IN THE SUPREME COURT OF FLORIDA

CASE NO. SC-01-1831
LOWER COURT CASE NO. 88 CF-689

BRUCE DOUGLAS PACE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal is from the denial of Bruce Douglas Pace's motion for post-conviction relief by Circuit Court Judge Paul Rasmussen, First Judicial Circuit, Santa Rosa County, Florida. This proceeding challenges both Mr. Sweet's conviction and his death sentence. References in this brief are as follows:

"R. ___." The record on direct appeal to this Court.

"PCR. ___." The post-conviction record on appeal.

"Supp. ___." The supplemental record on appeal.

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

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Pace 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. Pace, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

A. Trial and Direct Appeal

On December 14, 1988, a Grand Jury in the Circuit Court of Santa Rosa County issued an indictment of Mr. Pace for the first degree murder and armed robbery of Floyd Covington. (R. 1132-33) Mr. Pace pleaded not guilty to the charges. (R. 1252) Jury selection for Mr. Pace's trial began on August 21, 1989. (R. 1) On August 23, 1989, Mr. Pace's guilt phase started. (R. 532) The jury found him guilty on all counts. (R. 1210) A penalty phase proceeding was conducted on August 26, 1989 (R. 1030), after which the jury recommended a sentence of death for the murder of Mr. Covington by a vote of seven to five. (R. 1211)

On November 16, 1989, Circuit Judge Ben Gordon adjudged Mr. Pace guilt and sentenced him to death for the murder and 15 years imprisonment for the robbery. (R. 1238-43) In support of the death sentence, the court found three aggravating circumstances: (1) Mr. Pace had a previous conviction for a violent felony, a robbery in 1982; (2) Mr. Pace was on parole at the time of the homicide; and (3) the homicide was committed during the course of a robbery. (R. 1234-45) The court found no mitigating circumstances. (R. 1236-37)

On direct appeal, this Court affirmed Mr. Pace's conviction and the death sentence. See Pace v. State, 596 So. 2d 1034, 1036 (Fla. 1992). Justices Overton, Barkett, and Kogan concurred with the conviction but dissented, without an opinion, as to the death sentence. See id. The relevant portion of the Court's opinion for the instant appeal is as follows:

> [W]e hold that the aggravating circumstances of previous conviction of felony involving violence, committed while on parole, and committed while engaged in a robbery are all supported beyond a reasonable doubt. The trial judge found no statutory mitigating circumstances and, after reviewing the nonstatutory mitigating evidence, concluded that none of the suggested mitigating factors had been established. Considering the totality of the circumstances, we conclude that the record supports the trial judge's conclusion. Even if one or more nonstatutory mitigating factors were wrongfully rejected, we are persuaded beyond a reasonable doubt that the weight thereof was so insignificant that the trial judge would have imposed death. Because the aggravating circumstances outweigh any nonstatutory mitigating evidence, death is the appropriate penalty.
>
> Accordingly, we affirm the conviction and sentence of Bruce Douglas Pace.

Id. at 1035-36 (citations omitted).

B. Post-conviction proceedings

On March 7, 1997, Mr. Pace filed an amended motion for

postconviction relief under Florida Rule of Criminal Procedure 3.850. 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 August 18, 1998 to determine whether Mr. Pace was entitled to an evidentiary hearing. (PCR. 1192) On December 15, 1998, the circuit court issued an order, directing that an evidentiary hearing be held on several claims: failure by the State to disclose exculpatory or impeachment evidence; newly discovered evidence; ineffective assistance of counsel for failure to perform an adequate investigation, failure to properly cross-examine certain witnesses, failure to call available witnesses, failure to object to improper prosecutorial comments in guilt and penalty phase closing arguments, failure to investigate and present mitigating evidence of Mr. Pace's mental health and difficult childhood. (PCR. 1192-1203)

The evidentiary hearing was conducted on June 12, 13, and 14, 2000. (PCR. 1165) At the hearing, Mr. Pace presented several lay witnesses who provided detailed testimony regarding his crack addiction and how it affected his mental health. Mr. Pace presented the unrebutted testimony of his two trial experts, Dr. James Larson and Dr. Peter Szmurlo. Both doctors testified regarding the flaws in their trial

evaluations, as well as their new diagnosis that Mr. Pace suffered from an extreme mental or emotional disturbance at the time of the crime, and that Mr. Pace was unable to conform his conduct to the requirements of the law. Mr. Pace also presented his postconviction expert, Dr. Michael Herkov, who testified that at the time of the crime, Mr. Pace suffered from a severe crack cocaine addiction. Dr, Herkov also found that, based on his addiction, Mr. Pace suffered from an extreme mental or emotional disturbance at the time of the crime, and that Mr. Pace was unable to conform his conduct to the requirements of the law. Mr. Pace also presented the unrebutted testimony of Dr. Barry Crown, who found, among other things, that Mr. Pace suffered from brain damage that affected his judgement and ability to reason. Dr. Crown also found that the affects of Mr. Pace's crack use would be enhanced by the brain damage. Lastly, Mr. Pace presented the testimony of his trial attorneys, Sam Hall and Randy Etheridge, as well as James Martin, the investigator who assisted them.

On June 11, 2001, the circuit court entered an order that denied Mr. Pace relief. (PCR. 1164-91) This appeal follows.

SUMMARY OF ARGUMENT

I. Mr. Pace's trial counsel was ineffective for failing

to investigate and present Mr. Pace's history of crack cocaine abuse and addiction. His addiction constituted valuable nonstatutory mitigation, and with evidence of his addiction, three mental health professions, found the two statutory mental mitigators.

II. Trial counsel further failed to present a guilt phase defense based on Mr. Pace's crack cocaine addiction, as his addiction prevented him from forming the specific intent necessary for a conviction of first-degree murder.

III. At trial, the State failed to disclose evidence that Mr. Pace could and would have used: 1) a report showing why Mr. Pace's fingerprint on the victim's vehicle was not incriminating and 2) a letter reprimanding the investigator in this case for improper, unethical behavior just prior to Mr. Pace's trial.

IV. Mr. Pace's constitutional right to remain silent was violated by the prosecutor's improper comments on his silence. Trial counsel was ineffective for not objecting to the comments.

V. Mr. Pace was sentenced in an unconstitutional manner, as the State did not specify in the indictment which aggravators were sought and the jury was not required to unanimously find that each aggravator had been proven beyond a

reasonable doubt.

VI. The lower court erred by not ordering certain state agencies to comply with Mr. Pace's public records requests.

STANDARD OF REVIEW

In this appeal, Mr. Pace brings claims that the prosecution failed to disclose information in violation of Brady v. Maryland. The standard of review for "whether a reasonable probability exists that the disclosure of the suppressed evidence would have changed the outcome of the trial is a mixed question of law and fact" and thus must be reviewed de novo with this Court only deferring to the lower court's factual findings. Rogers v. State, 782 So. 2d 373, 377 (Fla. 2001).

Similarly, both the prejudice and performance prongs of Mr. Pace's ineffective assistance of counsel claims are "mixed questions of law and fact, with deference on appeal to be given only to the lower court's *factual* findings." Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 2000) (emphasis in original).

ARGUMENT I

MR. PACE ESTABLISHED AT THE HEARING BELOW THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF HIS TRIAL. TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT EVIDENCE OF MR. PACE'S SEVERE CRACK ADDICTION. TRIAL COUNSEL FAILED TO EFFECTIVELY INVESTIGATE AND PRESENT EVIDENCE OF MR. PACE'S DIFFICULT CHILDHOOD. THE LOWER COURT ERRED IN DENYING MR. PACE

RELIEF ON THIS CLAIM.

I. INTRODUCTION

Under Strickland v. Washington, 466 U.S. 668 (1984), counsel has "a duty to bring such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 688 (citation omitted). At the hearing below, Mr. Pace established that he was denied a reliable adversarial testing in the penalty phase of his trial as a result of his attorneys' ineffective representation.[1] His trial counsel failed in two primary ways: (1) trial counsel failed to investigate Mr. Pace's history of crack cocaine use, failed to provide this information to his mental health experts, and failed to consider presenting it as mitigation; and, (2) trial counsel failed to effectively investigate evidence of Mr. Pace's difficult childhood, and failed consider presenting it as possible mitigation.

Mr. Pace was prejudiced by trial counsel's ineffectiveness. Had trial counsel effectively investigated, Mr. Pace's jurors would have heard the following: evidence

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[1]Mr. Pace's defense team consisted of three individuals: Samuel Hall, Randall Etheridge, and Jim Martin. Mr. Hall was the first chair, or lead, attorney and was responsible for the penalty phase. Mr. Etheridge was the second chair attorney and was responsible for the guilt phase. Mr. Martin was the investigator who assisted Mr. Pace's attorneys. (PCR. 2008, 2015)

that established two statutory mitigators; extensive nonstatutory mitigation, including evidence of drug addiction and organic brain damage; and, evidence that would have corroborated the paltry mitigation placed before the jurors by trial counsel. Considering the fact that the jurors voted seven to five for death without hearing this substantial and compelling mitigation, there is more than a reasonable probability that but for counsel's deficient performance the vote of one juror would have been different. See Phillips v. State, 608 So.2d 778 (Fla. 1992). Thus, the circuit court erred in denying Mr. Pace relief on this claim.

II. HISTORY OF CRACK USE

At Mr. Pace's evidentiary hearing, he presented extensive and unrebutted evidence of his long-term crack cocaine use that trial counsel failed to investigate. The lower court concluded that because trial counsel chose not to investigate based on a strategic decision, they did not render deficient performance. However, the lower court, like counsel at the time of Mr. Pace's trial, missed the true issue. The lower court premised its order on the same fact that trial counsel based its "strategy" – the fact that Mr. Pace was not high on crack at the time of the offense. The lower court, like counsel at the time of trial, then erroneously assumed that

any history of drug use and abuse was irrelevant if the defendant was not high on crack at the time of the offense. As this Court has recognized, that is the wrong standard. Even if Mr. Pace was "cold sober" during the offense, his history of drug use and abuse still constitutes mitigation. See Mahn v. State, 714 So. 2d 391, 401 (Fla. 1998) (citation omitted). Trial counsel's failure to investigate Mr. Pace's crack use and consider presenting such evidence during his penalty phase constitutes ineffective assistance of counsel.

Part of trial counsel's duties include the duty to conduct a reasonable investigation for any possible mitigating evidence. See Porter v. Singletary, 14 F.3d 554 (11th Cir. 1994). To assess whether trial counsel did conduct a reasonable investigation, the Eleventh Circuit formulated a three-prong inquiry: (1) "whether a reasonable investigation should have uncovered such mitigating evidence;" (2) "whether the failure to put this evidence before the jury was a tactical choice made by trial counsel;" (3) if the performance was deficient and not the result of a tactical decision, "whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See Porter, 14 F.3d at 557 (citations, emphasis omitted).

However, "the mere incantation of 'strategy' does not insulate attorney behavior from review..." 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 an attorney has failed to investigate his options and make a reasonable choice between them."); Jackson v. Herring, 42 F.3d 1350, 1368 (11th Cir. 1995) ("[A] legal decision to forgo a mitigation presentation cannot be reasonable if it is unsupported by sufficient investigation."). The record from the evidentiary hearing clearly shows that trial counsel failed to investigate Mr. Pace's crack use. Thus, his "strategic" choice to forgo using this information was not a reasonable one.

A. Deficient Investigation

Mr. Pace contends that he was provided ineffective assistance during the penalty phase of his capital trial by his attorneys' failure to investigate his long-term crack use and the effects it had on him, and trial counsel's failure to present this mitigating evidence during his sentencing proceeding.

Courts have expressly and repeatedly held that in sentencing proceedings trial counsel has a duty to investigate

and prepare available mitigating evidence for the sentencer's consideration. See Phillips v. State, 608 So. 2d 778 (Fla. 1992) (granting new sentencing phase on ineffective assistance of counsel claim where trial attorney failed to present substantial existing mitigation); Ragsdale v. State, 798 So. 2d 713, 716 (Fla. 2001) (same); Rose v. State, 675 So. 2d 567, 571 (Fla. 1996) (same); Hildwin v. Dugger, 654 So. 2d 107, 110 (Fla. 1995) (same).

Mr. Pace's trial attorneys unreasonably failed to discover and present readily available evidence. This failure is compounded by the fact that the attorneys actually possessed some of the mitigating evidence, or information which could have easily directed them to substantial mitigation. Nonetheless, trial counsel neglected to properly investigate to discover this extensive evidence. Counsel must reasonably inquire and follow up on the information counsel already has. See Jackson v. Herring, 42 F.3d 1350, 1367 (11th Cir. 1995) (concluding that trial counsel's investigation into mitigating evidence was 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"). Trial counsel in the instant case received information from witness statements

to police and during depositions that should have alerted him to the fact that Mr. Pace had a history of drug problems, specifically a crack cocaine dependency.

Upon hearing various individuals mention Mr. Pace's extensive crack cocaine use, trial counsel should have delved into this matter. Had he done so, these individuals could have explained that Mr. Pace regularly used excessive amounts of crack cocaine. Failing to explore these individuals' knowledge of Mr. Pace's drug use constitutes deficient performance. See Ragsdale v. State, 798 So. 2d 713, 721 (2001) (citing, as one reason for granting defendant's penalty ineffective assistance of counsel claims, that mitigation "witnesses would have been available if counsel had conducted a minimal investigation"); Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995) ("[H]ad defense counsel conducted a reasonable investigation, [he] would have unearthed this mitigating evidence.") If counsel had investigated, he would have located additional witnesses who had information beneficial to Mr. Pace and were available and willing to testify at trial.

Despite not uncovering or presenting evidence of Mr. Pace's drug use, the lower court concluded that "trial counsel's investigation into [Mr. Pace's] drug use was reasonable based upon the representations of [Mr. Pace] and

others.” (PCR. 1179) However, the lower court’s order is based on the representations of Mr. Pace and others that Mr. Pace was not intoxicated on the day of the offense. Mr. Pace’s sobriety that day is not the definitive issue. Regardless of whether Mr. Pace was intoxicated, he and those close to him also represented that he had a history of consistent heavy cocaine use. Trial counsel had a duty to investigate, as potential mitigation, Mr. Pace’s history of drug use and the possibility that he had a crack cocaine addiction.

1. Representations of Mr. Pace

The circuit court noted that “counsel should not be faulted for relying on Pace’s representations when developing their investigation plan.” Mr. Pace does not dispute that. In fact, had trial counsel relied on the totality of Mr. Pace’s representations, he would have investigated Mr. Pace’s overall crack use, not just his use on the day of the offense. Although Mr. Pace told counsel that he did not use crack on the day of the offense, he also told trial counsel that he had used crack almost daily for several weeks leading up to the crime.

In addition to informing his counsel directly about his crack use, Mr. Pace also discussed his crack use and abuse with the mental health experts who evaluated him. For

instance, Dr. Larson reported that upon graduating from high school,

> [Mr. Pace] began a lifestyle of physical labor and drug abuse. He especially liked [crack] cocaine because it allowed him to party late into the night and continue with work the next day. It kept his 'hyperactivity going' and he also talked of frequent partying all night long. For three months prior to the incident for which he is charged, [Mr. Pace] reported that he used [crack] cocaine almost daily.

(Report of Dr. Larson contained in Exhibit 3, entered into evidence at PCR. 1690) Dr. Larson also noted that Mr. Pace earned "elevated scores" on the MacAndrew's Alcoholism Scale. Such scores "reflect either an alcoholic and/or drug abuse adjustment or the propensity of developing such a problem in the future." Id. Dr. Larson explained that Mr. Pace's elevated scores were "consistent with interview information." Id.

Mr. Pace also discussed his extensive crack cocaine use with Dr. Szmurlo. He told Dr. Szmurlo that he had been using about $150 of crack cocaine per day during the three months prior to the offense. (Report of Dr. Szmurlo contained in Exhibit 3, entered into evidence at PCR. 1690) Following his evaluation, Dr. Szmurlo concluded that "rather heavy use of cocaine prior to the offense" was the only psychiatric mitigating circumstance that he detected. Id.

To each of the people with whom he discussed his case, Mr. Pace consistently reported a past including substantial use of crack cocaine. As the circuit court noted, even trial counsel "believed that Pace had a drug problem." (PCR. 1175, Order on Defendant's Motion for Postconviction Relief) Still, trial counsel neglected to investigate Mr. Pace's drug use for possible presentation in the penalty phase.

2. Representations of Mr. Pace's Friends and Relatives

In the event that trial counsel was initially unaware of Mr. Pace's crack abuse, he should have recognized that it needed exploring given the fact that so many people, without prompting, mentioned Mr. Pace's crack use in their various statements.

a. Kenneth Bembo

Trial attorneys possessed a statement given to the police from Kenneth Bembo, a friend of Mr. Pace, stating that he had knew Mr. Pace used crack cocaine. (Contained in Exhibit 3) Mr. Bembo stated that Mr. Pace had not always used drugs regularly but suddenly he became "hooked." He also described Mr. Pace as being very dirty, with strong body odor, and appearing to not have bathed recently. He had also heard rumors that Mr. Pace was $1000 in debt to Wayne Hobbs for cocaine Mr. Pace had purchased.

Even if Mr. Bembo's description of Mr. Pace did not signal to his trial attorneys that they should investigate the possibility of that Mr. Pace had a crack cocaine habit, Mr. Bembo certainly recognized it as a problem. In fact, he speculated that Mr. Pace may have committed this crime to support his drug habit. Had trial counsel listened to Mr. Bembo they would have learned that he was a valuable source of information.

At Mr. Pace's evidentiary hearing, Mr. Bembo explained that Mr. Pace's excessive drug use often amounted to between $50 and $100 of crack cocaine each day. (PCR. 1651-55) Mr. Bembo also testified that Mr. Pace could not handle his crack cocaine, that he would lose control when consuming crack cocaine, and that he would not act like himself when he was strung out on the drug. Id. According to Mr. Bembo, Mr. Pace was strung out on crack cocaine the night before the victim disappeared. (PCR. 1661)

If Mr. Bembo had been asked, he would have provided trial counsel with the same information to which he testified at Mr. Pace's evidentiary hearing. (PCR. 1662)

b. Barry Copeland

Barry Copeland, a friend and former classmate and co-worker of Mr. Pace, had additional information which was

valuable to Mr. Pace's case. In his statement to the police, Mr. Copeland said that on the Sunday after the offense, Mr. Pace was in the same clothes he had been wearing since the preceding Friday. (Contained in Exhibit 3) That Sunday, Mr. Pace was also trying to get drugs from Pensacola. Mr. Copeland expanded on his statement in his deposition.

In his deposition, Mr. Copeland explained that on Friday afternoon, after the time of the offense, he and Mr. Pace were together, trying to purchase some crack cocaine. (Contained in Exhibit 3) At that time, Pace was acting weird and already seemed to be "stoned on crack." On the Sunday after the offense, Mr. Copeland's girlfriend, Kim McLeod, drove Mr. Pace to Pensacola so that he could purchase crack cocaine. When they returned he and Mr. Copeland spent the day together, smoking the crack. Mr. Copeland explained again that Mr. Pace was in the same clothes he had been wearing since Friday. He also stated that he loaned Mr. Pace money for food, since he had not eaten in a couple of days.

Further, Mr. Copeland stated during his deposition that he and Mr. Pace had used crack together a couple of weeks prior to the offense, but that he was unaware of whether Mr. Pace was a "heavy user." Mr. Copeland testified at the evidentiary hearing that he did not originally explain the

extent of Mr. Pace's drug use at his deposition, because he did not want Mr. Pace to get into more trouble. (PCR. 1817) All trial counsel needed to do to obtain the full breadth of mitigation that Mr. Copeland possessed was to explain that the information regarding Mr. Pace's drug use could be useful in his penalty phase. Mr. Copeland testified at the hearing that had he known that his testimony would have actually helped, not hurt Mr. Pace, he would have more accurately detailed Mr. Pace's drug use. (PCR. 1818)

At the evidentiary hearing, Mr. Copeland explained that Mr. Pace used crack cocaine extensively and that the drug altered his behavior and personality. (PCR. 1807-08) In the late 1980s, Mr. Pace was using crack cocaine on a daily basis with Mr. Copeland, and together they used between $300 and $500 worth of crack cocaine per day. (PCR. 1807) For at least a year before his arrest, Mr. Pace was "strung out hard." Cocaine effected Mr. Pace very strongly, stronger than the effect it had on most people. (PCR. 1809) After Mr. Pace's drug use began, he grew "overly paranoid." (PCR. 1808)

During the week of the offense, Mr. Copeland and Mr. Pace binged on crack cocaine, spending between $1500 and $2000 that week. (PCR. 1811) Mr. Copeland also stated that during the period Mr. Pace was using drugs, his hygiene was poor. He

would not bathe for days and would frequently wear the same clothes. (PCR. 1809) The only time Mr. Pace was not doing crack was when he did not have any or when he was passed out. Furthermore, during the times that Mr. Pace did not have the drug, he would consume more alcohol and marijuana in an attempt to control his desire for crack cocaine. (PCR. 1810)

The trial attorneys possessed Mr. Copeland's statements and deposition, which established Mr. Pace as a crack cocaine user. Merely by asking a few questions, trial counsel would have learned details of Mr. Pace's regular use of crack cocaine. However, other than at his deposition, trial counsel never spoke to Mr. Copeland. (PCR. 1814) Had he been asked, Mr. Copeland would have testified to this information at trial. (PCR. 1814)

c. Cynthia Pace[2]

Cynthia Pace, Mr. Pace's first cousin, was deposed before trial. (Contained in Exhibit 3) Cynthia was with Mr. Pace in the early morning hours of the day of the offense, and stated that he acted as though "he had something on this mind." He seemed "depressed" and "distant." While discussing how Mr.

[2]Although the defendant, Mr. Bruce Pace, will be consistently referred to as Mr. Pace throughout this brief, other individuals with the last name "Pace" will be referred to by their first name to minimize confusion.

Pace seemed at that time, counsel asked Cynthia if he had been using drugs:

> Q. Did he appear to be under the influence of any kind of drugs and alcohol?
> A. We had drunk a couple of beers earlier that day. Now, I ain't going to --
> Q. (Interposing.) I understand.

(Deposition at p. 22) This exchange illustrates trial counsel's ineffectiveness in recognizing and gathering potential mitigation. After asking an important question, trial counsel interrupted the witness, thus preventing himself from learning what her initial response would have been.

Furthermore, Cynthia gave additional information that invited trial counsel to ask about Mr. Pace's drug use. Cynthia stated that she had heard that Mr. Pace was in debt to Mr. Wayne Hobbs. Trial counsel already knew from Kenny Bembo's statement five months earlier that Mr. Pace owed money to Mr. Hobbs from an outstanding drug debt. Despite knowing that Mr. Pace was in debt from drugs, trial counsel never asked Cynthia any specific questions about Mr. Pace's regular use of crack cocaine.

During the evidentiary hearing, Cynthia described Mr. Pace's mood and appearance, both of which signaled possible drug use. She explained that in the year preceding the offense, Mr. Pace had poor hygiene and was unkempt. (PCR.

1834) Mr. Pace had quit cutting or combing his hair, he would wear the same clothes for several days at a time, and he was unclean and smelled. This was especially unusual, since Mr. Pace had always been "neat and clean" before this time. (PCR. 1834-35)

Cynthia also explained that in the hours preceding the offense, Mr. Pace appeared preoccupied and worried. (PCR. 1835) Cynthia thought there was something wrong with him, because he was acting weirdly, pacing and seeming restless.

Under order of a subpoena, Cynthia Pace was at Mr. Pace's trial and, despite being present at the courthouse, she was never called to testify. (PCR. 1837) If Cynthia had been called and asked specific questions, she would have testified to the same information she discussed at the hearing. (PCR. 1837) Not only did trial counsel not call Cynthia as a witness, trial counsel never spoke with her after her deposition. (PCR. 1837)

d. Margaret Dixon

At the evidentiary hearing, Margaret Dixon, one of Mr. Pace's second cousins and Cynthia Pace's daughter, testified to Mr. Pace's extensive crack use and how his behavior changed as his addiction grew. (PCR. 1786-87) Ms. Dixon would see Mr. Pace smoking crack with T.J. Hill and Donnie "Booker" Jones,

but Mr. Pace's use increased dramatically in the second half of 1988. (PCR. 1787-89) At that time, "[h]e was on it real heavy, more than he ever had been." (PCR. 1787) The more Mr. Pace used crack, the more it effected him and his behavior. (PCR. 1788) Around the end of 1987 when Mr. Pace was using crack cocaine heavily, he stopped going home and would instead stay in abandoned houses. The level of his personal hygiene also decreased. (PCR. 1787) Ms. Dixon remembered that it was always obvious when Mr. Pace had been smoking crack because his eyes would be large and glossy, he would continuously lick his lips, and he would become jittery. Mr. Pace would also become paranoid when he was on crack. (PCR. 1786)

Trial counsel could have easily gotten Ms. Dixon's name and whereabouts while preparing for the penalty phase. It is standard and expected to ask possible mitigation witnesses if they know of anyone else who could provide helpful information. If trial counsel would have asked Cynthia Pace at the time of her deposition, she could have put trial counsel in contact with her daughter Margaret Dixon. Nevertheless, Ms. Dixon was never contacted by trial counsel. (PCR. 1792) She was available and willing to testify had she been asked. (PCR. 1792)

e. Ora Kay Jones

At the hearing below, Mr. Pace also presented Ora Kay Jones, a friend of Mr. Pace's since childhood, who testified to Mr. Pace's crack use and behavior changes. (PCR. 1821-22) She explained that in the late 1980s, she and Mr. Pace would smoke crack cocaine together. (PCR. 1821) Mr. Pace also smoked crack with her husband, Donnie "Booker" Jones. (PCR. 1824) Ms. Jones remembered that Mr. Pace could not handle his crack as well as most others she smoked the drug with.

During the week of the offense, Ms. Jones ran into Mr. Pace. Ms. Jones remembered that when she saw him, he was trying to sell stolen VCRs, presumably to obtain money for drugs. (PCR. 1822) While trying to sell the VCR, Mr. Pace looked, "dirty," fidgety," and "nervous," and was "high." (PCR. 1822)

Ms. Jones was never contacted by Mr. Pace's trial attorneys. If she had been asked, she would have given this information and testified at trial.[3] (PCR. 1820) Trial counsel could have easily learned that Ms. Jones had information that could have been used in Mr. Pace's penalty phase. On numerous occasions, her husband was mentioned in connection with this case and in connection with Mr. Pace's

[3]In fact, Ms. Jones testified at the evidentiary hearing despite receiving threats from Donnie Jones. (PCR. 1826-27)

drug use. It is reasonable to expect that trial counsel should have interviewed the spouse of an individual, like Mr. Jones, who had a recurrent presence in this case.

f. Thomas "T.J." Hill

Thomas "T.J." Hill, a friend of Mr. Pace, had also known Mr. Pace for "a long time." (PCR. 1843) During the evidentiary hearing, he provided first-hand knowledge of Mr. Pace's crack use. (PCR. 1843) Mr. Hill remembered that Mr. Pace drank heavily when on crack, and that Mr. Pace would get paranoid and disoriented. He had seen Mr. Pace smoke crack cocaine on several occasions and had seen him using crack heavily in the 18 months before his arrest. (PCR. 1843)

As a result of being questioned by the police in regards to the murder of Floyd Covington, trial counsel had Mr. Hill's name. (PCR. 1846) Nonetheless, counsel never interviewed nor contacted Mr. Hill. Had he done so, Mr. Hill would have provided this information to trial counsel and testified to it. (PCR. 1847)

g. Paula King

Other witnesses were available to trial counsel had they followed up on the information they had. Trial counsel's investigator, Mr. Martin, spoke with a woman named Paula King before the trial began. Ms. King had been friends with Mr.

Pace since 1980. In an affidavit obtained by postconviction counsel, she explained that when Mr. Pace was on crack, he would constantly pace back and forth and would act very paranoid. (Affidavit contained in Exhibit 3) When Mr. Martin interviewed Ms. King, she told him that she and Mr. Pace "had a long history together" and that maybe she could help. Although Mr. Martin indicated that he would contact her, no one from Mr. Pace's defense team ever got in touch with Ms. King. If they had, she would have provided data about Mr. Pace's history of drug use.

h. Melanie Pace

Melanie Pace, one of Mr. Pace's first cousins, was also deposed in conjunction with this case. (Deposition contained in Exhibit 6) Melanie saw Mr. Pace around 8:30 on the morning of the offense. Although trial counsel asked her if Mr. Pace appeared to be on drugs, she said she didn't know because their encounter was brief. However, trial counsel never specifically asked about Mr. Pace's appearance or demeanor; he never sought to determine if she could report any signs of drug use.

In an affidavit obtained by postconviction counsel, Melanie elaborated on her description of Mr. Pace the last time she saw him: "[H]e looked really raggedy that morning,

like he'd been up all night and hadn't bathed." (Affidavit contained in Exhibit 3) Melanie gave the same account during her testimony at the evidentiary hearing. (PCR. 1778-79) Other than the deposition she gave in 1989, she never had any contact with Mr. Pace's counsel, though she would have provided this information and testified to it, had anyone requested that she do so. (PCR. 1779)

i. Hilda Pace

Hilda Pace, a former girlfriend of Mr. Pace, also had relevant mitigation information at the time of trial. (Affidavit obtained by postconviction counsel, located in Exhibit 3). Mr. Pace spoke with Hilda the week before the offense and was obviously upset: "He was talking like he hated the world and everything was wrong. He was talking about how everyone was out to get him." Although she never saw Mr. Pace use crack, she had heard rumors that he did. Trial counsel deposed Hilda but never explored any of this information. Hilda was never told by trial counsel that this information could be helpful. Had she known, she would have shared the information she knew, and she would have testified to it at Mr. Pace's trial.

j. Angela Pace

Angela Pace, a cousin of Mr. Pace, said in her statement

to the police that the night prior to the offense, Mr. Pace was depressed about his recent break-up with Hilda Pace and that Hilda did not want to have anything to do with him. (Statement contained in Exhibit 3) Around that time, Mr. Pace was not really living anywhere specific; he would just stay "here and there." Though she did not know with certainty, Angela feared that he was using drugs.

Trial counsel asked Angela during her deposition whether Mr. Pace was "dealing drugs." She did not know because he wouldn't have discussed "anything about drugs" with her. However, she had been told that Wayne Hobbs was trying to recover a debt that Mr. Pace owed him. Angela Pace also knew that Mr. Pace did not have a permanent residence but "stayed with people here and there." Nonetheless, trial counsel did not attempt to obtain other information from Angela, regarding any other indications that Mr. Pace was using crack cocaine.

k. Ella Mae Green

Trial counsel additionally deposed Ella Mae Green, who has known Mr. Pace since he was a child. (Deposition contained in Exhibit 6) The Sunday morning after the offense, Mr. Pace went to Ms. Green's house. Ms. Green left Mr. Pace at her house while she went to the store. When she returned, Mr. Pace had left without eating his meal and had stolen $85.00

from Ms. Green.

In an affidavit obtained by postconviction counsel, Ms. Green explained that on the Sunday after the offense, Mr. Pace was very dirty and "acting strange." Although she was never asked by trial counsel, Ms. Green would have been willing to describe Mr. Pace's behavior and appearance that afternoon. She also would have testified to the same at trial.

Additionally, learning from Ms. Green that Mr. Pace had allegedly stolen $85.00 that day and learning from Mr. Copeland that Mr. Pace went to Pensacola to purchase crack on Sunday afternoon, trial counsel should have suspected that the two events were related and a result of a crack cocaine dependency.

l. Johnnie "Peewee" Poole

Johnnie Poole, a friend of Mr. Pace, was at Ms. Green's house when Mr. Pace came over on the Sunday after the offense. When she and Ms. Green returned from the store, Mr. Pace had already taken the money and left without touching the plate of food that Ms. Green had prepared for him. In an affidavit obtained by postconviction counsel, Ms. Poole also described that Mr. Pace "was acting strangely. He was dirty and smelled bad, like he hadn't bathed or changed his clothes in a long time." (Affidavit contained in Exhibit 3) Ms. Poole was never

contacted by any of Mr. Pace's attorney, although she would have shared this information with them. Trial counsel had Ms. Poole's name, since Ms. Green discussed her during her deposition. (Deposition contained in Exhibit 6)

B. Deficient Preparation of Mental Health Evaluators

Not only did trial counsel need to investigate Mr. Pace's addiction to crack, he needed to provide the results of his investigation to his mental health experts. Trial counsel has a duty to conduct proper investigation into the client's mental health background, and to ensure that his client is afforded a professional and professionally conducted mental health evaluation. See State v. Michael, 530 So. 2d 929 (Fla. 1988).

As trial counsel relied on Dr. Szmurlo and Dr. Larson to assess Mr. Pace's mental state at the time of the offense, trial counsel should have known that to make an accurate assessment they needed extensive background information on Mr. Pace and his history of substance abuse. Counsel's failure deprived Mr. Pace of his right to the competent assistance of mental health experts. See Ake v. Oklahoma, 470 U.S. 68 (1985); Blake v. Kemp, 758 F. 2d 529 (11th Cir. 1985); State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1984). See also O'Callaghan v. State,

461 So.2d 1354, 1355-56 (Fla. 1984), United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

Mr. Pace had a right to "adequate psychiatric evaluation of [his] state of mind." Blake, 758 F.2d at 529. In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1976) (citation omitted). By not properly preparing or using the experts at trial, counsel's performance was deficient.

1. Dr. Szmurlo

Dr. Peter A. Szmurlo, a psychiatrist, was contacted by trial counsel in June of 1989 to evaluate Mr. Pace.[4] (PCR. 1873) At that time, he had never before served as an expert in a capital murder trial. (PCR. 1875) Nonetheless, trial

[4]This Court should note that Mr. Pace's trial began in late August of 1989. Thus, trial counsel did not seek out Dr. Szmurlo to examine Mr. Pace until approximately two months before the beginning of the trial. Dr. Szmurlo's report was provided to trial counsel on July 26, 1989, less than a month before the start of the trial. Mr. Pace's other trial expert, Dr. James Larson, was retained on July 20, 1989, approximately 1 month before the trial began. Dr. Larson did not finish evaluating Mr. Pace until August 16, 1989, less than a week before jury selection began in Mr. Pace's case. (See Report of Dr. Larson contained in Exhibit 3) Lastly, Dr. Larson did not report on his evaluation of Mr. Pace until August 21, 1989, the day jury selection began.

counsel did not provide him with an explanation or list of the statutory mitigators. (PCR. 1876, 2029) As a result, at the time of his evaluation of Mr. Pace, Dr. Szmurlo never knew about the statutory mental mitigators and, thus, was unable to determine whether or not they would apply to Mr. Pace. Trial counsel merely requested that Dr. Szmurlo "look at the case from the standpoint of determining any mitigating circumstances which would be presented to the jury and aid them in deciding whether to recommend to the court a sentence of life or death." (PCR. 2028)

Trial counsel provided Dr. Szmurlo with Mr. Pace's indictment, autopsy reports, investigative reports of several police officers, and a copy of the court order appointing him. (PCR. 2023) While trial counsel did not expect Dr. Szmurlo to complete his own investigation of Mr. Pace's friends and family, (PCR.2021), trial counsel neglected to provide Dr. Szmurlo with reports he did possess where individuals discussed Mr. Pace's drug use. Even without conducting further investigation into Mr. Pace's drug use, trial counsel had relevant mitigating information in statements to the police and depositions, particularly from Mr. Copeland, Mr. Bembo, Ms. McLeod, Ms. Cynthia Pace, and Ms. Angela Pace. (PCR. 2038-40)

Regardless of possessing minimal background information, Dr. Szmulo discovered that Mr. Pace had a history of serious cocaine use and abuse. Dr. Szmurlo concluded his report with a significant statement:

> **Except for a rather heavy use of cocaine prior to the offense, [Mr. Pace] denies having had any psychiatric problems that could influence the court's decision regarding his sentencing.**

(See Report of Dr. Szmurlo contained in Exhibit 3)

This statement shows two things: Mr. Pace had a history of cocaine use and Dr. Szmurlo was unclear, if not unaware, of how this drug use could work as a mitigating circumstance in Mr. Pace's case. At ths point, it was up to trial counsel to follow up with Dr. Szmurlo regarding this finding. Unfortunately for Mr. Pace, this never occurred.

2. Dr. Larson

Dr. James D. Larson, a clinical psychologist, was appointed by the court in Mr. Pace's trial in 1989 to assist the defense. (PCR. 1731) Dr. Larson reported that he had "no indication **based on [the provided] information** that [Mr. Pace] suffered from any emotional disturbance at the time of the incident." (See Report of Dr. Larson contained in Exhibit 3)(emphasis added) For the same reason, Dr. Larson did not find Mr. Pace's ability to conform his conduct to the

requirements of the law was impaired. Dr. Larson based these conclusions on psychological testing of Mr. Pace and interviews with him.[5] (PCR. 1735)

Although all mental health experts have some exposure to substance problems, Dr. Larson has no training specific to drug addiction. (PCR. 1741-42) While Dr. Larson knew, from his evaluation and Mr. Pace's scores on the MacAndrew's Alcoholism Scale, that Mr. Pace had abused cocaine, he did not have sufficient data to learn the extent of Mr. Pace's drug problem.

While relying on Dr. Larson to determine the existence of statutory mitigation, trial counsel also relied on him to assess whether Mr. Pace has any brain damage. Relying on Dr. Larson to find brain damage was problematic, since Dr. Larson is not a neuropsychologist. (PCR. 1738) Nevertheless, Dr. Larson's testing indicated an unspecified psychological disturbance. (PCR. 1737) In addition to undergoing psychological testing, Mr. Pace was administered an EEG in 1989 to measure the electrical activity in his brain. (PCR. 1628) However, thirty percent of the time an individual has brain damage, the damage will be detected by an EEG, while

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[5]Larson evaluated Mr. Pace on 8/5/89 and 8/16/89 and wrote a report on 8/21/89. See footnote #4, supra.

neuropsychological testing will detect brain damage in ninety percent of individuals who have such a condition. (PCR. 1628-29) With the indications of a psychological disturbance, trial counsel should have obtained a neuropsychologist to evaluate Mr. Pace for the potential brain damage. Trial counsel's failure to have Mr. Pace receive neuropsychological testing constitutes deficient performance.

The lower court denied Mr. Pace's claim that trial counsel failed to provide his experts with sufficient information; the court's denial was based on several reasons. The lower court's ruling presumed that trial counsel's investigation into Mr. Pace's drug use was reasonable and that counsel did not withhold any information from his experts. (PCR. 1179) However, trial counsel did not investigate Mr. Pace's drug use at all, and he did withhold pertinent information from his experts. Dr. Szmurlo received none of the statements individuals gave to police, nor did he receive their depositions. Although Dr. Larson did receive some of this information, he was not provided with all the information counsel possessed. For instance, he was not given any of Mr. Copeland's reports despite the fact that they detailed Mr. Pace's drug history. (See Report of Dr. Larson contained in Exhibit 3) The circuit court also reasoned that the experts

had information which contained insights into Mr. Pace's background. (PCR. 1179) However, that is incorrect. Dr. Szmurlo had no such data, and the data possessed by Dr. Larson was minimal.

The inadequacy of the experts' materials is illustrated by the fact that with additional information provided by postconviction counsel, both experts' found substantial statutory and nonstatutory mitigation. Contra Brown v. State, 755 So. 2d 616, 636 (Fla. 2000) (finding that counsel was not ineffective for failing to provide his expert with sufficient background data, because "such collateral data would not have changed his testimony"). "[T]hird-party information or reliable behavioral observations are far more important in terms of putting together the personality picture and pattern of someone than are tests results." (PCR. 1768) Because the experts did not have such data, their assessments of Mr. Pace's mental health were incomplete. With the requisite background materials, these experts would have found substantial mitigation that trial counsel could have presented during Mr. Pace's penalty phase.

C. Prejudice

To demonstrate that Mr. Pace received ineffective assistance from his trial attorney, he must show that he was

prejudiced by the omissions and errors of trial counsel. See Strickland v. Washington, 466 U.S. 668, 687 (1984). Such prejudice occurs when a defendant is "deprive[d] . . . of a fair trial, a trial whose result is reliable." See id. The prejudice to Mr. Pace is evident. Had his attorneys properly investigated and presented the information to their trial experts, the experts would have provided two statutory mitigating circumstances for the jury and trial court to consider as well as substantial nonstatutory mitigation. Had trial counsel presented this mitigation, there is more than a reasonable likelihood that Mr. Pace would have received a life sentence.

All of the mitigation evidence Mr. Pace presented at his evidentiary hearing was undisputed and uncontradicted by the State. As such, this Court should find that the mitigation existed at the time of trial and then weigh it against the aggravators in reassessing Mr. Pace's sentence. "[W]hen a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the . . . court *must* find that the mitigating circumstance has been proved." See, e.g., Nibert v. State, 574 So. 2d 1059, 1062-63 (Fla. 1990) (emphasis added) (vacating death sentence where the trial court failed to find mental health mitigating circumstances,

and “there was no competent, substantial evidence in the record to refute the mitigating evidence”).

Mr. Pace’s crack cocaine addiction was demonstrated by numerous lay witnesses and recognized by **four** mental health professionals and certainly constitutes competent, uncontroverted evidence. See Clark, 609 So. 2d at 515-16 (finding the trial court erred in rejecting mitigation evidence when, despite slight variations in the witnesses’ testimony, the mitigation was “uncontroverted”); Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993) (reversing a trial court’s imposition of a death sentence when, due to the uncontroverted evidence, “the trial court erred in failing to find as reasonably established mitigation the two statutory mental mitigating circumstances”).

Furthermore, a court may “only reject the proffered mitigation if the record provides competent, substantial evidence to the contrary.” See, e.g., Mahn, 714 So. 2d at 401 (finding that the “the trial court erred in giving no weight to [Mahn’s] uncontroverted history of drug and alcohol abuse as a nonstatutory mitigating circumstance”). At the hearing below, the State failed to point out to the court any parts of the trial record that contradicted the mitigation presented. Consequently, the lower court abused its discretion by not

recognizing the mitigation presented below. See Miller v. State, 770 So. 2d 1144, 1150 (Fla. 2000) (finding the trial court abused its discretion by not holding that uncontested evidence established mitigation).

The mitigation associated with Mr. Pace's drug addiction was both statutory and nonstatutory mitigation. If trial counsel would have investigated Mr. Pace's drug use, he would have learned this and presented it to the jury.

1. Statutory Mitigation

Trial counsel stated at the evidentiary hearing that if his experts found and could testify to the statutory mental health mitigators, he would have presented them to the jury. (PCR. 2016, 2018) Unfortunately, his experts did not find these mitigators because trial counsel did not provide them with sufficient information. Any evaluation, such as Dr. Larson's and Dr. Szmurlo's, is "subject to revision with additional information."[6] (PCR. 1765) With adequate background data, both Dr. Larson and Dr. Szmurlo found that

[6]For example, upon learning from postconviction counsel that Mr. Pace did not have a history of juvenile crimes or a juvenile criminal record, Dr. Larson receded from his initial diagnosis that Mr. Pace had antisocial personality disorder. (PCR. 1749-50) Trial counsel never bothered to supply this information to Dr. Larson, although he probably ran out of time to do so considering the fact that he waited until right before trial to retain Dr. Larson. See footnote #4, supra.

Mr. Pace was acting under an extreme emotional or mental disturbance and that his ability to conform his conduct to the law was substantially impaired.

a. Extreme mental or emotional disturbance

By supplying his mental health experts with adequate background information and the anecdotal evidence reported by the people close to Mr. Pace, trial counsel could have shown the jury that Mr. Pace was acting under an extreme mental and emotional disturbance at the time of the offense. See § 921.142 (7)(b).

Prior to trial, Dr. Larson did not find that Mr. Pace was acting under an extreme disturbance. However, with the readily available information supplied by postconviction counsel, his opinion changed. Dr. Larson found the information provided by postconviction counsel to be helpful, particularly the indications that Mr. Pace's behavior had taken a turn for the worse leading up to the murder:

> I found those things to be particularly helpful, some of them documented. Paranoid behavior, disorganized behavior, behavior I considered to be somewhat of a downward spiral of the substance abuser. That is poor hygiene, and sleeping in an abandoned house, and living a cocaine or drug addict lifestyle.

(PCR. 1743-44)

Dr. Larson then testified that after reviewing the

information provided by postconviction counsel, he found that Mr. Pace exhibited an extreme mental or emotional disturbance as a result of his cocaine dependency and his "chronic cycle of abusing alcohol and drugs." (PCR. 1748) The only reason Mr. Pace's jury did not hear this same testimony is because trial counsel failed to get sufficient information to Dr. Larson.

At the time of trial, defense expert Dr. Szmurlo also did not believe that Mr. Pace suffered from an extreme emotional disturbance, but Dr. Szmurlo concluded at the evidentiary hearing that Mr. Pace did meet that standard (PCR. 1879-80), and he based his finding on materials provided by postconviction counsel:

> **Q.** And we have established that you are a medical doctor. When you give this opinion that Mr. Pace was under a severe emotional or mental disturbance at the time are you basing this mainly on physiological factors?
>
> **A.** Yes.
>
> **Q.** What are those?
>
> **A.** Well, I believe that the evidence which I had an opportunity to review now suggests that several.
>
> 1. Is that Mr. Pace's cocaine habit has been of much longer duration and much higher severity than I suspected on the basis of evidence which I had in an interview with Mr. Pace previously.

> 2. There is a clear evidence from, at least medical evidence from those documents to suggest that cocaine had led to withdraw from food. And in all likelihood a semi-starvation on the part of Mr. Pace. And consequently neglect of himself which is consistent with the effects of cocaine, especially on a severe, a severe habit. In which an individual will prefer cocaine to nutrients. And that's consistent with animal research and animal evidence in cocaine abuse.
>
> And lastly, there is an also evidence that Mr. Pace has, has suffered from a sleep depravation and was likely himself to be more sensitive to the effect of cocaine than the average cocaine users due to the process of sensitization to the effects of cocaine.

(PCR. 1880-81).

Furthermore, Dr. Herkov, an expert retained by postconviction counsel, also found that at the time of the offense Mr. Pace was under an extreme psychological and emotional disturbance based on the data provided by postconviction counsel:

> [S]econdary to his drug use as manifested by the amount [of crack cocaine] that he was using, the statements regarding his lack of hygiene, lack of eating, lack of personal care, the statements regarding unusual behavior consistent with a cocaine intoxication that he was under coupled with the amount of alcohol that he was using, coupled with the . . . lack of sleep given in the 24-hour period or 48-hour period before this happened.

(PCR. 1708-09, 1711) All of this testimony was available to

Mr. Pace at the time of trial had trial counsel provided sufficient information to the experts.

b. Substantially impaired capacity to conform conduct to the law

With the same information that indicated Mr. Pace was suffering from an extreme psychological disturbance, the mental health experts also concluded that Mr. Pace's ability to conform his conduct to the law was substantially impaired. See § 921.142 (7)(e).

Dr. Larson concluded that based on Mr. Pace's condition as cocaine dependent, "he would have impairments to his capacity to conform his behavior to the requirements of the law." (PCR. 1748) Dr. Larson believed that Mr. Pace had also set aside "the conventional morals . . . to fulfill [his] drug craving." (PCR. 1748)

Dr. Szmurlo also agreed that Mr. Pace's ability to conform his conduct to the requirements of the law was substantially impaired:

> **Q.** Doctor, based upon the materials that I provided to you as well as the language in the statute, do you have an opinion on whether or not Mr. Pace's ability to conform his requirements of law at the time of the crime was substantially impaired?
>
> **A.** Yes, I do.

Q. Why is that?

A. I believe that.

Q. Why is that?

A. I believe that his ability to exercise a critical judgment was diminished and suspended. His ability to maintain a focus of attention was likely to be minimal. I believe that he practically acted in the state of a mental fog at the time of, of an offense.

(PCR. 1881).

Similarly, Dr. Herkov also concluded that Mr. Pace's ability to conform his conduct to the requirements of law was substantially impaired by his cocaine addiction:

> Second opinion is that his ability to conform his behavior to the requirements of law was substantially impaired by his cocaine addiction, that for Mr. Pace the goal is to get the cocaine, that his ability to really understand and conform his behavior was impaired.

(PCR. 1709)

Three experts at the hearing below all concluded that Mr. Pace met the requirements for these two statutory mitigators. The state presented nothing to rebut their opinions. All three experts based their opinions on the same information, information available at the time of trial had counsel sought it out. Clearly, Mr. Pace was prejudiced by trial counsel's failure to obtain this readily available information and

supply it to the experts.

2. Nonstatutory mitigation

a. Organic brain damage

In preparation for postconviction litigation, Dr. Barry M. Crown, a neuropsychologist, conducted a neuropsychological examination of Mr. Pace, which included administering a group of tests.[7] (PCR. 1618-19) As a result of his evaluation, Dr. Crown found that while Mr. Pace is of average intelligence he also has difficulties with cognitive functioning:

> However, on measures of intellectual efficiency, which in simple terms is using the brains that you've got, his capacities are significantly diminished. In fact, when I used standard conversion tables to convert that into an age equivalency, Mr. Pace's ability to deal with problem solving is at the level of someone who is 13 years, zero months.

(PCR. 1619)

Dr. Crown also found that Mr. Pace showed signs of damage to the anterior left side of his brain, which is the area that "deals with understanding long-term consequences of immediate behavior . . . [and] problems in self-assessment." (PCR. 1627)

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[7]Dr. Crown administered the Wechsler Adult Intelligence Scale Revised, the GFW Auditory Selective Attention Test, the Symbol Digits Modality Test, the Wisconsin Card Sorting Test, the Ray Osterreith Complex Figure Test, the Stroop Color Word Test, the Trailmaking Test, and the Reitan-Indian Aphasia Screening Test. (PCR. 1623-28)

Due to his neurological damage, Mr. Pace has information stored in his brain that he can not access with any level of efficiency. (PCR. 1628) In light of Mr. Pace's difficulties processing information in both hemispheres of his brain, Dr. Crown concluded that Mr. Pace suffers from organic brain damage that he acquired at some point after birth. (PCR. 1620-21, 1622-23)

Most importantly, Dr. Crown found that the difficulties and incapacities which result from Mr. Pace's brain damage can be aggravated when Mr. Pace is under the influence of a substance, such as crack cocaine. At the same time, the brain damage can actually increase the negative effects brought on by the crack use. As Dr. Herkov testified:

> **Q.** But what if a person's frontal lobes were already damaged?
>
> **A.** Well, that's why I was listening to Doctor Crown's testimony. It was helpful. If you in fact have already established somebody who had a frontal lobe syndrome -- frontal lobe damage, you would expect a heightened response to any drug, cocaine, alcohol. Anything that you're going to do that suppresses or inhibits the frontal lobes, which these drugs do, you have a more intense response.

(PCR. 1704).

Due to trial counsel's deficient preparation of the penalty phase and his failure to secure a complete, adequate

mental health evaluation for Mr. Pace, the jury never heard that he suffers from organic brain damage that impairs his abilities to process information and understand the long-term consequences of his actions.

b. History of crack cocaine use

In addition to being evaluated by Dr. Crown prior to his evidentiary hearing, Mr. Pace was also evaluated by Dr. Michael Herkov, a psychologist and expert of cocaine addictions. (PCR. 1675, 1679) Dr. Herkov testified that of the people who use drugs, including crack cocaine, only 15-20% become addicted. (PCR. 1688) To determine if a person is addicted, it is necessary to assess the frequency of his use, the compulsive level of his use, the variety of situation in which he uses, the presence of any relapse, and any extraordinary behavior the person exhibits to acquire the drug, such as committing criminal acts. “There’s really no other way to define addiction except from behavior,” which requires that the evaluator consider third party observations. (PCR. 1689) In fact, in forming his conclusions, Dr. Herkov relied on the statements of people close to Mr. Pace supplied by postconviction counsel. (PCR. 1689) The same information was readily available to trial counsel had they sought it.

Mr. Pace told Dr. Herkov that he had been using cocaine

in the months preceding the offense and was on a cocaine binge the week of the offense. (PCR. 1683) Various statements from Mr. Bembo and Mr. Copeland corroborated Mr. Pace's self-reports. (PCR. 1683) Dr. Herkov also considered reports that Mr. Pace was using cocaine during the days immediately following the offense, and that he went to Pensacola three days after the offense specifically to purchase crack cocaine. (PCR. 1684)

With this background data, including the reports of third-parties, Dr. Herkov and Dr. Szmurlo concluded that Mr. Pace had a crack cocaine dependency or addiction in 1989. (PCR. 1708, 1898) For a person addicted to cocaine, the compulsion to use the drug "becomes stronger and stronger and . . . their ability to resist, to avoid the cocaine is greatly diminished." (PCR. 1710) An addict's life becomes centered around feeding cocaine to their brain. (PCR. 1691) Because of the intense euphoria cocaine causes, the brain prioritizes cocaine above needs such as eating, drinking, and sex. (PCR. 1690) Consequently, loss of appetite and loss of weight are "telltale signs" that a person is on cocaine. (PCR. 1691) Poor hygiene and lack of bathing are also signs of cocain addiction. (PCR. 1700) Cocaine becomes "the all important thing," and an addict will do anything to get the drug. (PCR.

1692) Mr. Pace reported stealing from everyone, including his relatives, to get money for drugs. This is substantiated by Ms. Green's account of Mr. Pace stealing $85.00 from her, a friend, three days after the offense. (PCR. 1706)

Mr. Pace also reported using crack cocaine in conjunction with drinking alcohol, which is significant because, as Dr. Herkov testified, combining cocaine and alcohol "produces a third drug called coke ethylene." (PCR. 1684-85) Coke ethylene increases the impact the cocaine has on the user, and also extends the period that the individual feels the "high." (PCR. 1685) There are reports from Mr. Pace, Mr. Copeland, and Ms. Green stating that Mr. Pace had been drinking alcohol during the night before the offense. (PCR. 1685)

Even if Mr. Pace had not used crack cocaine the day of the offense or the day before the offense, he still would have been acting under the influence of the drug and, most importantly, the influence of the extreme cravings brought on by the addiction to the drug. (PCR. 1721) Cocaine "changes the fundamental neurochemistry of the brain." As a result, even when a person does not use the drug for a few days, the brain is still affected by the chronic cocaine use.[8] (PCR. 1722)

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[8]It is unclear how long it takes the brain to correct the damage it suffers from chronic cocaine use. However, even when a person is free from cocaine for thirty days, they may still

When a person becomes addicted to crack cocaine, the receptors in his brain change, making his brain thinks its normal state is when it has cocaine. (PCR. 1692) Then, when the brain does not have crack cocaine, it is in an abnormal state and the person starts to crave the drug. (PCR. 1692) For instance, cocaine use depletes the serotonin neurotransmitters that regulate a person's mood. (PCR. 1702) With decreased levels of serotonin, a person becomes depressed. As a result of the substantial effect cocaine has on the brain's serotonin levels, cocaine addicts experience "some of the most profound depressions." (PCR. 1702) Both Ms. Hilda Pace and Ms. Margaret Dixon described the changes in Mr. Pace's personality, including his depressive symptoms. (PCR. 1711)

Dr. Herkov also testified at the hearing below that cocaine further depletes the brain's supply of dopamine, which contributes to the changes in mood. (PCR. 1701) The depletion of dopamine also manifests in poor judgment, psychotic features, paranoia, and the brain's practice of recognizing cocaine as the most important thing. (PCR. 1699-1700)

The experts at the evidentiary hearing also reviewed data, which " suggested that [Mr. Pace] had a significant

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show psychotic symptoms or other effects of the cocaine. (PCR. 1722)

reaction to cocaine, not just the cocaine buzz, but that he had some negative effects, some of the paranoia." (PCR. 1685) Many people described him as acting "bizzare," "paranoid," and "weird." (PCR. 1685) Mr. Pace also exhibited physical, or psychomotor, reactions to the drug, such as profuse sweating, shaking, and acting jittery. (PCR. 1686) Mr. Copeland, Mr. Hill, Mr. Bembo, Ms. Cynthia Pace, and Ms. Wadsworth each described Mr. Pace's unusual reaction to crack cocaine. (PCR. 1685-86) Dr. Crown's finding of brain damage explains "some of those increased effects" that Mr. Pace experienced. (PCR. 1687) The damage to the brain's frontal lobes, which Mr. Pace has, generally intensifies the response to cocaine. (PCR. 1704) In turn, by using cocaine, a person with this type of brain damage significantly impairs his ability to think clearly and make rational decisions. (PCR. 1705)

If trial counsel had provided his experts (Dr. Szmurlo and Dr. Larson) with the information Mr. Pace's family and friends had about him, specifically his lack of personal hygiene, the changes in his personality and mood, and the unusual mannerisms he began exhibiting, these experts would have recognized that Mr. Pace had a serious addiction to crack

cocaine that could explain his behavior during this crime.[9]

Mr. Pace's history of drug use, much less his addiction, should have been presented and considered as nonstatutory mitigation during his penalty phase. See Mahn v. State, 714 So. 2d 391, 401 (Fla. 1998); Ross, 474 So. 2d at 1174; Clark v. State, 609 So. 2d 513, 515-16 (Fla. 1992). Trial counsel utterly failed to explore this, choosing instead to take the easy course and collect a small amount of information from a few individuals (some of whom had not seen Mr. Pace in years) in an attempt to show the jury that the man they had just convicted of murder was really a nice guy.

3. Corroboration of the humanistic element of Mr. Pace

Had trial counsel investigated, he would have learned that he could have presented Mr. Pace's drug use in conjunction with presenting the humanistic elements of Mr. Pace's life. Together, the mitigation could have provided the jury a more plausible idea of what occurred: Mr. Pace was a good, kind person who developed a crack cocaine dependency which influenced his actions. This idea is a more realistic

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[9]The evidence of Mr. Pace's drug dependency, alone, is so compelling that it was unreasonable not to present it to the jury. However, presenting the evidence through a qualified expert would not only have bolstered the impact of the evidence but could have eliminated any prejudice a juror may have harbored against a drug dependent individual.

explanation for the offense than the explanation that Mr. Pace was a good person who inexplicably committed a murder.

4. Death sentence

The most severe prejudice Mr. Pace suffered is that, by a vote of seven to five, he was sentenced to death. In a similar case, the Florida Supreme Court granted relief for ineffective assistance of counsel at a penalty phase where the jury never heard substantial mitigation. See Phillips v. State, 608 So. 2d 778 (Fla. 1992).

> The jury vote in this case was seven to five in favor of a death recommendation. The swaying of the vote of only one juror would have made a critical difference here. Accordingly, we find that there is a reasonable probability that but for counsel's deficient performance in failing to present mitigating evidence the vote of one juror would have been different, thereby changing the jury's vote of six to six and resulting in a recommendation of life reasonably supported by mitigating evidence. Having demonstrated both deficient performance and prejudice, Phillips is entitled to relief on his claim of ineffective assistance of counsel at the sentencing phase of this trial.

Id. at 783.

Although trial counsel did present mitigating evidence during Mr. Pace's penalty phase, the evidence presented was minimal and apparently not compelling. The circuit court rejected all of the proffered mitigation, and Mr. Pace's death

sentence was upheld on direct appeal by a vote of four to three. See Pace v. State, 596 So. 2d 1034, 1036 (Fla. 1992) ("The trial judge found no statutory mitigating evidence, after reviewing the nonstatutory mitigating circumstances, concluded that none of the suggested mitigating factors had been established. Considering the totality of the circumstances, we conclude that the record supports the trial judge's conclusion."). Even in the absence of mitigation, five jurors recommended that Mr. Pace receive a life sentence. If the jury heard the abundant mitigation that exists on behalf of Mr. Pace, it is likely that at least one additional juror would have been swayed to vote in favor of a life sentence.

D. Lower Court's Order

Mr. Pace argued in the court below that his trial counsel did not provide effective assistance during his penalty phase because counsel failed to effectively investigate his history of crack cocaine abuse; because counsel failed to provide information regarding this drug history to the trial experts, preventing them from providing an accurate mental health assessment; and, because counsel failed to present Mr. Pace's history of crack abuse to the jury as mitigation. The lower court summarized its denial of penalty phase relief by stating that "counsel reasonably concluded that further investigation

into [Mr. Pace's] drug history would not develop significant mitigation based on the representations of [Mr. Pace], his friends and family, and the mental health professionals who had examined him." (PCR. 1182) However, all of these people expressed a belief that Mr. Pace suffered from a serious crack cocaine addiction. Furthermore, trial counsel himself suspected that Mr. Pace had a drug problem, something the lower court acknowledges in its order. (PCR. 1175) Consequently, it was unreasonable for counsel not to investigate the possibility that Mr. Pace had an addiction to crack cocaine.

The lower court also concluded that the reports of "individuals close to Pace failed to disclose any information that either augmented or sharply contradicted Pace's own self reports of crack use." (PCR. 1177) However, just as Mr. Pace told his attorneys and mental health experts about his history of drug abuse, the individuals close to Mr. Pace also reported that he regularly and extensively used crack cocaine. What the lower court fails to understand is that the consistency among these reports only exacerbates trial counsel's failure to investigate Mr. Pace's crack use. Counsel should have recognized the necessity of exploring Mr. Pace's drug use as potential mitigation. Even one of his own experts pointed out

that it was the only possible mitigation he could detect. (See Report of Dr. Szmurlo contained in Exhibit 3, entered into evidence at PCR. 1690)

This Court has consistently held that a history of drug use is mitigation a jury and trial court should consider and weigh. See Amazon v. State, 487 So.2d 8 (Fla. 1986); Masterson v. State, 516 So.2d 256 (Fla. 1987); Holsworth v. State, 522 So.2d 348 (Fla. 1988); Carter v. State, 560 So.2d 1166 (Fla. 1990); Downs v. State, 574 So.2d 1095 (Fla. 1991). Mr. Pace's jury should have heard this information, especially because it was directly related to the crime. Mr. Pace's actions in committing this crime were the direct result of his crack addiction. Even trial counsel admitted at the hearing below that he would have used this information if he could tie it to the crime itself. (PCR. 2073-74) Unfortunately, trial counsel's deficient investigation prevented his experts from explaining how Mr. Pace's crime was tied to his crack addiction. Clearly, trial counsel's performance was deficient and, although the lower court refused to consider the prejudice prong of Strickland, (PCR. 1183), Mr. Pace was prejudiced as a result.

The lower court also found that trial counsel's decision to "humanize" Mr. Pace and not present evidence of his drug

abuse was reasonable.[10] (PCR. 1175, 1183) However, trial counsel developed this "strategy" without exploring Mr. Pace's drug use and assessing the role it could play in his case. Both the performance and prejudice prongs of ineffective assistance claims are mixed questions of fact and law. See Stephens v. State, 748 So. 2d 1028, 1033-34 (Fla. 1999). As such, while this Court must review the circuit court's factual findings under an abuse of discretion standard, no deference is owed to the circuit court's legal decisions. See id. "The question of whether an attorney's actions were a product of a tactical decision is an issue of fact. . . . Nonetheless, whether an attorney's tactical decision is a reasonable one . . . is an issue of law reviewed de novo." Jackson v. Herring,

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[10]Mr. Pace does not concede that trial counsel's strategy was reasonable. The circuit court explained that trial attorney Samuel Hall's "penalty phase strategy was to show 'that Bruce Pace was somebody that had a life, a human being, he should be save.' Hall attempted to emphasize Pace's good qualities and point out that he had led a relatively crime free life." (PCR. 1174) (record citation omitted) This strategy was counterintuitive in light of the evidence presented to the jury regarding Mr. Pace's violent prior criminal act, which the circuit court used in finding "that the aggravating circumstances of previous convictions of felony involving violence [and] committed while on parole . . . are supported beyond a reasonable doubt." This Court affirmed that finding. Pace v. State, 596 So. 2d 1034 1035-36 (Fla. 1992). See Horton v. Zant, 941 F.2d 1449, 1461 (11th Cir. 1991) ("[M]erely invoking the word strategy to explain errors was insufficient since 'particular decision[s] must be directly assessed for reasonableness [in light of] all the circumstances.'") (citation omitted).

42 F.3d 1350, 1367 (11th Cir. 1995). In this case, trial counsel's tactical decision was unreasonable, because it was based on trial counsel's ignorance of the law and his failure to investigate.

If trial counsel had researched this Court's position on drug and alcohol use prior to the offense, he would have learned that it can constitute a "significant mitigating factor." See Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985) (vacating death sentence based on trial court error in finding that any mitigation of defendant's history of alcohol abuse was negated by defendant's admission that he was "cold sober" on the night of the offense). However, trial counsel did not research this issue, much less investigate it. (PCR. 2078) The lower court premised its order, denying Mr. Pace relief, largely on the concept that trial counsel made a reasonable tactical decision. However, the lower court, like trial counsel, misconstrued the law by focusing on the fact that Mr. Pace was not on crack cocaine at the time of the offense. This is an incomplete, and thus erroneous, analysis. Evidence that Mr. Pace was on crack cocaine during the offense would clearly be mitigating; however, evidence that he was not on the drug does not preclude the court from considering his history of drug use. In fact, the circuit court erred by not

factoring his history of crack cocaine abuse into Mr. Pace's sentence. "Contrary to the statements in the sentencing orders here, evidence that Mahn was 'not under the influence of drugs or alcohol' when committing the offenses is not the correct standard for determining whether long-term substance abuse is mitigating." Mahn v. State, 714 So. 2d 391, 401 (Fla. 1998) (citations omitted). As the Court explained, regardless of use at the time of the offense, circuit courts must assess whether a *history* of substance abuse or addiction is mitigating. See id; Ross, 474 So. 2d at 1174; Clark v. State, 609 So. 2d 513, 515-16 (Fla. 1992) (finding defendant's extensive history of substance abuse constituted strong mitigation).

Even without researching this issue, trial counsel should have realized the relevance of Mr. Pace's long-term drug use. While he stated his belief was that Mr. Pace's drug use was unrelated to the crime, he also testified that a drug addict is influenced by his addiction, even when he is not intoxicated. At the evidentiary hearing, he testified that without drugs, addicts will frequently "rob, steal, kill." (PCR. 2035) How he could know this and not make the connection that Mr. Pace's drug use could be connected to the offense is incomprehensible. From the depositions of Mr.

Pace's associates as well as from the representations of Mr. Pace, trial counsel knew that Mr. Pace did not have any money at the time of the offense; he also knew that Mr. Pace regularly used crack but had not used it that day. Even a lay person, Mr. Bembo, recognized these as signs that if Mr. Pace was involved in the offense, it was "to support his habit." Still, trial counsel never investigated whether this offense may have been committed in an attempt to get money to feed a crack cocaine addiction. Trial counsel testified that because drug use "did not occur during the offense itself" that he "did not interpret" any prior drug use as mitigating. (PCR. 2033) Trial counsel was as unfamiliar with the law as he was with the facts surrounding Mr. Pace's drug abuse. Clearly, the lower court was mistaken when it deemed counsel's inaction "reasonable."

Even if trial counsel did not initially perceive Mr. Pace's history of drug use as relevant, after receiving Dr. Szmurlo's report, he had a duty to reevaluate his opinion. Dr. Szmurlo reported that the only psychiatric problem Mr. Pace had was "rather heavy use of cocaine prior to the offense." Upon receiving this report, trial counsel immediately dismissed it. He neglected to discuss this finding with Dr. Szmurlo and neglected to investigate it.

(PCR. 2035-36). Although trial counsel admitted during the hearing that, in light of Dr. Szmurlo's report, he probably should have explored Mr. Pace's drug use, he decided not to investigate based on his misconception that any prior drug use or abuse was irrelevant since Mr. Pace had not used crack cocaine at the time of the offense. (PCR. 2036-37) "An attorney is not obligated to present mitigation evidence if, after reasonable investigation, he . . . determines that such evidence may do more harm than good. . . . However, such decisions must flow from an informed judgment." Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989) (citations omitted) (granting a new sentencing proceeding based on where "counsel's failure to present or investigate mitigation evidence resulted not from an informed judgment, but from neglect"). Trial counsel's decision to not investigate Mr. Pace's drug use was based solely on his ignorance and neglect, which renders his decision unreasonable, rather than strategic.

Without background information regarding Mr. Pace's drug use, trial counsel's decision to not present the information was unreasonable. "Our 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." Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991). Although trial counsel could have ultimately made a strategic decision to refrain from presenting evidence of Mr. Pace's drug use, such a decision could not be made until he had investigated Mr. Pace's drug use and the law on a history of drug abuse as possible mitigation.

The lower court also ruled that trial counsel was not ineffective for failing to provide sufficient information regarding Mr. Pace's crack abuse to the trial experts so they could render an accurate opinion. (PCR. 1179) The lower court based this ruling on several findings. First, the lower court found that trial counsel's investigation into Mr. Pace's crack abuse was reasonable considering the representations of Mr. Pace and others. (PCR. 1179) As was discussed above, the lower court's finding is clearly erroneous. Nearly all of the information trial counsel possessed pointed to the fact that Mr. Pace had a serious drug problem. Even trial counsel thought so, which the lower court acknowledges. The lower court, however, fails to address whether trial counsel was reasonable in ignoring his own suspicions, especially when those suspicions were consistent with the information in counsel's possession. Furthermore, the lower court fails to address how it was reasonable for trial counsel to ignore this

same suspicion even after his own expert, Dr. Szmurlo, pointed it out. Trial counsel's actions cannot be deemed reasonable under these circumstances.

The second reason the lower court found that trial counsel provided sufficient information to the trial experts was the fact that trial counsel did not withhold any essential information from the experts that was in their possession. (PCR. 1179) The lower court's statement, however, is not only inaccurate but misses the point as well. Trial counsel did withhold pertinent information from his experts. Dr. Szmurlo received none of the witness statements given to police, and none of their depositions, yet this is the information he relied on, in part, to give his new diagnosis below, which included finding two statutory mitigators. Furthermore, trial expert Dr. Larson had some of this information but not all of the information trial counsel possessed. For example, Dr. Larson was not given any of Barry Copeland's statements despite the fact that these statements provided the best detail of Mr. Pace's drug history. As with Dr. Szmurlo, Dr. Larson based his new diagnosis at the hearing below, in part, on these statements. Regardless, the lower court misses the real issue, which is that counsel's ineffectiveness is a result, not only of what counsel had in their possession, but

more from what trial counsel failed to find despite having several statements that clearly pointed them in the right direction.

The third reason the lower court found that trial counsel provided sufficient information to the trial experts was the fact that neither expert at the time believed they had inadequate information to make a diagnosis. (PCR. 1179) This reason, however, makes little sense. Both trial experts made their diagnosis based on the information provided to them by trial counsel. Both experts changed their diagnosis once provided with additional information available had trial counsel looked for it. As Dr. Larson stated at the evidentiary hearing, any mental health evaluation is subject to revision with additional information. (PCR. 1765) Simply because a doctor can come to a diagnosis with limited information provided by counsel does not insulate counsel's actions should the doctor later come to a different diagnosis once provided with sufficient information. Lastly, the fourth reason the lower court found that trial counsel provided sufficient information to the trial experts is because the lower court determined that both experts had information that contained insights into Mr. Pace's background. (PCR. 1179-80) This, however, was incorrect. Dr.

Szmurlo was provided with no information by trial counsel regarding Mr. Pace's background, and what was provided to Dr. Larson was minimal at best.

Clearly, the lower court was incorrect in finding that trial counsel provided sufficient information to the experts. For the same reasons, the lower court was incorrect in finding that trial counsel was not deficient in relying on the expert's opinions. (PCR. 1180) If trial counsel is deficient in providing the necessary information to his experts, he must be found to be equally deficient for relying on their inaccurate diagnosis.

For the same reasons, the lower court is again incorrect in finding that trial counsel's penalty phase strategy was reasonable based on the unfavorable opinions of the trial experts. (PCR. 1183) There was no strategy behind trial counsel's decision not to use mental health experts during the trial. Neither Dr. Larson nor Dr. Szmurlo testified during Mr. Pace's penalty phase. Trial counsel did not use Dr. Larson, because he "did not like what [Dr. Larson] had to report." (PCR. 2016) However, if Dr. Larson had found the statutory mental mitigators and had information to substantiate his findings, trial counsel would have used him in the penalty phase. (PCR. 2016, 2018) Similarly, trial

counsel did not think that Dr. Szmurlo found anything mitigating. (PCR, 2032) Despite that Dr. Szmurlo reported that Mr. Pace did use cocaine prior to the offense, trial counsel misunderstood that to mean that was not a mitigating circumstance "because it did not occur during the offense itself." (PCR. 2033) If Dr. Szmurlo had found that the statutory mental mitigators, trial counsel would have used him in the penalty phase. (PCR. 2030)

The jury never heard the conclusions of Dr. Szmurlo and Dr. Larson, not because they did not have helpful or mitigating information, but because trial counsel failed to provide them with sufficient background data. Possibly the clearest example of trial counsel's deficient preparation of the experts revolves around Dr. Szmurlo. Dr. Szmurlo had never worked on a capital case before Mr. Pace's. Dr. Szmurlo did not know that there was such a thing as statutory mitigators and was not supplied a copy of the statute regarding mitigating circumstances by trial counsel. (PCR. 1875-76) Thus, even if trial counsel had supplied sufficient information to the experts, Dr. Szmurlo would still have been unable to take that information and apply it to the framework of the statute. The lower court dismisses this problem by stating that Dr. Szmurlo still understood the general meaning

of the term “mitigation.” (PCR. 1182) The lower court’s statement, however, still does not explain how Dr. Szmurlo would have known to assess whether his conclusions about Mr. Pace could be incorporated into a statutory framework he did not know even existed.

The actions detailed above were not tactical decisions on the part of trial counsel. Instead, the actions of trial counsel were based on neglect and ignorance which resulted in trial counsel’s deficient representation of Mr. Pace and the imposition of an unreliable death sentence. The lower court avoids considering whether Mr. Pace was prejudiced by trial counsel’s actions by finding that counsel was not deficient in the first place. (PCR. 1183) However, as established in the argument above, it is clear that trial counsel’s performance during and in preparation of Mr. Pace’s penalty phase was deficient. The lower court erred in finding otherwise and, thus, erred in refusing to consider whether Mr. Pace was prejudiced.

III. DIFFICULT CHILDHOOD

Mr. Pace was further deprived of effective assistance by trial counsel’s failure to fully investigate his childhood, specifically the problems Mr. Pace had with his stepfather and the devastating impact his grandmother’s death had on him.

Trial counsel failed to investigate this mitigation and, thus, never considered presenting it during Mr. Pace's penalty phase. Instead, trial counsel simply followed his "strategy" of presenting evidence of Mr. Pace's good character, despite the fact that other mitigation existed which was, by far, more compelling.

A. Deficient Investigation

In line with trial counsel's deficient investigation into Mr. Pace's history of drug abuse, trial counsel also failed to investigate the true nature of Mr. Pace's childhood. "In cases where sentencing counsel did not conduct enough investigation to formulate an accurate life profile of a defendant, we have held the representation beneath professionally competent standards." Jackson v. Herring, 42 F.3d 1350, 1367 (11th Cir. 1995) (citations omitted). Melanie Pace, Mr. Pace's cousin lived with his family for "85 to 90 percent" of her life. (PCR. 1773-74) As such, she possessed valuable information that was not presented until Mr. Pace's evidentiary hearing. Mr. Pace was raised, in part, by his stepfather, Harvey Rich. (PCR. 1774) Mr. Rich distinguished Mr. Pace from his biological children, enacting "stricter" punishments on Mr. Pace. (PCR. 1776)

However, Mr. Rich left the family in 1973, leaving Mr.

Pace responsible for many of the household duties, including helping his mother support the family and raise the younger children. (PCR. 1775) Mr. Pace had to quit school and get a job to make ends meet. Although Mr. Rich eventually returned after a seven year absence, his return was difficult for Mr. Pace. His stepfather's return "had an effect" on Mr. Pace by making him more withdrawn. (PCR. 1775) Where Mr. Pace had been very active in the family while his stepfather was gone, that ceased once the stepfather had returned.

Mr. Pace's attorneys also failed to discover the impact of his grandmother's death on Mr. Pace. Melanie Pace explained that Mr. Pace had always had a close relationship with his grandmother. He would talk to her more than anyone, to get advice and confide in her. (PCR. 1777) After Sarah Pace's death in May, 1986, Mr. Pace grew even more withdrawn. (PCR. 1776-77) He also stopped taking care of himself and his level of personal hygiene substantially decreased. (PCR. 1777) It is likely that Mr. Pace's use of crack cocaine was triggered, or at least increased, by his grandmother's death. Melanie Pace explained that with Mr. Pace's sudden habit of wearing "dirty clothes" and letting his hair "be a mess," that it made sense to her when she later learned that Mr. Pace had been using crack cocaine. (Affidavit contained in Exhibit 3)

Despite the effect Sarah Pace's death had on her grandson, trial counsel never learned this nor the effect Mr. Rich had on Mr. Pace. Trial counsel never learned this information, because trial counsel never investigated. Both Cynthia Pace and Melanie Pace would have shared this mitigating information with trial counsel had they been asked.

B. Prejudice

Trial counsel's penalty phase strategy was to depict Mr. Pace as a good person from a good family who was worthy of a life sentence. While this strategy may not appear to be a poor strategy, it was not an informed one. 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. See Kimmelman v. Morrison, 477 U.S. 365 (1986). Unfortunately, the investigation Mr. Pace's trial counsel performed was, at best, minimal.

Had trial counsel investigated, they would have discovered that Mr. Pace's upbringing was not as happy as they attempted to portray during his penalty phase, a portrayal that the trial court found ultimately unestablished. Furthermore, they would have discovered the tremendous stress Mr. Pace was dealing with near the time of the offense,

stemming from his grandmother's death. This mitigation does not contradict the evidence trial counsel presented during the penalty phase. Rather, it enhances the evidence presented. Not only was Mr. Pace a good person; he overcame adversities in life and remained a good person. He put his family's needs above his own despite his relative youth.

C. Lower Court's Order

The circuit court found that, regardless of whether trial counsel rendered deficient performance, Mr. Pace "failed to demonstrate any prejudice because there is not a reasonable probability that this evidence would have affected his sentence."[11] (PCR. 1185) As this Court knows, no deference is owed to such a legal conclusion. See Stephens v. State, 748 So. 2d 1028, 1033-34 (Fla. 1999).

After Mr. Pace's penalty phase, the trial court found that Mr. Pace had not established any mitigation. See Pace v. State, 596 So. 2d 1034, 1036 (Fla. 1992). What trial counsel presented to the jurors amounted to nothing more than small bits of testimony which indicated that, most of the time, Mr. Pace was a nice guy. Nothing presented to the jurors provided any answer to why Mr. Pace's life would spiral downward so

[11]Finding that Mr. Pace did not meet the prejudice prong of Strickland, the circuit court did not address whether trial counsel's performance was deficient. (PCR. 1184)

sharply to the point of committing murder. Despite this, the jury vote for death was only seven to five. Evidence of Mr. Pace's difficult childhood, and evidence regarding the impact his grandmother's death just prior to the murder had on him, significantly increases the value of the evidence presented at trial. Thus, there is a reasonable probability that this evidence would have swayed one juror to vote that Mr. Pace deserved a life sentence. See Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992). This Court should grant Mr. Pace relief and return his case to the lower court for a new penalty phase proceeding.

ARGUMENT II

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE DURING THE GUILT PHASE OF MR. PACE'S TRIAL BY NEGLECTING TO PRESENT A DEFENSE BASED ON HIS LONG-TERM USE OF CRACK COCAINE AND THE MENTAL IMPAIRMENTS HE SUFFERED AS A RESULT OF HIS CRACK ADDICTION. THE LOWER COURT ERRED IN NOT GRANTING MR. PACE RELIEF ON THIS CLAIM.

Mr. Pace 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 related to his history of crack cocaine abuse and addiction. Specifically, Mr. Pace's attorney failed to effectively investigate and consider presenting a voluntary intoxication defense. To establish that trial counsel rendered ineffective

assistance, Mr. Pace presented extensive evidence in the court below of trial counsels' deficient performance. Nearly all the evidence was unrebutted by the State. Furthermore, the prejudice to Mr. Pace resulting from trial counsels' deficient performance is clear: Mr. Pace 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. Pace relief on this claim.

Abundant evidence was available to form the basis of an effective voluntary intoxication defense, yet trial counsel failed to investigate it. At the hearing, trial counsel testified that he did not feel an investigation was necessary because he did not believe that Mr. Pace's crack cocaine use at the time of the crime was strong. (PCR. 2072) For the same reason, he did not consider hiring a mental health expert who specialized in drug addiction. (PCR. 2072) Furthermore, trial counsel would have considered a voluntary intoxication defense if they had possessed more information about Mr. Pace's crack cocaine use around the time of the offense:

> Q. So, if you had a lot of information about Mr. Pace's crack use around the time of the evidence and for several months leading up to it, you would have maybe considered voluntary intoxication a little more closely?
>
> A. Yes, sir.

(PCR. 1998) However, counsel did not have this data for the sole reason that they failed to investigate and acquire it. It was unreasonable and outside the range of competent assistance for trial counsel to eliminate voluntary intoxication as a possible defense before investigating Mr. Pace's history of crack use.

Mr. Pace's trial counsel did not have a strategic reason for failing to pursue a voluntary intoxication defense. Instead, trial counsel abandoned the defense based on minimal evidence collected during a wholly inadequate investigation. In Stewart v. State, 801 So. 2d 59, 65 (Fla. 2001), this Court rejected a guilt phase ineffective assistance claim where trial counsel had considered a voluntary intoxication defense "but opted against it . . . given Stewart's detailed account of the crime, which included a statement to [trial counsel] that he planned to shoot and rob the victims." See Stewart, 801 So. 2d at 65. Unlike in Stewart where trial counsel "made an informed and reasoned decision not to pursue a voluntary intoxication defense," see id., Mr. Pace's counsel neglected to investigate and then consider the legitimate possibility of presenting such a defense.

Had counsel presented evidence of Mr. Pace's crack cocaine use, he could not have been convicted of first-degree

murder. The Florida Supreme Court has "long recognized voluntary intoxication as a defense to specific intent crimes." Linehan v. State, 476 So. 2d 1262, 1264 (Fla. 1985); Savage v. State, 588 So. 2d 975, 979 (Fla. 1991).

> Whenever . . . a specific or particular intent is an essential or constituent of the offense, intoxication, though voluntary, becomes a matter for consideration, or is relevant evidence, with reference to the capacity or ability of the accused to form or entertain the particular intent, or upon the question whether the accused was in such a condition of mind as to form a premeditated design.

Garner v. State, 9 So. 835, 845 (Fla. 1891). As first-degree murder is a specific intent crime, voluntary intoxication is an applicable defense.[12] Id.; Linehan, 476 So. 2d at 1264 (citing Cirak v. State, 201 So. 2d 706 (Fla. 1967)).

In its order, the circuit court concluded that Mr. Pace "failed to demonstrate any prejudice," as he did not "introduce any competent evidence that [he] was intoxicated at the time of the crime to the extent that he was unable to form the premeditated intent of the murder." (PCR. 1171-72) However, three mental health experts who testified at the

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[12]Robbery, the underlying crime that enabled the State to prosecute Mr. Pace for first degree, felony murder, is also a specific intent crime that can be defended as a result of voluntary intoxication. See Linehan, 476 So. 2d at 1264 (citing Heathcoat v. State, 430 So. 2d 945 (Fla. 2d DCA 1983); Graham v. State, 406 So. 2d 503 (Fla. 3d DCA 1981)).

evidentiary hearing[13] that, as a result of his crack addiction, Mr. Pace met both of the statutory mental mitigators: he was acting under an extreme mental or emotional disturbance at the time of the offense, and his capacity to conform his conduct to the law was substantially impaired. (PCR. 1708-09, 1711, 1748, 1881, 1888) The factors that formed the bases of the experts' findings are the same factors that indicate Mr. Pace was under the influence of crack cocaine at the time of the offense.

Mr. Pace was in a "downward spiral." (PCR. 1743) He had been acting paranoid and disorganized. (PCR. 1743) At the time of the offense, Mr. Pace was in a state of "semi-starvation" and "sleep deprivation," (PCR. 1880-81), and was caught in "chronic cycle of abusing alcohol and drugs." (PCR. 1748) However, there were other signs that he was under the influence of crack:

> secondary to his drug us as manifested by the amount [of crack cocaine] that he was using, . . . his lack of hygiene, lack of eating, lack of personal care, . . . [his] unusual behavior consistent with a cocaine intoxication that he was under coupled with

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[13]Two of these experts, Dr. Larson and Dr. Szmurlo, evaluated Mr. Pace prior to trial but were unable to find any statutory mitigation as a result of having inadequate background data. With adequate information regarding Mr. Pace and his history of crack cocaine use, they found both mental statutory mitigators. See, supra, Argument I.

> the amount of alcohol that he was using, coupled with the . . . lack of sleep given in the 24-hour period or 48-hour period before this happened.

(PCR. 1708-09, 1711) Overall, Mr. Pace lived a "drug addict lifestyle." (PCR. 1744) The characteristics and behaviors undisputedly amount to a level of voluntary intoxication.

If Mr. Pace's attorney would have presented evidence of voluntary intoxication, Mr. Pace could only have been convicted of an offense less than first-degree murder and not eligible for a death sentence. See Garner, 9 So. 835, 846 (explaining that proof of voluntary intoxication that "renders the accused incapable of [specific] intent" will reduce the degree of the murder). However, Mr. Pace was convicted of first-degree murder and subsequently sentenced to death, because his attorney failed to investigate and present a defense based on voluntary intoxication.

The circuit court rejected the argument that Mr. Pace was provided ineffective assistance due to his counsels' failure to investigate and consider possible defenses based on his history of crack use. Basing its decision on Linehan v. State, 476 So. 2d 1262 (Fla. 1985), the circuit court found this claim failed to satisfy both prongs of Strickland. (PCR. 1171)

> "[T]he defendant must come forward with

> evidence of intoxication at the time of the offense sufficient to establish that he was unable to form the intent necessary to commit the crime charged. . . . [E]vidence of alcohol consumption prior to the commission of a crime does not, by itself, mandate the giving of jury instructions with regard to voluntary intoxication. . . . [W]here the evidence shows the use of intoxicants but does not show intoxication, the instruction is not required.

Id. at 1264. Although the circuit court interpreted this case to find that a voluntary intoxication defense "did not appear viable and was unsupported by the evidence," this is not an accurate interpretation. (PCR 1171) In fact, Linehan supports Mr. Pace's argument, holding that the crucial inquiry is what level of influence the alcohol had on the defendant, not what amount of alcohol was in his system at the time of the offense. Id. at 1264.

When determining whether a valid voluntary intoxication defense existed, the Court has consistently focused on the level of intoxication not on the amount of intoxicants consumed. See Jacobs v. State, 396 So. 2d 1113, 1115 (Fla. 1981) (holding that although there was evidence that the defendant had used intoxicating beverages, there was no evidence that he was intoxicated); Mora v. State, No. SC94421, at 7 (Fla. 2002) (concluding that instructions on voluntary intoxication were unnecessary because, regardless of testimony

that the defendant had consumed several prescription drugs, "no evidence suggest[ed] that Mora was under the influence of any gases or drugs at the time of the shootings.") (italics omitted); Lambrix v. State, 534 So. 2d 1151, 1154 (Fla. 1988) (holding that if there is no evidence of intoxication, instructions on voluntary intoxication are not required by the mere fact that the defendant had consumed intoxicants). Likewise, Dr. Larson, Dr. Herkov, and Dr. Szmurlo each testified that, regardless of whether he had smoked crack that day, Mr. Pace was under the influence of crack cocaine at the time of the offense. (PCR. 1708-09, 1711, 1748, 1881, 1888)

In cases where courts have recognized voluntary intoxication, it is because the defendants were in an abnormal state as a result of their intoxication. See Heathcoat v. State, 430 So. 2d 945, 946 (Fla. 2d DCA 1983) (finding that jury instructions on voluntary intoxication were warranted when evidence indicated that defendant was "acting wildly"); Presley v. State, 388 So. 2d 1385, 1386 (Fla. 2d DCA 1980) (remanding for a new trial with voluntary intoxication instructions, as at the offense, defendant was in "an alcoholic blackout"). The essence of a voluntary intoxication defense is that the defendant is in such an abnormal state that he is unable to form the requisite intent to commit a

crime. See, e.g., Garner, 9 So. at 845; Harris v. State, 415 So. 2d 135, 136 (Fla. 5th DCA 1982). Similarly, when Mr. Pace was not on crack cocaine, due to the neurological changes caused by extensive crack use, his brain was in an abnormal state and craved crack cocaine. (PCR. 1692)

While Mr. Pace told his attorneys that he had not used crack cocaine at the time of the offense, he had informed his attorneys that he regularly used crack; trial counsel even believed that Mr. Pace had a serious crack cocaine problem. (PCR. 1175)

The experts who evaluated Mr. Pace prior to trial, testified at the evidentiary hearing that to satisfy his cravings for crack cocaine, Mr. Pace strayed from traditional morals. (PCR. 1784) In addition, his extended crack use impaired and suspended "his ability to exercise a critical judgment." (PCR. 1881)

> [H]e practically acted in the state of a mental fog at the time of . . . [the] offense.

(PCR. 1881) Also as a result of his drug addiction, at the time of the offense, Mr. Pace was in a semi-starved state and was significantly deprived of sleep. (PCR. 1880-81)

Under the Court's practice of focusing on the level of intoxication and not the amount of intoxicant consumed, Mr.

Pace has demonstrated a viable voluntary intoxication defense by demonstrating that crack cocaine severely impacted his mental state and made him unable to form the requisite intent. Notwithstanding, the circuit court premised its order on the testimony that trial counsel had initially pursued voluntary intoxication as a defense but rejected it after Mr. Pace told them he was not intoxicated at the time of the offense. (PCR. 1171) (internal citations omitted). However, the circuit court overlooked that Mr. Pace's history of crack cocaine abuse prevented him from forming specific intent.

As a consequence of his crack addiction, Mr. Pace was under the direct influence of crack cocaine despite that he had not smoked it in the hours preceding the offense. (PCR. 1722) Dr. Herkov elaborated on this concept:

> If we take even Doctor Larson's report, which establishes daily use for two to three months before but none at the time, that's chronic cocaine use. Whether he had used it that morning of would have some impact. But would we still expect some of these things [or effects of cocaine use]? Sure. You can't use cocaine every day for three months, skip a day, and then, "Well, okay. My brain is back to normal." Part of what I tried to explain to the [c]ourt was the chronic changes in this brain. You have people who will still show psychotic symptoms after being detoxed from cocaine and being free from cocaine for 30 days. . . . What I was trying to tell you is that it changes the fundamental neurochemistry of the brain. It doesn't correct itself.

(PCR. 1722) If trial counsel had adequately investigated the possibility of presenting a voluntary intoxication defense, he would have learned that Mr. Pace's long-term crack use negated the specific intent required for a defendant to be convicted of first-degree murder.

In the event that this Court determines that counsel was reasonable in rejecting a voluntary intoxication claim based on Mr. Pace's lack of crack use the day of the offense, this Court must hold that counsel rendered deficient performance by neglecting to explore an insanity defense based on Mr. Pace's long-term use of crack cocaine. Regardless of whether he was under the direct intoxication of crack cocaine at the time of the offense, Mr. Pace's long-term crack use still prevented him from forming premeditated intent.

> While there is no evidence of intoxication at the time the act is alleged to have been committed by appellant, the condition was the result of drinking. We think, however, that it could not make much difference whether the temporary insanity is the immediate consequence of voluntary intoxication or is the deferred consequence of voluntary intoxication because the rule appears to be that where a person is too intoxicated to entertain or be capable of forming an essential or particular intent such intent cannot exist and consequently the offence of which it is a necessary element cannot be perpetrated.

Britts v. State, 30 So. 2d 363, 366 (Fla. 1947). In Britt,

the appellant had been on an alcohol binge "prior to [the] Monday before the Tuesday evening" when the offense occurred, yet the court found that his inability to form intent was the result of this drinking, albeit a deferred result. See id., 30 So. 2d at 840 ("[W]e are impelled to hold that the record in this case shows beyond any reasonable question that the appellant was not legally responsible for his acts at the time the assault was committed.").

Like Britt, Mr. Pace's actions were a deferred result of his crack cocaine use and abuse. At the evidentiary hearing, Mr. Pace presented uncontroverted evidence that his prolonged crack use changed the neurochemistry of his brain:

> [Cocaine] changes the fundamental neurochemistry of the brain. [The brain] doesn't correct itself.

(PCR. 1722) Consequently, even if he had not used crack cocaine the day of the offense or the day before the offense, the drug and his extreme cravings for it still would have influenced his actions. (PCR. 1721)

Mr. Pace's long-term crack cocaine use and the effect it had on his brain and mental health has been recognized by the Court to constitute insanity.

> [I]f excessive and longcontinued use of intoxicants produces a mental condition of insanity, permanent or intermittent, which insane condition exists when an unlawful

> act is committed, such insane mental condition may be of a nature that would relieve the person so affected from the consequences of the act that would otherwise be criminal and punishable.

Cochran v. State, 61 So. 2d 187, 190 (Fla. 1913) (reversing a conviction and awarding a new trial where jury was not instructed that if they found the defendant "was not conscious of what he was doing" due to his history of heavy alcohol consumption, then they should return a not guilty verdict); Cirak v. State, 201 So. 2d 706, 709 (Fla. 1967) ("The law recognizes insanity super-induced by the long and continued use of intoxicants."); Brunner v. State, 683 So. 2d 1129, 1129 (Fla. 4th DCA 1996) ("[T]he court erred in refusing to instruct the jury on his defense of insanity produced by the long and continued use of an intoxicant such as alcohol or drugs.").

Mr. Pace was convicted of first-degree murder and sentenced to death as a direct result of his counsels' failure to present a defense of voluntary intoxication or insanity based on his history of crack cocaine abuse and addiction. Had his counsel presented such a defense, he would not have been convicted of first-degree murder. Then, at the very least, Mr. Pace would have been ineligible for the death penalty. Clearly, Mr. Pace was prejudiced by counsels'

actions.

ARGUMENT III

MR. PACE WAS DENIED A FAIR TRIAL, BECAUSE THE STATE FAILED TO DISCLOSE TWO PIECES OF CRUCIAL EVIDENCE IN VIOLATION OF BRADY V. MARYLAND. THE LOWER COURT ERRED IN DENYING RELIEF ON THIS CLAIM.

The prosecution in Mr. Pace's trial failed to disclose two crucial pieces of evidence: evidence the defense could have used to used to explain why a fingerprint of Mr. Pace's on the victim's cab was irrelevant and insignificant and evidence the defense could have used to impeach Jean Shirah, the main investigator in Mr. Pace's case. Under Brady v. Maryland, 373 U.S. 83 (1963), the prosecution has a duty to disclose to a defendant evidence which is "material either to guilt or to punishment," and suppression of such evidence violates due process.[14] See id. at 87.

However, as Mr. Pace demonstrated at his evidentiary hearing trial, the State failed its duties under Brady and its progeny.

> A defendant must prove three elements in order to establish a Brady violation: (1)

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[14]"The prosecutor's obligation to disclose exculpatory evidence is grounded not only in the Due Process Clause of the United States Constitution, but in the unique and critical role played by the prosecutor in our American system of justice." State v. Huggins, 788 So. 2d 238, 244 (Fla. 2001) (Pariente, J., concurring).

> The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued.

Id. at 242 (citations omitted).

In assessing whether Mr. Pace suffered prejudice, the Court must view the "cumulative effect of the suppressed evidence." See Way v. State, 760 So. 2d 903, 913 (Fla. 2000). "[T]here is a reasonable probability that . . . the result of [Mr. Pace's trial] would have been different," see id. at 913, if the State had disclosed to the defense two crucial pieces of evidence: (1) a report he could have utilized to explain why his fingerprint on the victim's vehicle was unrelated to the offense, and (2) a written reprimand he could have utilized to impeach a key prosecution witness.

1. "Smudge Report"

On the second day of Mr. Pace's trial, then Assistant State Attorney Kim Skievaski directed Officer L.L. Daniels of the Santa Rosa County Sheriff's Department to conduct an experiment. Mr. Skievaski wanted to know whether a fingerprint on the driver's side door window of the victim's cab would smudge if the window were rolled up and down after the print was made. Whether a fingerprint would smudge was an

issue since Charles Richards testified at trial that a fingerprint found on the exterior of the cab's driver's side window belonged to Mr. Pace. (R. 767) However, Mr. Richards could not determine when Mr. Pace had left his fingerprint. (R. 768)

The prosecutor was using the fingerprint evidence in an attempt to place Mr. Pace in or near the victim's taxicab close to the time of the offense. If the fingerprint did smudge when the window was rolled up and down, it would have indicated that an unsmudged latent print on the window had to have been left on the window shortly before the car was abandoned. (PCR. 2100) Though this result of the experiment would have been helpful to the State's case, Officer Daniel's experiment proved exactly the opposite. Officer Daniels discovered that the print did not smudge and therefore could have been placed on the window days, weeks, or even months earlier. He recorded his experiment and findings in a report. This report, the "smudge report," was never disclosed to the Defense. (PCR. 1975, 2093, 2107)

As the smudge report was both exculpatory and material, the State's failure to disclose the report constituted a violation of the State's duty under Brady v. Maryland, 373 U.S. 83 (1963). See id. at 87. Mr. Skievaski testified that

he did not inform the defense of the smudge experiment because, in his opinion, the results were not exculpatory. (PCR. 2100) Mr. Skievaski admitted that if the print had smudged, it would have been "good evidence" for the State's case:

> If it would have smudged, I would have certainly said, "Oh, boy, this is good evidence." And would have said, "Sam, Randy, be aware of this,"

referring to defense attorneys, Sam Hall and Randy Etheridge. (PCR. 2100) Along this same reasoning, the fact that the experiment yielded a contrary result would have been good evidence for the Mr. Pace's case. Nevertheless, he explained that in determining "whether or not [he] had an obligation to disclose what happened," he made a judgment that the report would not have been helpful to Mr. Pace. (PCR. 2100-01)

The circuit court concluded that Mr. Pace failed to show that the smudge report "was sufficiently exculpatory to have affected the outcome of the trial." (R. 1189) However, this Court owes no deference to that conclusion. "[W]hether evidence was material resulting in a due process violation is a mixed question of law and fact subject to independent review." Way v. State, 760 So. 2d 903, 913 (Fla. 2000). Mr. Pace is not required to show that with the evidence he would not have been acquitted; evidence is material if it "could

reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." See Kyles v. Whitley, 514 U.S. 419, 435 (1995). Mr. Pace has fulfilled this burden.

The defense contended throughout the trial that Mr. Pace knew and worked for the victim, often rode in the victim's cab, and could have left the print on the window at any time. (R. 586-87, 687-88, 977) However, this argument is just an argument, a theory, that the defense could not establish with any physical evidence. In a case built on circumstantial evidence, the defense needs to effectively rebut each piece of evidence. The "smudge report," had it been turned over to the defense, would have supported the defense's contention that the fingerprint was left on the window at an earlier time and aided the defense in rebutting the State's argument that Mr. Pace left the print on the window when he took the victim's cab. (PCR. 2005) Mr. Etheridge testified that

> [the report] certainly would have helped our cause, the defense cause.

(PCR. 2005)

The State's failure to provide the report to the defense eliminates confidence that Mr. Pace's conviction was obtained by a fair and just trial. See Kyles, 514 U.S. at 435-36. As

Mr. Skievaski admitted at Mr. Pace's evidentiary hearing, the report "would have been a further example of [the] possibility" that Mr. Pace's fingerprint had been left on the window at a time remote and unrelated to the offense. (PCR. 2103) Still, he failed to give Mr. Pace the opportunity to use the "smudge report."

Compounding the prejudice Mr. Pace suffered from the State's failure to disclose the "smudge report" is that with this piece of evidence, the defense could have prevented the fingerprint from being admitted into evidence. When the State initially moved to admit into evidence State Exhibit 21, the 3x5 latent lift card with a fingerprint, identified as Mr. Pace's, take from the exterior of the cab's driver window, (R. 766), defense counsel objected as to relevancy. (R. 767) The judge ordered the attorneys to approach the bench and held an unrecorded bench conference. (R. 767) After the conference, State Exhibit 21 was admitted over the defense's objections. (R. 768) Although it is impossible to discern what the parties argued during the bench conference, it is probable that the defense contested the exhibit on the grounds no one could determine when Mr. Pace left the fingerprint. This is the same argument that the defense made to the jury: any fingerprint of Mr. Pace on the cab were irrelevant since he

regularly worked for the victim and worked on his cab, and no expert could even speculate as to when he left his fingerprint. Had Mr. Pace's trial counsel had the "smudge report," he could have prevented the fingerprint from being admitted into evidence by establishing that a test ordered by the prosecution showed that a fingerprint on the cab window remained intact even when the window was rolled up or down. The report illustrates the irrelevancy of the fingerprint card.

Not only did the prosecutor fail to turn over the report detailing the results of the test that were favorable to the defense, but he took improper advantage of the defense's engineered ignorance in his final argument to the jury.

> What about that fingerprint, ladies and gentlemen, that the defense would have you believe means absolutely nothing. That certainly was not on . . . the passenger side of the car, was it? This happened to be on the outside driver's window of the cab. Same place he would have put his hand shutting that cab door after he drove to Bagdad.

(R. 977-78) This was a violation of the prosecutor's constitutional duty to disclose. See Bartholomew v. Wood, 34 F.3d 870 (9th Cir. 1994); Jacobs v. Singletary, 952 F.2d 1282 (11th Cir. 1992); Rickman v. Dutton, 864 F. Supp. 686 (M.D.Tenn. 1994). The prosecutor knew that the results of a

test he ordered supported the defense's explanation of the fingerprint, and weakened his argument that the print must have been left by the last person to shut the taxi's door. Mr. Pace was obviously prejudice by the prosecutor's failure to disclose the "smudge report" evidence.

2. Deputy Jean Shirah

Deputy Jean Shirah was an investigator with the Santa Rosa County Sheriff's Office at the time of this incident. Deputy Shirah played a major role in the investigation of Mr. Pace's case and was the principal investigator responsible for gathering evidence and interrogating witnesses. The warrant authorizing search of Mr. Pace's residence was predicated on Deputy Shirah's sworn affidavit regarding statements given to her by witnesses, and she participated in the execution of the search warrant. Deputy Shirah collected the weapon that allegedly used to kill the victim. Deputy Shirah's involvement in nearly every stage of the investigation making up the state's case was pivotal.

On May 23, 1989, only two months before Mr. Pace's trial, Deputy Shirah knowingly gave false information under oath during a deposition. She was issued a written reprimand for her conduct, see Defense Exhibit 13, a reprimand that was issued while she was preparing for Mr. Pace's trial, (PCR.

2140), yet not disclosed to Mr. Pace's trial counsel. (PCR. 1975)

While trial counsel was aware of Deputy Shirah's misconduct, they were completely unaware that she had been disciplined. The letter sent to the Public Defender's Office by the State Attorney indicated only that Shirah had given false testimony; it did not refer to any disciplinary action. See State's Exhibit 2. (PCR. 2000) The State's failure to disclose the reprimand constituted a violation of the State's obligation under Brady. See id. at 87 (requiring the State to disclose to a defendant information which is favorable to him and material to his guilt or punishment).

The fact that Shirah was reprimanded would have been valuable for impeaching Shirah at Mr. Pace's trial. Impeachment evidence, as well as exculpatory evidence, falls within the Brady rule. See Strickler v. Greene, 526 U.S. 263 (1999) ("[T]he duty [under Brady] encompasses impeachment evidence as well as exculpatory evidence."); United States v. Bagley, 473 U.S. 667, 678 (1985) ("constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial"); Giglio v. United States, 405 U.S. 150, 154 (1972).

That Deputy Shirah exhibited behavior so unethical and dishonest as to require disciplinary action be taken against her constitutes impeachment evidence more significant than the mere evidence that she had lied in a prior investigation. As the credibility of Deputy Shirah and the integrity of her investigation were key to this case, information of discipline against her was certainly material to Mr. Pace. See Giglio v. United States, 405 U.S. 150, 154 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule."). All of the evidence against Mr. Pace was circumstantial. The state's case depended almost entirely on the testimony of several witnesses whose evidence was gathered by Deputy Shirah or on her own testimony. Mr. Pace was entitled to any information which would have cast doubt on the testimony of the state's witnesses. Had the jury known that Deputy Shirah was caught lying under oath, only two months before the trial began and during the later stages of investigation in this case, her credibility and the credibility of all those witnesses whose testimony she secured would have been called into question. See Napue v. Illinois, 360 U.S. 264, 269 (1959); Huggins, 788 So. 2d at 244.

For example, on November 7, 1988, three days after the victim disappeared, Deputy Shirah twice interviewed Ella Mae Green two times, with less than three hours separating the interviews. The second interview was recorded. Recounting both interviews, Deputy Shirah stated that Ms. Green saw Mr. Pace was wearing beige pants. However, Ms. Green had originally told police that Mr. Pace was wearing blue jeans, not beige pants. After being interrogated by Deputy Shirah, Ms. Green changed her story and explained that she had been drinking that day. Deputy Shirah, in her affidavit seeking a warrant to search Mr. Pace's residence, only alludes to information she received from Mae Green regarding what clothes Ms. Green says she saw on Mr. Pace. (See Investigative Reports of Deputy Shirah contained in Exhibit 12; Exhibit 16)

Deputy Shirah also interviewed Orestine Franklin. Ms. Franklin stated that she saw Mr. Pace with the victim around 9:30 in the morning the day that the victim was last seen. Ms. Franklin also stated that Mr. Pace had waved to her. Later, in her deposition, Ms. Franklin denied ever stating that Mr. Pace had waved to her. (See Exhibit 12)

Furthermore, Deputy Shirah interviewed Barbara Mack, who testified at trial that she last spoke to the victim around 10:30 a.m. (R. 587) Ms. Mack stated in her deposition that

she was sure the last time she spoke to the victim was 10:30 that morning. But Deputy Shirah's initial report regarding this witness states that the last time she spoke with the victim was between 9:30 a.m. and 10:00 a.m. the day he disappeared, times pleasing to the ears of prosecutors but utterly clashing with the witness's own sworn statements. (See Exhibit 12)

The accounts Deputy Shirah gave differed greatly from what the witnesses actually said. The times Ms. Mack gave were 45 to 60 minutes later than what Deputy Shirah reported. Ms. Franklin testified in her deposition that she never made a statement attributed to her by Deputy Shirah. Ms. Green originally said that Mr. Pace was wearing blue jeans, but changed her statement after being questioned by Deputy Shirah. The defense was prevented from attacking the credibility of the State's case by the improper withholding of impeachment material, namely, that the principal investigator in this case was reprimanded for knowingly giving a false statement under oath shortly before this trial began.

Ms. Mack, Ms. Franklin and Ms. Green were key state witnesses in that their testimony was crucial to linking Mr. Pace with the state's theory of how the crime occurred. Ms. Mack's testimony provided the time of anyone's last contact

with the victim. Ms. Franklin's testimony not only put Mr. Pace with the victim, but placed them near where the state contends the murder took place, Mr. Pace's home. Ms. Green's testimony was even more crucial to the state. Ms. Green connects Mr. Pace to the gun the state contends was the murder weapon. Ms. Green testified that Mr. Pace left two Busch beers at her house, the same type of beer found empty near the victim's vehicle. Ms. Green testified that she saw stains resembling blood on Mr. Pace's beige pants, though she originally told police before coming into contact with Deputy Shirah that Mr. Pace was wearing blue jeans.

Deputy Shirah's report, written at the time of her affidavit seeking a search warrant, states that Mae Green did not ask Mr. Pace about stains on his pants. Deputy Shirah's affidavit is not consistent with her report of what Ms. Green said to her. Ms. Green's testimony is completely inconsistent with Deputy Shirah's report. Though the State knew that Ms. Green told investigators that she never talked to Mr. Pace about stains on his pants, stains that the State claimed were the victim's blood, the State elicited lengthy testimony about the content of a conversation which the witness initially said never happened. (R. 709-710)

Although defense counsel did cross-examine Deputy Shirah

when she testified at Mr. Pace's trial, he had no way of knowing that two months earlier she had been reprimanded for lying under oath. (R. 688-693) Consequently, Mr. Pace was denied his constitutional right to effective cross-examination by the state's withholding of information concerning Deputy Shirah's lying under oath. Giglio v. United States, 405 U.S. 150, 154 (1972); Davis v. Alaska, 94 S. Ct. 1105 (1974).

In Kyles, the United States Supreme Court explained that a showing of materiality, as required under Brady, does not require demonstration by a preponderance that disclosure of suppressed evidence would have resulted ultimately in defendant's acquittal. Rather, the touchstone of materiality is "reasonable probability" of a different result. See Kyles, 514 U.S. at 433.

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Id. at 434 (citing Bagley, 473 U.S. at 678).

The State's withholding of information concerning Deputy Shirah's lying under oath was material. Mr. Pace was denied

information that would have been used to impeach this key state witness. The State's failure to disclose this information material to Mr. Pace's defense was a violation of the duty established by Brady v. Maryland and undermines the confidence in Mr. Pace's conviction.

The circuit court denied relief on this claim, asserting that "the value of impeaching [Deputy Shirah's] testimony is questionable." (PCR. 1188) However, because the jury was never alerted to Deputy Shirah's unreliability, it placed full faith in the version of events recorded by her and presented by the prosecutor at trial. If counsel had presented this evidence and impeached the testimony of Deputy Shirah and the investigation she conducted, it is unlikely that the jury would have convicted Mr. Pace. See Huggins, 788 So. 2d at 244 (ordering a new trial on Brady grounds where the case was "purely circumstantial" and the withheld evidence "could have affected [the] credibility" of the "key prosecutorial witness who established crucial details" in the State's case).

Accordingly, this Court cannot be confident that the outcome of Mr. Pace's trial is reliable and just. See Brady, 373 U.S. at 87; Giglio, 405 U.S. at 154 ("A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'")

(citation omitted).

As the cumulative result of the State's failure to disclose both the disciplinary action taken against Shirah and the "smudge" report, Mr. Pace was prejudiced by an unconstitutionally obtained verdict, and this Court must reverse his convictions. See id. at 87; Way, 760 So. 2d at 913.

ARGUMENT IV

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S IMPERMISSIBLE COMMENTS ON MR. PACE'S RIGHT TO REMAIN SILENT. THE TRIAL COURT ERRED IN NOT GRANTING RELIEF ON THIS CLAIM.

During his trial, Mr. Pace was deprived of his right to effective assistance of counsel. Trial counsel was ineffective for failing to object to the prosecutor's improper comments in the guilt phase; consequently, Mr. Pace was prejudiced by an unconstitutionally obtained conviction. See Strickland v. Washington, 466 U.S. 668 (1984). Trial court erred by not granting relief on this claim.

During the State's closing argument, the prosecutor impermissibly commented on Mr. Pace's Fifth Amendment right to remain silent:

> The defendant never makes one mention of Floyd Covington or about the story that he told to either May Green or Michael Green. And you recall their testimony about

> whether or not it appeared he had been injured in any way or complained about being injured in any way.
>
> * * *
>
> He never reported it, not to any law enforcement agency, not to May Green, not to anyone else. He never tells anybody that he was injured, never reports what happened to him or Floyd Covington.

(R. 979, 984-85.) It was constitutional error for the prosecutor to comment upon Mr. Pace's right to remain silent. See Griffin v. California, 380 U.S. 609 (1965). In Florida, "[c]omments on a defendant's failure to testify can be of an 'almost unlimited variety' and any remark which is 'fairly susceptible' of being interpreted as a comment on silence creates a 'high risk' of error." Rodriguez v. State, 753 So. 2d 29, 37 (Fla. 2000) (quoting State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986)).

Trial counsel, as he admitted at the evidentiary hearing, was ineffective for not objecting to the prosecutor's improper argument and moving for a mistrial:

> [C]ertainly if he improperly commented on Bruce's right to remain silent, it is a mistrial right then and there. And if I did not [object], I was negligent, if I did not do so.

(PCR 1980) Mr. Pace was prejudiced by a fundamentally unfair trial, as the prosecutor's argument tainted the jury and

placed the burden on Mr. Pace to prove his innocence. The circuit court erroneously found that with these statements, the prosecutor was not commenting on Mr. Pace's right to remain silent but rather the reasonableness of the statements Mr. Pace made to his stepfather. (PCR. 1170) The court also found that the comments "were not fairly susceptible of being interpreted as comments on [Mr.] Pace's right to remain silent." (PCR. 1170).

However, this Court has stated that "where the evidence is uncontradicted on a point that only the defendant can contradict, a comment on the failure to contradict the evidence becomes an impermissible comment on the failure of the defendant to testify." Rodriguez, 753 So. 2d at 38. Here, the State suggested that Mr. Pace should have offered his account of the events as well as given an explanation for his absence of injuries, but in no way was Mr. Pace obligated to do this. He had the right to remain silent before the jury and law enforcement officers.

"The prosecution is not permitted to comment upon a defendant's failure to offer an exculpatory statement prior to trial, since this would amount to a comment upon the defendant's right to remain silent." Hosper v. State, 513 So. 2d 234, 235 (Fla. 3d DCA 1987) (holding that comments by the

prosecution were improper, since they were “fairly susceptible of being interpreted by the jury as a comment upon the fact that Hosper failed to offer an exculpatory statement prior to trial”). Notwithstanding, the prosecutor questioned Mr. Pace’s decision to not report the incident to the police. Again, such a comment is improper and contrasts the law.

Trial counsel was ineffective for failing to object to these comments and failing to move for a mistrial. Due to the prosecutor’s unconstitutional comments on Mr. Pace’s Fifth Amendment rights, this Court must correct the lower court’s error and grant Mr. Pace relief.

ARGUMENT V

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.[15]

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. Apprendi v. New Jersey, 530 U.S. 466 (2000).

Like in Apprendi, in Mr. Pace's case, the aggravating

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[15]Mr. Pace 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. Pace 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. Pace requests that this Court relinquish jurisdiction, so that he may file such a motion in circuit court. In addition to raising this claim in his appeal, Mr. Pace simultaneously brings it in his petition for writ of habeas corpus in order to ensure that he has properly pled this claim.

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.[16] Certainly, the difference between life and death has more than a nominal effect and is of constitutional significance.

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, yet this Court permits jury recommendations of death based upon a simple majority vote.[17] See Fla. Stat. §§ 921.141(1), (2) (1981); Walton v. Arizona, 497 U.S. 639, 648 (1990). Moreover, this Court does not require that the jury

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[16] Florida law requires the State to 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).

[17] The trial judge instructed Mr. Pace's jury of this: "In these proceedings, it is not unanimous that the advisory sentence of the jury be unanimous." (R. 1124) Consequently, Mr. Pace was sentenced to death by only seven jurors. (R. 1129)

unanimously find 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.[18]

In fact, Mr. Pace's jury recommended a death sentence by a vote of seven to five. (R. 1129) This is especially significant since, as the trial court explained, none of the statutory or nonstatutory mitigating factors presented were established. (R. 1235-36) However, even in the absence of proven mitigating factors, five of Mr. Pace's jurors recommended that he receive a life sentence. (R. 1129) These jurors were following the trial court's instructions to not merely count the aggravating and mitigating circumstances but

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[18] Although this Court has said that Apprendi did not overrule Walton, see Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001), and Mr. Pace 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).

to compare the quality of the circumstances. "[T]he procedure to be followed by the jury is not a mere counting process of the number of aggravating circumstances and the number of mitigating circumstances. But rather, a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of circumstances present." (R. 1120) Despite the lack of mitigating factors, five jurors either did not find the aggravators had been proven beyond a reasonable doubt or did not find that Mr. Pace's situation required the imposition of death.[19] In either event, it is undisputed that the aggravating factors which made Mr. Pace 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 recommendation 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. Pace alleged the

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

following:

> BRUCE DOUGLAS PACE did unlawfully from a premeditated design to effect the death of a human being, to-wit: Floyd Covington, or while engaged in the preparation of or in an attempt to perpetuate a felony, to-wit: Robbery, did kill and murder said Floyd Covington, by shooting him with a firearm, to-wit: a shotgun, in violation of Sections 782.04 and 775.087(2), Florida Statutes.

(R. 1132) In response to this indictment, Mr. Pace's trial counsel filed a motion to dismiss indictment or to declare that death is not a possible penalty. (R. 1151-52) Mr. Pace's trial counsel further filed a motion for statement of particulars regarding aggravating and mitigating circumstances, alleging "that the Indictment fails to sufficiently inform the Defendant of the particulars of the offense, relevant to imposition of the death penalty under Florida Statute Section 921.141, to enable him to prepare his defense." (R. 1158) The Court denied each of these motions.

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. Pace's case, thus, his death sentence is unconstitutional.

ARGUMENT VI

MR. PACE WAS DENIED ACCESS TO PERTINENT PUBLIC RECORDS IN VIOLATION OF CHAPTER 119, FLA. STAT., THE UNITED STATES CONSTITUTION, THE FLORIDA CONSTITUTION. THE LOWER COURT ERRED BY DENYING MR. PACE THESE RECORDS.

The Florida Supreme Court has held that capital post-conviction defendants are entitled to Chapter 119 records disclosure. State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). Nonetheless, the lower court erred by not requiring several state agencies to comply with Mr. Pace's requests for public records.

On December 28, 1998, Mr. Pace filed numerous public records requests pursuant to Florida Rule of Criminal Procedure 3.852(h)(2). Mr. Pace requested record from the following agencies: the Santa Rosa County Sheriff's Department (PCR. 807-09; Supp. 191-99); the Milton Police Department (PCR. 801-03; Supp. 200-02); the Florida Department of Law Enforcement (Supp. 203-211); and, the First Judicial Circuit State Attorney's Office (PCR. 804-06; Supp. 218-20).[20]

The lower court erroneously denied these requests, finding that the public records stage of Mr. Pace's case had

[20]This list is not complete. Mr. Pace highlights these agencies due to the fact that they all had some involvement in the investigation and prosecution of this case.

ended.[21] In an earlier order, the court stated that it "has attempted through every means available to bring some finality to Defendant's requests for public records disclosure." (PCR. 1194) However, as this Court has recognized, the opportunity for capital defendants to request and receive public records does not end. See Sims v. State, 753 So. 2d 566 (Fla. 2000)("[S]ection 119.19(9), Florida Statutes (1999) . . . allows collateral counsel to obtain additional public records at any time.").[22]

Post-conviction litigation is governed by principles of due process. See Holland v. State, 503 So. 2d 1250 (Fla. 1987). However, as a result of not receiving additional public records, Mr. Pace was prevented from effectively challenging his case in postconviction, violating his rights to due process.

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[21]Undersigned counsel assumes that the lower court did not issue a written order denying these requests. Nothing in the postconviction record or the supplemental postconviction record recites the lower court's ruling on these matters.

[22]Mr. Pace recognizes that the records request at issue in this claim should have been filed under subsection (i) of 3.852, Fla. R. Crim. P., instead of under subsection (h). However, this rule was adopted on September 18, 1998 and went into effect October 1, 1998. When filing these requests, postconviction counsel did not have the benefit of case law interpreting the rule. Consequently, postconviction counsel followed the plain language of the rule and filed the requests under subsection (h).

For instance, Mr. Pace needed information on several individuals, including State trial witnesses May Green, Michael Green, and Angela Pace Patterson. Mr. Pace requested the information from the Santa Rosa County Sheriff's Office, (Supp. R. 191-93), Florida Department of Law Enforcement, (Supp. R. 203-05), the Office of the State Attorney, (Supp. R. 218-20), and the Motion Police Department, (Supp. R. 200-02). All of these agencies were involved in the investigation and prosecution of Mr. Pace's case, yet he did not receive information from any of these agencies in response to these requests.

Consequently, Mr. Pace was unable to effectively investigate his case in postconviction, thereby limiting his ability to challenge the trial testimony of state witnesses Ms. Patterson, Mr. Green, and Ms. Green. The lower court's erroneous ruling was especially egregious regarding state witnesses Green and Green (mother and son). For example, three days after the victim disappeared, Deputy Shirah,[23] lead investigator on this case, twice interviewed Ms. Green with less than three hours separating the interviews. Recounting both interviews, Deputy Shirah stated that Ms. Green saw Mr. Pace wearing beige pants. However, Ms. Green had originally

[23]See Argument III, supra.

told police that Mr. Pace was wearing blue jeans, not beige pants. After being interrogated by Deputy Shirah, Mrs. Green changed her story and explained that she had been drinking that day. Mr. Pace has a right to investigate and challenge Ms. Green's testimony, including the possibility that she changed her story to fit the State's case in exchange for assistance in her own criminal matters, or those of her children (like Mr. Green). The lower court's erroneous ruling prevented Mr. Pace from effectively presenting his case in postconviction. Records regarding these individuals may have enabled Mr. Pace to more effectively challenge his case in postconviction. By not ensuring that Mr. Pace received these records, the lower court denied him due process. Clearly, the lower court erred by not granting Mr. Pace access to the public records necessary for him to have a full and fair evidentiary hearing.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, appellant, BRUCE DOUGLAS PACE, urges this Court to reverse the lower court's order and grant Mr. Pace 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 2, 2002, to Curtis M. French, Assistant Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399.

CERTIFICATION OF TYPE SIZE AND STYLE

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