counsel for not calling Doctor Berland is unreasonable. In virtually every death penalty case in which the defense presents a mental health expert, defense counsel will have to "deal" with an expert called by the state. If, when confronted with a state mental health expert with contrary findings, defense counsel merely abandoned claims of mental mitigation, no defendant would ever present such evidence in the penalty phase.

Furthermore, an examination of the testimony of Doctor Merin at the original trial, contrasted with the testimony of Doctor Berland at the evidentiary hearing, establishes that the defense in the present case had little to fear from Doctor Merin. Doctor Merin's primary criticisms of Doctor Berland in the initial trial were that (1)

Doctor Berland gave the "old" version of the Wechler adult intelligence scale (R 1895) ; (2) Doctor Berland didn't administer all of the sub-tests of the WAIS. Doctor Merin stated:

> He didn't give all the sub-tests. He alluded to it. In fact he stated he did not give all of them. I don't know how clearly that may have come out but nevertheless, the ones which he did not give, particularly those which are under the verbal group - those are two major groups of intellectual challenges which is determined by the examination ... again, in order to ascertain what's really going on in a person and whether an individual can fully understand things that are done to him and so on, we need a better measure than that which was obtained here ... so the fact that all of the available tests were not given to him becomes, in my estimation, the second major deficit on this examination that was administered to Mr. Burns.

(R 1845)

(3). Doctor Berland was incorrect in stating that a 10 point difference between a verbal IQ score and the performance IQ score was indicative of brain damage (R 1847); (4). The MMPI test administered by Doctor Berland did not establish that Mr. Burns was psychotic but rather has some of the symptoms of paranoid personality disorder(R 1859).

An examination of Doctor Berland's testimony from the evidentiary hearing reveals a fact that the lower court never considered - that, between the initial trial in 1988 and the 1994 resentencing, Doctor Berland administered additional testing to

Mr. Burns and discovered additional lay witness testimony which corroborated his findings from 1988 and negated many of the criticisms levied by Doctor Merin at the initial trial. In 1993, Doctor Berland gave another WAIS test to Mr. Burns, this time with all 11 sub-tests (PC-R 502). This eliminates Doctor Merin's criticism of Doctor Berland in 1988 for not giving all the sub-tests.

Furthermore, Doctor Berland testified at the evidentiary hearing that there was a 55 point difference between the highest and lowest scores on the intelligence test he administered in 1994 (PC-R 505). This eliminates Doctor Merin's criticism that a greater than 15 point differential was required for a finding of brain damage. Even under Doctor Merin's own standard, the differences in the IQ scores establish brain damage. Doctor Berland commented at the evidentiary hearing as to the significance of these additional test findings:

> Q. Okay. So it would be fair to say that the testing - - the additional testing you did or the repeating of testing you did in 1993 as against the information you had in 1988 bolstered your opinion that Mr. Burns' was suffering from brain damage?
> A. It was consistent with, but were more dramatically different. So yes, <u>it did appear to bolster my findings.</u>

PC-R 507 (*emphasis added*).

In addition to the further testing which supported his 1988 findings, in 1994

Doctor Berland also had confirmatory lay witness testimony which he did not have in 1988. Specifically, Doctor Berland spoke with an ex-girlfriend of Mr. Burns who lived with him from 1969 - 1974. She told Doctor Berland that Mr. Burns frequently thought that people were trying to take advantage of him when it did not appear that way to her (PC-R 493). She also stated that Mr. Burns frequently heard things like someone knocking at the door or someone out in the yard, and there would be no one there when he or she would check. Mr. Burns would think he heard someone walking in the house and would get out of bed to check when there would be no one there (PC-R 496). Doctor Berland stated that the witnesses reports were consistent with hallucinations, delusions, and mood disturbance (PC-R 496). Doctor Berland commented on the significance of this additional information at the evidentiary hearing by stating:

> A. So I had some tentative, in one case fairly clear indication from the ex-girlfriend who lived with him and saw him initially of these same symptoms that the MMPI had told me existed in 1988 and 1994 but for which I received fairly little confirmation originally.
>
> Q. So in comparing your position to testify in 1988 with that in 1994, your position or your ability to testify in 1994, your findings would have been bolstered by the other witness you've described?
> A. I would agree with that use of that word, yes.

PC-R 496 (*emphasis added*).

Obviously, when Doctor Merin testified in the initial trial in 1988, he did not have the benefit of the additional testing and confirmatory lay witness statements acquired by Doctor Berland in 1993. Since the state chose not to call Doctor Merin at the evidentiary hearing, it is unknown whether his criticisms of Doctor Berland would remain the same in light of the additional testing and information. The testimony of Doctor Berland, as to the additional testing and information he acquired in 1993, is uncontroverted in this record. The lower court ignored this fact. Resentencing counsel had little to fear from Doctor Merin because a large portion of his criticisms of Doctor Berland were cured in the time between the first and second sentencing proceedings. The existence of a rebuttal witness who had been effectively mooted was no basis for counsel to abandon the presentation of expert mental mitigation on Mr. Burns' behalf.

Furthermore, Doctor Merin is not a neuropsychologist. One of the claims of ineffective assistance of counsel alleged by Mr. Burns was the failure to utilize a neuropsychologist to confirm Dr. Berland's findings of brain damage (PC-R 279-80). At the evidentiary hearing, Doctor Dee testified that he administered the WAIS III (the most current version), Denman Neuropsychology memory scale, Halstead Reitan, Wisconsin card test, and the aphasia screening test, and he

concluded that Mr. Burns' was brain damaged and both two statutory mental health mitigators applied (PC-R 545).

The lower court erroneously ignored Doctor Dee's opinions when making it's finding that the failure to present mental mitigation testimony was a "tactical choice" because Doctor Merin could be called as a rebuttal witness. Doctor Dee's testimony, which substantiated Doctor Berland's, rendered Doctor Merin's possible rebuttal impotent. Therefore, the decision not to present expert mental health testimony could not have been "tactical" due to a fear of Doctor Merin's testimony because Doctor Merin could not refute the neuropsychological testing which should have been presented. Even if, from a total lack of evidence, strategy is assumed, the strategic decision must be objectively reasonable. Strickland, 466 U.S. 688.

B. THE DEFICIENCIES OF COUNSEL

Once the "tactical choices" imputed by the lower court for resentencing counsel not presenting mental mitigation evidence are properly discarded by this Court as unsubstantiated by the record, then the next step in a proper analysis of the ineffective assistance of counsel claim is a de-novo assessment of whether counsel's actual stated reasons for not calling any mental health experts constitute a deficiency in performance which prejudiced Mr. Burns.

Resentencing counsel Tebrugge testified that he intended to call Doctor Berland to testify to the existence of the two statutory mental health mitigators as well as to relate evidence of brain damage (PC-R 436, 438). He testified he did not present Doctor Berland because something had happened in the Doctor's personal life involving a death in his family that was going to make it difficult for him to testify (PC-R 439). He stated he did not request a continuance from the lower court in order to call Doctor Berland because he was "overwhelmed by the entire proceedings" (PC-R 442). He further stated that there was no strategic reason associated with failure to present any mental mitigation at the Spencer hearing and that ,in 1994, "I probably didn't really understand what a Spencer hearing was" (PC-R 440, 456).

Resentencing counsel Metcalfe, the elected Public Defender for the 12th Judicial Circuit, testified it was his understanding that Doctor Berland would be called as a witness , and that "any mitigating evidence dealing with the mental health issue would be beneficial to Mr. Burns" (PC-R 469, 470). He recalled that Doctor Berland was not called due to a family crisis and he was surprised that Doctor Berland wasn't presented (PC-R 471). Metcalfe testified there was no strategic reason for not presenting any psychological evidence or mental health mitigation at the sentencing hearing (PC-R 474).

The above stated reasons of resentencing counsel for failing to present any mental mitigation evidence at Mr. Burns' resentencing proceeding constitutes a deficiency in performance of counsel which "fell below an objective standard of reasonableness". Strickland , 466 U.S. 688.

This Court has consistently held that the failure to present available expert opinions of the defendant's mental and emotional condition in support of mitigating circumstances constitutes substantial deficiencies in the performance of counsel. In Rose v. State, 675 So.2d 567 (Fla. 1996), this Court held that counsel was ineffective for failing to present mental mitigators. In that case, Dr. Jethro Toomer testified at the evidentiary hearing that: (1) Rose suffered from organic brain damage (2) Rose was a chronic alcoholic (3) Rose had a longstanding personality disorder (4) Rose meets the criteria for the statutory criteria of being under the influence of an extreme emotional or mental disturbance at the time of the offense (5) Roses ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired at the time of the offense. In so holding, this Court stated " We find counsels performance, when considered under the standards set out in Hildwin and Baxter, to be deficient. It is apparent that counsels informed choice of strategy during the guilt phase was neither informed nor strategic." Id at 572. In addressing the prejudicial effect of counsels

performance in failing to present the mental mitigators the Court stated **We have consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order**. (citing Hildwin v State , 654 So.2d at 110 (Fla. 1995); Santos v. State, 629 So.2d 838, 840 (Fla. 1994), **and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness** .....indeed, the substantial mitigation that has been presented on the record is similar to the mitigation found in Hildwin and Baxter to require a sentencing proceeding where such evidence may be properly presented." Id .at 573.(*emphasis added*)(*see also* Holmes v. State, 429 So.2d 297 (Fla. 1983); Hildwin v. State, 654 So.2d 107 (Fla. 1995); State v. Michael, 530 So.2d 929 (Fla. 1988); Phillips v. State, 608 So.2d 778 (Fla. 1992).

Federal Courts have also held that failure to present available mental mitigation evidence can be ineffective assistance of counsel. In Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988), the Eleventh Circuit Court of Appeals held that counsel was ineffective for failing to present psychiatric evidence. Id. at 495. In that case, an evidentiary hearing was held during which Dr. Krop testified that Mr. Middleton was under extreme emotional duress at the time of the homicide, and that he had a very limited capacity to conform his conduct to the requirements of the law. Id. The Court held that Dr. Krop's testimony, or testimony substantially

similar to it, could very possibly have been obtained at the time of the sentencing. Id. The Court explained the importance of mental health mitigation evidence by stating that " **this kind of psychiatric evidence, it has been held, has the potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior" and "this psychiatric mitigation evidence not only can act in mitigation, it could significantly weaken the aggravating factors"** (, *citing* Huckaby v. State, 343 So.2d 29, 33-34 (Fla. 1977); Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), (*emphasis added*)

In applying the above outlined cases to the case at bar, it is clear that counsel for Mr. Burns was ineffective for failing to present mental mitigation evidence. Such evidence, as in the Middleton case, has the potential to totally change the evidentiary picture in Mr. Burn's case.

Resentencing counsel were also deficient in failing to present mental mitigation evidence to the lower court at the Spencer hearing. The jury returned its advisory sentence recommending death on April 14, 1994 **(**R. 2049). After the jury delivered it's advisory sentence the Court, at the urging of defense counsel, set a Spencer hearing for May 27, 1994 to allow the state or defense to present additional testimony (R 2055, 2056).

At the May 27, 1994 hearing the state called two witnesses in rebuttal to defense mitigators (R. 2062,2073). At the conclusion of the state's presentation of evidence the judge asked counsel for the defense of he wished to present any evidence on Mr. Burns' behalf:

> THE COURT: Mr. Tebrugge, do you have any evidence to present?
>
> MR. TEBRUGGE: Judge, the only evidence that I was going to present has already been admitted, which was the copy of the statement Mr. Burns gave the night he was arrested.

R 2082

Florida law is clear that a criminal defendant is entitled to present additional evidence at a hearing before the sentencing judge even after the jury has delivered it's advisory sentence. The procedures are set forth by this Court in Spencer v. State, 615 So.2d 688(Fla. 1993), where this Court stated:

> We contemplated that the following procedures be used in sentencing phase proceedings. First, the trial judge should hold a hearing to; a) give the defendant, his counsel, and the state, an opportunity to be heard; b) afford, if appropriate, both the state and the defendant as opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentencing report; and d) afford the defendant as opportunity to be heard in person.

Id. at 690

Despite the legal opportunities to present mental health mitigation evidence at

the May 27, 1994, hearing before Judge Logan, counsel again failed to present any such evidence. Counsel could have presented expert mental health testimony from Dr. Berland and Dr. Dee, or other mental health experts, to establish the statutory mental health mitigators that (1) Mr. Burns was under the influence of extreme mental or emotional disturbance at the time of the murder and (2) Mr. Burn's capacity to appreciate the criminality of his conduct was substantially impaired. Evidence of non-statutory mental mitigators could also have been presented including Mr. Burns organic brain damage and below average intelligence.

Counsels stated reasons for not presenting any mental mitigation evidence at the Spencer hearing was simply a lack of understanding by counsel that he could do so (PC-R 456). This is unreasonable performance since Spencer was decided well in advance from the resentencing proceedings, and counsel had a duty to educate himself as to it's provisions and application to this case.

C. THE LOWER COURT ERRED IN FINDING THAT THE FAILURE TO PRESENT MENTAL MITIGATION EVIDENCE DID NOT PREJUDICE MR. BURNS

The determination of whether the deficiencies of counsel in this case were prejudicial to Mr. Burns under Strickland is a legal question requiring a de-novo review by this Court.

At the evidentiary hearing, expert witnesses Doctor Robert Berland and Doctor Henry Dee provided testimony which counsel should have presented at the resentencing proceedings. Doctor Berland testified that in 1988, he administered the WAIS and MMPI tests to Mr. Burns (PC-R 487). He readministered the WAIS and MMPI in 1993 (PC-R 487). Based on the testing Doctor Berland found that Mr. Burns had chronic ambulatory psychotic disturbance and brain damage (PC-R 496, 502). Doctor Berland concluded that Mr. Burns was under the influence of extreme mental or emotional disturbance at the time of the homicide (PC-R 509-511). Doctor Berland also stated that Mr. Burns reaction to the Trooper's actions "would be significantly inflamed by the existence of this mental illness" (PC-R 497).

Doctor Henry Dee, a neuropsychologist, testified that he interviewed Mr. Burns and administered the WAIS III , memory scale, the Halstead-Reitan battery and the asphasia screening test (PC-R 540-542). Based on these tests, Doctor Dee

testified that Mr. Burns is brain damaged and has been his whole life (PC-R 547). Doctor Dee concluded that Mr. Burns' capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired at the time of the homicide (PC-R 552). Doctor Dee's opinions are uncontroverted in the record as the state did not present a neuropsychology expert at the evidentiary hearing in rebuttal to Doctor Dee's findings.

The prejudice to Mr. Burns associated with counsel's failure to present mental mitigation evidence is exemplified by a comparison of this Court's opinion in Songer v. State, 544 So.2d 1010 (Fla. 1989)(Songer II), with the opinion affirming Mr. Burns death sentence on direct appeal in Burns v. State, 699 So.2d 646 (Fla. 1997). Songer killed a Florida Highway Patrol Trooper who approached a car in which he and a companion were sleeping. Songer. at 1010. Songer's companion exited the car, and the patrolman searched him while he stood at the rear of the vehicle.(*see* Songer v. State, 322 So.2d 481 (Fla. 1975)(Songer I). When the officer with pistol raised returned to and leaned into the car, Songer shot and killed him. Id.at 482. The state proved one aggravating circumstance that Songer was under a sentence of imprisonment in Oklahoma when the murder was committed. Songer II at 1011. The defense proved three statutory mitigating circumstances: that the crime was committed while Songer was under the influence

of extreme mental or emotional disturbance, that Songer's ability to appreciate the criminality of his conduct was substantially impaired, and he was 23 years old. Id. This Court vacated Songer's death sentence citing the almost total lack of aggravation and the presence of significant mitigation. Id. This Court stressed the well settled law that the death penalty is to be reserved for the least mitigated and most aggravated of murder (Id. *citing* State v. Dixon, 283 So.2d 1 (Fla. 1973). This Court stated " we have in the past affirmed death sentences that were supported by only one aggravating factor but those cases involved nothing or very little in mitigation". Id. In Burns this Court compared the facts at bar with those in Songer and stated:

> In the instant case, the gravity of the single merged aggravator was not reduced by any particular factual circumstance. On the contrary, we agree with the trial court that the aggravator was entitled to great weight. Nor does the instance case involve any statutory mental mitigators. The consideration given statutory mental mitigators , depending on the evidence presented to support them, may be substantial. Not only was the instant case devoid of the statutory mental mitigators, but the statutory mitigation that were afforded only minimal weight.

Burns at 650. (Emphasis added)

This proves counsel's unreasonable failure to introduce evidence of mental

health mitigators prejudiced Mr. Burns. This Court has repeatedly held that a death sentence supported by a single aggravating circumstance will be upheld only when little or no mitigation evidence is presented. Woods v. State , 733 So.2d 980 (Fla. 1999) ("We have rarely approved a death sentence with a single aggravator involving a contemporaneous felony and substantial mitigation and we cannot do so in this case"). Therefore, it was essential for counsel to present all available mitigating factors on Mr. Burns behalf. Failure to do so undermines the confidence in the penalty imposed to meet the prejudice prong of Strickland.

(i) **The lower court formed incorrect legal conclusions and ignored substantial evidence in the record in finding no prejudice to Mr. Burns concerning the failure of resentencing counsel to present mental mitigation evidence.**

This Court enumerated the correct standard for prejudice associated with ineffective assistance of counsel claims in Stephens v. State , 748 So.2d 1028, 1033-34 (Fla. 1999):

> An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

Id.

The lower court's findings of no prejudice were based on unreasonable conclusions from the evidence and ignored critical testimony presented at the evidentiary hearing.

The lower court found no prejudice, holding:

(a) The mental mitigation evidence that Mr. Burns should have offered at the resentencing would have "contradicted" the testimony of the numerous lay witnesses who espoused nothing but positive "role model" traits to humanize Burns (PC-R 407).

This finding is contradicted in the record. Both resentencing counsel testified that the introduction of mitigation on Mr. Burns behalf was <u>not</u> inconsistent with Doctor Berland's findings (PC-R 458, 472). Furthermore, Doctor Dee specifically addressed the issue of his findings as contrasted with the lay witness testimony as to Mr. Burns being a role model. Doctor Dee stated:

> Q. Now would it be unusual in this kind of situation that some of the family members of Mr. Burns would come in and testify at the mitigation stage of this trial that they held him out to be a role model and that there appeared to them that dispute your findings at all in this case?
>
> A. Well, I don't think so.

PC-R 547

This finding also ignores the confirmatory lay witness testimony that Doctor

Berland acquired in 1993. Doctor Berland found a laywitness, familiar with Mr. Burns, who confirmed the presence of hallucinations, delusions, and mood disturbances (PC-R 494-496). The lower court makes no mention of this important testimony in the sentencing order.

The lower court's finding is not only unsupported by the record, it involves application of inherently flawed reasoning. A person with a mental illness is no less "human" than a person with normal mental functioning. The presentation of mental health mitigation does not "dehumanize" the accused, but instead offers an explanation of the criminal act and mitigates culpability. The lower court's finding contradicts this Court's historical view of the importance of mental mitigation evidence in death penalty cases.

In refusing to find prejudice the court held:

(b) The proposed mental mitigation evidence would have "detracted" from the testimony of Professor Radelet, who characterized Burns as a productive person who would be able to make a satisfactory adjustment to a life sentence in prison (PC-R 407).

The lower court made this conclusion without explaining <u>how</u> the presentation of mental mitigation evidence would detract from Doctor Radelet's findings. Doctor Radelet was not called as an expert psychologist or mental health

expert, and his findings were not intended as a comment on Mr. Burns' mental status. No defense counsel of right mind would forgo the testimony of a psychologist and neuropsychologist with opinions of statutory and nonstatutory mental mitigation in favor of presentation of evidence that the defendant would make a "satisfactory adjustment to life in prison". The finding by the lower court is nonsensical and belies the view by this court that mental mitigation evidence is of "the most weighty order" (*See* Rose at 573).

The court also held:

(c) Had resentence counsel called Doctor Berland, they would have had to negate the testimony of the state rebuttal witness who would have testified, in accord with his testimony at the original trial, that there was no evidence that Mr. Burns was psychotic and that he was not under extreme mental disturbance at the time he shot Trooper Young.

The lower court also stated that it was "mindful that far less lay witness testimony was presented at the first trial and both Doctor Berland and Doctor Merin testified. Yet the jury returned an advisory sentence of death, and the court imposed a death sentence on Mr. Burns" (PC-R 407).

These findings by the lower court are based upon unreasonable conclusions from the evidence, ignores evidentiary hearing evidence, and improperly attaches

evidentiary value to the previous advisory sentence of the jury and the death sentence which this Court vacated. The lower court undertook no meaningful qualitative comparison of the trial testimony of Doctor Merin and the evidentiary testimony of Doctor Dee and Doctor Berland. Rather, the lower court merely states in a conclusory fashion that the testimony of Doctor Merin at the trial "negates" Doctor Berland's testimony. Ample evidence in the record disputes this conclusion.

Additionally, the lower court erred in failing to asses Doctor Dee's testimony in it's finding that Doctor Merin's trial testimony "negated" Doctor Berland's testimony at the evidentiary hearing. Doctor Dee testified at the evidentiary hearing as to the extensive neurological testing he administered to Mr. Burns and to his conclusion that Mr. Burns was brain damaged and his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law were substantially impaired at the time of the homicide (PC-R 552). Doctor Merin's criticisms do not address Doctor Dee's findings and could not possibly negate them. The lower court ignored this testimony.

Lastly, the lower court improperly attached evidentiary value to the previous jury's advisory sentence of death and the previous death sentence of the lower court. The impropriety of the lower court's reasoning is exemplified by this Court

in Burns I :

> Burns raises several claims regarding aggravators and mitigators, but one is dispositive. We agree with Burns that the record does not support the trial court's finding the murder to have been especially heinous atrocious or cruel. The struggle during which Trooper Young was shot a single time was short, and the medical examiner testified the wound would have caused rapid unconsciousness followed within a few minutes by death. Additional facts that set it "apart from the norm of capital felonies," and that could have made it heinous, atrocious, or cruel, did not accompany the murder. Eliminating the heinous, atrocious, or cruel aggravator leaves one valid aggravator to be weighed against one statutory mitigator and, in the trial court's words, "not significant" nonstatutory mitigators. "If there is no likelihood of a different sentence," the trial court's reliance on an invalid aggravator "must be deemed harmless." *quoting* Rogers v. State , 511 So.2d 526, 535 (Fla. 1987). Here, however, we cannot determine what weight the trial judge gave to the various aggravators and mitigators he found or what part the invalid aggravator played in Mr. Burns' sentence. Therefore, although we affirm Mr. Burns' convictions, we vacate his death sentence and remand for a new sentencing hearing.
>
> We must next decide whether this new sentencing hearing should be before a jury or whether a reassessment by the trial judge alone is appropriate. Generally, if we discern no error in the jury proceeding and reverse soley because of error in the sentencing order, a new sentencing proceeding before the judge alone is the prescribed remedy. Reverting to our earlier finding that it was error to

> admit the background evidence of the deceased, we cannot with the same certainty determine it to be harmless in the penalty phase. The testimony was extensive and it was frequently referred to by the prosecutor. The prosecutor referred to the defendant as an evil supplier of drugs and contrasted him with the deceased. These emotional issues may have influenced the jury in their recommendation. In the interest of justice we determine that fairness dictates the new sentencing proceeding to be before a newly empaneled jury as well as the judge.

Burns 1 at 606, 607

This Court very clearly stated that emotional issues may have improperly swayed the jury in their recommendation. Contrary to the lower court's findings, the previous jury's advisory sentence is of no evidentiary value in assessing the prejudice associated with resentencing counsel's failure to present mental mitigation evidence. It should be further noted that the first jury never heard the additional testing and information from Doctor Berland or Doctor Dee's testimony. Mr. Burns is also prejudiced by the failure to present mental mitigation evidence because this court's proportionality review was conducted with insufficient information.

The failure to present mental mitigation evidence was a deficiency in performance of counsel that prejudiced Mr. Burns. He is entitled to a vacation of

his death sentence and a new sentencing proceeding before a new jury.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING MR. BURNS' CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT THE NON-STATUTORY MITIGATING CIRCUMSTANCES THAT THE INITIAL TRAFFIC STOP OF MR. BURNS WAS WITHOUT PROBABLE CAUSE AND MORE LIKELY THAN NOT WAS THE RESULT OF "RACIAL PROFILING"

As presented in the record, the facts and circumstances surrounding the August 18, 1987 traffic stop and detention of Daniel Burns by Trooper Young are as follows: Trooper Young was assigned to the Drug Task Force for drug interdiction on the highways (R 1178). Trooper Young came on duty on August 18, 1987 at 3:45 p.m.(R 1129) at 7:22 p.m. Trooper Young asked for a registration and wanted check on Michigan tag #682 RBS (R-1131-32). The dispatcher responded that the car was registered to Oliver Burns and that there were no warrants outstanding.(R 1133-34) at 7:42 p.m. Trooper Young requested a wanted check on Samuel Williams (R 1133). Dispatch responded that there were none (R1134). Trooper Young had pulled over Mr. Burns car, asked Mr. Burns and his passenger for identification, then after everything checked out, he searched the back seat of the car (R 1350). He then said that there was a lot of drug trafficking

going through the area and asked for permission to search the trunk (R 1350).

The above stated facts establish that Trooper Young had no probable cause or reasonable suspicion of criminal activity to justify a traffic stop of Mr. Burns car. He ran wanted checks on Daniel Burns and Samuel Williams without any probable cause or reasonable suspicion of criminal activity. At no time during the traffic stop did Trooper Young indicate to dispatch that he was issuing a citation for any traffic violation or equipment violation which would have justified the stop. Based upon these circumstances, it is reasonable to conclude Mr. Burns and Samuel Williams were stopped not based upon probable cause or a reasonable suspicion of criminal activity, but rather were stopped because they were African Americans driving an older model cadillac and fit the "racial profile" of drug traffickers. (Mr. Burns and Mr. Williams are African Americans)

The United States Supreme Court, in Lockett v. Ohio, 438 U.S. 586 (1978), has ruled that the Eighth and Fourteenth Amendment requires that the sentencer shall not be precluded from considering as a mitigating factor, any aspect of the defendants character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Appellant asserts that the facts and circumstances of the case support the non-statutory mitigating facts of a lack of probable cause or reasonable suspicion

of criminal activity for the stop and search and the probability of "racial profiling" by Trooper Young and the Florida Highway Patrol. These non-statutory mitigating factors are essential to Mr. Burns defense in that they potentially lessen the impact of the state's single aggravator that the victim was a law enforcement officer and provide contextual understanding of Daniel Burns fear and apprehension of Trooper Young. The lack of probable cause for the stop added fuel to Mr. Burns delusional paranoid belief, likely caused by brain damage that Trooper Young intended to harm him. Counsel's failure to present evidence and argue these non-statutory mitigating factors was ineffective assistance of counsel in that it fell below the acceptable standard of practice and there is a reasonable probability that the outcome of the proceedings would have been different- i.e. a life sentence instead of death. The lower court erred in denying this claim.

ARGUMENT III

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY FAILING TO ADDRESS AND WEIGH EACH MITIGATING CIRCUMSTANCE IN THE FINAL SENTENCING ORDER AND COUNSEL WAS INEFFECTIVE FOR NOT FILING A MOTION FOR REHEARING TO CORRECT THE ERROR

This Court has set forth specific procedures to be followed by State Court

Judges when addressing mitigating circumstances in the sentencing order in death penalty cases. In Cambpell v. State, 571 So.2d 415 (Fla. 1990) this Court stated:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence: "A mitigating circumstance need not be proved beyond a reasonable doubt by a defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla. Std. Jury Inst. (Crim.) At 81. The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record." Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981) Hopefully, use of these guidelines will promote the uniform application of mitigating circumstances in reaching the individualized decision required by law. Id at 419

In the present case the court addressed the mitigating circumstances proposed by the defendant in the following way**:**

The following mitigating factors have been established by a preponderance of the evidence (the first two are statutory and the remaining are non-statutory):

1. At the time of the murder BURNS was 42 years old.

2. BURNS has no significant prior criminal activity.

BURNS was convicted of gambling in 1976. Testimony established that in the months just before YOUNG'S murder BURNS possessed and delivered crack cocaine to two employees of BURNS' Georgia watermelon hauling business. These facts reduce the weight to be given these factors.

3. BURNS was raised in a poor, rural environment. Born in 1945, one of 17 children, in Yazoo City, Mississippi, BURNS family was honest and hardworking, bur had little economic, educational, or social advantage. BURNS, however, is intelligent and became continuously employed after high school.

4. BURNS has contributed to his community and to society. He was a good student and graduated high school. BURNS has worked hard to support his family, including his four children. He has a loving, caring relationship with his family. Additionally, BURNS was honorably discharged from the military, but for excessive demerits one month and 17 days active duty.

5. BURNS has shown some remorse, has a good prison record, has behaved appropriately in court, has shown some spiritual growth since his original sentencing. BURNS has consistently said that YOUNG'S death was an accident for which he is sorry. Though professing spiritual convictions, BURNS has

> never been completely truthful with anyone about the details of his crime, not with the police after his capture, or with his family, or even with his visiting prison pastor. It is difficult to conclude whether BURNS either has grown spiritually and is remorseful or whether his convictions and attitudes are only self-serving (R 0027).

The record establishes that the trial court violated the mandates of Cambpell by failing to address the following mitigating circumstances proposed by the defendant.

> (i) The capital crime was sudden and impulsive and the defendant was unarmed prior to the confrontation (R 244).
>
> (ii) The defendants judgment could have been affected by his use of alcohol and his impaired hearing (R 245).
>
> (iii) The defendant cooperated with the police and confessed (R 245).
>
> (iv) The defendant has the potential for productive functioning in the structured environment of prison (R 252).
>
> (v) Daniel Burns will likely not pose a danger to others in the future and has the potential for rehabilitation. (R 253)

The trial court committed fundamental error in failing to weigh each of the mitigating factors which were listed in the sentencing order. The trial court's sentencing order falls short of providing meaningful, thoughtful, and comprehensive

analysis of the mitigating evidence in the record. There is no explanation as to the weight the court afforded each mitigator, but instead a conclusory finding by the court that "Though presented through many witnesses, the mitigating factors are not substantial or significant enough to overcome the grave nature of the aggravating factors." (*see* Campbell at 419, *see also* Jackson v. State, 704 SO.2d 506 (Fla. 1997) (court vacated death sentence after finding the trial court failed to expressly evaluate each mitigating factor) Counsel was ineffective for failing to file a motion for rehearing and correcting the court's errors. The lower court erred in denying this claim.

ARGUMENT IV

MR. BURN'S SENTENCE OF DEATH UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION IS INVALID BECAUSE THE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. BURNS TO PROVE DEATH WAS INAPPROPRIATE AND IN THE PROCESS EMPLOYED A PRESUMPTION OF DEATH IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

Under Florida law, a capital sentencing jury must be:

> [T]old that the state must establish the existence of

> one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Burn's capital proceedings. To the contrary, the court repeatedly and unconstitutionally shifted to Mr. Burns the burden of proving whether he should live or die (R. 780). In Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), a capital post-conviction action, the Florida Supreme Court addressed the question of whether the standard employed shifted to the defendant the burden on the question of whether he should live or die. The Hamblen opinion said these claims should be addressed on a case-by-case basis in capital post-conviction actions. Mr. Burns urges that this Court assess this significant issue in his case and grant him the relief to which he entitled.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the constitution; such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing

determination, thus violating Caldwell.

In his preliminary penalty phase instructions to the jury, the Judge explained that the jury's job was to determine whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

The jury understood that Mr. Burns had the burden of proving whether he should live or die. But just in case the jury was unsure, the Judge twice repeated the incorrect statement of the law immediately before the jury retired for deliberations:

> As you have been told, the final decision as to what punishment shall be imposed is my responsibility...Your advisory sentence must be given great weight by the Court..... it is your duty to follow the law that will now be given to you by the Court and to render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(R. 2041) (emphasis added). And:

> Now, should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances if any.

(R. 2042) (emphasis added).

The instructions violated Florida law and the Eighth and Fourteenth Amendments in two ways. First, the instructions shifted the burden of proof to Mr. Burns on the central sentencing issue of whether death was the appropriate sentence.

Second, while being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Thus, the jury was precluded from considering mitigating evidence, Hitchcock, and from evaluating the "totality of the circumstances" in considering the appropriate penalty. Dixon, 283 So. 2d at 10. According to the instructions, jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered. Therefore, Mr. Burns is entitled to a new sentencing hearing because his sentencing was tainted by improper instructions.

Counsel's failure to object to the instructions was deficient performance. But for counsel's deficient performance, there is a reasonable probability that the jury would have recommended life. The lower court erred in denying the claim.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on June 22nd 2001.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Petition for Amended Initial Brief of Appellant ,was generated in a Times New Roman non-proportional, 14 point font, pursuant to Fla. R. App. P. 9.210**.** this 22nd day of June, 2001.

_____

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