

CASE NO. SC01-1718
LOWER COURT CASE NO. 89-2165

GEORGE MICHAEL HODGES,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Hodges' motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied several of Mr. Hodges' claims without an evidentiary hearing. The circuit court held a limited evidentiary hearing on Mr. Hodges' ineffective assistance of counsel claims and Ake v. Oklahoma claim. The following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation.

"R. ____." - record on direct appeal to this Court;

"PC-R. ____." - record on appeal from the denial of postconviction relief;

"PC-T. ____." - transcript of the evidentiary hearing;

"Supp. R." - supplemental record on appeal materials;

"Supp. T." - supplemental transcripts.

"Supp. PC-R. ____." - supplemental record on appeal from the denial of postconviction relief;

All other references will be self-explanatory or otherwise explained herewith.

STANDARD OF REVIEW

The constitutional arguments advanced in this brief present mixed questions of fact and law. As such, this Court is required to give deference to the factual conclusions of the lower court. The legal conclusions of the lower court are to be reviewed independently. See Ornelas v. U.S., 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); Stephens v. State, 748 So.2d 1028 (Fla. 1999).

REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE

Mr. Hodges was charged by indictment dated February 22, 1989, with one count of first degree murder in the death of Betty Ricks (R. 806). On March 22, 1989, a superseding indictment was filed, again charging Mr. Hodges with one count of first degree murder (R. 815). Mr. Hodges pleaded not guilty to the charge.

Mr. Hodges' capital jury trial commenced on July 10, 1989. On July 13, 1989, the jury found Mr. Hodges guilty of first degree murder (R. 650).

The following day, the penalty phase was conducted. While the jury deliberated, Mr. Hodges attempted to commit suicide in his holding cell. The court ordered a competency evaluation to determine if Mr. Hodges was competent to be sentenced (R. 890-893). Out of Mr. Hodges' presence, the jury recommended a sentence of death by a vote of ten (10) to two (2) (R. 885).

On August 9, 1989, the court held a sentencing hearing (R. 960-978). The next day, the trial court imposed the sentence of death, finding two (2) aggravating factors and no statutory mitigating factors (906-908).

On direct appeal, this Court affirmed the conviction and the death sentence. Hodges v. State, 595 So. 2d 929 (Fla. 1992).

Thereafter, the United States Supreme Court granted certiorari, vacated and remanded the case in light of the

Court's decision in Espinosa v. Florida. See Hodges v. Florida, 113 S. Ct. 33, 121 L.Ed.2d 6 (1992). On remand from the United States Supreme Court, this Court affirmed the death sentence. Hodges v. State, 619 So. 2d 272 (Fla. 1993).

On June 20, 1995, Mr. Hodges filed a timely, but incomplete Rule 3.850 motion (PC-R. 14-54). Mr. Hodges filed his motion prior to the date that the motion was due in order to obtain public records.

On November 28, 1995, Mr. Hodges filed an amended Rule 3.850 motion, again detailing the problems in securing access to public records (PC-R. 69-197).

On July 31, 1996, Judge Padgett granted an evidentiary hearing on three (3) of Mr. Hodges' claims: ineffective assistance of counsel at the penalty phase, trial counsel was ineffective for failing to develop and present evidence of Mr. Hodges' mental state at the guilt phase and trial counsel was ineffective for failing to object to improper comments and instructions that shifted the burden to Mr. Hodges to prove that death was not an appropriate penalty (PC-R. 210-230). Judge Padgett summarily denied all of Mr. Hodges other claims (Id.). As to Mr. Hodges' claim of ineffective assistance of counsel at the penalty phase, Judge Padgett stated: "In the penalty phase, Defendant's counsel only presented two witnesses, Defendant's mother and brother-in-law. Defense counsel asked Defendant's mother very few questions about Defendant's childhood." (PC-R. 8).

On August 16, 1996, Mr. Hodges filed a motion for rehearing (PC-R. 245-264). The court denied the motion (PC-R. 265).

On September 27, 1996, Mr. Hodges filed a motion to compel public records production (PC-R. 266-271). The court granted, in part, Mr. Hodges' motion and ordered production (PC-R. 272).

On February 28, 1997, Mr. Hodges filed an amended motion for postconviction relief under Florida Rule of Criminal Procedure 3.850 (PC-R. 281-289). The State responded to Mr. Hodges' amended 3.850 in November, 1997.

Pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993) and Florida Rule of Criminal Procedure 3.851(c), a hearing was held on January 25, 1999, to determine whether Mr. Hodges was entitled to an evidentiary hearing (Supp. T. 1-38). On October 29, 1999, the circuit court issued an order, directing that an evidentiary hearing be held on four (4) claims; three (3) of which he granted an evidentiary hearing on in 1996 (PC-R. 210-230), and an Ake v. Oklahoma claim (PC-R. 730-749).

An evidentiary hearing was scheduled for July, 1999. However, days before the evidentiary hearing was scheduled to begin, Judge Padgett, *sua sponte*, recused himself from presiding over Mr. Hodges' hearing due to the fact that Mr. Hodges' trial attorney was a circuit judge, the Honorable Daniel L. Perry, sitting in the same circuit as Judge Padgett.

This Court appointed the Honorable Dennis P. Maloney,

Circuit Judge in and for the Tenth Judicial Circuit, to preside over Mr. Hodges' evidentiary hearing and case (PC-R. 699).

On September 30, 1999, Mr. Hodges moved to disqualify Judge Maloney when it was revealed that his law clerk communicated, *ex parte*, with the Assistant State Attorney regarding Mr. Hodges' case (PC-R. 700-719). Judge Maloney denied the motion (PC-R. 721). On January 5, 2000, this Court denied Mr. Hodges' writ.

The evidentiary hearing was scheduled for November 2 - 3, 2000 (Supp. R. 85). On October 19, 2000, the State filed a motion to depose Mr. Hodges' experts (PC-R. 890-892). Additionally, two (2) days before the scheduled evidentiary hearing, the State filed a motion for access to Mr. Hodges to conduct a mental health examination (PC-R. 895-899).

After a hearing on the State's motion for access to Mr. Hodges, wherein Mr. Hodges objected to the due process violation committed by the State, the court granted the State's motion (PC-R. 990-992).

Mr. Hodges requested that the circuit court hold his proceedings in abeyance because he filed a Petition for Extraordinary Relief, for a Writ of Prohibition and for a Writ of Mandamus with this Court (PC-R 722-724). The court denied Mr. Hodges' motion to hold the proceedings in abeyance (PC-R. 728). Mr. Hodges filed an emergency petition requesting that this Court allow an interlocutory appeal and stay the circuit

court proceedings (PC-R. 904-1026). This Court dismissed Mr. Hodges' petition on November 17, 2000 (PC-R. 1271).

The evidentiary hearing was conducted on November 2 and 3, 2000 and January 29, 2001.

On June 6, 2001, the circuit court entered an order that denied Mr. Hodges relief. Mr. Hodges timely filed a notice of appeal (PC-R. 1704-1705).

STATEMENT OF FACTS

The Trial

In 1987, Betty Ricks was shot and killed as she exited her car at the Beverage Barn in Plant City to begin work in the early morning hours on January 10th. In 1989, over two years after Ms. Ricks' death, the police arrested George Michael Hodges and he was indicted for first degree murder (R. 815).

Trial commenced six (6) months after Mr. Hodges' arrest, in July, 1989. The testimony presented at the guilt phase of Mr. Hodges' capital trial was entirely circumstantial.

Over defense objections, the State presented evidence that Ms. Ricks had accused Mr. Hodges of exposing himself to her in November, 1986 (R. 296), and that she was adamant about prosecuting Mr. Hodges (R. 297). Mr. Hodges was directed into an arbitration hearing and was scheduled to attend on January 8th (R. 488). That day he called the program and said there was no reason for him to go through the diversion program (R. 489).

Additionally, the State presented a witness, Janetta Hansen, who worked with Mr. Hodges at Zayre, which was located across the street from the Beverage Barn (R. 306). On the morning of the crime, while it was still dark, Ms. Hansen saw a truck that looked like Mr. Hodges' near the Beverage Barn, but she did not see the victim's car (R. 311).

The medical examiner testified that Ms. Ricks had been shot twice (R. 288). Testimony was presented that Mr. Hodges owned a shotgun, as did his step-son (R. 387).

Detective Miller testified that Mr. Hodges maintained that his step-son, Jesse Watson, drove his car to school on the morning of the crime, but returned home around 8:30 a.m. because he felt ill (R. 333).¹ Mr. Hodges also surrendered his shotgun to the police (R. 333).

In order to refute Mr. Hodges' statements, the State presented testimony from Mr. Hodges' family members. Jessie Watson, Mr. Hodges' step-son, testified that he awoke at 5:30 a.m. on the morning of the crime, when he heard Mr. Hodges come home (R. 417). He testified that Mr. Hodges entered the house with his shotgun in his hands (R. 418). Mr. Watson told Mr. Hodges that he was not feeling well and Mr. Hodges told him to drive his truck to school (R. 420). Mr. Watson testified that his shotgun had scratches on it, and he

¹Peggy Lewandowski, a neighbor of the Hodges, testified that in 1988 she provided a statement to the police in which she stated that she saw a truck pull in the Hodges' driveway at approximately 8:00 a.m. (R. 353).

identified the shotgun in evidence as his (R. 416).

Mr. Watson testified that he lied to the police when he was interviewed about the crime (R. 425). On cross examination, Mr. Watson testified that Mr. Hodges admitted that he was involved in the crime, but that Mr. Watson did not believe him (R. 428). Mr. Watson was also impeached with letters he wrote to Mr. Hodges, while he was incarcerated, admitting that he lied to the police about Mr. Hodges' alleged confession and informing Mr. Hodges that the police and prosecutors were pressuring him (R. 430). Mr. Watson also admitted that he was a drug addict and that he was undergoing treatment for his problem at the time of the trial (R. 434).

Mr. Hodges' wife, Harriet Hodges, testified that on the evening before the crime, she and Mr. Hodges stayed up late and played cards with some friends (R. 382). When she awoke the morning of the crime she heard Mr. Hodges speaking to her son, Jessie Watson (R. 383). Mr. Watson drove Mr. Hodges' truck to school that morning (R. 386). Mrs. Hodges did not know whether, on the morning of the crime, Mr. Hodges left the house or not (R. 390). Mrs. Hodges also admitted that she had made a false statement to the police in 1987 (R. 393).

Vickie Boatwright, Jesse Watson's girlfriend, testified that Mr. Hodges had told her in 1988, that he had shot a woman and she had died (R. 367). She also testified that Mr. Hodges stated that nothing happened because he gave the police Mr.

Watson's gun. On cross examination, Ms. Boatwright testified that she thought Mr. Hodges was kidding (R. 387). She also admitted that she did not tell the police about this conversation until after she was questioned twice and spoke to Mr. Watson (R. 371).

The defense presented evidence that a witness saw a truck, not Mr. Hodges', in the parking lot of the Beverage Barn around 6:00 a.m., on the morning of January 8th (R. 539-541).

Further, Detective Rick Orzechowski testified that he was aware that the victim's step-father ran for a position on the city commission in order to remove the current police chief and replace him with an individual who would pursue the investigation of his step-daughter's murder (R. 299).

The jury convicted Mr. Hodges (R. 650).

On July 14, 1989, one day after the jury found George Hodges guilty of first degree murder, the jury reconvened to hear the penalty phase evidence and recommend whether Mr. Hodges should be sentenced to death or life in prison with a minimum of twenty-five years.

The penalty phase hearing lasted less than forty-five minutes. During that forty-five minutes, the State of Florida presented three witnesses: Detectives Orzechowski and Horn as well as Debra Ricks, the victim's sister. All three of the witnesses' testimony consisted of the hearsay testimony that the victim, Betty Ricks, told them that George approached her

and attempted to convince her to drop the exposure charge (R. 681, 685, 689). During Debra Ricks's testimony the defense objected because she was crying before the jury (R. 688).

Mr. Hodges' trial attorney presented the testimony of two witnesses: Lula Hodges and Harold Stewart, Mr. Hodges' mother and brother-in-law, respectively. Mrs. Hodges testified while her husband sat in the courtroom. Mrs. Hodges testified that George grew up in West Virginia; the family moved around a lot; that George did not finish high school, but obtained a GED and that George's brother drowned and "[i]t seemed to change [George] completely, because they was real close." (R. 694). Mrs. Hodges' testimony is transcribed in less than three pages. Mr. Stewart testified that George was a good worker and a good father (R. 697, 698). His testimony is transcribed in less than two-and-a-half pages. No exhibits were entered.

No mental health testimony was presented to the jury.

The State argued that two aggravating factors applied: 1) the crime was committed to disrupt or hinder the lawful exercise of governmental function or the enforcement of laws; and 2) the crime was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. While the prosecutor argued that two (2) aggravating factors applied in Mr. Hodges' case, he told the jury: "The State of Florida is limited to proving ten aggravating circumstances." (R. 711).

Also, as this Court recognized, the prosecutor made an improper "Golden Rule" argument to the jury which was not objected to by Mr. Hodges' trial counsel. Hodges v. State, 595 So. 2d 929, 933-934 (1992).

What about life in imprisonment (sic)?
What can a person do in jail for life? You can cry. You can read. You can watch TV. You can listen to the radio. You can talk to people. In short, you are alive. People want to live. You are living. All right? If Betty Ricks had had a choice between spending life in prison or lying on that pavement in her own blood, what choice would Betty Ricks have made? But, you see, Betty Ricks didn't have that choice.

(R. 716-717).

Mr. Hodges' trial attorney argued that recommending life for Mr. Hodges would mean that Mr. Hodges would serve a minimum of twenty-five (25) years in prison. Trial counsel then read the entire list of the aggravating circumstances, even those that had already been determined, and the State conceded, were inapplicable to Mr. Hodges' case (R. 722-723). Also, counsel argued that Mrs. Hodges loved her son and the jury should be compassionate (R. 723).

Following closing arguments, the jury was improperly instructed about the cold, calculated and premeditated aggravating factor (R. 726). Trial counsel failed to object to the unconstitutionally vague instruction. Hodges v. State, 619 So. 2d 272, 273 (Fla. 1993). As to mitigation, the jury was told that they could consider "any aspect of the defendant's character or record and any other circumstance of

the offense." (R. 726-727). The jury did not hear the instructions regarding any other statutory mitigators.

During deliberation, the jury requested a list of the inadmissible aggravating circumstances (R. 731).

Also, while the jury deliberated, Mr. Hodges attempted to commit suicide by hanging himself and was taken to the hospital (R. 732). His attorneys did not request that the court inform the jury about the suicide attempt or request the assistance of a mental health expert. However, the court appointed two (2) experts to determine if Mr. Hodges was competent to be sentenced (R. 890).

After hearing almost no evidence about Mr. Hodges' background the jury recommended death by a vote of ten (10) to two (2) (R. 739).

In accordance with the jury's recommendation, the trial court sentenced Mr. Hodges to death. The court found two (2) aggravating circumstances: (1) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; and (2) The crime was committed in a cold, calculated and premeditated manner (R. 906-908). The court's order stated: "the Court has attempted to find mitigating circumstances sufficient in weight to offset the [] aggravating circumstances . . . Mr. Hodges' family has spoken as to his character and dedication to his family." (R. 908). The trial court found no other mitigation.

The Direct Appeal

During Mr. Hodges' direct appeal, this Court found several errors had occurred at his capital trial. This Court found that inadmissible hearsay was admitted during the guilt phase regarding the victim's statements and state of mind that she was adamant about prosecuting Mr. Hodges for the indecent exposure. Hodges v. State, 595 So. 2d 929, 931-932 (Fla. 1992). However, this Court found that the error was harmless. Id.

Further, this Court found that the prosecutor's closing argument during the penalty phase was error. Id. at 933-934. However, this Court found that the error was harmless and there was no objection. Id.

In light of the limited mitigation, this Court found Mr. Hodges' death sentence proportional. Id. at 935.

This Court also found that the cold, calculated and premeditated instruction was not unconstitutional and the issue was meritless. Hodges, 595 So. 2d at 934. However, the United States Supreme Court vacated Mr. Hodges' sentence and remanded to this Court in light of Espinosa v. Florida, 505 U.S. 1079. Hodges v. Florida, 506 U.S. 803 (1992). On remand, this Court found that the issue was procedurally barred because counsel failed to object at trial. Hodges v. State, 619 So. 2d 272, 273 (Fla. 1993).

The Evidentiary Hearing

Shortly, before the evidentiary hearing, the State requested leave of the court to depose Mr. Hodges' experts

(PC-R. 890). Mr. Hodges' counsel objected to the timing of the motion since the deposition interfered with counsel's preparation for the hearing and was traveling out-of-state to interview witnesses. Further, less than two (2) weeks remained until the hearing date. The court granted the State's motion and depositions were conducted.

Two (2) days before the date of the evidentiary hearing, the State filed a motion for access to Mr. Hodges in order to conduct a mental health evaluation (PC-R. 895). Mr. Hodges objected to the State's motion because it violated Mr. Hodges' right to due process. The court granted the State's motion (R. 900). One (1) day before the scheduled evidentiary hearing, and weeks after Mr. Hodges filed his witness list, the State informed Mr. Hodges' counsel that Dr. Sidney Merin would appear as a State's witness.

Mr. Hodges requested that the circuit court hold his proceedings in abeyance because he filed a Petition for Extraordinary Relief, for a Writ of Prohibition and for a Writ of Mandamus with this Court (PC-R 722-724). The court denied Mr. Hodges' motion to hold the proceedings in abeyance (PC-R. 728). This Court dismissed Mr. Hodges' petition on November 17, 2000 (PC-R. 1271).

At the evidentiary hearing Mr. Hodges presented several lay witnesses who provided detailed testimony regarding his troubled childhood. These witnesses included his sister Karen Sue Tucker, his brother, Robert Hodges, and family friend

Cecilia Sanson. In addition, Dr. Richard Ball, a sociologist, testified regarding the detrimental effects growing up in the poverty stricken subculture of southern Appalachia where the Hodges lived. Also, Dr. Marlin Delaney, a toxicologist, testified regarding the effects of lead poisoning from the Kanawha River.

Specifically, testimony was presented about the area where Mr. Hodges was raised. Mr. Hodges' older sister, Karen Sue Tucker, testified that the family lived in a small place called Lock Seven, which was located in St. Albans, West Virginia (PC-T. 25). Cecelia Sanson testified that Lock Seven is "mainly [a] community of welfare people, drunks, druggies" (PC-T. 103). Further, Dr. Ball described the area as a "subculture of the southern Appalachian" (PC-T. 460), and he explained that a subculture consists of a "pattern of values that are somewhat different from that prevailing in the rest of the country." (PC-T. 460).

The area was populated with chemical plants and industry (PC-R. 26, 100). In fact, the chemical plants spewed pollutants into the air and river near where the Hodges lived (PC-T. 27).

Chemical wastes and pollutants were dumped into the Kanawha River by the industrial plants causing water pollution so severe that it killed or caused mutations of the fish in the river (PC-T. 109). The waste also effected the taste and created odor problems in public water supplies obtained from

the river (PC-T. 38). Traces of cyanide, manganese, lead, mercury and cadmium were also found in the river (PC-T. 274-75).

The witnesses also described Mr. Hodges' dysfunctional and chaotic family life. Mrs. Tucker testified that the family moved twenty (20) to twenty-five (25) times when she and her siblings were growing up (PC-T. 30). The houses were usually two-bedroom houses, where the five (5) children shared a room and their parents had a room (PC-T. 40). In fact, the children slept in the same bed (Id.). Some of the houses did not have heat or indoor plumbing (PC-T. 39). All of the houses had rats in them (PC-T. 39).

Dr. Maher testified that the family lived in extreme impoverishment "of a nature which in the modern United States is almost unheard of except in some very isolated areas." (PC-T. 258). Dr. Ball testified that Lock Seven is 'just about at the bottom of the ladder socioeconomically' (PC-T. 474). Mrs. Tucker explained that the garbage dump was the only place the Hodges "got anything, because, you know, we didn't have a lot when we was growing up. I mean, that was just simple. You know, daddy didn't make a lot; and what he did, he drank." (PC-T. 32). Due to Mr. Hodges' father's alcohol problem, he had difficulty holding a job (PC-T. 39).

As to the amenities, the witnesses testified that the Hodges children wore feed sacks as clothes or took clothes

from a local garbage dump (PC-T. 31). The dump smelled vile but the family also ate from it (PC-T. 34, 38). Mrs. Tucker testified:

There was a dump - we lived right here, and the dump was right here. To us, that was a fortune. We went there. We took clothes out. We got toys out. You know, if there was canned food - because you wouldn't believe what people threw away. Other people's trash was your fortune.

(PC-T. 31). Mrs. Tucker and Robert Hodges also explained that the chemical plants used the dump to deposit chemical waste (PC-T. 34, 81). Ms. Sanson recalled when a dead baby was found in the dump (PC-T. 107).

As far as nutrition from sources other than the dump, the family ate mayonnaise sandwiches, contaminated fish from the contaminated Kanawha River, and potatoes and pinto beans in order to survive (PC-T. 29, 31, 60, 76). Robert Tucker, Mr. Hodges older brother, testified that the Hodges' children were often hungry because the meals at the Hodges' house included limited portions: "Well, you'd get maybe two spoonfuls of beans; a small piece of cornbread, about two inches square; and a couple of spoons of potatoes." (PC-T. 78).

Like most impoverished families, the Hodges also did not have proper medical care. There was no money for medicine or insurance (PC-T. 84). When the children needed glasses they were provided by the Lions Club through their elementary school (PC-T. 55). Living near the dump, Mr. Hodges and his

siblings were often afflicted with "fall" sores and infections that took several weeks to heal (PC-T. 35-36). Mr. Hodges suffered from whooping cough throughout his childhood (PC-T. 37).

The witnesses also testified about Mr. Hodges' father. Mrs. Tucker testified:

A: My daddy drank all the time.

Q: Is your dad still alive?

A: No, he's not.

Q: So, you said he drank all the time?

A: He drank up until I was about 18 years old and then quit.

Q: I guess - could you - could you tell the judge what your dad was like when he was - had been drinking?

A: He was mean. He was mean. I mean, I loved my dad, but he was mean.

Q: Let's talk about, you know, when your dad would get drunk, would - would he do anything to [George Hodges]?

A: He got to us all.

Q: Well, could you tell me what - what kind of things did your dad do?

A: Mainly to my mother. You know, he would - he - he'd beat my mother and then [George Hodges] and then Robert (crying) - sorry.

Q: That's okay.

A: And then [George Hodges] and Robert, and Randy would try to stop him.

* * *

A: But they would try to stop him and he would just pick them up like rags and shook them up against the wall; and he'd tell us if we didn't shut up, we'd be next. And, I mean, you know, you watched him beat your mother. The blood would pour from her nose; and when he gets done, you know, she's right there with him like nothing happened.

(PC-T. 41-42). Mrs. Tucker testified that the family beatings occurred three (3) to four (4) times a week (PC-T. 43). Her mother would lie about the beatings when people asked about her bruises and marks (PC-T. 42). Robert Hodges confirmed that George Hodges witnessed the brutal beatings of his mother (PC-T. 87).

Mr. Hodges' father's brutality did not focus entirely on his wife. He beat his children with switches, belts or his bare hands when an instrument of pain was unavailable (PC-T. 87, 304). In addition, Mrs. Hodges would beat her children, especially, if they told anyone that their father beat their mother and them (PC-T. 43). Even when Mrs. Tucker called her aunt for assistance a few times, her mother would turn out the lights so that it looked like no one was home (PC-T. 43). And even when the Hodges children did what they were told, they were still beat (PC-T. 44).

Mrs. Tucker also testified about the events that occurred surrounding her parents' marriage and the exposure to her parents' sexual relationships. She testified that her parents had affairs (PC-T. 45). At one time, her father impregnated his sixteen (16) year old girlfriend and "[h]e brought her in

the house. She lived with us. She had the baby. You know they stayed with us." (PC-T. 45).

In addition to his dysfunctional family life, Mr. Hodges had a difficult childhood. "He really only had one friend, and he was - he was retarded" - Raymond Riffle (PC-T. 46). Mr. Hodges also had a speech defect (PC-T. 46). The children at school teased and made fun of him about his speech and appearance (PC-T. 46-47).

Mr. Hodges was close to his brother, Randy (PC-T. 47). Randy drowned in the Kanawha River (PC-T. 49). After Randy died, Mr. Hodges "was lost" (PC-T. 49). Robert Hodges described George Hodges' reaction as: "he just withdrew off by himself, wouldn't hardly talk to anybody. He stayed by himself." (PC-T. 90).

The dysfunction and chaos of the Hodges family took a toll on all of the children: Robert has an alcohol problem, has tried to commit suicide three (3) times and has been sent to prison for a sex-crime he committed while intoxicated (PC-T. 91). While undergoing psychiatric treatment after shooting himself in the head, Robert was told that he was depressed (PC-T. 93). Randy Hodges was hyperactive and suffered from ADH which resulted in severe mood swings (PC-T. 68). He and George Hodges shared a close relationship, but an abusive one. Randy Hodges took advantage of his younger brother, engaging him in sex throughout their childhood and teenage years (Supp. T. 69). George Hodges' records

illustrate three (3) clear suicide attempts. Once he drank disinfectant which caused him to lose consciousness and he was sent to the hospital. Another time he slit his wrists and again was hospitalized. (PC-T. 162). On the third attempt, just after the penalty phase of his trial, he tried to hang himself (PC-T. 162). Karen Sue Tucker, like her mother, was a victim of domestic abuse (PC-T. 50). She left home at eighteen (18) in order to avoid a beating (PC-T. 61).

Dr. Ball described the Hodges' environment as an area of social disorganization (PC-T. 475). He stated:

In an area of social disorganization, there is - that's usually indicated by such factors as low levels of home ownership, high transients in the population, people coming and going. It's usually indicated by high rates of alcoholism and drug abuse, high levels of truancy, teenage pregnancy, various indicators of social instability or what we typify as social disorganization, so that some impoverished areas at least have stability and organization and structure to them; and some impoverished areas, the socially disorganized areas, are not only poor, but they're also disorganized. They manifest all those characteristics. That was true of Lock Seven . . .

(PC-T. 475-476). In addition, Dr. Ball concluded that Mr. Hodges had no protective factors or support from his community or home (PC-T. 489).

Dr. Marlin Delaney, a toxicologist, confirmed Mrs. Tucker, Ms. Sanson and Robert Hodges' suspicions about the problems in the Kanawha River. Dr. Delaney described the area near where the Hodges lived as a "cesspool" because of

the "tremendous amount of dumping" (PC-T. 128). Large volumes of hazardous wastes and other waste residuals were disposed of in landfills, dumps, and surface impoundments that were not properly designed, constructed, or maintained to adequately contain the toxic substances present in the wastes (Id.). As a result, toxic pollutants were released to the air, to surface water, and to groundwater (PC-T. 278-280).

Also, the lead in the water would uptake in the fish and "once you consume the fish, you've taken in lead" (PC-T. 129). Dr. Delaney testified and Dr. Beaver concurred that children who ingest lead can develop neurological deficits, low IQ, behavior problems and nervous system problems (PC-T. 131, 231).

As to Mr. Hodges' mental health, Dr. Michael Maher, M.D., a psychiatrist, testified that at the time of Mr. Hodges' trial in 1989, he was retained as a confidential expert to assess whether Mr. Hodges was competent to proceed, whether any issues in regards to sanity existed and whether any mitigation was present (PC-T. 245). At trial, Dr. Maher reviewed police reports and spoke to Mr. Hodges twice (PC-T. 246). Dr. Maher did not conduct any psychological testing (PC-T. 250). In 1989, Dr. Maher concluded that Mr. Hodges was competent to proceed, that he was suffering from depression, and that there was no evidence that he was psychotic or suffering from any major brain illness (PC-T.

251). Dr. Maher testified:

A: What I told the attorneys at the time was that I had evaluated Mr. Hodges; that I didn't find much in the way of mitigating circumstances, that there might be some - I think what I probably - the phrase I used probably was "soft psychiatric diagnosis or limited psychiatric diagnosis," that Mr. Hodges was not a great historian, but that he had been cooperative with me; and I simply didn't have much to offer in terms of psychiatric information, opinions, evidence that I thought would be relevant or useful either in a guilt phase or a penalty phase of his trial.

Q: Did you make it clear to Mr. Hodges' attorneys that those were preliminary conclusions?

A: I told them, as I did anyone at that time, and continued to do that, any additional information that they might find about his background could be of considerable value to me.

(PC-T. 253-254).

In postconviction Dr. Maher re-evaluated Mr. Hodges. Postconviction counsel provided Dr. Maher with extensive background materials and neuropsychological testing (PC-T. 256-257). After reviewing these materials, Dr. Maher diagnosed Mr. Hodges with chronic depressive disorder, that he had brain damage and that Mr. Hodges suffered from "an extreme, beyond even what would normally be considered significant or dramatic, pattern of impoverishment and abuse as a child." (PC-T. 257-258). Dr. Maher clarified that Mr. Hodges suffered from impoverishment in terms of family

structure (Id.).²

In addition to the information regarding Mr. Hodges' family life, Dr. Maher testified that Mr. Hodges' history was filled with negative factors which impacted his mental health and behavior, including exposure to toxins in the area where he grew up (PC-T. 279), his malnutrition he suffered as a child (PC-T. 271), and his suicide attempts (PC-T. 283).

Dr. Maher also concluded that Mr. Hodges was under the influence of an extreme mental or emotional disturbance at the time of the crime (PC-T. 292). He also concluded that there was evidence to rebut the cold, calculated and premeditated aggravating factor (PC-T. 300).

As to non-statutory mitigation, Dr. Maher testified:

Q: When we're talking about someone who suffers from extreme trauma as a child and into early adolescence, does time heal the physical and mental state that's caused by those factors?

A: Certainly, time and subsequent experience can be very helpful in healing those kinds of wounds and injuries. One of the most troubling, frustrating, difficult issues clinically is that those kinds of formative early experiences - physical abuse, sexual abuse, et cetera -- tend to have lifelong effects. It's one of the justifications for removing children from a family where those things are occurring even in spite of parents who have some capacity to parent and continue to love those children.

²Dr. Maher commented that in his capacity as someone who evaluates children for the Department of Children and Families, had he seen Mr. Hodges as a child, he would have recommended immediate removal from the family (PC-T. 297).

The fact that we know how damaging it is and that it produces lifelong problems at a very high incidence is one of the problems with those kind of disorders and history.

(PC-T. 298-299).

Dr. Maher explained that the difference in his opinion from 1989 to 2000 was that in the latter evaluation, he had substantial, both in quality and quantity, information about Mr. Hodges' history (PC-T. 302). Dr. Maher also candidly admitted that he "missed the diagnosis" of brain damage in 1989 (PC-T. 320).

Dr. Craig Beaver a forensic psychologist and neuropsychologist testified that Mr. Hodges suffers from brain dysfunction which affects him, that Mr. Hodges suffers from a verbal learning disability and that Mr. Hodges has suffered a lifelong struggle with depression (PC-T. 176-179, 180). Dr. Beaver explained: "I would view Mr. Hodges' deficits as in the mild category; but even though you put them in that category, they have a big impact on how a person operates in the world, particularly under certain circumstances." (PC-T. 179). Dr. Beaver based his opinion on neurological testing, background information and an interview with Mr. Hodges (PC-T. 140-193). Dr. Beaver also testified that individuals who suffer from depression do not handle stress well (PC-T. 181).

Considering the facts of the crime and Mr. Hodges' mental make-up, Dr. Beaver agreed with Dr. Maher and concluded that Mr. Hodges was under the influence of extreme emotional

distress at the time of the crime (PC-T. 188).

Dr. Beaver believed that the background materials were necessary to conduct an adequate evaluation of Mr. Hodges because the subculture in which Mr. Hodges was raised was a "pretty impoverished culture where people kept to themselves . . ." (PC-T. 157). Throughout Mr. Hodges' background materials he identified several "red flags", including the fact that Mr. Hodges was abused and neglected and exposed to "a lot of physical violence" (PC-T. 158). He testified that the circumstances of Mr. Hodges' life "have a significant effect on an individual's personal development and emotional development." (PC-T. 158). Additionally, Mr. Hodges' poor academic history, speech deficit, IQ testing and head injuries indicated a potential problem (PC-T. 159-160). And Mr. Hodges' attempts to commit suicide were also important to Dr. Beaver's evaluation (PC-T. 159).

Both Dr. Beaver and Dr. Maher believed that while Mr. Hodges' capacity to appreciate the criminality of his conduct may have been impaired, it did not rise to the level of the statutory mitigator (PC-T. 189, 293).

All of Mr. Hodges' experts reviewed extensive background materials in coming to their conclusions (PC-T. 152). In fact, Dr. Beaver testified that he will not conduct an evaluation without background materials (PC-T. 154).

In rebuttal, the State presented the testimony of Dr. Sidney Merin. Dr. Merin concluded that Mr. Hodges suffered

from an Axis I mental or emotional disorder, dysthymic disorder (Supp. T. 47). Dr. Merin explained that his diagnosis meant that Mr. Hodges suffered from a longstanding depression (Supp. T. 47). Dr. Merin stated that he diagnosed the depression in 1989 when he saw Mr. Hodges to determine his competency to be sentenced (Supp. T. 99-100). Dr. Merin also believed that Mr. Hodges suffered from a personality disorder, not otherwise specified, with borderline features (Supp. T. 87-88). Dr. Merin described the childhood of an individual with borderline features: "Usually these people have felt and, in fact, may have been abandoned when they were kids, pretty much fending for themselves . . . inadequate parenting, inadequate affection . . . (Supp. T. 89). Rather than diagnose Mr. Hodges with brain damage, Dr. Merin testified that Mr. Hodges had a learning disability (Supp. T. 117).

Dr. Merin disagreed with Mr. Hodges' doctors, in that he believed that the Mr. Hodges could act in a cold, calculated and premeditated manner (Supp. T. 126). However, when the court posed Dr. Merin with a question, the following exchange occurred:

Q: (By the Court) In your opinion, was it inappropriate for his defense attorneys to fail to present this mental health information to the jury?

A: I would say it was, yes. I think, particularly in a case this serious, I think the defense should take the opportunity to - if there's any question at all, it really ought to be explored . . .

(Supp. T. 131).

Finally, Mr. Hodges presented the testimony of his trial attorney, the Honorable Judge Daniel Perry. Judge Perry testified that he represented Mr. Hodges at the time of his capital trial and was responsible for the penalty phase (PC-T. 385). Judge Perry recalled attempting to collect some medical records and school records and speaking to Mr. Hodges' mother (PC-T. 404).

Judge Perry testified that he reviewed the depositions of the mental health experts and reports and he considered the information to be mitigating (PC-T. 392-393). Judge Perry also stated that the mitigating evidence seemed "good to great" (PC-T. 410). He stated that he would have attempted to present the evidence had he had it in 1989 (PC-T 393). Additionally, had he had more information about Mr. Hodges' background he would have provided it to his mental health experts (Id.).

Judge Perry testified that he had no strategic reason for failing to object to the cold, calculated and premeditated aggravating factor (PC-T. 387).

SUMMARY OF THE ARGUMENT

1. The lower court erroneously denied Mr. Hodges relief on his claim that he was denied effective assistance of counsel at the penalty phase of his trial. Trial counsel failed to present available mitigating evidence, both statutory and non-statutory and failed to conduct a reasonable investigation of

Mr. Hodges' family history and background.

2. The lower court erred in denying Mr. Hodges relief on his claim that he did not receive competent assistance from a mental health expert and trial counsel's failure to ensure that Mr. Hodges received such mental health assistance from a fully informed qualified expert was prejudicial deficient performance.

3. The lower court's numerous erroneous rulings and improper conduct denied Mr. Hodges due process, the right to an impartial judge, and the right to a full and fair hearing. The lower court judge improperly engaged in *ex parte* communication with the State; granted the state access to Mr. Hodges in order to conduct a mental health evaluation at the eleventh hour; and allowed the state to disregard discovery orders to turn over witness lists and evidence prior to the hearing. Compounding its previous errors, the lower court also denied Mr. Hodges' motion in limine to prohibit the state's expert from testifying on any matter other than brain damage.

4. The lower court erroneously denied Mr. Hodges' claim that trial counsel was ineffective for failing to investigate and present evidence linking Mr. Hodges' impaired mental capacity and his inability to commit murder in a cold, calculated and premeditated manner.

5. The lower court erroneously denied Mr. Hodges a hearing on his claim that the burden was shifted to Mr. Hodges to prove whether he should live or die. At Mr. Hodges' trial the

jury was given misleading and inappropriate instructions that Mr. Hodges had to prove that the mitigating circumstance outweighed the aggravating circumstances in order to receive a life sentence. Trial counsel's failure to object to these improper instructions was ineffective assistance of counsel and interfered with Mr. Hodges' right to a full and fair hearing.

6. The Florida death penalty statute as applied to Mr. Hodges is unconstitutional under the Sixth, Eighth and Fourteenth Amendments. Based on the United States Supreme Court decision in Apprendi v. New Jersey, Mr. Hodges argues that the effect of finding an aggravator exposes the defendant to greater punishment than that authorized by the jury's verdict, the aggravator must be charged in the indictment, submitted to a jury and proven beyond a reasonable doubt. As this did not occur in Mr. Hodges' case, his death sentence is unconstitutional.

7. The lower court erroneously denied Mr. Hodges an evidentiary hearing regarding several of his claims, including: improper jury instructions on the cold, calculated and premeditated aggravator; unconstitutional instructions explaining the jury's verdict as "advisory" and as a "recommendation" to the court, thus diminishing the jury's sense of responsibility in sentencing Mr. Hodges to death; the misconduct of the prosecutor during closing arguments; and improper jury instructions which led the jury to believe a

majority vote was required for a life sentence. Trial counsel's failure to object in these instances constituted prejudicial deficient performance.

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING MR. HODGES' PENALTY PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM. MR. HODGES HAS BEEN DENIED A FULL ADVERSARIAL TESTING AND HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 688. Strickland requires a defendant to demonstrate: 1) unreasonable attorney performance and 2) prejudice. Based on the evidence presented at the evidentiary hearing below, Mr. Hodges has satisfied both elements of Strickland.

A. COUNSEL'S FAILURE TO CONDUCT A REASONABLE INVESTIGATION

At the evidentiary hearing, evidence was presented that trial counsel for Mr. Hodges failed to obtain and present available mitigation, both non-statutory and statutory. This mitigating evidence was available through lay witnesses as well as expert testimony. Counsel's failure to obtain and present this evidence constitutes deficient performance.

During the evidentiary hearing, Mr. Hodges' sister, Karen Sue Tucker, testified to the deplorable conditions in which Mr. Hodges was raised. The family lived in a small place

called Lock Seven, which was located in St. Albans, West Virginia (PC-T. 25). Mrs. Tucker described how the Hodges children wore feed sacks for clothing and spent their days playing and scavenging for food and toys in the local garbage heap (PC-T. 32-33). Mr. Hodges and his brothers regularly consumed fish from the nearby river; fish laced with toxic chemicals and lead (PC-T. 58). Physical violence made regular appearances in the Hodges' household. Mr. Hodges' alcoholic father beat the children and their mother several times a week (PC-T. 43). Mrs. Tucker described the beatings in her testimony: "Probably three, four times a week he would beat her, and then he's beat the boys more than he ever beat me or Cathy, because he really didn't whip us girls. He kicked me down the stairs one time; but, you know, that was because I had been out with a boy." (PC-T. 43). If the children tried to get help to stop the abuse, they were subjected to more beatings(Id).

Mrs. Tucker further testified that the family moved twenty (20) to twenty-five (25) times when she and her siblings were growing up (PC-T. 30). Some of the houses did not have heat or indoor plumbing (PC-T. 39). All of the houses had rats in them (PC-T. 39).

Additionally, Mrs. Tucker stated that Mr. Hodges' only close friends as a child were his mentally retarded neighbor, Raymond, and his brother Randy, who sexually abused Mr. Hodges throughout their childhood and drowned in a river as a

teenager (PC-T. 49).

Robert Tucker, Mr. Hodges' older brother, willingly discussed his childhood with Mr. Hodges in his testimony at the evidentiary hearing. Robert described the poverty of their childhood in Lock Seven where most of the time the children went hungry. Robert described a typical meal at the Hodges house: "Well, you'd get maybe two spoonfuls of beans; a small piece of cornbread, about two inches square and a couple of spoons of potatoes." (PC-T. 78). He further stated, "You'd get out of bed and you still felt hungry when you went to bed. There wasn't much to eat." Id. Robert also explained how his father would regularly come home drunk and beat his wife, Lula, and the children (PC-T. 87-88). Robert and his siblings were not shielded from their father's drinking or his infidelities. In fact, Robert testified that he sometimes used his son as a prop: "He had girlfriends. He'd go out to a beer joint and take me with him. I guess he thought he would pick up more girls, and he did impregnate a younger girlfriend of my sister; and she had a child...The girl stayed with us while she was pregnant." (PC-T 88-89). Robert also testified about his own alcoholism and suicide attempts (PC-T. 91-93). While on the witness stand, Robert pointed out the scar from his failed attempt to shoot himself in the head (PC-T. 93).

Ms. Cecilia Sanson, a family friend, was also available and willing to talk about the environment in which Mr. Hodges

and his family were raised. At the evidentiary hearing, Ms. Sanson described the Lock Seven community as mainly consisting of "welfare people, drunks, druggies. One father killed his own son..." (PC-T. 103). She described incest as common in the community (PC-T. 103-104). Ms. Sanson also recalled recent warnings against eating fish from the Kanawha River because of the toxic chemicals (PC-T. 109).

Documentation and studies of the depressed area where Mr. Hodges grew up existed at the time of trial and could have been presented through an expert witness. The social history of the extremely depressed area and subculture where Mr. Hodges grew up is important additional non-statutory mitigation that was available to trial counsel. Dr. Richard Ball, a sociologist, provided extensive information regarding the poverty and social organization of the southern Appalachian region (PC-T. 451). Dr. Ball indicated the dump where Mr. Hodges played as a child had a long, unsavory history and that Lock Seven basically "became a dumping ground for all sorts of things" including hazardous industrial waste. (PC-T. 476). Dr. Ball also testified about the subculture of social disorganization and frustration that permeated the region (PC-T. 484-488). Dr. Ball indicated that this subculture in Mr. Hodges' case resulted in a lack of resources to cope with problems effectively and a lack of "protective factors" to insulate Mr. Hodges from the negative impact of poverty and social disorganization (PC-T. 489).

Additional substantial mitigation was available to trial counsel had he sought it. Trial counsel merely had to look to the toxic waters where Mr. Hodges fished and ate as a child to find additional evidence of the horrific environment where Mr. Hodges grew up. Dr. Marlin Delaney, a toxicologist, testified at the evidentiary hearing that there was ample evidence available to trial counsel regarding the harmful neurological and behavioral effects associated with long-term exposure to toxins such as those found in the fish of the Kanawha river where Mr. Hodges and his brothers fished and played as children (PC-T. 114). Dr. Delaney described the area near where the Hodges lived as a "cesspool" because of the "tremendous amount of dumping" (PC-T. 128). Large volumes of hazardous wastes and other waste residuals were disposed of in landfills, dumps, and other surface impoundments that were not properly designed, constructed, or maintained to adequately contain the toxic substances present in the wastes (Id.). According to Dr. Delaney, the lead in the water would uptake in the fish and "once you consume the fish, you've taken in the lead" (PC-T. 129). Dr. Delaney testified that children who ingest lead can develop neurological deficits, low IQ, behavior problems and nervous system problems (PC-T. 131, 231).

Trial counsel presented none of the aforementioned evidence during the penalty phase of Mr. Hodges' trial. As such, trial counsel failed in his "duty to conduct a

reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994). Failure to interview family members is indicative of ineffective assistance of counsel. See, e.g., Williams v. Head, 185 F. 3d 1223, 1247 (11th Cir. 1999)(J. Barkett dissenting)(noting that besides the client, the family is the most important source to look for relevant information); Baxter v. Thomas, 45 F.3d 1501, 1513 (11th Cir. 1995); Blanco v. Singletary, 943 F.2d 1477, 1501-02 (11th Cir. 1991); Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989); Counsel must reasonably inquire and followup on the information counsel already has. Jackson v. Herring, 42 F.3d 1350, 1367 (11th Cir. 1995)(finding investigation into mitigating evidence unreasonable where counsel "had a small amount of mitigating evidence regarding [the defendant's] history, but ... inexplicably failed to follow up with further interviews or investigation"); Cunningham v. Zant, 928 F.2d 1006, 1018 (11th Cir. 1991); Middleton v. Dugger, 849 F.2d 491, 493-94 (11th Cir. 1988).

Failure to investigate and present mitigating evidence cannot possibly be tactical where counsel is unaware of the evidence. The case of having the information and deciding not to present it is different from neglecting to gather relevant information in the first place. See, Williams, 185 F.3d at 1249; Jackson, 42 F.3d at 1368 ("[A] legal decision to forgo a

mitigation presentation cannot be reasonable if it is unsupported by sufficient investigation.").

Justice Barkett further explained in Williams that:

If the decision was a tactical one, it will usually be upheld, since counsel's tactical choice to introduce less than all available mitigating evidence is presumed effective. See Jackson v. Herring, 42 F.3d 1350, 1366 (11th Cir. 1995). "Nonetheless, the mere incantation of 'strategy' does not insulate attorney behavior from review; an attorney must have chosen not to present mitigating evidence after having investigated the defendant's background, and that choice must have been reasonable under the circumstances." Stevens v. Zant, 968 F.2d 1076, 1083 (11th Cir. 1992); see also Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991) ("[O]ur case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them.").

Williams, 185 F.3d at 1249 fn 13. Moreover, no tactical motive can be ascribed to omissions based on lack of knowledge, see Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979), or on the failure to properly investigate and prepare. Kimmelman v. Morrison, 477 U.S. 365 (1986).

In Mr. Hodges' case, trial counsel's failure to conduct a reasonable investigation of Mr. Hodges' background also led to inadequate mental health evaluations at trial (See Argument II). Dr. Michael Maher, M.D., a psychiatrist, testified at the evidentiary hearing that at the time of Mr. Hodges' trial in 1989, he was retained as a confidential expert to assess whether Mr. Hodges was competent to proceed, whether any issues in regards to sanity existed and whether any mitigation was present (PC-T. 245). At trial, Dr. Maher reviewed police

reports and spoke to Mr. Hodges twice (PC-T. 246). Dr. Maher did not conduct any psychological testing (PC-T. 250). In 1989, Dr. Maher concluded that Mr. Hodges was competent to proceed, that he was suffering from depression, and that there was no evidence that he was psychotic or suffering from any major brain illness (PC-T. 251). Dr. Maher testified:

A: What I told the attorneys at the time was that I had evaluated Mr. Hodges; that I didn't find much in the way of mitigating circumstances, that there might be some - I think what I probably - the phrase I used probably was "soft psychiatric diagnosis or limited psychiatric diagnosis," that Mr. Hodges was not a great historian, but that he had been cooperative with me; and I simply didn't have much to offer in terms of psychiatric information, opinions, evidence that I thought would be relevant or useful either in a guilt phase or a penalty phase of his trial.

Q: Did you make it clear to Mr. Hodges' attorneys that those were preliminary conclusions?

A: I told them, as I did anyone at that time, and continued to do that, any additional information that they might find about his background could be of considerable value to me.

(PC-T. 253-254).

In postconviction Dr. Maher re-evaluated Mr. Hodges. Postconviction counsel provided Dr. Maher with extensive background materials and neuropsychological testing (PC-T. 256-257). After reviewing these materials, Dr. Maher diagnosed Mr. Hodges with chronic depressive disorder, that he had brain damage and that Mr. Hodges suffered from "an

extreme, beyond even what would normally be considered significant or dramatic, pattern of impoverishment and abuse as a child." (PC-T. 257-258). Dr. Maher clarified that Mr. Hodges suffered from impoverishment in terms of family structure (Id.).³

In addition to the information regarding Mr. Hodges' family life, Dr. Maher testified that Mr. Hodges' history was filled with negative factors which impacted his mental health and behavior, including exposure to toxins in the area where he grew up (PC-T. 279), his malnutrition he suffered as a child (PC-T. 271), and his suicide attempts (PC-T. 283).

Dr. Maher also concluded that Mr. Hodges was under the influence of an extreme mental or emotional disturbance at the time of the crime (PC-T. 292). He also concluded that there was evidence to rebut the cold, calculated and premeditated aggravating factor (PC-T. 300).

As to non-statutory mitigation, Dr. Maher testified:

Q: When we're talking about someone who suffers from extreme trauma as a child and into early adolescence, does time heal the physical and mental state that's caused by those factors?

A: Certainly, time and subsequent experience can be very helpful in healing those kinds of wounds and injuries. One of the most troubling, frustrating, difficult issues clinically is that those kinds of

³Dr. Maher commented that in his capacity as someone who evaluates children for the Department of Children and Families, had he seen Mr. Hodges as a child, he would have recommended immediate removal from the family (PC-T. 297).

formative early experiences - physical abuse, sexual abuse, et cetera -- tend to have lifelong effects. It's one of the justifications for removing children from a family where those things are occurring even in spite of parents who have some capacity to parent and continue to love those children.

The fact that we know how damaging it is and that it produces lifelong problems at a very high incidence is one of the problems with those kind of disorders and history.

(PC-T. 298-299).

Dr. Maher explained that the difference in his opinion from 1989 to 2000 was that in the latter evaluation, he had substantial, both in quality and quantity, information about Mr. Hodges' history (PC-T. 302). Dr. Maher also candidly admitted that he "missed the diagnosis" of brain damage in 1989 (PC-T. 320).

Dr. Craig Beaver a forensic psychologist and neuropsychologist testified that Mr. Hodges suffers from brain dysfunction which affects him, that Mr. Hodges suffers from a verbal learning disability and that Mr. Hodges has suffered a lifelong struggle with depression (PC-T. 176-179, 180). Dr. Beaver explained: "I would view Mr. Hodges' deficits as in the mild category; but even though you put them in that category, they have a big impact on how a person operates in the world, particularly under certain circumstances." (PC-T. 179). Dr. Beaver based his opinion on neurological testing, background information and an interview with Mr. Hodges (PC-T. 140-193). Dr. Beaver also testified that individuals who suffer from

depression do not handle stress well (PC-T. 181).

Considering the facts of the crime and Mr. Hodges' mental make-up, Dr. Beaver agreed with Dr. Maher and concluded that Mr. Hodges was under the influence of extreme emotional distress at the time of the crime (PC-T. 188).

Dr. Beaver believed that the background materials were necessary to conduct an adequate evaluation of Mr. Hodges because the subculture in which Mr. Hodges was raised was a "pretty impoverished culture where people kept to themselves . . ." (PC-T. 157). Throughout Mr. Hodges' background materials he identified several "red flags", including the fact that Mr. Hodges was abused and neglected and exposed to "a lot of physical violence" (PC-T. 158). He testified that the circumstances of Mr. Hodges' life "have a significant effect on an individual's personal development and emotional development." (PC-T. 158). Additionally, Mr. Hodges' poor academic history, speech deficit and IQ testing and head injuries indicated a potential problem (PC-T. 159-160). And Mr. Hodges' attempts to commit suicide were also important to Dr. Beaver's evaluation (PC-T. 159).⁴

Due to trial counsel's failure to investigate, the jury was deprived of the knowledge that Mr. Hodges had a vast amount of non-statutory mitigation as well as an additional

⁴Both Dr. Beaver and Dr. Maher believed that while Mr. Hodges' capacity to appreciate the criminality of his conduct may have been impaired, it did not rise to the level of the statutory mitigator (PC-T. 189, 293).

statutory mitigator. Counsel's performance was clearly deficient.

In its order denying relief, however, the circuit court made the following findings:

In the first issue, Hodges contends that counsel was ineffective for failing to present the circumstances of his childhood as mitigating evidence. Testimony during the hearing revealed that Hodges suffered from physical, mental and possibly sexual abuse, and that he was raised in abject poverty in a part of rural West Virginia contaminated by industrial waste. Two of Hodges' siblings, a brother and a sister, testified about these conditions and claimed to have never been contacted by the defense team at trial. Mr. Perry acknowledged that had he had this information he would have presented it to the jury at the sentencing phase of trial.

Presently, Mr. Perry has little personal recollection of the trial. Unfortunately, the Public Defender's office has lost portions of the trial file, including Mr. Perry's notes. The records that do remain reflect that Mr. Perry hired an investigator to look into the Hodges' family and childhood. Contrary to her testimony at the evidentiary hearing, it appears that Hodges' sister, Karen Sue Tucker, was contacted and told the investigator that she could not attend the trial. Hodges' best friend in West Virginia, Ray Riffle, was also contacted and said he did not want to get involved. Hodges' other sister, Cathy, was contacted and said she would be at the trial, but failed to appear. Both of Hodges' parents attended the trial and his mother spoke in mitigation.

* * *

He [Mr. Perry] conducted a reasonable investigation and did attempt to present mitigating evidence concerning Hodge's background. The witnesses, and Hodges personally, failed to provide him with the information that was presented during the evidentiary hearing. The record also reflects that during the penalty phase Mr. Hodges became uncooperative with counsel and announced that he would not testify in his own

behalf.

(PC-R. 1571-73)(emphasis added).

The circuit court's findings do not provide a basis for denying relief and are not supported by the record. For example, though the record does reflect that an investigator was assigned to work on Mr. Hodges' case, there is absolutely nothing in the record to indicate that this person did any meaningful investigation into Mr. Hodges' background and home life. That trial counsel hired an investigator has absolutely no bearing on the fact that a reasonable investigation did not take place. Mr. Hodges' trial counsel, the Honorable Judge Daniel Perry, testified at the evidentiary hearing that he recalled "discussing it with an investigator" and asking the investigator to "do certain things, interviewing witnesses." (PC-T. 390). However, the only evidence of investigation done following these conversations is a witness list with a few sentences written next to a few individuals' names (PC-T. 424). Judge Perry acknowledged that neither the investigator nor Mr. Hodges' trial counsel ever made the trip to West Virginia to meet with family members or to view first hand the deplorable and conditions in which Mr. Hodges grew up (PC-T. 391). A few, cursory phone calls to some family members and a retarded friend Mr. Hodges knew growing up does not equal a reasonable investigation.

Further, the record does not reflect what if any questions were asked of the family members. In fact, the

family members' testimony indicated that no questions were asked about Mr. Hodges' background (PC-T. 66,94). The circuit court did not make any finding that the family members post-conviction hearing testimony was not to be believed.

This inadequate investigation is even more egregious when it was clear to trial counsel, as in Mr. Hodges' case, that a wealth of mental health issues existed and cried out for exploration.

The circuit court's finding that, "The witnesses, and Hodges personally, failed to provide him with the information that was presented during the evidentiary hearing" is irrelevant and fails to address the issue: it is counsel's duty to investigate mitigation. It is not reasonable for counsel to rely on family members to know what information is mitigating and to come forward on their own to divulge what are often traumatic, painful memories. As both Mr. Hodges' sister and brother indicated, no one ever took the time to interview them about their childhood or their family.⁵ (PC-T. 66,94). Had they been interviewed by counsel or an investigator, both would have been able to shed considerable light on Mr. Hodges' formative years and resulting mental

⁵Judge Perry indicated that he had no independent recollection of contacting Mrs. Tucker, though there is an indication on the defense witness list that she was contacted by phone to determine if she could fly down for the trial (PC-T. 427-428). However, the record does not reflect that an investigatory interview was ever conducted with Mrs. Tucker regarding her family or childhood.

health. Counsel failed to perform his independent obligation to conduct a reasonable investigation.

Additionally, the circuit court's finding that Mrs. Tucker told the investigator that she could not attend the trial is not supported by the record. The record indicates that some notes on a witness list with Mrs. Tucker's name reflect that she might be able to fly down if she could return the same day (PC-T. 427). There is no indication that anyone ever followed up with Mrs. Tucker.

The circuit court also found that Mr. Hodges' best friend from childhood, Ray Riffle, was contacted and he did not want to get involved (PC-R. 1572). This finding is also without merit. A brief telephone call from a complete stranger to a mentally retarded individual to discuss his childhood best friend, who is now charged with a capital crime, is not reasonable investigation.

Further, the record is unrebutted that trial counsel never even contacted Mr. Hodges' brother, Robert, who stated that if he had been asked to testify at trial he would have been there "in a heartbeat." (PC-T. 95). Trial counsel failed to conduct a reasonable investigation and interviews with Mr. Hodges' friends and family and as a result critical mitigation was lost.

The circuit court's finding that "any inadequacy in the initial mental examinations was the result of an uncooperative defendant and recalcitrant witnesses and not attributable to

trial counsel" is wholly unsupported by the record (PC-R. 1575). Mr. Hodges' family members were more than willing to provide counsel with information, had anyone taken the time to interview them.

Similarly, the circuit court's statement that Mr. Hodges was uncooperative is simply untrue. Judge Perry testified that Mr. Hodges was in fact, "Quiet, unassuming," "cooperative" and "acted appropriately" (PC-T. 411). When the court inquired of Judge Perry as to Mr. Hodges' suicide note, which stated in part, "I'm sorry I didn't give you a chance to help me in court on the second phase of the trial," Judge Perry quite candidly stated, "You know, I am not positive of what he meant by that. I really am not...I don't recall him thwarting my efforts. As I said before, he would always answer questions appropriately and was cooperative." (PC-T. 446).

Penultimately, the circuit court's finding that Mr. Hodges "became uncooperative and announced that he would not testify in his own behalf" is directly contradicted by the record. During his trial, Mr. Hodges' counsel stated for the record, "After reviewing everything with him and giving him the benefit of my advice concerning that decision, he has decided that he is not going to testify." (PC-T. 440). There is absolutely no indication that this was a unilateral decision made by Mr. Hodges against the advice of trial counsel. To suggest otherwise is simply a false

characterization of the record. In fact, counsel affirmatively informed the court that the decision was made after Mr. Hodges consulted with both of his trial attorneys; he did not make any statements to the court about Mr. Hodges being recalcitrant or ignoring counsel's advice.

While the record refutes any claim that Mr. Hodges failed to cooperate with his counsel, even if this were partially true, such does not excuse trial counsel's deficiencies. Even a defendant's desire not to present mitigation evidence does not terminate the lawyer's constitutional duties during the sentencing phase of a death penalty trial. See, Blanco v. Singletary, 943 F.2d 1477, 1502 (11th Cir. 1991); Deaton v. Dugger, 635 So. 2d 4, 7-9 (Fla. 1994). Further, a lawyer may not blindly follow where his client might lead, but has a duty to independently investigate and present to his client the results of his investigation and his view of the merits of alternative courses of action. Tafero v. Wainwright, 796 F.2d 1314, 1320 (11th Cir. 1986); Eutzy v. Dugger, 746 F. Supp. 1492, 1499 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. 1990); Koon v. Dugger, 619 So. 2d 246 (Fla. 1993). Although a client's wishes or directions may limit the scope of an attorney's investigation, they will not excuse the failure to conduct any investigation of a defendant's background for potential mitigating evidence. See, Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986); 1986); Thomas v. Kemp, 796 F.2d 1322 (11th Cir.), cert. denied, 479 U.S. 996 (1986);

Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), cert. denied, 461 U.S. 910 (1983).

The record gives no indication that Mr. Hodges was uncooperative with trial counsel or any expert who evaluated him. An accurate picture of the record belies the circuit court's finding and shows that trial counsel's failure to conduct a reasonable investigation of Mr. Hodges' background was the *sole reason* for the inadequate mental health evaluations produced at trial.

Finally, the circuit court indicated in its findings that, "A new sentencing hearing is not mandated simply because reasonable experts disagree about Hodges' mental condition." (PC-R. 1575). On the contrary, this is precisely why Mr. Hodges should receive a new sentencing hearing. All of the mental health professionals, including the state's expert, Dr. Merin, agree that Mr. Hodges suffers from longstanding depression. All of the experts agree that the mental health problems are apparent from the voluminous background materials provided in postconviction and not provided at trial.

Dr. Merin, the State's expert, concluded that Mr. Hodges suffered from an Axis I mental or emotional disorder, dysthymic disorder (Supp. T. 47). Dr. Merin explained that his diagnosis meant that Mr. Hodges suffered from a longstanding depression (Supp. T. 47). Dr. Merin also believed that Mr. Hodges suffered from a personality disorder, not otherwise specified, with borderline features (Supp. T.

87-88). Dr. Merin described the childhood of an individual with borderline features: "Usually these people have felt and, in fact, may have been abandoned when they were kids, pretty much fending for themselves . . . inadequate parenting, inadequate affection . . . (Supp. T. 89).⁶ When the court posed Dr. Merin with a question, the following exchange occurred:

Q: (By the Court) In your opinion, was it inappropriate for his defense attorneys to fail to present this mental health information to the jury?

A: I would say it was, yes. I think, particularly in a case this serious, I think the defense should take the opportunity to - if there's any question at all, it really ought to be explored . . .

(Supp. T. 131)(emphasis added).

In light of the agreement by all of the experts that substantial mitigation existed, albeit in varying levels, the lower court's finding was erroneous.⁷

The jury at Mr. Hodges' trial should have had the

⁶Rather than diagnose Mr. Hodges with brain damage, Dr. Merin testified that Mr. Hodges had a learning disability (Supp. T. 117), and he also disagreed with Mr. Hodges' doctors, in that he believed that the Mr. Hodges could act in a cold, calculated and premeditated manner (Supp. T. 126).

⁷It is important to note that the circuit court did not question the credibility of any expert who testified at the evidentiary hearing. In fact, the court explicitly stated, "It is not the court's intention to denigrate the testimony of the mental health professionals that testified, nor does the court quarrel with the validity of their empirical findings regarding Mr. Hodges' mental health." (PC-R. 1579)(emphasis added).

opportunity to hear these experts' testimony at trial. The jury should have been able to listen to and evaluate the credibility of these expert witnesses. The jury should have had the opportunity to determine whether Mr. Hodges' impaired mental health warranted a life sentence. Counsel's failure to bring these issues to the jury through a mental health expert is a clear indication of counsel's deficient performance. Had trial counsel adequately investigated Mr. Hodges' background, he could have introduced compelling evidence of mitigation to the jury.

B. REASONABLE PROBABILITY OF A DIFFERENT OUTCOME.

Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or that the deficiencies substantially impair confidence in the outcome of the proceedings. Strickland, 466 U.S. at 695. Had counsel discovered and presented the available mitigating circumstances, there is more than a reasonable probability that the jury would have voted for life and that the balance of aggravating and mitigating circumstances would have been different. Mr. Hodges has shown that "[the] death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687.

At the penalty phase, trial counsel presented only two

witnesses⁸, Mr. Hodges' mother Lula, and his brother-in-law, Harold Stewart. His mother testified that Mr. Hodges grew up in West Virginia; that his younger brother's death changed him; that the family moved around a lot during Mr. Hodges' youth; Mr. Hodges was unable to establish any long-term friendships; and that Mr. Hodges had a good relationship with his children (R. 693-695). Mrs. Hodges' testimony is transcribed in less than three pages. Mr. Stewart testified that Mr. Hodges was a good worker; that Mr. Hodges got along well with his children and his in-laws; and that Mr. Hodges liked to fish. (R. 697-698). His testimony is transcribed in less than two-and-a-half pages. No exhibits were entered. No mental health testimony was presented. Absolutely none of the testimony at the trial penalty phase gave the jury any notice of the extensive statutory and non-statutory mitigation available at the time of the trial and subsequently presented during the post-conviction hearing. It is important to note that trial counsel testified that he had no tactical or strategic reason for not discovering or presenting the evidence of mitigation presented during the postconviction hearing. Judge Perry testified that he would have introduced all of this information to the jury (PC-T. 394). When asked to evaluate the quality of mitigating evidence and its

⁸The penalty phase hearing lasted less than forty-five minutes. During that forty-five minutes, the State presented three witnesses.

usefulness to a jury, Judge Perry stated, "Well, I would say good to great, depending upon the panel; and-but it certainly is something you would present." (PC-T. 410). Furthermore, the post-conviction court did not find any of the mitigation or mental health witnesses to be incredible. A jury should have been permitted to evaluate this information when considering whether to sentence Mr. Hodges to life or death. Trial counsel's failure to present this evidence clearly prejudiced Mr. Hodges.

At the evidentiary hearing, collateral counsel presented evidence of statutory mitigation, that at the time of the crime, Mr. Hodges acted under the influence of extreme mental and emotional disturbance (PC-T. 188, 292). Through family and expert witnesses, collateral counsel also presented abundant evidence of non-statutory mitigation. The picture of Mr. Hodges that the jury should have been given was one of a troubled man who struggled throughout his life with mental illnesses and the scars of a horrible child. Mr. Hodges suffered from: 1) extreme neglect as a child and adolescent; 2) emotional abuse as a child and adolescent; 3) longstanding, chronic depression; 4) exposure to inappropriate sexual behavior; 5) exposure to aggression, violence and physical abuse; 6) exposure to a father who was a violent alcoholic; 7) exposure to care-givers who were unstable, mentally ill, or cruel; 8) exposure to and ingestion of toxic waste/chemicals; 9) brain damage and accounts of impaired behavior; 10) extreme

poverty; 11) sexual molestation; 12) lack of education; 13) malnourishment and chronic sickness as a child; 14) trauma due to his brother's drowning; 15) dull normal intelligence; 16) emotional instability; 17) history of head injury/trauma; 18) multiple suicide attempts and 19) stunted personal and emotional development.

The overwhelming mitigation developed and presented by postconviction counsel could not and would not have been ignored had it been presented to the sentencing judge and jury.⁹

Prejudice is established under such circumstances. See, Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995)(prejudice established by presenting of "substantial mitigating evidence" in postconviction); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992)(prejudice established by "strong mental mitigation" which was "essentially un rebutted" in postconviction); State v. Lara, 581 So. 2d 1288, 1289 (Fla.

⁹Further illustrating the fact that additional mitigation could have indeed made a difference, in Hodges v. State, 595 So.2d 929 (Fla. 1992), Justice Barkett raised the following in dissent: "Despite the fact that very little mitigation was presented, the trial judge found that Hodges was a contributing member of society, a good employee, and a good and caring husband and father to his four children. The death penalty is not to be applied to all murderers, but is supposed to be reserved only for the most egregious and heinous of criminals. Hodges did not have a criminal record and, despite his terrible crime, he does not fit that description." Hodges at 935. Justice Barkett also stated in a footnote, "I believe more mitigation could and should have been presented. However, Hodges' mental condition culminating in his suicide attempt truncated the penalty phase." Id.

1991)(prejudice established by evidence of statutory mitigating factors and abusive childhood); Bassett v. State, 541 So. 2d 596, 597 (Fla. 1989)("this additional mitigating evidence does raise a reasonable probability that the jury recommendation would have been different").¹⁰

Recently, in Ragsdale v. State, 798 So. 2d 713 (Fla. 2001), this Court reversed a circuit court's order rejecting an ineffective assistance of counsel claim which is remarkably similar to Mr. Hodges' case. In Ragsdale, this Court stated: [A]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." 798 So. 2d 713, 715, citing Riechman v. State, 777 So. 2d 342 (Fla. 2000). Further, this Court pointed out that Mr. Ragsdale's attorney only presented one witness at the penalty phase, "who provided minimal evidence in mitigation." Id. Similarly, in Mr. Hodges' case trial counsel presented very limited testimony about Mr. Hodges through two (2) witnesses.

Additionally, like Mr. Hodges' case, in postconviction, Mr. Ragsdale presented evidence of child and domestic abuse, poverty and instability. Id. at 717. Also, as in Mr. Hodges' case, no mental health testimony was presented at Mr. Ragsdale's penalty phase. Id. However, in postconviction,

¹⁰Prejudice was found in these cases despite the existence of numerous aggravating circumstances. See, Hildwin (four aggravating circumstances); Phillips (same); Mitchell (three aggravating circumstances); Lara (same); Bassett (same).

mental health testimony was presented. While the State rebutted Mr. Ragsdale's expert testimony with that of Dr. Sidney Merin,¹¹ even Dr. Merin diagnosed Mr. Ragsdale as being impaired and suffering from a personality disorder with borderline features.¹² Thus, this Court stated: "The conclusion is inescapable that there was available evidence from experts which would have supported substantial mitigation but which was not presented during the penalty phase." Ragsdale, 798 So. 2d at 713, 718. Such is the case with Mr. Hodges.¹³

Mr. Hodges is entitled to relief.

C. CUMULATIVE REVIEW

Furthermore, Mr. Hodges urges this Court to review his ineffective assistance of counsel claim cumulatively with the other errors, recognized by this Court, which occurred at his penalty phase and sentencing proceeding. State v. Gunsby, 670 So. 2d 920 (Fla. 1996); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991); Blanco v.

¹¹Dr. Merin was retained by the State and testified in rebuttal to Mr. Hodges' mental health experts.

¹²As to the personality disorder, Dr. Merin arrived at the same diagnosis as to Mr. Ragsdale and Mr. Hodges.

¹³Further, it is important to note that only two aggravating factors were found in Mr. Hodges' case: (1) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; and (2) The crime was committed in a cold, calculated and premeditated manner (R. 906-908). Had the substantial mitigation demonstrated at the evidentiary hearing been presented to the penalty phase jury, there is a reasonable probability that the outcome of the proceedings would have been different.

Singletary.

This Court found that the prosecutor's closing argument during the penalty phase was error. Hodges v. State, 595 So. 2d 929, 933-934 (Fla. 1992). However, this Court found that the error was harmless and there was no objection.¹⁴ Id.

This Court also found that the cold, calculated and premeditated instruction was not unconstitutional and the issue was meritless. Hodges, 595 So. 2d at 934. However, the United States Supreme Court vacated Mr. Hodges' sentence and remanded to this Court in light of Espinosa v. Florida, 505 U.S. 1079. Hodges v. Florida, 506 U.S. 803 (1992). On remand, this Court found that the issue was procedurally barred because he failed to object at trial.¹⁵ Hodges v. State, 619 So. 2d 272, 273 (Fla. 1993).

This Court has recognized that errors occurred at Mr. Hodges' capital penalty phase. In light of the Sixth Amendment error that Mr. Hodges presented at his evidentiary hearing this Court must consider all of the errors that occurred during Mr. Hodges' capital penalty phase.

In Jones v. State, 569 So. 2d 1234 (Fla. 1990) this Court vacated a capital sentence and remanded for a new sentencing

¹⁴The circuit court did not grant Mr. Hodges an evidentiary hearing on his claim that trial counsel was ineffective for failing to object to the prosecutor's Golden Rule argument.

¹⁵The circuit court did not grant Mr. Hodges an evidentiary hearing on his claim that trial counsel was ineffective for failing to object to the unconstitutionally vague jury instruction.

proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added). Likewise, this Court should reverse Mr. Hodges' sentence and remand for a new penalty phase.

ARGUMENT II

MR. HODGES DID NOT RECEIVE COMPETENT ASSISTANCE FROM A MENTAL HEALTH EXPERT AS HE WAS ENTITLED TO UNDER AKE V. OKLAHOMA IN VIOLATION OF HIS FIFTH, SIXTH, EIGHT AND FOURTEENTH AMENDMENT RIGHTS.

A criminal defendant is entitled to expert psychiatric assistance when his mental state is relevant to guilt or sentencing. Ake v. Oklahoma, 470 U.S. 68 (1985). There exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1275, 1279 (5th Cir. 1976). Counsel has a duty to conduct proper investigation into a client's mental health background and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984). "The failure of defense counsel to seek such assistance when the need is apparent deprives an accused of adequate representation in violation of his sixth amendment right to counsel." Proffitt v. United States, 582 U.S. 854, 857 (4th Cir. 1978).

Trial counsel's failure to ensure the assistance of a

competent qualified mental health expert to assist in establishing mitigating circumstances and rebutting aggravation deprived the jury and sentencing judge of an accurate account of Mr. Hodges' background and mental impairments, denied Mr. Hodges the adversarial testing to which he was entitled, and constituted ineffective assistance of counsel.

A wealth of both statutory and nonstatutory mitigation was available based on Mr. Hodges' mental condition (See Argument I). Mr. Hodges was not provided with assistance from a fully-informed confidential mental health expert. Without such assistance, information that even the state's expert, Dr. Merin, deemed important, was not presented to the judge and jury (See Argument I). Counsel's failure to ensure that Hodges received such mental health assistance from a fully-informed qualified expert was prejudicial deficient performance.

In denying this claim after an evidentiary hearing, the circuit court found that Mr. Hodges' trial counsel obtained the assistance of Dr. Gamache and Dr. Maher and that trial counsel's decision not to call them was a strategic decision. (PC-R. 1573). This finding is clearly erroneous. Drs. Gamache and Maher were unable to provide competent evaluations at the time of trial due to the lack of investigation on the case. Due to trial counsel's deficient investigation of mitigating circumstance, neither doctor Maher nor Dr. Gamache

could render a reliable opinion. No decision made by trial counsel on such scanty facts could reasonably be considered strategic.

Dr. Maher himself attributed his misdiagnosis prior to trial to a lack of background information (PC-T. 253-254). At the evidentiary hearing Dr. Maher indicated that had this information been presented to him prior to trial Dr. Maher would have rendered "different opinions and recommendations." (PC-T. 302).

All of the information presented at the evidentiary hearing was available to trial counsel had he chosen to conduct a reasonable investigation. Trial counsel's deficient performance in investigating Mr. Hodges' case deprived Mr. Hodges of valuable mental health mitigation, including a statutory mitigator, at trial (See Argument I).

The circuit court also found that "any inadequacy in the initial mental examinations were the result of an uncooperative defendant and recalcitrant witnesses and not attributable to trial counsel. A new sentencing hearing is not mandated simply because reasonable experts disagree." (PC-R. 1575). This finding is also clearly erroneous. As stated in Argument I, there is no evidence that Mr. Hodges was either uncooperative or that witness were reluctant to testify. Further, the circuit court did not find any of Mr. Hodges experts incredible (also discussed in Argument I). The court simply notes that the state and defense experts "disagree" on

Mr. Hodges' mental condition (PC-R. 1575). The circuit court could not have more precisely pointed out the reason that a jury should have the opportunity to hear each of these experts. However, no jury heard this testimony because Mr. Hodges' trial counsel was ineffective in failing to provide Dr. Maher with the information needed to render an accurate diagnosis.

Trial counsel's failure to ensure the assistance of a competent qualified mental health expert to assist in establishing mitigating circumstances and rebutting aggravation deprived the jury and sentencing judge of an accurate account of Mr. Hodges' background and mental impairments, denied Mr. Hodges the adversarial testing to which he was entitled, and constituted ineffective assistance of counsel. Relief is proper.

ARGUMENT III

THE CIRCUIT COURT'S NUMEROUS ERRONEOUS RULINGS DENIED MR. HODGES DUE PROCESS AND THE RIGHT TO A FULL AND FAIR HEARING.

A. THE CIRCUIT COURT VIOLATED MR. HODGES' DUE PROCESS RIGHT TO A FULL AND FAIR HEARING AND HIS RIGHT TO AN IMPARTIAL JUDGE WHEN JUDGE MALONEY ENGAGED IN IMPROPER *EX PARTE* COMMUNICATION WITH THE STATE.

On his own motion, in June, 1999, the Honorable J. Rogers Padgett, Hillsborough County Circuit Court Judge, recused himself from presiding over Mr. Hodges' case. In mid August, 1999, Mr. Hodges' counsel was informed that the Honorable Judge Dennis P. Maloney would preside over Mr. Hodges' case. In early September, undersigned was contacted by Judge Maloney's staff attorney who indicated that a Huff hearing would be held on December 2, 1999.

Shortly thereafter, events came to light which prompted Mr. Hodges to file a Motion to Disqualify Judge Maloney. As grounds for disqualification, Mr. Hodges stated that Judge Maloney should be disqualified pursuant to Fla. R. Jud. Admin. 2.160(d)(1), because Mr. Hodges feared that he would not receive a fair hearing because of judicial prejudice or bias and because of *ex parte* communications between Assistant State Attorney Vollrath and Judge Maloney.

Judge Maloney denied Mr. Hodges' motion by written order on October 5, 1999 (PC-R. 721).

As set forth in Mr. Hodges' motion to disqualify:

On September 9, 1999, Mr. Hodges' counsel received a message to contact Judge Maloney's staff attorney. Mr. Hodges' counsel spoke to Judge Maloney's staff attorney about scheduling a Huff hearing in Mr. Hodges' case. Thereafter on September 22, 1999, Mr. Hodges' counsel received two telephone messages from Assistant State Attorney Sharon Vollrath. One of the messages indicated that the call was urgent and regarded "the proposed order" in the Hodges case. On September 22, 1999, Ms. Vollrath informed Mr. Hodges' counsel that she had discussed the case with the Court's staff attorney, and that as a result the Court had changed the December 2, 1999, hearing from a Huff hearing (to be held in Polk County) to an evidentiary hearing (to be held in Hillsborough County). Ms. Vollrath also indicated that the Court has requested that the parties write a proposed order outlining Judge Padgett's rulings from the Huff hearing or perhaps prepare an order for Judge Padgett himself to sign.

(PC-R. 700-718).

Judge Maloney's *ex parte* contact with Assistant State Attorney Vollrath was improper. Substantive matters such as the nature, timing and location of substantive proceedings were discussed outside the presence of Mr. Hodges or his counsel which resulted in the lower court making substantive determinations. The contact constitutes impermissible *ex*

parte communication and violated Mr. Hodges' rights.

That Judge Maloney was unclear about the past litigation in this matter, including that a Huff hearing was previously conducted and an evidentiary hearing previously ordered and scheduled by Judge Padgett prior to his recusal, is understandable and unremarkable. It is further understandable and unremarkable that the new court might be unaware of Judge Padgett's prior rulings, including the rulings permitting Mr. Hodges to continue to seek compliance with public record requests and file any amendments which any newly disclosed materials gave rise to. However it is remarkable that Judge Maloney would direct his staff attorney to review the case with Assistant State Attorney Vollrath or permit her to do so on her own volition. It is further remarkable that as a result of *ex parte* communication between Assistant State Attorney Vollrath and the lower court, Judge Maloney would cancel Mr. Hodges' opportunity to be heard as to the status of his case, how it should proceed, the scope of any evidentiary hearing, and how an order on the Rule 3.850 motion should be prepared.

In fact, Judge Maloney did not hold a Huff hearing and Judge Padgett, a judge who had recused himself from presiding over Mr. Hodges' case, subsequently entered an order determining the scope of the evidentiary hearing (PC-R. 730-775).

Judge Maloney's conduct demonstrated his bias against Mr.

Hodges and/or his counsel and a disregard for the duty of the court to avoid the appearance of impropriety. This *ex parte* communication and demonstration of bias is violative of Mr. Hodges' right to due process and the right to be represented by counsel provided by the constitutions of the State of Florida and the United States. Because of Judge Maloney's impermissible *ex parte* communications, "a shadow is cast upon judicial neutrality so that disqualification is required." Chastine v. Broome, 629 So. 2d 293, 295 (Fla. 4th DCA 1993).

Canon 3B (7) of Florida's Code of Judicial Conduct states:

A judge should accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized, provided:

(I) The judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communications, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communications and allows an opportunity to respond.

Fla. Code Jud. Conduct, Canon 3B (7)(a)(I-ii)(1995)(emphasis added). The Commentary to this Canon indicates that the Canon

applies equally to court personnel:

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

Fla. Code Jud. Conduct, Commentary to Canon 3B (7). Judge Maloney's conduct, under the circumstances presented herein, was clearly prohibited by the Canon.

This Court explained in In re Inquiry Concerning a Judge: Clayton, 504 So. 2d 394 (Fla. 1987), that the intent of Canon 3 was to exclude all *ex parte* communications except those authorized by statute or rules. It "implements a fundamental requirement for all judicial proceedings under our form of government. Except under limited circumstances, no party should be allowed the advantage of presenting matters to or having matters decided by the judge without notice to all interest parties." Id., at 395. In In re Inquiry Concerning a Judge: Robert R. Perry, 586 So. 2d 1054 (Fla. 1991), this Court found that improper *ex parte* conduct by a judge was grounds for discipline.

Further, in a case involving *ex parte* preparation of an order in a Rule 3.850 proceeding, this Court has stated that, "a judge should not engage in any conversation about a pending case with one of the parties participating in that conversation." Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992). This Court explained:

We are not here concerned with whether an

ex parte communication actually prejudices one party at the expense of the other. The most insidious result of ex parte communications is their effect on the appearance of the impartiality of the tribunal.

Id.

Justice Harding wrote a concurring opinion in Rose specifically addressing ex parte communications. He specifically cautioned trial judges to exercise great care especially in instances where attorneys, like Mr. Hodges' counsel, are required to litigate in courts "away from home." Rose at 1184, quoting State v. el rel. Davis v. Parks, 141 Fla. 516, 519-520, 194 So. 613, 1615 (1939).

An ex parte communication is prejudicial per se. It is "[t]he essence of due process is that fair notice and reasonable opportunity to be heard must be given to interested parties before judgment is rendered." Huff v. State, 622 So. 2d 982 (Fla. 1993), quoting Scull v. State, 568 So. 2d 1251, 1252 (Fla. 1990). As this Court has observed regarding a similar ex parte communication in a postconviction proceeding:

No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments.

Rose, 601 So. 2d at 1183 (emphasis added). Moreover, Mr.

Hodges was significantly prejudiced by the improper *ex parte* communication between Judge Maloney and the State. As a result of the communication, Judge Maloney changed a scheduled Huff hearing into an evidentiary hearing.

Moreover, the Judge failed to promptly notify counsel of the substance of the *ex parte* communications, an especially glaring failure in light of the fact that the communications resulted in the scheduling of an evidentiary hearing at which Mr. Hodges, as the moving party, would carry the burden of proof.

Mr. Hodges is entitled to full and fair Rule 3.850 proceedings, Holland v. State, 503 So. 2d 1250 (Fla. 1987); Easter v. Endell, 37 F. 3d 1343 (8th Cir. 1994); including the fair determination of the issues by a neutral, detached judge.

Further, Judge Maloney erred in failing to grant Mr. Hodges' motion to disqualify. Canon 3E of the Florida Code of Judicial Conduct and Rule 2.160 of the Florida Rules of Judicial Administration mandate that a judge disqualify him or herself in any proceeding "in which the judge's impartiality might reasonably be questioned," including, but not limited to, instances where the judge has a personal bias or prejudice concerning a party or a party's lawyer, personal knowledge of disputed evidentiary facts concerning the proceeding, or where the judge has been a material witness concerning the matter in controversy. Fla. Code Jud. Conduct, Canon 3E(1)(a) & (b);

Fla. R. Jud. Admin. 2.160(d)(1) & (2). Judge Maloney's conduct demonstrates his clear bias against Mr. Hodges and his counsel.

The Eleventh Circuit Court of Appeals explained recently:

The Commentary to Canon 3E(1) [Code of Judicial Conduct] provides that a judge should disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification. We conclude that both litigants and attorneys should be able to rely upon judges to comply with their own Canons of Ethics. A contrary rule would presume that litigants and counsel cannot rely upon an unbiased judiciary, and that counsel, in discharging their Sixth Amendment obligation to provide their clients effective professional assistance, must investigate the impartiality of the judges before whom they appear. Such investigations, of course, would undermine public confidence in the judiciary and hinder, if not disrupt, the judicial process -- all to the detriment of the fair administration of justice.

Porter v. Singletary, 49 F.3d 1483, 1489 (11th Cir. 1995).

Due process guarantees the right to a neutral, detached judiciary in order "to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." Carey v. Piphus, 425 U.S. 247, 262 (1978). The United States Supreme Court has explained that in deciding whether a particular judge cannot preside over a litigant's trial:

the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was "such a likelihood

of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." Ungar v. Sarafite, 376 U.S. 575, 588, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964). "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," but due process of law requires no less. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955).

Taylor v. Hayes, 418 U.S. 488, 501 (1974).

The appearance of impropriety violates state and federal constitutional rights to due process. A fair hearing before an impartial tribunal is a basic requirement of due process. In re Murchison, 349 U.S. 133 (1955). "Every litigant[] is entitled to nothing less than the cold neutrality of an impartial judge." State ex rel. Mickle v. Rowe, 131 So. 331, 332 (Fla. 1930). Absent a fair tribunal there is no full and fair hearing. Suarez teaches that even the appearance of impartiality is sufficient to warrant reversal.

Mr. Hodges was denied a full and fair hearing and due process by the circuit court's actions.

B. THE CIRCUIT COURT ERRED WHEN IT GRANTED THE STATE ACCESS TO MR. HODGES IN ORDER TO CONDUCT A MENTAL HEALTH EVALUATION, ALLOWED THE STATE TO DISREGARD DISCOVERY ORDERS AND DENIED MR. HODGES' MOTION IN LIMINE. MR. HODGES WAS DENIED DUE PROCESS OF LAW DUE TO THE CIRCUIT COURT'S ACTIONS.

On August 21, 2000, an evidentiary hearing was scheduled on Mr. Hodges' amended Rule 3.850 motion (Supp. PC-R. 71-79). The hearing was scheduled for November 2 - 3, 2000 (Supp. PC-

R. 78). Two (2) days before the scheduled evidentiary hearing, the State filed a motion for access to Mr. Hodges to conduct a mental health examination (PC-R. 895-899).

After a hearing on the State's motion for access to Mr. Hodges, wherein Mr. Hodges objected to the due process violation committed by the State, the court granted the State's motion (PC-R. 990-992).

Mr. Hodges requested that the circuit court hold his proceedings in abeyance because he filed a Petition for Extraordinary Relief, for a Writ of Prohibition and for a Writ of Mandamus with this Court (PC-R 722-724). The court denied Mr. Hodges' motion to hold the proceedings in abeyance (PC-R. 728). Mr. Hodges filed an emergency petition requesting that this Court allow an interlocutory appeal and stay the circuit court proceedings (PC-R. 904-1026). This Court dismissed Mr. Hodges' petition on November 17, 2000 (PC-R. 1271).

The evidentiary hearing was conducted on November 2 and 3, 2000 and the circuit court compelled Mr. Hodges to proceed with his case in chief although the State willfully and contumaciously disobeyed the lower court's discovery order and provided Mr. Hodges with no information regarding what witnesses or evidence it was going to rely upon.¹⁶ Mr. Hodges provided the State with the names of his expert witnesses on June 14, 1999 (Supp. PC-R. 32-33), and the State delayed

¹⁶Mr. Hodges complied with all pleading and discovery requirements.

requests to depose these witnesses until October 19, 2000 (PC-R. 890).¹⁷ The circuit court rewarded the State's dilatory tactics by compelling Mr. Hodges' counsel to attend the State's discovery depositions during the days immediately preceding the evidentiary hearing.

Further, the State delayed seeking its own mental health evaluation of Mr. Hodges until October 30, 2000, and withheld filing and service of its motion until 4:30 p.m. of that day¹⁸ (PC-R. 895). The circuit court rewarded the State for its dilatory tactics by forcing Mr. Hodges' counsel to conduct a hearing on the State's motion rather than preparing for the defense case in chief. The circuit court further rewarded the State for its dilatory tactics by indefinitely postponing (1) the State's evaluation of Mr. Hodges, and (2) presentation of the State's portion of the evidentiary hearing. Mr. Hodges' counsel were prevented from preparing for the evidentiary hearing by the circuit court's orders requiring them to attend to the State's dilatory discovery demands.

Mr. Hodges' counsel was forced to proceed blind without any knowledge of the evidence, information, or witnesses the State would rely upon, in violation of the Due Process Clause

¹⁷The State delayed even seeking discovery until October 11, 2000, more than 6 weeks after the hearing was noticed.

¹⁸The State supplemented its motion with orders from other cases in which the State had sought to have its experts evaluate the defendant/movant weeks before any scheduled hearing. The State's longstanding prior knowledge of the orders in these other cases evidences intentional delay in seeking a similar order in this case.

of the United States Constitution and the similar provisions of the Florida Constitution, see Wardius v. Oregon, 412 U.S. 470 (1973).¹⁹ The result was that the State had almost three (3) months to obtain and review the transcripts, evidence and proffers from the depositions and evidentiary hearing before it had to present any evidence or argument, in violation of Mr. Hodges' due process rights, see Wardius, supra.

In 1996 and again in 1999, the lower court found that Mr. Hodges had pled his claims with specificity and particularity, and that he was therefore entitled to an evidentiary hearing. The State had thus been on notice since at least February 28, 1997, when Mr. Hodges amended his rule 3.850 motion, that Mr. Hodges was planning to rely upon mental health experts to substantiate his fully pled claim that "Mr. Hodges was subjected to toxic chemical ingestion . . . An expert in this area would have described how chemical toxins affect mental and physical development and specifically how Mr. Hodges was impaired by these substances." (PC-R. 289). By rewarding the State's willful disregard for the circuit court's discovery

¹⁹ The Supreme Court held in Wardius that:

in the absence of a strong showing of state interests to the contrary, discovery must be a two way street. The State may not insist that trials be run as a 'search for truth' so far as the defense witnesses are concerned, while maintaining 'poker game' secrecy for its open witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he discloses to the State.

412 U.S. at 475-76 (emphasis added).

order and its delay tactics, and "requir[ing Mr. Hodges] to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he discloses to the State," Wardius, 412 U.S. 475-76, the lower court has departed from the essential requirements of law. See Trepal, 754 So.2d at 707.

Furthermore, the circuit court compounded it's error and further violated Mr. Hodges' right to due process when it denied Mr. Hodges' motion to limit Dr. Merin's testimony at the evidentiary hearing.

On January 23, 2001, Mr. Hodges filed a Motion in Limine to prohibit Dr. Merin from testifying on any matters other than whether or not Mr. Hodges suffered from brain damage (PC-R. 1492-1496). In that motion, Mr. Hodges informed the court that, in response to Mr. Hodges' motion to this Court to prohibit Dr. Merin's access to Mr. Hodges, the State had argued:

2) In preparation for this hearing, Assistant State Attorney Sharon Vollrath, on October 26, 2000, deposed defense witness Dr. Michael Maher. Dr. Maher stated that he has not prepared a report, but that he had examined Hodges and determined that Hodges had brain damage.

3) On October 26, 2000, ASA Vollrath received copies of the report of defense witness Dr. Richard Ball. Dr. Ball was deposed by the State on October 27, 2000. Dr. Ball's report of October 25, 2000, alleges that certain chemicals produced from factories in the region in which Hodges grew up suggest possibilities of

neurological and genetic damage.

4) On October 30, 2000, Assistant State Attorney Vollrath received copies of the report of Dr. Craig Beaver. The report was dated October 13, 2000. Dr. Beaver was deposed on October 30, 2000. Dr. Beaver's report alleged that Hodges suffers from cognitive difficulties indicative of brain injury and/or dysfunction.

* * *

10) Recognizing that the evidentiary hearing was scheduled for November 2 and 3, 2000, the State did not request a continuance of the evidentiary hearing. However, having only learned of Defendant's allegations of brain injury from the depositions and reports of the defense experts between October 26 and 30, 2000, the State asked that the lower court proceedings be concluded on a subsequent date after the mental health examination is conducted.

Furthermore, in a footnote, the State asserted "While the Defendant's 3.850 motion did mention mental impairment, no prior pleadings suggested that Defendant suffered any organic and/or neurological brain damage." See id at fn. 1 (emphasis added).

The State led this Court to believe that the only reason a rebuttal witness was necessary was because they were unaware that Mr. Hodges was attempting to prove that he was neurologically impaired.

The State consistently maintained both to the circuit court and this Court that an expert was needed in regards to Mr. Hodges' allegation of cognitive dysfunction. In fact, the State relied entirely upon the fact that they only received

Dr. Beaver's (a neuropsychologist), name thirty days before the hearing and only found out about his conclusions days before the hearing in arguing that a rebuttal witness was required.

Despite the State's admissions, the circuit court allowed Dr. Merin to testify to other issues outside of whether Mr. Hodges suffered from cognitive dysfunction. This was error and violated Mr. Hodges' right to due process.

The State was supplied with a witness list that made clear that mitigating information regarding mental health testimony would be presented at the evidentiary hearing (Supp. PC-R. 32-33). They were provided a witness list on June 14, 1999, over a year and four months before Mr. Hodges evidentiary hearing, indicating that Dr. Maher, (a psychiatrist), Dr. Sultan (a psychologist), and Dr. Ball (a sociologist), would be witnesses for Mr. Hodges regarding mental health mitigation (Supp. PC-R. 32-33).

The State's underhanded tactics and misrepresentations made to the circuit court and this Court allowed the State to gain an unfair tactical advantage which violated Mr. Hodges's right to due process in postconviction. See Williams v. State, 777 So. 2d 947 (Fla. 2001); Steele v. Kehoe, 747 So. 2d 931, 934 (Fla. 1999); Mordenti v. State, 711 So. 2d 30, 32 (Fla. 1998).

Due to the State's actions Mr. Hodges was denied a full and fair hearing and due process of law.

ARGUMENT IV

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE DURING THE GUILT AND PENALTY PHASE OF MR. HODGES'S TRIAL BY FAILING TO PRESENT EVIDENCE THAT MR. HODGES MENTAL CAPACITY DID NOT ALLOW HIM THE ABILITY TO COMMIT MURDER IN A COLD, CALCULATED AND PREMEDITATED MANNER. THE LOWER COURT ERRED IN NOT GRANTING MR. HODGES RELIEF ON THIS CLAIM.

Mr. Hodges was deprived of his right to effective assistance of counsel during the guilt phase due to his counsels' failure to investigate and present possible defenses negating specific intent and thus his ability to commit murder in a cold, calculated and premeditated manner. To establish that trial counsel rendered ineffective assistance, Mr. Hodges presented extensive evidence in the court below of trial counsels' deficient performance. Furthermore, the prejudice to Mr. Hodges resulting from trial counsels' deficient performance is clear: Mr. Hodges could not have been convicted of first-degree murder had counsel presented this evidence. See Strickland v. Washington, 466 U.S. 668 (1984). The lower court erred in denying Mr. Hodges relief on this claim.

In Bunney v. State, 603 So.2d 1270 (Fla. 1992), the defendant wanted to "raise epilepsy as a defense to his ability to form the intent required to commit a first-degree felony murder and kidnaping outside the context of an insanity plea." The Florida Supreme Court held that while "evidence of diminished capacity is too potentially misleading to be permitted routinely in the guilt phase of criminal trials,

evidence of 'intoxication, medication, epilepsy, infancy, or senility' is not." Id. at 1273. Here, evidence of Mr. Hodges' mental and physical disabilities would certainly fall within the class of impairments (infancy or senility) that the Florida Supreme Court highlighted in Bunney. See Argument I.

In its order, the circuit court concluded that "the facts belie the defense contention that Hodges is incapable of this murder" and that "Hodges has failed to show that he was prejudiced by his counsel's failure to advance it." (PC-R. 1578-1579) These findings are clearly erroneous and without merit. The circuit court recognizes that three mental health experts who testified at the evidentiary hearing, Drs. Beaver, Maher and Dee, all found Mr. Hodges incapable of committing murder in a cold, calculated and premeditated manner. In addition, the circuit court specifically states that it does not question the validity of these findings (PC-R. 1579)(emphasis added). The factors that formed the bases of the experts' findings are precisely the factors that trial counsel failed to investigate.

If defense counsel had developed the mental health history and the cultural history of his client, he would have found that Mr. Hodges was not capable of forming specific intent. Nor could Mr. Hodges be capable of the cold, calculated and premeditated aggravator. Further, Mr. Hodges would have been entitled to the jury instruction that his

mental deficiencies may negate the specific intent necessary for first-degree murder.

The evidence of Mr. Hodges' complex neurological and psychological problems should have been presented at the guilt phase of trial to provide a defense to first degree murder.

The Florida Supreme Court has held:

A defendant has the right to a jury instruction on the law applicable to his theory of defense where any trial evidence supports that theory. Bryant v. State, 412 So. 2d 347 (Fla. 1982); Palmes v. State, 397 So. 2d 648 (Fla.), cert. denied, 454 U.S. 882, 102 S. Ct. 369, 70 L. Ed. 2d 195 (1981). Moreover, evidence elicited during the cross-examination of prosecution witnesses may provide sufficient evidence for a jury instruction on voluntary intoxication. Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA), review denied, 402 So. 2d 613 (Fla. 1981).

Gardner v. State, 480 So. 2d 91, 92-93 (Fla. 1985). If Mr. Hodges' counsel had performed his duty to Mr. Hodges as reasonable counsel would have, Mr. Hodges would not have been convicted of first-degree murder and would not have been sentenced to death.

In Strickland v. Washington, 466 U.S. 688 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 668 (citation omitted). Strickland requires a defendant to establish unreasonable, deficient attorney performance, and prejudice resulting from that deficient performance.

An effective attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970); see also Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc)(ineffective assistance in failure to present theory of self-defense); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978). This error also violates defendant's right to present a meaningful defense. See Crane v. Kentucky, 476 U.S. 683 (1986). Failure to present a defense that could result in a conviction of a lesser charge can be ineffective and prejudicial. Chambers.

Mr. Hodges was convicted of first-degree murder and sentenced to death as a direct result of his counsels' failure to present a defense linking Mr. Hodges' diminished mental capacity to his inability to commit murder in a cold, calculated and premeditated manner. Had trial counsel presented such a defense, he would not have been convicted of first-degree murder. At the very least, Mr. Hodges would have been ineligible for the death penalty. Counsel's ignorance of the law was deficient performance which prejudiced Mr. Hodges. Counsel's failure to investigate and prepare was also deficient. One cannot make a reasoned tactical decision without having investigated. (See also Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995)).

ARGUMENT V

MR. HODGES' SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE BURDEN WAS SHIFTED TO MR. HODGES TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. HODGES TO DEATH.

Under Florida law:

[T]he 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. Hodges' capital proceedings. To the contrary, the court shifted to Mr. Hodges the burden of proving whether he should live or die.

In Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), a capital post-conviction action, this 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 reflects that these claims should be addressed on a case-by-case basis in capital post-conviction actions. Mr. Hodges urges that the Court assess this significant issue in his case and, for the reasons set forth below, that the Court grant him the relief to which he can show his entitlement. Moreover, he asserts that defense counsel rendered prejudicially deficient assistance in failing to object to the errors. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for 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 v.

Mississippi, 472 U.S. 320 (1985), Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

Judicial instructions at Mr. Hodges' capital penalty phase required that the jury impose death unless mitigation was not only produced by Mr. Hodges, but also unless Mr. Hodges proved that the mitigation he provided outweighed and overcame the aggravation. The trial court then employed the same standard in sentencing Mr. Hodges to death. See Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988)(trial court is presumed to apply the law in accord with manner in which jury was instructed). This standard obviously shifted the burden to Mr. Hodges to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the aggravation.

The standard given to the jury and which the trial court followed violated state and federal law. According to this standard, the jury could not "full[y] consider[]" and "give effect to" mitigating evidence. Penry v. Lynaugh, 492 U.S. 302, 327 (1989). This burden-shifting standard thus "interfered with the consideration of mitigating evidence." Boyde v. California, 110 S. Ct. 1190, 1196 (1990). Since "[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty," McCleskey v. Kemp, 481 U.S. 279, 306 (1987), the argument and instructions provided to Mr. Hodges' sentencing jury, as well as the standard employed by the trial court, violated the Eighth Amendment's "requirement of individualized sentencing in capital cases [which] is satisfied by allowing the jury to consider all relevant mitigating evidence." Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083 (1990). See also Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987). The instructions gave the jury inaccurate and misleading information regarding who bore the burden of proof as to whether a death recommendation should be returned.

As explained below, the standard which the judge instructed Mr. Hodges' jury, and upon which the judge relied, is a distinctly egregious abrogation of Florida law and therefore Eighth Amendment principles. See McKoy v. North Carolina, 110 S. Ct. 1227, 1239 (1990)(Kennedy, J., concurring)(a

death sentence arising from erroneous instructions "represents imposition of capital punishment through a system that can be described as arbitrary or capricious"). In this case, Mr. Hodges, the capital defendant, was required to prove that life was the appropriate sentence, and the jury's and judge's consideration of mitigating evidence was limited to mitigation "sufficient to outweigh" aggravation.

In his penalty phase instructions to the jury, the judge repeatedly instructed the jury that it was their job to determine if the mitigating circumstances outweighed the aggravating circumstances.

Beginning with the Court's opening of the penalty phase, the jury was told:

As I have said, ladies and gentlemen, the State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant, Mr. Hodges. You are instructed that this evidence, when considered with the evidence that you have already heard, is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty as I described to you a moment ago. And, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

(R. 680)(emphasis added). This unconstitutional standard was repeated after evidence was presented during the penalty phase.

[I]t is your duty to follow the law that will now be given you by the Court and 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. 725) (emphasis added). This erroneous standard was then repeated to the jury by the judge later in his instructions:

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(R. 726). Finally, the trial court relied on this erroneous standard in its written findings of fact sentencing Mr. Hodges to death.

Having so found, the Court has then attempted to find mitigating circumstances sufficient in weight to offset the above aggravating circumstances so as to prevent imposition of the death penalty.

(R. 907). After numerous unconstitutional instructions, there can be no doubt that the jury understood that Mr. Hodges had the burden of proving whether he should live or die.

The instructions violated Florida law and the Eighth and Fourteenth Amendments in two ways. First, the instructions shifted the burden of proof to Mr. Hodges on the central sentencing issue of whether he should live or die. Under Mullaney, this unconstitutional burden-shifting violated Mr. Hodges' Due Process and Eighth Amendment rights. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). The jury was not instructed in conformity with the standard set forth in Dixon. Since the Jury in Florida is a sentencer it must be properly instructed. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993).

Second, in 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. Cf. Mills v. Maryland, 108 S. Ct. 1860 (1988); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987). Thus, the jury was precluded from considering mitigating evidence, Hitchcock, and from evaluating the "totality of the circumstances" in considering the appropriate penalty. State v. 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. Hodges is entitled to relief in the form of a new sentencing hearing in front of a jury, due to the fact that his sentencing was tainted by improper instructions.

Trial counsel's failure to know the law and object to this error was deficient performance.²⁰ But

²⁰Mr. Hodges was given an evidentiary hearing on the ineffective assistance of counsel portion of this claim. At the hearing, trial counsel testified that he couldn't recall if he made a tactical decision not to object to this instruction (PC-T. 389). In its order denying relief, the lower court found this claim to be both procedurally barred and meritless (PC-T. 1580).

for counsel's deficient performance, there is a reasonable probability that Mr. Hodges would not have been sentenced to death. Accordingly, relief is warranted.

ARGUMENT VI

**THE FLORIDA DEATH PENALTY SENTENCING
STATUTE AS APPLIED IS UNCONSTITUTIONAL
UNDER THE SIXTH, EIGHTH, AND FOURTEENTH
AMENDMENTS OF THE UNITED STATES
CONSTITUTION AND CORRESPONDING PROVISIONS
OF THE FLORIDA CONSTITUTION.²¹**

In Jones v. United States, the United States Supreme Court held that "under the Due Process Clause of the Fifth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 243 n.6 (1999). Subsequently, in Apprendi v. New Jersey, the Court held that the Fourteenth Amendment affords citizens the same protections under state law. See Apprendi v. New Jersey,

²¹ Mr. Hodges recognizes that claims of fundamental changes in law are generally raised in motions for postconviction relief under Florida Rule of Criminal Procedure 3.850. See Adams v. State, 543 So. 2d 1244 (Fla. 1989); Dixon v. State, 730 So. 2d 265 (Fla. 1999). However, because Mr. Hodges is currently appealing the circuit court's denial of his motion for postconviction relief, he brings the claim here. If this claim must be brought in a motion for postconviction relief, Mr. Hodges requests that this Court relinquish jurisdiction, so that he may file such a motion in circuit court.

On several occasions this Court has addressed Apprendi claims raised in petitions for writ of habeas corpus: Mills v. Moore, 786 So. 2d 532 (Fla. 2001); Mann v. Moore, 794 So. 2d 595 (Fla. 2001); Brown v. Moore, 800 So. 2d 223 (Fla. 2001). Therefore, in addition to raising this claim in his appeal, Mr. Hodges simultaneously brings it in his petition for writ of habeas corpus in order to ensure that he has properly pled this claim.

530 U.S. 466 (2000).

In Apprendi, the issue was whether a New Jersey hate crime sentencing enhancement, which increased the punishment beyond the statutory maximum, operated as an element of an offense so as to require a jury determination beyond a reasonable doubt. Apprendi, 120 S. Ct. at 2365. "[T]he relevant inquiry here is not one of form, but of effect - does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Apprendi, 120 S. Ct. at 2365. Applying this test, it is clear that aggravators under Florida's death penalty sentencing scheme are elements of the offense which must be charged in an indictment, submitted to a jury during guilt phase, and proven beyond a reasonable doubt by a unanimous verdict.

Like in Apprendi, in Mr. Hodges' case, the aggravating sentencing factors came into play only after he was found guilty and the maximum statutory penalty, based upon the guilty verdict, was increased from life imprisonment to death. At the time of Mr. Hodges' penalty phase, Florida Statutes, Section 775.082(1) (1989), provided:

A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in §§ 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

Fla. Stat. § 775.082(1) (1989).

Under this statute, the state must prove at least one aggravating factor in the separate penalty phase proceeding before a person convicted of first degree murder is eligible for the death penalty. See State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973); Fla. Stat. § 775.082(1) (2001); Fla. Stat. §§ 921.141(2)(a), (3)(a) (2001). Thus, Florida capital defendants are not eligible for a death sentence simply upon conviction of first degree murder. If a court sentenced a defendant immediately after conviction, the court could only impose a life sentence. See Fla. Stat. § 775.082 (2001). Therefore, under Florida law, the death sentence is not within the statutory maximum sentence, as analyzed in Apprendi, because it increased the penalty for first degree murder beyond the life sentence a defendant is eligible for based solely upon the jury's guilty verdict.

In Apprendi, a hate crime sentencing enhancement was applied after the defendant was found guilty and increased the sentenced the statutory maximum penalty by up to ten years. Apprendi, 120 S. Ct. at 2351. The Apprendi Court clearly dispensed with the fiction that the sentencing enhancement was not an element which received Sixth Amendment protections. "[I]t can hardly be said that the potential doubling of one's sentence from 10 to 20 years has no more than a nominal effect. Both in terms of absolute years behind bars, and

because of the severe stigma attached, the differential here is unquestionably of constitutional significance." Apprendi, 120 S. Ct. at 2365. Similarly, in Mr. Hodges' case, the aggravators were applied only after he was found guilty, yet it was these aggravators that increased the statutory maximum penalty to which he could be sentenced based on the jury's guilty verdict from life imprisonment to death. Certainly, the difference between life and death has more than a nominal effect and is of constitutional significance. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." Woodson v. North Carolina, 428 U.S. 280, 305 (1975); see Gardner v. Florida, 430 U.S. 349, 357 (1976).

Under Apprendi's reasoning, aggravating factors in the Florida death penalty scheme are elements of a capital crime which must be decided by a unanimous jury. Florida Rule of Criminal Procedure 3.440, requires unanimous jury verdicts on criminal charges. However, in capital cases, this Court permits jury recommendations of death based upon a simple majority vote. See Fla. Stat. §§ 921.141(1), (2) (1981); Walton v. Arizona, 497 U.S. 639, 648 (1990). The trial judge instructed Mr. Hodges' jury of this: "In these proceedings, it is not necessary that the advisory sentence of the jury be unanimous." (R. 728) Consequently, Mr. Hodges was sentenced to

death by only ten jurors. (R. 742)

Moreover, this Court does not require jury unanimity as to the existence of specific aggravating factors. In Florida, it is the judge and not the jury who finds the specific aggravating factors that make a person death-eligible. See Fla. Stat. §§ 921.141(1), (2) (1981); Walton v. Arizona, 497 U.S. 639, 648 (1990). For Sixth Amendment purposes, these aggravators are elements of a death penalty offense. Consequently, the procedure followed in the sentencing phase should receive the protections guaranteed by Apprendi. The trial court's weighing of the jury's recommendation does not change that. See Walton, 497 U.S. at 648. Although this Court has said that Apprendi did not overrule Walton, see Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001), and Mr. Hodges contends that the Florida death penalty scheme is unconstitutional as applied, the United States Supreme Court has granted certiorari in Ring v. Arizona to decide precisely that question. See State v. Ring, 25 P.3d 1139 (Ariz. 2001), *cert. granted*, Ring v. Arizona, 122 S. Ct. 865 (2001).²²

²²On January 11, 2002, the United States Supreme Court granted Timothy Stuart Ring's petition for Writ of Certiorari. The petition raised, as its sole issue, the question of whether Walton v. Arizona, 497 U.S. 639 (1990), should be overruled in light of the Court's subsequent holding in Apprendi that "for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed" violates the defendant's Sixth Amendment right to a jury trial. Apprendi, 530 U.S. at 490. The Florida capital sentencing scheme is in significant part

In fact, Mr. Hodges' jury recommended a death sentence by a vote of ten to two. (R. 742) Despite a lack of mitigating factors, two jurors either did not find the aggravators had been proven beyond a reasonable doubt or did not find that Mr. Hodges' situation required the imposition of death.²³ In either event, it is undisputed that the aggravating factors which made Mr. Hodges eligible for a death sentence were not found by a unanimous jury to be proven beyond a reasonable doubt. As such, his sentence was unconstitutionally imposed and must be vacated.

In addition to not requiring jury unanimity of a sentence nor jury unanimity of each aggravator, this Court does not require that the prosecution inform the defendant in the indictment which aggravating factors will be presented. The indictment against Mr. Hodges alleged the following:

GEORGE MICHAEL HODGES, on the 8th day of January, 1997, in the county and state aforesaid, from a premeditated design to effect the death of BETTY RICKS, a human

subject to the same constitutional inadequacies as Arizona's capital sentencing scheme, and the Ring petition identified Florida as one of nine states whose capital sentencing schemes have questionable constitutional underpinnings pursuant to the language of Apprendi. As a result of the implications Ring could have on Florida's death penalty scheme, the United States Supreme Court recently stayed the executions of two Florida inmates until an opinion is reached in Ring. See King v. Florida, 122 S. Ct. 932 (2002); Bottoson v. Florida, 2002 WL 181142 (2002).

²³ Likewise, on Mr. Hodges' direct appeal to the Court, Justices Overton, Barkett, and Kogan found a death sentence to be inappropriate and unwarranted. See Hodges, 596 So. 2d at 1036.

being, did unlawfully injure or wound the said BETTY RICKS by shooting her with a firearm, and as a result thereof the said BETTY RICKS did languish and die on the 9th day of January 1997, contrary to the form of the statute in such cases made and provided, to-wit: Florida Statute 782.04.

(R. 815). In response to this indictment, Mr. Hodges' trial counsel filed a motion for statement of particulars, alleging that "[T]he Information fails to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense..." (R. 811) The Court denied this motion.

Because the effect of finding an aggravator exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict, the aggravator must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. Apprendi, 530 U.S. 494-95. This did not occur in Mr. Hodges' case, thus, the death sentence against him is unconstitutional.

ARGUMENT VII

THE LOWER COURT ERRED IN DENYING MR. HODGES AN EVIDENTIARY HEARING ON SEVERAL OF HIS CLAIMS.

The lower court erred when it summarily denied several of Mr. Hodges' claims without holding an evidentiary hearing. (PC-R. 214). Mr. Hodges was entitled to an evidentiary hearing because the motions, files and records in the case do not conclusively show that the prisoner is entitled to no relief. See Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986).

- A. **THE JURY WAS IMPROPERLY INSTRUCTED ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR, IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH**

AMENDMENTS.

This issue was raised on direct appeal. Upon remand by the United States Supreme Court, this Court found the issue to be procedurally barred due to trial counsel's failure to preserve the issue at trial. See Hodges v. State, 619 So.2d 272, 273 (Fla. 1993). The circuit court summarily denied Mr. Hodges an evidentiary hearing on the issue and as a result Mr. Hodges was only permitted to ask trial counsel a brief question at the evidentiary hearing regarding whether or not he had a strategic reason for not objecting. Trial counsel responded that it was not a tactical decision. (PC-T. 388). Mr. Hodges should have been granted an evidentiary hearing to further inquire of trial counsel on this issue. Though this court found in its opinion that if any error in the instruction existed it would be harmless, it is necessary to reweigh the issue in light of the substantial mitigating evidence Mr. Hodges presented at his evidentiary hearing (See Argument I).

The jury was given the following instruction regarding the cold, calculated, and premeditated aggravating factor:

The crime for which the defendant is to be sentenced was committed in a cold, calculated, premeditated manner without any pretense of moral or legal justification.

(R. 726). This instruction violates Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), Jackson v. State, 648 So. 2d 85 (Fla. 1994) and the Eighth and Fourteenth Amendments. The jury instruction failed to give the jury meaningful guidance as to what was necessary to find this aggravating factor present. Trial counsel was ineffective for failing to properly preserve this issue. Relief is warranted.

The jury instructions regarding the aggravator of cold, calculated, and premeditated (CCP) did not include this Court's limiting construction of the aggravating circumstance in finding this factor. Jackson v. State, 648 So. 2d 85 (Fla. 1994). The Florida Supreme Court has adopted several limiting instructions regarding this aggravating factor. Most recently, in Jackson, this Court held that the following instruction must be used:

The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense or moral or legal justification. In order for you to consider this aggravating factor, you must find the murder was cold, and calculated, and premeditated, and that there was no pretense of moral or legal justification. 'Cold' means the murder was the product of calm and cool reflection. 'Calculated' means the defendant had a careful plan or prearranged design to commit the murder. 'Premeditated' means the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder. A 'pretense of moral or legal justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

Jackson, 648 So. 2d 90.

In Mr. Hodges' case, this aggravating factor was overbroadly applied, see Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), failed to genuinely narrow the class of persons eligible for the death sentence, see Zant v. Stephens, 462 U.S. 862, 876 (1983), and the jury was not provided with a complete limiting instruction for all the elements of this aggravator. As a result, Mr. Hodges' death sentence was imposed in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Mr. Hodges' jury was only given the limiting construction for "premeditated", and not for the terms "cold", "calculated", or "pretense of moral or legal justification" as required by law. The Florida Supreme Court has held that "calculated" consists "of a careful plan or prearranged design," Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). Moreover, in addition to the calculated element, this Court has made clear that in order to satisfy the "coldness" element, the murder must also be the product of calm and cool reflection. See, e.g., Richardson v. State, 604 So. 2d 1107 (Fla. 1992) ("[w]hile there is sufficient evidence to show calculation on Richardson's part, the record clearly establishes that the present murder was not 'cold'"); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991) ("there was no deliberate plan formed through calm and cool reflection"). Regarding the "pretense of moral or legal justification" prong of the aggravating factor, this Court has held that this is "any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide." Banda v. State, 536 So. 2d 221, 224-25 (Fla. 1988), cert.

denied, 489 U.S. 1087 (1989).

Trial judges are required to apply these limiting constructions, often and consistently rejecting the aggravator when these limitations are not met. See, e.g., Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992); Geralds v. State, 601 So. 2d 1157 (Fla. 1992); Gore v. State, 599 So. 2d 978 (Fla. 1992); Jackson v. State, 599 So. 2d 103 (Fla. 1992); Richardson v. State, 604 So. 2d 1107 (Fla. 1992); Happ v. State, 596 So. 2d 991 (Fla. 1992); Green v. State, 583 So. 2d 647, 652-53 (Fla. 1991); Sochor v. State, 580 So. 2d 595, 604 (Fla. 1991); Wright v. State, 586 So. 2d 1024 (Fla. 1991); Santos v. State, 591 So. 2d 160 (Fla. 1991); Bedford v. State, 589 So. 2d 245 (Fla. 1991); Dailey v. State, 594 So. 2d 254 (Fla. 1991); Holton v. State, 573 So. 2d 284, 292 (Fla. 1990); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985). Such "confusion in lower courts is evidence of vagueness which violates due process." Hermanson v. State, 604 So. 2d 775 (Fla. 1992) (citing United States v. Cardiff, 344 U.S. 174 (1952)).

Mr. Hodges' jury was not told about the limitations on the "cold, calculated" aggravating factor, but presumably found this aggravator present. Espinosa, 112 S. Ct. at 2928. It must be presumed that the erroneous instructions tainted the jury's recommendation, and in turn the judge's death sentence, with Eighth Amendment error. Espinosa, 112 S. Ct. at 2928. Again, Espinosa clearly holds that because Florida law requires great weight be given to the jury's death recommendation, the Eighth Amendment errors before the jury infected the judge's imposition of death. Thus, a reversal is required unless the errors were harmless beyond a reasonable doubt. Stringer v. Black, 112 S. Ct. 1130 (1992).

The prosecutor compounded the instructional error when during closing argument, counsel for the State proffered arguments that urged the jury to apply aggravating circumstances in a manner inconsistent with this Court's narrowed interpretation of those circumstances. Specifically, the prosecutor argued for application of (1) disrupt or hinder the lawful exercise of enforcement of the law; and (2) murders were committed in a cold, calculated and premeditated manner (R. 710-16). The State's arguments urged the jury to apply these aggravating factors in a vague and overbroad fashion.

Mr. Hodges' rights under the Eighth Amendment were violated. Richmond v. Lewis, 113 S. Ct. 528 (1992); Espinosa v. Florida, 112 S. Ct. 2926 (1992).

The errors were not harmless beyond a reasonable doubt. Here, it cannot be said that no mitigating circumstances were present which would have constituted a reasonable basis for a life recommendation. The evidence provided a reasonable basis upon which the jury could have based a life recommendation. See Hall v. State, 541 So. 2d 1125 (Fla. 1989)(question whether constitutional error was harmless is whether properly instructed jury could have recommended life). However, the jury was given erroneous instructions which resulted in improper aggravation to weigh against the mitigation. Moreover, when considered together with the errors resulting from counsel's failure to investigate and prepare for the penalty phase, it is clear that no finding of harmlessness can stand.

Mr. Hodges was deprived of the effective assistance of counsel by his counsel's failure to know the law and object to the vagueness of this aggravating circumstance. But for counsel's deficient performance, there is a reasonable probability that Mr. Hodges would not have been sentenced to death. Accordingly, the circuit court erred in failing to grant an evidentiary hearing. Relief is warranted.

B. INACCURATE COMMENTS OF BOTH THE PROSECUTOR AND THE TRIAL COURT GREATLY DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY IN DECIDING WHETHER MR. HODGES SHOULD LIVE OR DIE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The trial court and the prosecutor misled the jury concerning the significance that is attached to its sentencing verdict under the laws of the State of Florida. In Florida's trifurcated capital sentencing scheme, a jury's sentencing recommendation is to be accorded great deference. Mann v. Dugger, 844 F.2d 1446, 1453 (11th Cir. 1988); Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). However during Mr. Hodges' sentencing procedure the prosecutor improperly minimized the jury's "sense of responsibility for determining the appropriateness of death" in violation of the Eighth Amendment to the United States Constitution. Caldwell v. Mississippi, 105 S. Ct. 2633, 2646 (1985); Mann, 844 F. 2d at 1456.

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), relief was granted to a capital habeas corpus petitioner presenting a Caldwell v. Mississippi claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the Eighth Amendment in the identical way in which the comments and instructions here violated Mr. Hodges' Eighth Amendment rights. Mr. Hodges is entitled to relief under Mann, since there is no discernible difference between the two cases. A contrary result would result in the totally arbitrary and freakish imposition of the death penalty and violate the Eighth Amendment.

For some time the State of Florida has maintained that its judge/jury sentencing procedure insulates it from the dictates of the Eighth Amendment to the United States Constitution as set forth in Caldwell v. Mississippi. See, Mann v. Dugger, 844 F.2d 1446, 1454, n. 10 (11th Cir. 1988); Combs v. State, 525 So. 2d 853 (Fla. 1988). This Court has maintained that since the jury does not actually sentence the accused and only renders an advisory verdict that there can never be a violation of Caldwell when instructing or arguing to the jury. This theory is contrary to Florida law as discussed at length in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988). In Mann the Eleventh Circuit determined "that the sentencing jury plays a substantive role under the Florida capital sentencing scheme..." The en banc opinion rested on long standing Florida case law which has held that the trial court in making a sentencing decision must give great weight to the jury's verdict. Mann v. Dugger, 844 F.2d at 1450; Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

The United States Supreme Court has also concluded that the Florida jury is an integral part of the Florida sentencing scheme. In Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992), the question before the Court was the impact of an invalid aggravating circumstance, but the Court said:

Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation... (citations omitted).

In other words, the trial court in a Florida death penalty case is the sentencer, in combination with the jury, and not in lieu of the jury. The standards for sentencing and sentencing discretion found in the

Eighth Amendment apply to a Florida capital jury since it is the sentencer.

In Caldwell, the Supreme Court held, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere." 472 U.S. at 328-29.

Mr. Hodges' jury was repeatedly instructed that its role was merely "advisory" in violation of the law. Time and again the jury was told that their role in sentencing was just a "recommendation" (R. 44, 170, 711, 725-29, 735, 737, 739, 742-44). In Florida the jury is a co-sentencer. Espinosa v. Florida, 112 S. Ct. 2926 (1992). This court has characterized the jury as a "co-sentencer." Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). Any brief statement of the law was insufficient to explain the jury's actual role, and any sense of responsibility in imposing death was vitiated by the constant repetition of its role as "advisory" and returning a "recommendation" to the court. Mr. Hodges' jury was not adequately told it was a co-sentencer, and its sense of responsibility in sentencing Mr. Hodges to death was thus diminished in violation of the Eighth Amendment to the United States Constitution. Caldwell v. Mississippi, 472 U.S. 320 (1985).

To the extent trial counsel failed to raise and preserve the issue, Mr. Hodges was denied effective assistance of counsel. But for counsel's deficient performance, there is a reasonable probability that Mr. Hodges would not have been sentenced to death. Relief must be granted.

C. THE PROSECUTOR'S MISCONDUCT DURING THE COURSE OF MR. HODGES' CASE RENDERS MR. HODGES' CONVICTION AND DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The prosecutor's acts of misconduct both individually, and cumulatively, deprived Mr. Hodges of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. This Court has held that when improper conduct by a prosecutor "permeates" a case, as it has here, relief is proper. Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

The prosecutor in this case, Mr. Benito, climaxed his closing argument by asking the jury to compare the impact of a life sentence with the impact of the offense upon Betty Ricks:

What about life imprisonment? What can a person do in jail for life? You can cry. You can read, You can watch TV. You can listen to the radio. You can talk to people. In short, you are alive. People want to live. You are living. All right? If Betty Ricks had had a choice between spending life in prison or lying on that pavement in her own blood, what choice would Betty Ricks have made? But, you see, Betty Ricks didn't have that choice. Now why? Because George Michael Hodges decided for himself, for himself, that Betty Ricks, should die. And for making that decision, for making that decision, he, too, deserves to die.

(R. 717).

Trial counsel should have known to object because this Court has condemned this type of argument in previous cases. This same kind of argument was used by another Assistant State Attorney of the Thirteenth Circuit in Jackson v. State, 522 So. 2d 802, 808-809 (Fla.), cert. denied, 488 U.S. 871, 109 S. Ct. 183, 102 L.Ed.2d 153 (1988). In Jackson, the Court found this argument to be "improper because it urged consideration of factors outside the scope of the jury's deliberations." 522 So. 2d at 809. The Court referred to the argument as "misconduct" and said the trial court should have sustained defense counsel's objection and given a curative instruction. Id. However, the Court concluded that the misconduct was not sufficiently egregious to require reversal for a new penalty phase trial in Jackson's case. Id.

Subsequent decisions have made it clear that the improper conduct found harmless in Jackson cannot be condoned. In South Carolina v. Gathers, the Supreme Court prohibited prosecutorial remarks which violate the Eighth Amendment prohibition of victim impact evidence. South Carolina v. Gathers, 490 U.S. 805 (1989). This Court found similar "golden rule" arguments taken together with other improper remarks sufficiently egregious to require reversal in both Rhodes v. State, 547 So. 2d 1201, 1205 (Fla. 1989), and Garron v. State, 528 So. 2d 353, 359 n.6 (Fla. 1988).

Perhaps the most egregious instance of prosecutorial misconduct in violation of the Eighth Amendment prohibition of victim impact evidence and argument occurred during the prosecutor's final sentencing argument before the court:

Mr. Tucker, the victim's stepfather, and Mrs. Tucker, the victim's mother, are seated in the courtroom. They would certainly like

to get up here and tell you about their daughter. I have told them about the line of cases from the Supreme Court regarding victims' impact statements in front of juries and how the Supreme Court has reversed cases in which family members have gotten up in second phase and told the jury about what impact the victim's death has had on the family. I don't think the same would apply to a Court because you are going to determine whether this man lives or dies based on aggravating and mitigating circumstances.

But I told them too, if the Court does impose the death penalty, I don't want to run the risk of the Supreme Court three years down the road saying you shouldn't have heard any statements made by the family regarding victim impact.

Suffice it to say, they loved their daughter very much. Mr. Tucker wanted me to tell you that he promised his daughter as she lay dying in the hospital that he would make sure justice was done. Mr. Tucker feels that the death penalty is the only way he can keep that promise.

(R. 968)

Here, the prosecutor's own remarks show that he was aware of the Eighth Amendment prohibition of victim impact evidence under the Booth v. Maryland rule. From this, trial counsel should have known to object to the prosecutor's improper remarks. The prosecutor sought to excuse his flagrant misconduct on two grounds: (1) he was presenting the victim impact remarks to the court alone and not before the jury, and (2) he was summarizing the statements by the mother and stepfather of the victim rather than presenting their testimony. The prosecutor was wrong in both instances. First, the presentation of victim impact statements solely to the sentencing judge does violate the Eighth Amendment under Booth v. Maryland. Patterson v. State, 513 So. 2d 1257, 1263 (Fla. 1987). Second, victim impact statements by the prosecutor rather than the victim's survivors also violate the Eighth Amendment. South Carolina v. Gathers, 490 U.S. 805, 883 (1989). Furthermore, the prosecutor compounded the error by violating one of the most basic principles governing argument of counsel -- he was arguing facts which were not in evidence. Huff v. State, 437 So. 2d 1087, 1090 (Fla. 1983); Duque v. State, 460 So. 2d 416, 417 (Fla. 2d DCA 1984), rev. denied, 467 So. 2d 1000 (Fla. 1985).

Closing arguments such as the one made here are condemned by the Court. See e.g. Newlon

v. Armontrout, 885 F.2d 1328 (8th Cir. 1989). The cumulative effect of this closing argument was to "improperly appeal to the jury's passions and prejudices." Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 647 (1974).

Arguments such as those made by the State Attorney in Mr. Hodges' penalty phase violate due process and the Eighth Amendment, and render a death sentence fundamentally unfair and unreliable. This Court has held that when improper conduct by the prosecutor "permeates" a case, as it has here, relief is proper. Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

The circuit court erred in failing to grant a hearing on this issue. As such, Mr. Hodges was never able to inquire as to whether trial counsel made a tactical decision in not objecting to the prosecutors arguments. To the extent trial counsel failed to raise and preserve the issue, Mr. Hodges was denied effective assistance of counsel. Relief is proper.

D. MR. HODGES' JURY WAS MISLED AND INCORRECTLY INFORMED ABOUT ITS FUNCTION AT CAPITAL SENTENCING, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Hodges' Sixth, Eighth, and Fourteenth Amendment rights were violated by erroneous and misleading instructions at the sentencing phase. These instructions indicated to the jury that seven or more members must agree on a recommendation of life imprisonment before declining to impose a sentence of death. The effect of these erroneous instructions was to render Mr. Hodges' death sentence fundamentally unfair.

The trial judge gave this erroneous instruction during the court of his sentencing instructions:

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury. The fact that the determination of whether a majority of you recommend a sentence of death or a sentence of life imprisonment in this case can be reached in a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake and bring to bear your best judgment in reaching your advisory

sentence.

(R. 728).

However, the judge did read at least part of the correct standard jury instruction, that part which advises the jury that if six or more of their number recommends life, they have made a life recommendation (R. 728-29). This brief statement of the law was rendered nugatory by the previous instruction that misled the jury, giving them the erroneous impression that they could not return a valid sentencing verdict if they were tied six to six.

In Rose v. State, 425 So. 2d 521 (Fla. 1983), and Harich v. State, 437 So. 2d 1082 (Fla. 1983), the Florida Supreme Court ruled that majority vote was required only for a death recommendation. Accordingly, the court held that a six-to-six vote by the jury is a life recommendation. The jury instructions provided at Mr. Hodges' trial were therefore erroneous. Rose was decided well before Mr. Hodges' 1989 trial.

To the extent trial counsel failed to raise and preserve the issue, Mr. Hodges was denied effective assistance of counsel. Relief is warranted.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, appellant, GEORGE MICHAEL HODGES, urges this Court to reverse the lower court's order and grant Mr. Hodges Rule 3.850 relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to counsel of record on April 22, 2002, Curtis M. French, Assistant Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399.

CERTIFICATION OF TYPE SIZE AND STYLE

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