IN THE SUPREME COURT OF FLORIDA

CASE NO. SC-01-1874

LANCELOT URILEY ARMSTRONG,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the denial of postconviction relief pursuant to Fla. R. Crim. P. 3.850 after a limited evidentiary hearing. The following symbols will be used to designate references to the record in this appeal:

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

"PC-R. ___" -- record on instant appeal to this Court;

"T ___" --Transcript of hearing of 3/21/01 (Volumes XII and XIII of the record of this appeal, being separately numbered)

"Supp. PC-R. ___" -- supplemental record on appeal to this Court;

References to other documents and pleadings will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE

On March 7, 1990, an indictment was handed down charging Mr. Armstrong with one count of first-degree murder, one count of attempted first-degree murder and one count of robbery (R. 2061). Mr. Armstrong's jury trial on these charges commenced on April 1, 1991 and concluded on June 20, 1991 (R. 490, 2059). The jury found Mr. Armstrong guilty on all counts and as to count one, recommended

that he be sentenced to death. (R. 1777, 1954). Giving the jury's recommendation great weight, the court followed the recommendation and sentenced Mr. Armstrong to death on count one. (R. 2420) The court also sentenced Mr. Armstrong to life imprisonment on counts two and three. (R. 2423, 2426)

Mr. Armstrong unsuccessfully appealed his convictions and sentences. Armstrong v. State, 642 So. 2d 730 (Fla. 1994). Mr. Armstrong filed a Petition for Writ of Certiorari with the United States Supreme Court, which was denied on April 24, 1995. Armstrong v. Florida, 115 S. Ct. 1799 (1995).

Mr. Armstrong filed a motion to vacate judgments of convictions and sentences pursuant to Fla. R. Crim. P. 3.850 on March 19, 1997.(PC-R.89-296) Following public records litigation, Mr. Armstrong filed an amended motion on April 24, 2000. (PC-R.297-428). Following a Huff hearing the lower court entered an order granting a limited evidentiary hearing on Mr. Armstrong's claims of ineffective assistance of trial counsel at the penalty phase and on his claim pursuant to Johnson v. Mississippi 108 S. Ct. 1981 (1988), but summarily denied all his other claims. (PC-R. 6432-658).

An evidentiary hearing was held before the lower court on March 21-23, 2001. Mr. Armstrong presented testimony of trial counsel, Edward Malavenda, four mental health experts, a Jamaican cultural expert, and numerous family members and friends, demonstrating both

the deficient performance and the prejudice prongs required by Strickland v. Washington to show ineffective assistance of counsel. Mr. Armstrong also filed with the Court a copy of the order vacating Mr. Armstrong's prior invalid Massachusetts conviction for indecent assault.

The lower court entered an order denying post-conviction relief. (PCR. 777-805). Mr. Armstrong then filed a timely motion for rehearing (PCR.806-815) which was denied on July 24, 2001 (PCR.824). This appeal follows.

SUMMARY OF THE ARGUMENTS

1. The lower court misconstrued the law and misunderstood the facts in erroneously denying Mr. Armstrong's postconviction motion because trial counsel unreasonably failed to investigate and present evidence of Mr. Armstrong's childhood trauma, poverty, brain damage, PTSD and other mental health issues which would have supported statutory and non-statutory mitigation. Mr. Armstrong's counsel was constitutionally deficient and ineffective. This evidence was not rebutted by State witnesses. Furthermore, the trial court's finding that Mr. Armstrong's prior Massachusetts conviction was unconstitutional entitles Mr. Armstrong to a new penalty phase pursuant to Johnson v. Mississippi, 108 S. Ct. 1981 (1988). The trial court's findings of fact and conclusions of law were legally and factually incorrect.

2. Mr. Armstrong was erroneously denied a full and fair evidentiary hearing on all claims relating to the guilt phase of his capital trial. Mr. Armstrong pleaded specific facts, including claims of ineffective assistance of counsel, newly-discovered evidence and Brady claims that were legally sufficient and were not refuted by the record. The hearing court erred in summarily denying these claims.

3. Mr. Armstrong has been denied access to the files and records in the possession of certain state agencies which pertain to his case. The trial court erred by refusing to hear Mr. Armstrong's first motion to compel production of public records.

4. Mr. Armstrong is innocent of first degree murder and of the death penalty. The summary denial of this claims without a cumulative error analysis was error.

5. The lower court erred in summarily denying Mr. Armstrong's claim that constitutional error occurred during the jury instructions and trial counsel was ineffective for failing to object. These errors include, including the majority verdict instruction, the burden-shifting instruction, and the automatic felony aggravating circumstance.

6. The lower court erred in summarily denying Mr. Armstrong's claim that the State improperly introduced non-statutory aggravating circumstances to the jury.

7. The hearing court erred in failing to allow an evidentiary hearing on the claim that Mr. Armstrong was absent from critical stages of the trial.

8. Mr. Armstrong's convictions and sentences were illegally imposed in violation of international law. The hearing court erred in failing to grant an evidentiary hearing on this issue.

9. Execution by lethal injection and electrocution constitutes cruel and unusual punishment.

10. The prohibition against Mr. Armstrong's defense counsel interviewing jurors is unconstitutional and fundamentally unfair.

11. Mr. Armstrong is insane to be executed.

12. The hearing court's failure to conduct a proper cumulative error analysis and the court's failure to consider the effects of those errors on the jury deprived Mr. Armstrong of due process and a meaningful review of his appellate postconviction issues.

ARGUMENT I

THE HEARING COURT ERRED IN FAILING TO GRANT SENTENCING PHASE RELIEF AFTER AN EVIDENTIARY HEARING WHEN MR. ARMSTRONG'S DEATH SENTENCE WAS BASED ON AN UNCONSTITUTIONAL PRIOR CONVICTION AND INEFFECTIVE ASSISTANCE OF COUNSEL.

The lower court misunderstood and misinterpreted the facts and law evidence presented at Mr. Armstrong's evidentiary hearing. Mr. Armstrong established that he received ineffective assistance of counsel in that his trial counsel failed to adequately investigate and prepare mitigating evidence at penalty phase. The evidence also showed that Mr. Armstrong was entitled to a resentencing because his penalty phase jury weighed an invalid aggravating circumstance under Johnson v. Mississippi, 108 S. Ct. 1981 (1988). Mr. Armstrong established by stipulation of counsel and current legal authority that his prior conviction in Massachusetts of indecent assault and battery of a child under the age of 14 was overturned and rendered unconstitutionally invalid. Contrary to the hearing court's findings, Mr. Armstrong is entitled to a resentencing before a newly empaneled jury.

A. The Johnson v. Mississippi Claim

Mr. Armstrong was convicted of indecent assault and battery of a child of 14 years, a felony, in Dorchester District Court, Boston, Massachusetts, in 1985. At his murder trial, Mr. Satz used this prior conviction to support the aggravating circumstance of prior violent felony (R. 1931). The State presented the testimony of two

witnesses to prove this aggravating factor, Rose Flynch, the victim (R. 1838-1857) and John Clough, assistant clerk magistrate for Dorchester District Court in Massachusetts (R. 1825-1837).

Ms. Flynch testified that Mr. Armstrong took her to a park and asked her to get in the driver's seat. She said Mr. Armstrong reclined the seat and got on top of her (R. 1842). She told him to stop but he told her to be quiet and eventually got off her and took a Kleenex from the glove compartment to wipe "white stuff" from his hands (R. 1843).

Ms. Flynch then testified that Mr. Armstrong drove her back to his apartment where his pregnant wife Angela was resting. Ms. Flynch testified that while Angela was resting, Mr. Armstrong pushed Ms. Flynch down on the couch and got on top of her again (R. 1845). He told her not to scream then lifted up her night gown and put his penis inside her (R. 1845). Ms. Flynch testified that Mr. Armstrong laid there for a while then got up. She locked herself in the bathroom (R. 1846). Ms. Flynch said she was a virgin and had never had sex before (R. 1847). She said she did not tell Angela because Lance had told her it would hurt the baby (R. 1847). This testimony was unrebutted.

During closing argument, Mr. Satz argued to the jury that Mr. Armstrong should be put to death because of his prior violent felony against Rose Flynch (R. 1932). The jury considered this argument and

the testimony of both Massachusetts witnesses. There is no way of knowing what weight the jury gave this testimony. The jury recommended death by a vote of 9 to 3.

In sentencing Mr. Armstrong to death, Judge Coker specifically relied on Ms. Flynch's testimony in finding the prior violent felony aggravator (R. 2054).

> The testimony of Rose Flynch supports the allegation of Indecent Assault and Battery upon a Child of Fourteen Years.
>
> * * *
>
> At the bifurcated portion of the trial, the Court and the jury heard from eleven witnesses.
>
> The State called John Clough, Assistant Clerk Magistrate of Boston, Massachusetts, regarding the felony conviction of the Defendant in 1985 concerning an indecent assault and battery of a fourteen-year old female, Rose Flynch.
>
> Ms. Flynch also testified concerning the sexual assault upon her by the Defendant.

Sentencing Order at page 5 (R. 2433)

In early 1997, CCR took over representation of Mr. Armstrong after direct appeal and certiorari had been denied. During the course of raising Mr. Armstrong's post-conviction appeal, Linda McDermott, Assistant CCR understood that the prior violent felony aggravator could be challenged because it was used against Mr. Armstrong at his capital trial and assisted the prosecution in obtaining a death sentence. Upon reviewing the information from Massachusetts, it appeared that Mr. Armstrong's conviction violated

his constitutional rights.

Ms. McDermott contacted Susan Murphy an attorney in Massachusetts and sought her assistance in challenging Mr. Armstrong's conviction.

On March 3, 1999, Judge M. Zaleski in Boston, Massachusetts overturned Mr. Armstrong's conviction in Commonwealth v. Lancelot Armstrong, Case No. 53211 finding that:

> The Court finds that defendant did not have a trial or plea guilty nor was he informed of his right to a trial, to confront his accusers and against self-incrimination. Commonwealth failed to meet its burden after defendant presented credible evidence to challenge the presumption of regularity (Commonwealth v. Lopez, 526 Mass. 657 (1998).

See, Stipulation1 (T. 6)

Both parties to this case entered a stipulation on March 20, 2001 which was accepted by this Court that Mr. Armstrong's prior conviction in Commonwealth of Massachusetts v. Lancelot Armstrong, Case No. 53011 was found to be unconstitutionally invalid by Judge M. Zaliski on March 3, 1991.

At Mr. Armstrong's penalty phase, the jury was not only presented with Mr. Armstrong's Massachusetts conviction, but bombarded with inflammatory testimony of the fourteen-year old victim. Counsel was ineffective for failing to object to this testimony, and for failing to adequately challenge the evidence

presented by the state.[1] Because the jury was irretrievably tainted by evidence of an invalid conviction, Mr. Armstrong argued to the hearing court that he was entitled to a new sentencing hearing.

The overturning of Mr. Armstrong's Massachusetts conviction rendered Mr. Armstrong's death sentence invalid, in violation of state and federal due process which results in an infected and unreliable death sentence, and constitutes cruel and unusual punishment in violation of the Eighth Amendment and Johnson v. Mississippi, 108 S. Ct. 1981 (1988).

At the evidentiary hearing, the State argued that the hearing court should deny relief because Mr. Armstrong did not exercise due diligence in challenging his prior conviction, and that a harmless error analysis could be applied to Mr. Armstrong's claim because there were two other prior violent felonies to support the aggravating factor (PCR. 1430**)**. These two felonies were committed simultaneous with the first-degree murder case. They were the first-degree attempted murder of Officer Sallustio and the robbery of Kengeral Allen. The State also entered into evidence an armed robbery conviction from June, 26, 1991, in which Mr. Armstrong was

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[1]To the extent this claim was not preserved by trial or appellate counsel, Mr. Armstrong received ineffective assistance. Mr. Armstrong's capital conviction and sentence of death are the resulting prejudice. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989). The jury did not receive adequate information about the case due to counsel's failures.

sentenced **after** he was tried on the instant case. The State's argument is that if the judge granted a new sentencing because of the invalid prior violent felony aggravator, the State could introduce that conviction in support of the prior violent felony aggravator at a resentencing (PC-R. 54-57). The State argued that the inclusion of an illegal Massachusetts conviction would be harmless.

The hearing court agreed and held in its findings of fact and conclusions of law that it chose to take a "path that has not yet been traveled" and find that the possibility that the State could admit another prior violent felony made the constitutional error harmless. (PCR-790) Thus, the hearing court recognizing that the law was contrary to his position, chose to ignore it because it believed absent the constitutional error Mr. Armstrong would still be sentenced to death.

The law on unconstitutional aggravating factors is well-settled. Johnson v. Mississippi addresses both the diligence and the harmless error arguments. In Johnson's case, his 1963 New York conviction was declared invalid and he filed a postconviction motion in Mississippi asking for a new sentencing proceeding. Mr. Johnson did not challenge his New York conviction until 1982. The Mississippi prosecutors argued that a procedural bar should be applied because the conviction could have been challenged earlier. The United State Supreme Court rejected that argument stating :

> We cannot conclude that the procedural bar relied on by the Mississippi Supreme Court in this case has been consistently or regularly applied. Consequently, under federal law, it is not an adequate and independent state ground for affirming petitioner's conviction.

Johnson v. Mississippi, 108 S. Ct. at 1988.

Florida courts have not regularly or consistently applied a procedural bar in these circumstances. See, Rivera v. State, 629 So. 2d 105 (Fla. 1993); Preston v. State, 564 So. 2d 120 (Fla. 1990).

In addressing the harmless error issue, the United States Supreme Court said:

> First, the Mississippi Supreme Court expressly refused to rely on harmless-error analysis in upholding petitioner's sentence, 511 So. 2d at 1338. On the facts of this case, that refusal was plainly justified. Second, and more importantly, the error here extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate.

Johnson v. Mississippi, 108 S. Ct. at 1988.

Likewise in Duest v. Singletary, 997 F. 2d 1336 (11th Cir. 1993), the 11th Circuit twice visited the issue of whether a harmless error analysis could be applied in Mr. Duest's case. The State in Duest argued that absent the Johnson v. Mississippi error Mr. Duest would have still received the death penalty. The 11th Circuit rejected that argument twice; once under the harmless error analysis in Chapman v. California, 386 U.S. 18 (1967) and once under the harmless error analysis under Brecht v. Abrahamson, 507 U.S. 619 (1993). In rejecting this argument, the 11th Circuit relied heavily

on Kotteakos v. United States, 328 U.S. 750 (1946), it said:

> As Justice Rutledge explained in Kotteakos, the issue is not were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men [or women], not on one's own, in the total setting...
>
> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. *The inquiry can not be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.*

Duest v. Singletary, 997 F. 2nd at 1338-39 (emphasis supplied). The central issue becomes whether or not the error in Mr. Armstrong's case is a "structural defect" or simply trial error. Structural defects are not subject to a harmless error analysis. See, Arizona v. Fulminante, 499 U.S. 279 (1991). The 11th Circuit analyzed Mr. Duest's claim under this standard and reversed the case. Therefore, the lower court's analysis in Mr. Armstrong's case is not only wrong but contrary to existing law. The lower court should have assessed the impact of the illegal aggravator without considering what could be presented at a resentencing. Cf. Rivera v. State, 629 So. 2d 105 (Fla. 1993); Preston v. State, 564 So. 2d 120 (Fla. 1990). The reason this "path has not been traveled" is because the courts have

recognized that it cannot predict, assess or forecast the impact of a victim's testimony on the jury.

Here, the court failed to consider the effect of Massachusetts victim had on the jury. In its order and at the evidentiary hearing, the court cited Rogers v. State, 783 So. 2d. 980 (Fla. 2001) to support its deviation from the law. Rogers does not deal with an invalid prior conviction. It addresses the consideration of subsequent convictions in conducting a harmless error analysis. This Court held:

> We cannot speculate as to what evidence would be admitted in a subsequent penalty phase hearing. Instead, we must determine whether the erroneous admission of the misdemeanor conviction prejudiced Rogers to such an extent that he could not receive a fair trial.

Rogers v. State, supra.

Ultimately, this Court concluded that there was no abuse of discretion in Rogers because the trial judge specifically instructed the jury to disregard the testimony of the two State witnesses who referred to the invalid misdemeanor conviction; the prosecution did not refer to the witnesses' testimony during closing argument; the court did not instruct the jury on any aggravating circumstances other than pecuniary gain and HAC; and the trial judge specifically stated that he would not consider the evidence in weighing the aggravating and mitigating circumstances. Id.

This is not true in Mr. Armstrong's case. First, the invalid

prior conviction was a felony, not a misdemeanor. Second, the jury and judge considered the facts of the Massachusetts case in detail. The judge specifically referred to Ms. Flynch's testimony in his sentencing order. The error cannot be harmless under these circumstances.

Further, the lower court's denial of relief is based upon erroneous assumptions that (a) some evidence of the subsequent conviction would be admitted and weighed by the jury against all the mitigation demonstrated by Mr. Armstrong at his post conviction evidentiary hearing; and (b) that the facts of the subsequent conviction would weigh as heavily as those of the invalid Massachusetts conviction. Under Johnson, Duest and Rivera, the courts have never made those assumptions. Nor should the Court do it now.

At the evidentiary hearing, the State presented no evidence of the subsequent conviction other than a certified copy of the conviction itself. It is impossible to determine the weight that a hypothetical future jury might place on a certified copy of a robbery conviction.

By contrast, at the penalty phase of Mr. Armstrong's capital trial, the State presented the victim of the Massachusetts crime vividly explaining her ordeal. Ms. Flynch's testimony left the jury with the impression that Mr. Armstrong had not only committed a

murder of a police officer during the course of a robbery, but that he was a dangerous and violent child molester This testimony was unrebutted. The bald certified copy of the subsequent robbery conviction pales in comparison with the testimony of a fourteen-year old sexual battery victim.

However, the lower court suggested that a subsequent robbery conviction could be just as damaging because "not only does the subsequent conviction establish that the Defendant is a recidivist, the conviction also shows that the Defendant is a recidivist-robber who committed his last armed robbery thirteen days before he murdered John Greeney during the course of another armed robbery." (PCR. 790 The important point that this Court has made in Duest is that no one knows which scenario the jury would consider more aggravating.

Just as the jury in Rivera did not know they were relying on erroneous facts, the jury in Armstrong did not know the conviction was invalid. It is this ignorance of the facts that skews the weighing process to such a degree that it becomes a "structural defect" for due process purposes.

This skewed weighing process is further exacerbated by the striking of an aggravating factor on direct appeal.

> Moreover, at the time of the trial in this case , this issue was governed by Suarez v. State, 481 So. 2d 1201 (Fla. 1985) citations omitted, in which we determined that the failure to instruct a jury on duplicative aggravating factors is not reversible error when the trial court does not give the factors double weight in its

> sentencing order. Although the trial judge in this case **did give** the factors double weight in his sentencing order, we still find that the trial judge's improper doubling of two of the aggravating circumstances and failure to give the limiting instruction were harmless error beyond a reasonable doubt in light of the remaining three valid aggravating circumstances and the negligible mitigating evidence in this case.

Armstrong v. State, 642 So. 2d 730, 738 (Fla. 1994)(emphasis added).

Mr. Armstrong's jury not only relied on the prejudicial facts of invalid sexual battery, but also relied on another invalid aggravating factor. Mr. Armstrong's sentence rested on two unconstitutional aggravating factors without **any** of the mitigation that has been developed since the time of trial.

The Eighth Amendment error in this case is a "structural defect" under the law. Mr. Armstrong is entitled to a new sentencing proceeding before a new jury.

B. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AT MR. ARMSTRONG'S PENALTY PHASE

> [A]ny error was harmless beyond a reasonable doubt, because, as indicated aboove, the three valid aggravating circumstances in this case strongly outweigh the negligible non statutory mitigating evidnece submitted by Armstrong.

Armstrong v. State, 642 So. 2d 730, 739 (Fla. 1994)(emphasis added). This Court denied Mr. Armstrong relief on direct appeal because his attorney had presented "negligible" non-statutory mitigation at his penalty phase. Now that it is known that the jury weighed two

invalid aggravating factors, the failure of defense counsel to discover a wealth of mitigation becomes even more egregious.

The record of Mr. Armstrong's penalty phase reflects that no statutory or non-statutory mental health mitiagtion was presented. Counsel's failure to investigate and present this evidence, as well as his fundamental ignorance of mental health mitigation was the direct cause of Mr. Armstrong's death sentence. The lower court failed to understand the law or analyze the claim cumulatively with the Johnson v. Mississippi error.

a. Deficient Performance.

Counsel in a capital case has a duty to conduct a "requisite, diligent investigation" into his client's background for potential mitigation evidence. Williams v. Taylor, 120 S. Ct. 1495, 1524 (2000).[2] See also id at 1515 ("trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); State v. Riechmann, 777 So. 2d 342 (Fla. 2000) ("an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence"). "It seems apparent that there would be few cases, if any, where defense counsel

[2]The Supreme Court granted relief to Mr. Williams, the first time the Court has granted relief on the basis of ineffective assistance of counsel as to the penalty phase of a capital case. As demonstrated at the hearing and in this memorandum, Mr. Armstrong's case is even stronger than Mr. Williams' and his entitlement to relief is clearly established under the Williams decision.

would be justified in failing to investigate and present a case for the defendant in the penalty phase of a capital trial." Id.

At the evidentiary hearing, Mr. Armstrong presented an abundance of evidence that showed that counsel did not conduct the requisite "thorough investigation" of Mr. Armstrong's background. Because of trial counsel's errors in developing a mental health and family history mitigation case, including his failure to investigate and to provide adequate background materials to the expert he retained; his failure to call any mental health expert; and his failure to present anything other than the most superficial family history evidence; the jury did not know about significant mitigating evidence. It is abundantly clear that trial counsel failed to conduct the "requisite, diligent" investigation into Mr. Jones' background to unearth available and plentiful mitigation. Williams, 120 S.Ct. at 1524. Despite having an investigator at his disposal, substantial avenues of investigation were not pursued by trial counsel. Trial counsel, Edward Malavenda, testified that he relied exclusively on Mr. Armstrong's mother, Dorrett English to find family members from whom to develop a mitigation case based on Mr. Armstrong's social history.

> [by Ms. Backhus] Who did you rely on to give you witnesses or people to talk to regarding Mr. Armstrong's background?
>
> [A.] Mr. Armstrong himself, and his mother.

> [Q.] Was Mr. Armstrong's mother forthcoming with information that you asked her for?
>
> [A.] Again, all I can say is that she provided me with information. Whether or not she gave me a hundred percent of it, I cannot tell you.

(T.31.)(emphasis added).

However, Mr. Malavenda did not ask or discover that Mrs. Armstrong was absent during most of Mr. Armstrong's childhood in Kingston working as a nurse to send money to the family During her extended absences, Mr. Armstrong was left in the care of other family caretakers. See PCR 1304.

Ms. English was not present when these incidents occurred and she was not a reliable source upon which to base an entire mitigation investigation. Trial counsel should have been aware of the identities of numerous people in Mr. Armstrong's background yet without tactic or strategy these people were never contacted.

For example, Mr. Armstrong's aunt, Pamela Weir Mitchell, who was one of Mr. Armstrong's primary caretakers was available in North Miami at the time of trial, and would have been willing to testify about the conditions experienced by Mr. Armstrong during his early childhood. See PCR. 1315. Mr. Armstrong's brother, Harlo Mayne was in Boston, available and willing to testify, but was never interviewed by Mr. Malavenda. See PCR. 1349. Other witnesses with pertinent information, including Alton Beech and Errol Dowman were not approached by Mr. Malavenda. Furthermore, the witnesses who were

presented were only given the sketchiest of preparation and not told what constituted mitigating information. Marcel Foster, Mr. Armstrong's youngest brother testified that:

> I don't recall the preparation. He met with me in the hallway for about five minutes
>
> [Q.] What did he say to you about the testimony?
>
> [A.] Basically how he was. How we grew up. Very brief. Nothing in depth

(PCR. 1369).

One of the crucial areas of investigation in Mr. Armstrong's case was that relating to Mr. Armstrong's background in Jamaica. Trial counsel testified that it had never been his intention to go to Jamaica to interview family witnesses there.[3] However, in Mr. Malavenda's request for an investigator and funds for investigation, he was granted funds to travel to Jamaica See Exhibit F, T. 24. Therefore, the record belies defense counsel's testimony.

Certainly if the attorney discussed in the Williams case was deficient for failing to return the phone call of a certified public accountant who could have testified that Mr. Williams was thriving in prison and was proud of a carpentry degree he had earned in prison,

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[3] This omission clearly did not amount to a strategy decision. Hilliard Moldof, an attorney who was experienced in the field of capital defense in Broward County at the time of Mr. Armstrong's trial testified that in order to develop mitigation, community standards mandate investigating attorneys to "travel to the ends of the earth". See PCR. 1165.

Williams, 120 S.Ct. at 1514, Mr. Malavenda's failure to undertake even a rudimentary investigation into Mr. Armstrong's background is unreasonable attorney performance. See also Phillips v. State, 608 So. 2d 778, 782 (Fla. 1992); Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1326 (Fla. 1994).

At the evidentiary hearing, collateral counsel presented evidence of Mr. Armstrong's early life in Jamaica that trial counsel failed to discover. Mr. Armstrong's early health problems, poverty, abuse and neglect not only constituted valuable mitigation in its own right, but also is vital background information that should have been presented to mental health experts to assist in their evaluation of Mr. Armstrong.

Dorrett English testified at Mr. Armstrong's penalty phase that he suffered from a cranial hematoma and had a difficult birth. R. 1913. Ironically, trial counsel failed to know the true significance of these early ailments or present them to the jury. Dr. Thomas Hyde, a behavioral neurologist testified at the evidentiary hearing:

> ..I was able to spend some time on the telephone with [Mr. Armstrong's] mother specifically looking into issues of early development, birth, prenatal health care, and the issues of seizures in childhood. There were several important elements that came out of these discussions.
>
> He was born to a 16-year-old mother. That makes it a high risk pregnancy. She had limited prenatal care. There may have been some elements of malnutrition while she was

> pregnant. She did have some prenatal care. She developed pre-eclampsia in the last trimester, which was treated, as is often the case in developing countries, with diet and bed rest. This frequently is a complicating factor in pregnancies.
>
> He was born in hospital with a normal body weight, but he had meconium staining at birth which his mother related to me, which means the baby is stained with fecal material during the delivery. It's a sign of fetal distress. Often times, infants who have fetal distress suffer from some form of anoxic brain injury. They were kept in the hospital for two weeks after birth, which is unusual, in my experience in developing countries which suggests there was some degree of medical problems with Lance after birth. He had a hematoma on his head at the time of birth, which may have been related to brain trauma at the time of delivery.

(T. 181).

After his difficult birth, Mr. Armstrong had severe health problems as described by several family members. Pamela Weir Mitchell, his maternal aunt and frequent caretaker described them:

> ..he used to have fits, his nose used to bleed. He used to cry from headaches and stuff like that.
>
> [by Ms. Backhus] About how old was he when these things would happen?
>
> [A.] Different stages of his life. He would cry for headaches.
>
> [Q.] From the time he was a small child?
>
> [A.] Yeah.
>
> [Q.] Or more like a teenager?

> [A.] When he--before he could talk, he used to bang his head on the place. But then, after he get big, we discovered maybe he was having headaches and he couldn't tell us that.
>
> [Q.] Okay. You said before that he had fits, could you describe what that is to me?
>
> [A.] His eyes would roll over and he was on the floor and shaking.

(PCR. 1305)(emphasis added).

Further evidence of Mr. Armstrong's early seizure disorder was presented through Harlo Mayne, his younger brother.

> ...he used to black out. I don't know what was wrong with him at the time, but he used to if he was sitting in a chair, he would black right out and his head would go back and he was not responding to anybody.
>
> [by Ms. Day] So, if you talked to him, he would not answer?
>
> [A.] Yes.
>
> [Q.] He would just be out of it?
>
> [A.] Right.
>
> [Q.] What happened when he came around, did he remember what was going on?
>
> [A.] Not quite, no.
>
> ***
>
> [Q.] Okay. Did you ever see him fall over or black out?
>
> [A.] Yeah.
>
> [Q.] And I'm going to ask you to describe to the court what he would do when he would fall over or

black out?

[A.] He would shake. He would shake kind of uncontrollably.

[Q.] Uncontrollable shaking?

[A.] His entire body would shake.

PCR1333-34(emphasis added).[4]

Inexplicably, no evidence of Mr. Armstrong's seizure disorder was presented at Mr. Armstrong's penalty phase. This was clearly not a strategy decision since Mr. Malavenda had admitted that he would "probably present" evidence of a seizure disorder. See. T. 36, 3/21/0.

Trial counsel also failed to conduct an independent investigation with family members who had known and cared for Mr. Armstrong as a child. Mr. Malavenda failed to discover that Mr. Armstrong's mother was away from home at nursing school and later working during the salient times of Mr. Armstrong's childhood. Mr. Malavenda did not interview any of the people who had been directly involved in taking care of Mr. Armstrong during his childhood. Pamela Weir Mitchell, Mr. Armstrong's maternal aunt, her mother, Mr. Armstrong's grandmother, and Nevelle Foster, Mr. Armstrong's stepfather were the primary caretakers:

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[4] Mr. Armstrong's seizure disorder was corroborated by affidavits and videotaped sworn statements of Mr. Armstrong's aunt, Memry Weir, Mr. Armstrong's older brother, Danny Miller and his step-grandmother, Menda Golding. Ms. Weir, Mr. Miller and Ms. Golding are Jamaican citizens and despite due diligence on the part of counsel for Mr. Armstrong, they were denied visas to enter the USA to testify at Mr. Armstrong's evidentiary hearing.

> [by Ms. Backhus]...did you live with him constantly during the time he was small or off and on?
>
> [by Ms. Weir Mitchell] I was there for a period of time. Then I left and I came back.
>
> [Q.] Do you remember how long those periods were?
>
> [A.] When he was born, I was around ten and I was there until I was around 13. Then I leave and came back around 15.

(PCR. 1306).

Mr. Armstrong's early life was marked by extreme poverty, yet, unreasonably, Mr. Malavenda failed to investigate and present evidence of the true extent of Mr. Armstrong's deprivation while a child in Jamaica. As Mr. Armstrong's brother Harlo Mayne, testified the house had no running water and the windows of the house were usually boarded up with zinc. Water would have to be collected from a standpipe by the children of the household who balanced the full jars on their heads:

> [by Mr. Mayne] Well, we get the water from a standpipe in the backyard, We go to where the standpipe is.
>
> [by Ms. Day] Where is the pipe, on the street?
>
> [A.] There is one on the street, and one in the back of the yard. The one in the back of the yard sometimes doesn't work, so you go to the one the street and get the water and it put in a jar and keep them in the yard.

(PCR.1327).

The house provided inadequate shelter from frequent rainstorms. Marcel Foster testified that:

> [It was] a flat roof with galvanized sheets that you can hear every rain drop falling on the house. It becomes very hot during the day. And it's not uncommon to enter the house and see a bucket or pot in any of the living areas collecting water because the roof would leak.

(PCR. 1362).

Food was in short supply. As Mr. Mayne testified, the family was largely reliant on the breadfruit and fruit trees in the backyard and fish from the river behind the house. (PCR. 1332) Cooking was done over a coal stove, or sometimes, a wood fire outside the house. Cooking utensils were scarce and Pamela Weir Mitchell testified they were not used on the wood fire:

> We have pots, but sometimes if you cook on the wood stove, we would have tins we cook in sometimes so that the pots don't get black.

(PCR.1313).

One of the more telling features of Mr. Armstrong's early development was his "Pica." Psychiatrist Dr. Richard Dudley explained:

> [Pica is] an eating disorder seen most often - first seen in children. And it essentially involves the eating of non-nutritious foods. I don't mean junk food. I mean things that have no nutritive value. In his case, lead paint, dirt, chicken excrement, and paint, non nutritious products. Like I said, this is usually seen in children. <u>It's commonly seen in children who have been abused or neglected in some way.</u>

(PCR. 1267)(emphasis added).

Pamela Weir Mitchell testified that:

> [Lance] used to eat dirt, and the marl sometimes. I catch him with the paint of the house, like

eating it when he was a baby.

[by Ms. Backhus] What is marl?

[A.] The marl is a white dirt.

[Q.] Like a rock?

[A.] Yeah. We used to live near a marl pit.

(PCR. 1311). As explained by Dr. Dudley, Pica is not merely a sign of malnutrition, but:

> ...more of a psychological thing, although in children who have been neglected they are malnourished as well as neglected. It's not necessarily the driving force. The driving force is usually psychological in nature. Of course, there's concerns of kind of a secondary social problem with Pica, depending on what the children are eating.
>
> For example, the ingestion of lead paint, the concern is of lead toxicity. With the ingestion of dirt, the question is whether you'll contract other sorts of difficulties depending on where the dirt's from and what's in it.

(PCR. 1268)(emphasis added).

Again, trial counsel failed to present evidence of childhood poverty that was not a reasonable strategy. Mr. Malavenda stated several times during his testimony that his strategy was to "humanize" Mr. Armstrong. However, he presented nothing to the jury to make his client appear human. The presentation of evidence of childhood poverty and neglect, particularly in a third world country outside the United States, would appear to be "humanizing," but trial counsel failed to present it.

At Mr. Armstrong's penalty phase, passing reference was made to two traumatic incidents in Mr. Armstrong's life - that he lost two fingers in a sugar cane cutting incident, and that he was stabbed by his brother, Harlo (R. 1914) No one in the jury panel knew the circumstances or the impact that these events had on Lance Armstrong.

At the evidentiary hearing, Harlo Mayne described the true extent of accidental amputation. He said Lance bled profusely, and that he was kept in the hospital for five months afterwards. See PCR. 1343. Lance was ashamed of his deformed hand and would hide it to avoid the stares and taunts of the other children PCR 1343

Even more significantly, Mr. Malavenda failed to investigate or present evidence of Lance's physical abuse at the hands of his stepfather, his aunt and his schoolteachers. Much of the beating that was inflicted because Lance could not perform his school work due to his learning disability. But no one recognized his disability and it was not appreciated in the community. Pamela Weir Mitchell testified:

> He was going to school wouldn't come home with any school work or anything much, and he couldn't read.
>
> [by Ms. Backhus] And when you said he had difficulty reading; did you understand why, at the time, it would be that other people said that he wouldn't read and he was slow?
>
> [A.] Yes, at the time I thought he was lazy and he wouldn't do the work.
>
> [Q.] Okay.

> [A.} Sometimes I would beat him to do his school work.

(PCR. 1306) (emphasis added).

Ms. Mitchell's testimony was supported by Harlo Mayne who frequently witnessed Mr. Armstrong being beaten by his stepfather, Nevelle Foster, as well as by Pamela Weir Mitchell. He described the means of administering the beatings:

> ...Mostly a stick. They used a belt, but mostly a stick.
>
> [by Ms. Day] Where did the stick come from?
>
> [A.] They get it off a tree called a guava tree, the same guava you have to make jams.
>
> ***
>
> [by Mr. Mayne] I saw it. When you get hit with the stick, that's what happens, you get bruised.
>
> [Q.] Did it ever cause the cuts to bleed?
>
> [A.] Yes.
>
> [Q.] How did Lance react to this, do you remember?
>
> [A.] Well, he was always a nervous kid. He didn't like getting beaten and beaten all the time.

(PCR.1337-38)(emphasis added).

Much of the household violence was meted out by Mr. Armstrong's stepfather, Nevelle Foster. Pamela Weir Mitchell testified that the brunt of the beatings were borne by the older boys, Danny and Lance. Nevelle would beat them with "a stick from a guava tree, a piece of

light wire, shoes, anything, a belt" , and that he favored "a little belt from his waist, from his pants, waist pants."(PCR. 1309)

Nevelle Foster was also a heavy binge drinker. As Pamela Weir Mitchell testified:

> Nevelle? Well he used to drink sometimes when he would come in and he would be very upset over nothing.
>
> [by Ms. Backhus] Uh-huh.
>
> [A.] And sometimes he would tear apart the house, tear apart, just carrying on.
>
> (PCR. 1307).

Nevelle's binge drinking was graphically described by Mr. Armstrong's youngest brother, Marcel Foster:

> His routing would be on Fridays after work, which he would stop at the bank, and stop at the bar, and get home and throw up and fall asleep in the seat.
>
> [by Ms. Day] What would he be like when he got home?
>
> [A.] <u>He was stumbling, knocking over furniture</u>.
>
> ***
>
> [Q.] <u>Where would he throw up?</u>
>
> [A.] <u>Anywhere, the living room, the bedroom, the porch</u>.
>
> ***
>
> [by Mr. Foster] We would leave the house.
>
> [Q.] Why was that?
>
> [A.] <u>No-one wanted to smell it or clean it</u>.

(PCR. 1361)(emphasis added).

In addition to being beaten at home, Lance also was humiliated and beaten at school for failing to understand his lessons. Harlo Mayne testified that, despite the fact that he (Mr. Mayne) was two years younger than Lance, and his own reading ability was "Not very good either" (PCR. 1335), he would help Lance with his homework in order to try to forestall the inevitable beating at school. He testified that the teachers would use a belt at times, but also a stick. (PCR. 1336).

The systemic use of corporal punishment in Jamaican schools was confirmed by Dr. Laurie Gunst, an expert in Twentieth Century Jamaican history and culture who testified that:

> ...the Jamaican school system is very brutal.
>
> Children who have learning disabilities are called "dunces"[5]and made to sit in the corner and usually punished very very harshly and beaten. Corporal punishment is a way of life in the Jamaican school system.
>
> [by Ms. Day] And what sort of- how is corporal punishment administered in the Jamaican school system?
>
> [A.] By being beaten often, and it involves the hands. They also involve a student taking his pants down and is beaten that way. But beatings are administered with straps, rulers. Also, in some cases, a Cat o Nine Tails.

5This cruel teasing was also noted by Harlo Mayne who noted that Lance was called "dummy", "duncebat" and "brain dead" by other children, especially his older brother Danny Miller.

(PCR. 1401).

Dr. Gunst described Mr. Armstrong's school experiences as "pretty much like torture" (PCR. 1400) because of the humiliation and physical abuse he endured there. This evidence relating to the cultural void between American and Jamaican attitudes towards learning disabilities was readily available at the time of Mr. Armstrong's trial. Even though Mr. Malavenda intended to "humanize" Mr. Armstrong, he could not because he did not know the "human" aspects of his own client's life.

Perhaps the most perverse part of Lance Armstrong's early life was the necessity of retrieving dead bodies of drowning victims from the Martha Brae river behind the family house. Harlo Mayne testified that "a lot of people drowned in the river"(PCR. 1339), and that:

> Lance was forced to go find [the victims] because once they went in the river, the fast flowing current would take them at least a mile downstream. So you got the people, the people in the community would grab a certain amount of the people who can swim good and go and find the drowning person.
>
> ***
>
> ..<u>the person would swell up. Their appearance would change because they are saturated with water. The skin would start peeling as a result of being under water for some time.</u>
>
> <u>Usually they don't get fine (sic) the same day. It's two days later. So most of the time they swell, so big that they float from the bottom where they was at, to the top. By that time they're decomposing.</u>

[Q.] They smell bad?

[A.] They smell bad and the skin is peeling, the flesh is peeling.

(PCR. 1340)(emphasis added). Marcel Foster also corroborated the trauma of having to retrieve dead bodies from the river (PCR. 1315).

Once again, trial counsel relied only upon Mrs. Armstrong who was neither cognizant of this detail of Mr. Armstrong's childhood experience or knew it was helpful information for presenting mitigation. Had counsel taken the trip to Jamaica that had been approved for investigation, he would have discovered the wealth of mitigation available. Now, the Court must "consider[] the different course that the trial would probably have taken had counsel acted in an objectively reasonable manner." Coss v. Lackawanna County District Attorney, 204 F. 3d 453, 464 (3d Cir. 2000). See also Blanco v. Singletary, 943 F. 2d 1477, 1501 (11th Cir. 1991) ("[c]ounsel essentially acquiesced in Blanco's defeatism without knowing what evidence Blanco was foregoing. Counsel therefore could not have advised Blanco fully as to the consequences of his choice not to put on [a defense]"); Rose v. State, 675 So. 2d 567, 572-73 (Fla. 1996) (counsel rendered deficient performance in capital case when he "chose to present this theory [of defense] even though he thought it was far-fetched at the time. Without ever investigating his options, counsel latched onto a strategy which even he believed to be ill-conceived").

Contrary to Mr. Malavenda's belief, it was not Ms. English's responsibility to develop a case in mitigation, it was trial counsel's duty.

Even if Mr. Malavenda chose not to go to Jamaica, he could have investigated and discovered the information on the effects of the social and political conditions in Jamaica during Mr. Armstrong's childhood and adolescence. See Mak v. Blodgett, 754 F. Supp. 1490 (9th Cir. 1991) (Trial counsel's penalty phase performance was deficient where counsel failed to present in mitigation the testimony of a cultural anthropologist concerning defendant's assimilation difficulties, which could have helped to explain both defendant's involvement in crime and apparent lack of emotion at trial.) See also Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992). In Mr. Armstrong's case, no evidence of the political turbulence and random street violence he experienced in Jamaica was presented to his sentencing jury. As Dr. Gunst testified at the evidentiary hearing:

> It's hard for any American to believe it because it was so violent, but most of this violence fell on the heads of the Jamaican poor.
>
> ***
>
> What eventually happened, the Jamaican politicals from both parties cemented the power of Jamaica's criminality, which was quite strong and growing because of the illegal drug trade in Jamaica, produced by marijuana.
>
> ***

> Very similar to American Mafia, but more widespread and with a deadlier effect.
>
> ***
>
> And this situation got so critical throughout the 1970's that, as I said before, Jamaica was essentially in a state of civil war between the parties.
>
> ***
>
> The police got rooked in because they were very easily polarized between one party and another, depending on the area they were working in. They became a force to be tremendously feared and not trusted on the island, especially by the poor
>
> ***
>
> There was huge firepower in Jamaica. It's mind boggling. This all exploded in 1980, when with backing by both left and right, here and abroad, Jamaica had a blood bath of a national election, in which almost a thousand people died which is a large number when you think that you have an island of two million people and one thousand deaths in a political warfare.

(PCR. 1403))(emphasis added).

Harlo Mayne testified that Mr. Armstrong had experienced the political turmoil leading up to the 1980 election. He described the random violence of uprising in Falmouth in 1977 in which:

> ... People were turning over vehicles. People were shooting at people and all kinds of stuff.
>
> [Q.] So you know if Lance witnessed any of this?
>
> [A.] He was there. I saw it, so he had to have seen it.

> [Q.] Were many people shot in Falmouth?
>
> [A.] Yeah. Some people got shot. I don't know who was doing the shooting. At one point I know that the police was doing the shooting at the Jamaica Defense Force. Doing the shooting to create a curfew.
>
> ***
>
> Political violence. It was violent riots. People were getting killed, people are going to be afraid.

(PCR.1344-45)(emphasis added).

Pamela Weir Mitchell also indicated how the violence affected everyone. "[Y]ou couldn't wear certain colors or somebody would beat you for wearing certain colors." (PCR. 1314)

During the 1980 election, Lance Armstrong became personally involved by being coerced into guarding a ballot box. Harlo Mayne said:

> I remember specifically one time he had to guard a ballot box.
>
> ***
>
> They gave him a gun and told him to guard a ballot box.
>
> ***
>
> ...it was some people from Falmouth's P.N.P. people, you know who get a lot of people to support their side and to help, help guard the ballot box from the other side taking it.
>
> [Q.] Did you ever hear of any election workers being killed?
>
> [A.] Yeah.

***

> [Lance] was very upset. He couldn't leave. He asked me to get lunch for him. He was upset. He believed he was going to be the next getting killed. It was a [J.L.P.] controlled area and he was guarding the ballot box for that area and he was very nervous.

(PCR. 1346-471)(emphasis added).

Mr. Armstrong's fear and nervousness about this task was well founded.

Dr. Gunst described the violent anarchy surrounding the 1980 election:

> ...if you were forced to [guard a ballot box], you didn't say no.

***

> they were always the target of violence by these thugs. If you're guarding a ballot box in an area that's loyal to one party, you can expect the gunmen from the rival party to come in and try to shoot you up and steal the ballot box, because they want to destroy that ballot box and do anything to keep them from being counted.
>
> This was a frequent occurrence in 1980.

***

> If the police had been paid off by the gunman, paid to look the other way, the gunman would careen up in a vehicle and jump out with high powered weapons and start shooting, spraying the area with gunfire.

(PCR. 1497-08)(emphasis added).

Dr. Gunst explained that it was a frequent occurrence for election workers such as Mr. Armstrong to be victims of such acts (PCR. 1408). As Dr. Gunst testified, the police force in Jamaica were not only a

force to be feared during the election violence, but a general menace to society:

> The Jamaican police kill between one third and one half of the island's yearly homicides. Think about it for a minute, it's an extraordinarily high number. The misdoing has been so widespread that human rights organizations and international law organizations have frequently examined Jamaica and written reports about this because it's an unusual occurrence for a democracy to have a police force that's this violent.

(PCR.1407).

The fear of the police is demonstrated by the popular slang word for the police in Jamaica "Babylon", meaning, as Harlo Mayne described "a real beast, a really evil person". (PCR. 1348). Dr. Gunst explained that Mr. Armstrong's fear of the police dated from his early life, staying in Flankers with his step-grandmother, Menda Golding. Dr. Gunst described Flankers as a shanty town on the outskirts of Montego Bay which is

> ...notoriously violent because it's a hot bed of warfare between Jamaica's two parties. So it's often an area that the police are summoned to; there's a great deal of fire.

(PCR. 1400).

While Mr. Armstrong was staying in Flankers with his step grandmother,

> ...the police would do night raids through the shanty town and [Lance] was so frightened of them ...that his grandmother testified or stated under oath that he often tried to hide behind her because he was so frightened.
>
> [Q.] Could you explain to the Court what the

night raids were?

[A.] Well, the police essentially would kick in doors and hold people at gun point and also sometimes shoot without warning.

(PCR. 1410).

Mr. Armstrong's early fear of the police was exacerbated by events that occurred during his adolescence. As Harlo Mayne testified, Mr. Armstrong was arrested on false charges of robbery, and :

...they [the police] took him away for months and they tortured him.

***

<u>They tied some weights and stuff to his genitals to get him to speak. They beat him on his toes and underneath his feet with some heavy objects, a hammer</u>.

***

I don't remember if he was tried, but I know he was finally released. The Court let him go.

(PCR. 1343)(emphasis added).

Dr. Gunst testified that the use of torture was widespread and fairly well-documented in Jamaica at the time and:

they cause great concern internationally. This of course vitiates the Jamaican system to administer justice because it's known that confessions are often wrestled out of suspects because of torture.

(PCR. 1412).

Despite this compelling evidence as to Mr. Armstrong's experiences with political violence and the Jamaican police, trial counsel claimed that he strategically chose not to put on any evidence about abuse by police

because:

> ...we were dealing with a case that involved the shooting of a police officer. It would just create a situation with Mr. Satz or any capable attorney could have made it look like he hated police officers, he's confronted by a police officer and that was his mission to kill a police officer.

(T.95).

However, Kay Allen had already testified in guilt phase that Mr. Armstrong hated the police and at penalty phase, Mr. Armstrong had already been convicted of murdering a police officer and wounding another. Inexplicably trial counsel testified that he would not have used information that Mr. Armstrong had been previously tortured by the police because he did not want the jury to think Mr. Armstrong hated the police (T. 39) Under the circumstances at penalty phase, trial counsel's excuse for not investigating this information is unconvincing. The information could have served as a possible explanation for why Mr. Armstrong reacted as he did when he was confronted by police. As Mr. Armstrong's evidentiary hearing demonstrated, the reverse is true.

Mr. Armstrong presented testimony from a City of Boston police officer, Errol Dowman who testified that he was a close friend of Mr. Armstrong and had acted as his father at Mr. Armstrong's wedding. See PCR.1420. Mr. Malavenda conceded that had he known of Mr. Armstrong's friendship with a police officer he would have put it on. See T.37.

Had Mr. Malavenda conducted a constitutionally-adequate investigation, he would have discovered that Mr. Armstrong's reaction towards police was not "hatred".

Mr. Armstrong's traumatic early experiences of police brutality in Jamaica led him to fear for his life when confronted by police. This difference is crucial, especially in light of the fact that Kay Allen had testified at the guilt phase as to Mr. Armstrong's hatred of the police. The fact that Mr. Malavenda chose to leave Ms. Allen's testimony unrebutted ratter than to explain the highly important distinction between hatred and trauma induced fear reflects neither strategy nor tactic.

Mr. Malavenda's personal views do not vitiate his responsibility to investigate a viable issue on behalf of his client charged with capital murder. Mr. Malavenda made it clear at the evidentiary hearing that he does not even investigate the issue of trauma induced by police brutality as potential mitigation. Mr. Malavenda did not investigate the police brutality experienced by Mr. Armstrong. He did not provide any his mental health experts with this information and he did not present it to the jury. Mr. Malavenda's failure to investigate Mr. Armstrong's fear of police as it related to his mental health issues including PTSD and his neurocognitive deficits constitutes deficient performance.

An attorney cannot make a strategic decision not to present a

potentially viable issue absent a diligent investigation. "[M]erely invoking the word strategy to explain errors [is] insufficient since `particular decision[s] must be directly assessed for reasonableness [in light of] all the circumstances.'" Horton v. Zant, 941 F. 2d 1449, 1461 (11th Cir. 1991) (quoting Strickland v. Washington, 466 U.S. at 691) (footnote omitted). "[C]ase law rejects the notion that a `strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." Horton, 941 F.2d at 1462. Mr. Armstrong has established deficient performance under Strickland and Williams.

One further area neglected by trial counsel was the difficulties faced by Mr. Armstrong when he came to the United States aged 19. Trial counsel's attempts to make it seem as though Mr. Armstrong was living "the American Dream" as characterized by the State, (PCR. 1291) was a strategy based on ignorance and failure to investigate the facts surrounding Mr. Armstrong's experiences in Boston. Trial counsel made much of the fact that Mr. Armstrong had a carpentry business. However trial counsel did not show Mr. Armstrong's difficulties in prioritizing, meeting contract deadlines and concentration with and the inevitable losses of his contracts. Marcel Foster, Mr. Armstrong's younger brother worked with Mr. Armstrong in the business and according to Mr. Foster,:

> ..the guys would complain he was not doing anything. He would stop doing what he was doing

> and sometimes wander off.
>
> [Q.] When you say "wander off" do you mean physically wander off or space out?
>
> [A.] Both.
>
> ***
>
> Well, the guys would sometimes say to him there's a deadline that we have to reach, that we need to put everything together and he would start again and space out again and stop. Sometimes he completely would leave a job site.

(PCR. 1353)

Alton Beech, another coworker from Boston recalled Mr. Armstrong's lack of concentration and inability to complete his contracts. He recalled Mr. Armstrong "spacing out" while driving from New York (PCR. 1373), and that he "couldn't carry on a conversation" (PCR. 1373). Alton Beech also opined that he thought that Mr.Armstrong was "depressed" and that he "didn't think [Mr. Armstrong] was really smart" (PCR. 1374). Mr. Beech also testified that although Mr. Armstrong was hired for jobs, he had difficulty keeping them due to his inability to prioritize and his lapses in concentration. He also could not deal with the business side of the operation because " I think he was more illiterate" (PCR. 1381). This "spacing out" was also described by Officer Errol Dowman who noted that he had seen Mr. Armstrong suffering from apparent dizziness on "a couple of occasions" Officer Dowman recounted that:

> It seemed like he was disoriented or dizzy. One particular time I was on York Street, where he

> was doing renovating of a particular building there, and for a moment, three to five minutes, he just froze, he was totally confused going up the stairs.
>
> ***
>
> Basically, I didn't know what was happening, if it was a blackout or something to that effect.

(PCR.1421(emphasis added).

Alton Beech also noted that Mr.Armstrong's mental condition appeared to worsen after he had moved to Miami. Mr. Beech described an occasion on which Mr. Armstrong returned to Boston for a visit and appeared "crazy", thought that "people were after him", and that he was "paranoid" (PCR. 1382-83).

Trial counsel failed to contact any of these witnesses, and so presented an inaccurate account of Mr. Armstrong's life in Boston that was so superficial as to be actively misleading. Mr. Malavenda's attempt to slough off the blame of his failure to discover this easily available evidence on Mr. Armstrong and his mother is not well founded. Mr. Malavenda's choice not to pursue independent investigation did not relieve him his responsibility for investigating the issue of Mr. Armstrong's family history in Jamaica and presenting Mr. Armstrong with a full panoply of available mitigation at penalty phase. [T]he different course that the trial would probably have taken had counsel acted in an objectively reasonable manner..." Coss, 204 F.3d at 464.

The lower court found that trial counsel Malavenda's investigation into Mr. Armstrong's background for mitigating evidence and that he

"complied with the duty to investigate". PCR. 792. Furthermore the lower court found that "the facts provided at the evidentiary hearing of Jamaican poverty, political unrest and violence, the Defendant's malnutrition, physical beatings and his prior contact with the Jamaican police would have offered little to the testimony already presented to the penalty phase jury and is not of a compelling nature". PCR. 796. This analysis is not borne out by the record and is not in accordance with applicable law. See Washington v. Smith, 219 F. 3d 620, 631 (7th Cir. 2000).

The United States Supreme Court has made it clear that Mr. Armstrong "had a right--indeed a constitutionally protected right--to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." Williams v. Taylor, 120 S.Ct. 1495 (2000) at 1513. Counsel in a capital case has a duty to conduct a "requisite, diligent investigation" into his client's background for potential mitigation evidence. Id. at 1524. See also id at 1515 ("trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background").(emphasis added). Trial counsel's reliance only on one witness as the gateway to the remainder of the family and his failure to travel to Jamaica was neither "diligent" nor "thorough" as required by Williams. As Williams makes plain, the test is not whether trial counsel reached a certain fixed threshold of investigation or puts on a certain quantum

of mitigating evidence, but rather whether the evidence is a reasonable representation of the sum trial available, and represents a reasonable representation of the defendant's life and circumstances to date. Clearly, under Williams, Malavenda had a duty to visit a place where Mr. Armstrong had spent his childhood and teenage years and to conduct independent investigation there.

The hearing court's findings as to the testimony of the witnesses as to Mr. Armstrong's background is not borne out by the record. First, the Court questions Pamela Weir Mitchell's reliability as a witness because she "did not choose to travel twenty miles to stand by her nephew at trial". Ms Mitchell stated that had she been asked to testify she would have done so (PCR. 1316). By this observation, the lower court put the onus for presenting the penalty phase on the witness rather than on trial counsel. Contrary to the court's finding, most of the evidence from Pamela Weir Mitchell, Harlo Mayne, and Marcel Foster was entirely new and not cumulative. Evidence of the traumas caused by finding drowned bodies in the river; direct physical abuse of Mr. Armstrong by Nevelle Foster;[6] Mr. Armstrong's treatment at the hands of the Jamaican police; his experiences as an election guard and his seizure disorder; numerous head injuries and Pica was not presented at

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6 While Dorrett English had testified at the penalty phase as to Foster's abusive environment, her testimony referred solely to Foster's abuse of **her** and Mr. Armstrong's witnessing it. She does not testify about abuse to Mr. Armstrong because she was absent for most of the time he spent with Mr. Foster.

the penalty phase. They would not have been considered "negligible" by a sentencing jury.

However, the lower court never addressed the impact that images of the abject poverty would have on the jury from photographs of Mr. Armstrong's childhood home in Jamaica (See PCR. 777 et. seq.). The court ignored compelling testimony regarding the lack of plumbing and even the basic facilities as Mr. Armstrong grew up. Id. The court failed to consider that for most of Mr. Armstrong's life he never had anything but a hole-ridden tin roof over his head and not enough food to eat. Violence is the only world Mr. Armstrong knew, yet the lower court said a sentencing jury would have found this information to be "negligible."

In truth, what was negligible was Mr. Malavenda's presentation of evidence at penalty phase. The United States Supreme Court has found very similar evidence to be compelling. See Williams v. Taylor, 120 S.Ct. 1495 (2000), in which the United States Supreme Court granted relief based on ineffective assistance of counsel because "....the graphic description of [Mr. Armstrong's] childhood, filled with abuse and privation....might well have influenced the jury's appraisal of his moral culpability."(Williams v. Taylor),120 S.Ct. 1495 at 1515)

The lower court also faults Dr. Laurie Gunst, Mr. Armstrong's expert witness on contemporary Jamaican history and culture, for relying on hearsay regarding Mr. Armstrong's personal experiences. The

court's analysis is not borne out by the record. In fact Dr, Gunst's testimony was based largely on her own knowledge and expertise of conditions in Jamaica at the time Mr. Armstrong was growing up. The lower court's concern that Dr. Gunst relied on "hearsay"[7] could equally well be applied to every mental health expert who relies in part on a clinical interview with a defendant. Furthermore, nearly all of the events in Mr. Armstrong's life discussed by Dr. Gunst were corroborated by other family members. Dr. Gunst's opinion that Mr. Armstrong's experiences were consistent with and typical of contemporary events in Jamaica is completely unrebutted. Similar testimony should have been presented to Mr. Armstrong's jury. The lower court could not say Dr. Gunst's testimony would not have been compelling to a sentencing jury.

The lower court erroneously refused to consider the videotaped statements and affidavits obtained by Mr. Armstrong in Jamaica from Danny Miller, Memry Weir, and Mend Golding, Mr. Armstrong's older brother, aunt and step-grandmother. This testimony would have buttressed the testimony of Mr. Armstrong's family members, friends and Dr. Gunst at the evidentiary hearing, but the lower court erroneously

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7 The lower court did not specify the particular source of "hearsay" as either Dr. Gunst's interview of Mr. Armstrong or her review of the affidavits and videotapes of Danny Miller, Memry Weir and Menda Golding obtained in Jamaica. Whatever the case, both interviews with defendants and review of such collateral materials are common sources of information for expert opinion and the lower court's objection is misplaced.

refused to consider it to Mr. Armstrong's prejudice. All three witnesses are Jamaican nationals and are resident in Jamaica. None of them held an entry visa that would allow them to travel to the United States to testify. Following the grant of the evidentiary hearing, Mr. Armstrong filed a motion to accept out of state witness depositions in lieu of live testimony regarding these witnesses (PCR. Supp 244). However, the State objected to such depositions on several grounds. First, it complained that with depositions in Jamaica would "The State has no way of ensuring these people are in fact who they say they are" (PCR.1127) Next, the State complained on the purported ground that to conduct such depositions would constitute the unlawful practice of law in Jamaica, and that the State could not therefore participate in any such proceeding. The lower court, having initially granted the depositions in lieu of live testimony then ruled in the State's favor and required that the witnesses be brought to the United States (PCR. 1131). The lower court's ruling was erroneous on several points. First of all, the practice of law in Jamaica is limited to the litigation of cases arising under the jurisdiction if Jamaica. Mr. Armstrong's case is a Florida case with no litigation in the Jamaican courts. The fact that several family members are Jamaican citizens and residents is incidental to the litigation and does not render it subject to Jamaican law. A deposition is essentially no more than a sworn statement. No disadvantage would accrue to these witnesses from

being deposed. No Jamaican process would be required to ensure the attendance of the Jamaican witnesses; their willingness to testify is evident from their affidavits and videotaped statements. Additionally, the State's concern about identification is misplaced. Just as the witness affidavits were properly notarized by a local Commissioner for Oaths, the same process could equally well have been utilized to swear in the witnesses at a deposition.

Furthermore, assuming arguendo that the State's position as to unauthorized practice of law in Jamaica is correct, the State's squeamishness about conducting depositions overseas could easily have been overcome by the use of counsel admitted to practice law in Jamaica. Given the State's position, there was nothing to stop it from hiring local solicitors or barristers to act for it in conducting such depositions. Jamaica's legal system is closely related to and based on that extant in England and Wales, under which legal claims are processed through adversarial testing. Any competent criminal trial lawyer in Jamaica would easily have been able to act for the State in a deposition of the type requested by Mr. Armstrong.

Notwithstanding the lower court's denial of Mr. Armstrong's motion for depositions in Jamaica, Mr. Armstrong obtained sworn videotaped statements and affidavits from the three Jamaican witnesses. Mr. Armstrong also made strenuous efforts to assist Mr. Miller and Ms. Weir in obtaining the necessary documents that would enable them to

travel to the United States to testify. However, the United States Embassy in Kingston denied both requests. See PCR. 1433-34. The denial of the necessary travel visas showed conclusively that the Jamaican sworn statements should have been admitted, yet the lower court refused to allow them as substantial competent evidence.[8]

The government cannot both refuse to travel to Jamaica for depositions and then refuse to grant visas for the witnesses to travel to the United States. All of these events were outside Mr. Armstrong's control and interfered with his ability to subpoena witnesses on his behalf. See, Fla. R. Crim. Rule 3.850. The court's refusal to consider the statements deprived Mr. Armstrong of the opportunity to present further credible evidence of the true extent of his learning disability, his seizure disorder and poor health, his childhood traumas, his Pica, and the abject poverty, abuse and neglect and the police brutality that he endured in Jamaica.

In addition to his failure to investigate his client's background, trial counsel failed to present available mental health evidence that showed Mr. Armstrong to have bifrontal and temporal lobe damage, as well as Post Traumatic Stress Disorder (PTSD) arising from his traumatic early life in Jamaica. In fact counsel failed to present **any** mental health testimony to the jury, despite the fact that he had

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8 The lower court allowed the videotapes and affidavits to be admitted as materials relied on by the expert witnesses only.

retained a competent neuropsychologist, Dr. Antoinette Appel.

At the evidentiary hearing, Dr. Appel testified that although she had been retained as a confidential expert to assist trial counsel in all areas pertaining to Mr. Armstrong's defense, she was never asked to do any mitigation work at all, but merely testified at his competency hearing:

> [by Ms. Backhus] Did Mr. Malavenda ask you to do any mitigation investigation or evaluation at all?
>
> [by Dr. Appel] None whatsoever.
>
> [Q.] Can you explain to us what the difference is between an evaluation for competency and an evaluation for mitigation?
>
> [A.] Sure. Competency is always a narrow issue and has to do with whether, on a particular day, an individual has the current capacity to cooperate with counsel in the preparation and trial of his case and it's an issue that can be visited repeatedly throughout the proceeding.
>
> So, it's a narrow issue.

(PCR. 1195).

Dr. Appel also indicated her willingness to develop mitigation evidence, based on her neuropsychological evaluation of Mr. Armstrong, but stated that trial counsel only gave her minimal records and other information from which to develop mitigation:

> [Q.] What kind of information did Mr. Malavenda provide to you at the time that you were evaluating Mr. Armstrong?
>
> [A.] <u>The only information Mr. Malavenda provided to me may have been the Mass. General records</u>.

> He was, when Mr. Armstrong came to the country, living in Boston.

(PCR. 1196)(emphasis added).

Dr. Appel testified that she was able to supplement the information provided her through some investigation of her own, but that she was not provided with all of the information she required for a full mental health mitigation investigation during the pendency of Mr. Armstrong's capital trial, despite repeatedly asking trial counsel:

> [Q.] Did you ask Mr. Malavenda to provide additional information to you?
>
> [A.] I have always asked for everything.
>
> [Q.] And did you ask him tell him that you needed more background information?
>
> [A.] I not only told him I needed it, I got involved in some of it.
>
> ***
>
> [Q.] So you did a background investigation on your own?
>
> [A.] I tried to find some medical records, that's correct.
>
> [Q.] And what did you find?
>
> [Q.] At the time, I did find that he had a number of car accidents. I knew about the car accidents. I knew about the documented neurocognitive defects at Mass. General.
>
> I knew of the potential of an intercranial hemorrhage. I knew about the 1989 car accident. I knew about the '85 and '87 accidents.
>
> [Q.] Did you speak with any family members?

> [A.] I spoke with his mother, I think that's correct. And, as I said, briefly with his former attorney.

(PCR 1197-98).

There were many areas of investigation that Dr. Appel indicated should have been explored that Mr. Malavenda failed to follow up. One vital area was the investigation of Mr. Armstrong's childhood in Jamaica, which Mr. Malavenda would neither consider himself nor permit Dr. Appel to do:

> [by Dr. Appel] Well, being that, I had the following discussion with Mr. Malavenda, all right? I suggested that he go to Jamaica at the time. He didn't want to.
>
> I offered to go. I mean you would be a fool not to take the trip.

(PCR.1235)(emphasis added).

Even despite Dr. Appel's inability to obtain all the documents and other information she needed for a comprehensive mental health mitigation evaluation at the time of Mr. Armstrong's trial, she was still able to generate valuable mitigation, which Mr. Malavenda unreasonably failed to present to the jury:

> [Q.] Even if [Mr. Malavenda] hadn't asked you to do any additional investigation or hadn't provided you with any additional materials, could you have testified at the penalty phase?
>
> [A.] Yes.
>
> [Q.] About mitigating evidence?
>
> [A.] Yes.

> [Q.] What type of mitigating evidence could you have testified about just from what he had given you?
>
> [A.] I could testify to the birth trauma. The intercranial hematoma. The two motor vehicle accidents that I knew about. And something about the family. As well as the neurocognitive evidence that derived from both the Mass. General's evaluation and my own evaluation.

(PCR.1207).

Dr. Appel's findings of neurocognitive defects were borne out by her neuropsychological tests of Mr. Armstrong.

> Mr. Armstrong has a striking deficit in the ability to form conceptual categories to characterize slightly ambiguous stimuli, even when the stimuli are non verbal...and he has an even more striking deficit in his ability to both track and shift concepts.

(Report of Dr. Appel at 8).

Mr. Malavenda claimed that his decision not to put on Dr. Appel was strategic. He attempted two justifications; firstly that Dr. Appel's testimony would open the door to the State rebutting her testimony with the Court appointed competency experts, and secondly that she would be "impossible to control", she was a "loose cannon" and a "frustrated lawyer". Neither justification amounts to a valid strategy. As to the fear of rebuttal by the competency experts, Dr. Berken, Dr. Kaprowski and Dr. Spencer, Mr. Malavenda's decision was based on ignorance of fundamental mental health principles. As Dr. Appel testified, the scope of a competency evaluation is vastly

different from that of a mitigation evaluation.

> ...Competency is always a narrow issue. and has to do with whether, on a particular day, an individual has the current capacity to cooperate with counsel in the preparation and trial of his case and it's an issue that can be visited repeatedly throughout the proceeding.

(PCR.1195).

This is in marked contrast to an evaluation to determine mental health mitigation in a capital case. Thus, the scope of the competency experts' evaluations was distinctly different from that of Dr. Appel, and their evaluations were by their nature, both narrow and superficial.

Furthermore, given that "this guy [Lance Armstrong] has a history of brain injury", Dr. Appel was "the only neuropsychologist in the batch" (PCR. 1201). Trial counsel erroneously believed mental health experts are fungible, and demonstrates his ignorance of the differences between the work done by psychiatrists, psychologists and neuropsychologist.

Dr. Appel could have testified to valuable mental health mitigation, based solely on her testing and the materials she herself managed to gather. However, had she been provided with easily available records, interviews and other materials relating to Mr. Armstrong's life, she would have been able to testify to a wealth of additional mitigation, including statutory mental health mitigating

circumstances. The information that would have supported such findings was easily available, but, without strategy or tactic, Mr. Malavenda unreasonably failed to retrieve it.

Dr. Appel stated that, having reviewed affidavits from family members, additional hospital records and other documents she could have testified to several additional areas of mitigation. The first of these areas, she testified was Mr. Armstrong's inability to conform his conduct according to the law, which Dr. Appel based on ten further areas, namely: the birth trauma; "the intercranial bleed; the near drowning and loss of consciousness at age 9; the head injuries at age 11, and 16; motor vehicle accidents at age 22, 24, and 26; and the head banging and seizures for which Mr. Armstrong was treated with Phenobarbital and Dilantin (PCR. 1209). Dr. Appel further testified that the head injury in 1989, when Mr. Armstrong was 26, was especially significant in relation to the date of the crime because of the effect of hypermetabolism which typically follows such a closed head injury, and which, without proper medical intervention, exacerbates the brain dysfunction due to the residual effects of the recent injury. According to Dr. Appel:

> In this particular case it's important to know whether or not residual problems from the November 1989 motor vehicle accident because the date of the charged event in the particular accident, <u>he would have been smack, dab in the middle of the period of hypermetabolism, so his brain would not have functioned normally</u>.

(PCR. 1211)(emphasis added). Dr. Appel further explained how in a stressful situation, a person with hypermetabolism due to brain injury would be affected:

> Memory is bad. The ability to respond, to respond to emergency situations, be it- never mind, a criminal event, a fire alarm going off, okay? Somebody is pulling out in front of your car. There's a period of time these folks shouldn't be driving a car. So those kinds of things, operating dangerous machinery.They wouldn't know what to do with it.

(PCR. 1213-14). Dr. Appel noted that the hypermetabolism affects the communication between temporal and frontal lobe and thus the effective integration of those parts of the brain since:

> The frontal lobe is responsible for reflexes, learning from feedback, abstracts, categorization, those kinds of issues. When we talk about the brain, most people really mean what happens up front.

(PCR 1214).

In addition to the closed head injuries and other incidents of unconsciousness, Dr. Appel found etiologies for Mr. Armstrong's neurocognitive deficits in the toxicity he was exposed to as a child through eating lead paint chips, eating food cooked in a paint cans, and eating dirt and chicken feces (PCR.1215). As she explained, none of this information was made available to her at the time of her original evaluation of Mr.Armstrong.

The third factor Dr. Appel would have addressed was the childhood and adolescent traumas experienced by Mr. Armstrong, resulting from,

inter alia, his loss of fingers, the physical abuse he suffered at the hands of his stepfather, being forced to guard a ballot box in the 1980 election, and his abuse at the hands of the Jamaican police (PCR. 1216). In addition. Dr. Appel considered the family mitigation that his mother was very young when he was born, that she reputedly tried to drown him in the river, and that he was abused by his stepfather.

The additional evidence reviewed by Dr. Appel provided additional support for her finding of significant neurocognitive deficits relating to both frontal and temporal lobe function.. It also provided support for her finding that Mr. Armstrong was under extreme mental or emotional disturbance at the time of the crime, in addition to his inability to conform his conduct according to the law at that time. See PCR. 1221. Dr. Appel would have been willing to testify to these factors, had she received the additional materials, but in any event. was never called to testify at Mr. Armstrong's penalty phase. The other competency experts did not conduct the tests that Dr. Appel did, they did not review the materials that she did, but merely conducted a cursory examination as to Mr. Armstrong's current state of competency. Counsel's "strategy" to preclude any "rebuttal" of Dr. Appel's testimony was based solely on ignorance and therefore constitutes no strategy. See Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), on the failure to properly investigate or prepare. See Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365

(1986). Mr. Malavenda's said he did not use Dr. Appel at trial because she was "hard to control" and a "loose cannon.". He complained that Dr. Appel "wanted to tell me how to run the show" (T.33) and that she was more interested in Miranda than competency. However, Mr. Malavenda ignored the fact that Dr. Appel's testimony at penalty phase would be limited to areas of mitigation, so however controversial he felt her views of Mr. Armstrong's Miranda and competency issues, they simply would not have been an issue at penalty phase.

Mr. Malavenda's view of Dr. Appel as "wanting to run the show", reflects more his own discomfort with mental heath principles than any deficiency on the part of Dr. Appel. As Hilliard Moldof testified, Dr. Appel's reputation in the Broward criminal defense community in 1990 and 1991 was strong.

> My opinion of her reputation is that she's a strong witness would put her on the witness stand, if I could call her as a witness. I would think she's hard to impeach.

(T.14, 3/22/01).

The lower court found that counsel's strategy in not calling Dr. Appel was reasonable because at the evidentiary hearing she was "abrasive" and might have "alienated the jury" (PCR. 801). However, the lower court ignores the fact that Dr. Appel's findings could easily have been replicated and presented to the jury by an expert or experts more personally pleasing to Mr. Malavenda, had he only pursued this avenue. As Dr. Appel had testified, her findings of neurocognitive

defects were backed up by reports from the Massachusetts General Hospital, and also from subsequent tests of Mr. Armstrong's brain functioning, conducted by Dr. Terry Goldberg, a neuropsychologist, and Dr. Thomas Hyde, a behavioral neurologist who testified at the evidentiary hearing. Mr. Malavenda's complaint about Dr. Appel was not about the substance of her testimony but her manner. He failed to explain if he disagreed with her manner why he did not request another expert to testify to those findings.

Dr. Goldberg testified in detail as to the neuropsychological testing he had performed on Mr. Armstrong and the impairments he found in Mr. Armstrong's brain functioning. In particular, he found deficits in Mr. Armstrong's ability to inhibit impulses, executive functioning, planning, judgment and decision making. Regarding impulse control, Goldberg described Mr. Armstrong's performance on the Stroop test, which requires the patient to inhibit over learned responses:

> [by Ms. Day] How did he do on this?
>
> [by Dr. Goldberg] Not too well. His performance was, I would suggest, at least in the mildly impaired range.
>
> [Q.] What does that tell you about his ability?
>
> [A.] <u>It says he may have difficulty inhibiting impulses, especially when you need to put the behavioral brakes in a situation, he may not be able to do that very well. When you have to stop yourself doing the most routine kind of thing or things that involve sort of more basic responses, he may have trouble with that</u>.

> [Q.] Trouble overriding a basic response to an external stimulus?
>
> [A.] Yes.
>
> [Q.] Is that trouble likely to be more evident in a stressful situation?
>
> [A.] I would say yes.

(T. 139)(emphasis added).

Dr. Goldberg tested Mr. Armstrong's executive functioning which he explained is:

> [by Dr. Goldberg] . . t h e a b i l i t y t o simultaneously remember and manipulate information. It's the ability to do multi tasking in the sense of allocating resources to several tasks that a person is doing at once. It has to do also with the ability to come, generate hypotheses or plan and systematically test them and the ability to integrate feedback to refine performance.

(T.142, 3/22/01).

Dr. Goldberg administered two tests relating to executive functioning. On the working memory test "he did very badly", (T.143, 3/22/001), and on the Wisconsin Card Sort Test Mr. Armstrong's performance was "severely compromised, severely impaired" (T.143, 3/22/01). Overall, Dr. Goldberg found that regarding Mr. Armstrong's executive functioning,

> [A.] It says he has difficulty planning, testing out plans, and developing a reasonable strategy, especially in non routine situations and certainly, this test is not routine.

***

> [Q.] Does [the Wisconsin Card Sort Test] say anything about the person's judgment?
>
> [A.] It would, in the sense the person might not think of all possible alternative solutions to a given problem; and as a result pick the wrong solution, which the person next to them would say, hey, bad judgment.
>
> [Q.] It affects decision making?
>
> [A.] Correct.
>
> [Q.] Is it correct that he might not perceive all the possible solutions to a particular problem?
>
> [A.] Yes.
>
> [Q.] What about impulse control?
>
> [A.] It may also reflect that in the sense that the person may respond in a very routine way may make responses rather than stepping back and reflecting on what they are doing, and saying , hey, I better come up with something new because this is no longer working.

(T.145)(emphasis added). Dr. Goldberg identified the impairments demonstrated by Mr. Armstrong on the battery of tests as showing impaired frontal lobe functioning. As he explained:

> [by Dr. Goldberg] One of the purposes of the frontal lobes is to put behavioral brakes on routine overlearned responses, too quick or impulsive responses and say maybe there is a better way to deal with this situation and generate some other hypotheses, other options, test them out mentally and try to pick the best one. In a stressful situation, which may by its very nature can be non routine, this would be what you need frontal lobe functioning the most in a sense.

> [Q.] This is [when] the frontal lobe function deserts you?
>
> [A.] Could desert you or never be there in the first place.

(T.145). Dr. Goldberg found, based on the results of his complete neuropsychological battery, that Mr. Armstrong suffers from frontal lobe brain damage which significantly impacts his ability to function:

> [by Dr. Goldberg] I think he displayed fairly consistent evidence for problems in cognitive control over lower level information processing and also classic problems in what is called executive function and complex verbal, with complex working memory.
>
> [Q.] Is that consistent with frontal lobe dysfunction?
>
> [A.] Yes.

(T. 146).

Dr. Goldberg's neuropsychological test results were completely consistent with a similar battery performed by Dr. Appel in her pretrial evaluation of Mr. Armstrong, as both Dr. Goldberg and Dr. Appel testified:

> [by Dr. Appel] Whether you talk about my evaluation in 1991, when you talk about a current evaluation that was done in preparation for this hearing, okay, by the folks at N.I.H.,[9] you get three separate groups who do not know each other

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9 The *curricula vitae* of Dr. Hyde, the behavioral neurologist, and Dr. Goldberg, the neuropsychologist, which are in evidence, reflect that both work at the National Institute Of Mental Health, Clinical Brain Disorders Unit.

> who have not talked, presenting exactly the same kinds of information.

(T.69, 3/22/01).

> [by Dr. Goldberg] There is a prior report from Dr. Appel whose findings were very similar to my own in terms of the neuropsychological results of tests like trail making, Wisconsin Card Sort and the [Stroop].

(T. 150).

Similarly the findings of Dr. Thomas Hyde, a medical doctor and behavioral neurologist who conducted a neurological examination of Mr.Armstrong, indicate Mr. Armstrong's neurocognitive deficits. Dr. Hyde explained the scope of his evaluation:

> My evaluation involves records review with what records I'm provided with through your office, meeting with Mr.Armstrong, interviewing him, testing him neurologically, putting him through a detailed behavioral neurologic/neuropsychiatry evaluation. And I also had the opportunity, very recently to interview his mother to get early developmental history and birth history. Then I try to synthesize that information together.

(T.171). As a result of his complete evaluation, Dr. Hyde found that Mr. Armstrong:

> ...had some memory problems. He had poor complex motor sequencing of the hands, bilaterally. And he had a primitive reflex, or frontal release sign, something called a globellar reflex.

***

> He had deficits in his mathematical skills, suggestion to mean concert with the other elements of his history, that he had developmental brain dysfunction. His memory deficits suggested the temporal lobe the memory parts of the brain were not working up to snuff. These could have been developmental in origin, from either around the time of birth or as a child, or acquired through head injury, substance abuse, toxic substances or some combination of factors which is usually the case in these individuals.
>
> Finally, the complex motor sequencing deficits and the frontal release signs specifically refer to frontal lobe dysfunction, the executive part of the brain. Individuals with frontal lobe dysfunction frequently show these types of subtle deficits on neurological testing. If you don't test for it, you don't pick it up.

(T.175)(emphasis added).

Dr. Hyde detailed the environmental factors in Mr. Armstrong's life that supported his neurological findings:

> .. a significant number of closed head injuries strong suggestion in evidence of a seizure disorder in childhood,and a strong history of exposure to toxic substances through Pica, eating of dirt and organic--inorganic matter around the house. Eating food cooked in paint cans. And those are the main toxic factors that may have adversely impacted on his brain development and function.

(T.176). Dr. Hyde found, as a result of his complete neurological evaluation and review of collateral information, that Mr. Armstrong suffers from temporal and frontal lobe dysfunction. He explained

that:

> [The frontal lobe is] the most important part of the brain for regulating our behavior. It acts as the reasoning center of the brain, conscience of the brain. It is the part of the brain that regulates our responses to situations, it is the executive planning, insight, judgment, the abstraction and reasoning part of the brain. It is particularly important in an individual to override emotional responses to stressful situations.
>
> The individuals with frontal lobe dysfunction, depending on the degree of frontal lobe dysfunction, may range from minimally competent and minimally capable of carrying out aspects of life except for under stressful circumstances to people totally incapacitated in all aspects of their life, depending on the degree of functioning.
>
> ***
>
> [Mr. Armstrong's] judgment, reasoning and insight would be absent in stressful situations. He would respond on a very emotional level that we call more vegetative response, flee or fight reflex. When he's confronted with a threatening situation, he would either fight back immediately, try to flee from it or some combination of these, oftentimes in an impulsive fashion, rather than showing great thought and planning in the situation.

13.(T.185).

In combination with Mr. Armstrong's temporal lobe damage, the effect of frontal lobe damage would be to make him "incapable of making proper connections between past experiences and present circumstances and often make the same mistakes over and over again" (T.186). Like

Dr. Appel, Dr. Hyde was of the opinion that due to his brain dysfunction, Mr. Armstrong was unable to conform his conduct according to the law at the time of crime and that he was under extreme mental disturbance at the time of the crime (T.190).

In addition to the neuroscientists' consistent opinions as to Mr. Armstrong's frontal and temporal lobe dysfunction and its effect on his functioning at the time of the crime, Mr. Armstrong presented the testimony of Dr. Richard Dudley, a psychiatrist.
Dr. Dudley opined as to the effects of Mr. Armstrong's early life traumas on his functioning:

> The conclusions were that he had multiple neuropsychiatric difficulties, that included cognitive, long standing cognitive difficulties. That he also had chronic dysthymia, chronic depression.
>
> That for years he had suffered from the kind of symptoms that are seen in traumatized children- that are these seen in traumatized children that suffer from post- traumatic stress disorder.

(PCR 1261, emphasis added).

Dr. Dudley cited the factors that affected Mr. Armstrong as "significant neglect as well as significant abuse", T.1263, amplified by the fact that his cognitive difficulties were not recognized and he was "punished for not being able to do things, respond as quickly as the other kids" (PCR.1264). Dr. Dudley opined that as a result of his review of the records supplied to him, that Mr. Armstrong's cognitive defects were "long standing" (PCR.1265), and dated from early childhood

although augmented by the "severe" physical abuse meted out to Mr. Armstrong.

Dr. Dudley noted the effect of Mr. Armstrong's arrest and detention by the Jamaican police:

> That the characterization of one, that it involved an arrest and torture at the hands of the police, was significant and that it added to a pre-existing fear of police that was already in place and that he describes when you meet with him.
>
> As a result of some of the experiences that he's had, experienced, and even before that, the combination of these traumas certainly were significant contributors to this kind of post traumatic stress disorder type of symptoms that he exhibited; specifically directed towards the police.
>
> ***
>
> ...seeing the abuse and murders by police, being pulled into that he was an election guard, then having his life threatened and things like that: all of that, I think adds to trauma.
>
> Also what's significant during the time in Jamaica was his own reports as well as his family's reports of how frightened and hyper-vigilant he was.

(PCR.1266)(emphasis added).

Dr. Dudley explained how Mr. Armstrong coped with his childhood traumas in adulthood by learning "basic, concrete skills", (PCR.1268), and by getting involved in relationships, but that when these things

were taken away:

> The PTSD like symptoms come and go depending on what kind of circumstances you find yourself in. What I mean by that is there's a certain amount of, you know,kind of part of the package of symptoms, avoidance. Or you can continue to orchestrate your life in such a way so that you avoid reminders of difficulties that you have had, you can be somewhat [asymptomatic]. Then when you're threatened again, or exposed to things that remind you, it plagues you and you become hyper-vigilant, impulsive jumpy. So he had that kind of happening over the course of his life.
>
> I guess the other things, I guess is that these interact with each other is that when under stress from either the depression or the symptoms of the traumatization, then his cognitive difficulties are even more limiting than they normally are, because they are influenced by other stressors.

14.(PCR.1269-1270)

As a result of his findings of neurocognitive deficits, chronic depression, and the results of Mr. Armstrong's childhood traumas, Dr. Dudley opined that Mr.Armstrong was under extreme emotional disturbance at the time of the crime and that his ability to conform his conduct according to the law was significantly impaired. (PCR.1274).

Regarding the mental health testimony at the evidentiary hearing, the lower court appeared to o misunderstand completely the nature of the cognitive deficits suffered by Mr. Armstrong. The court found that "there was no objective confirmation" of Dr. Appel's finding of brain damage". In coming to this conclusion, the lower court disregarded the

testimony of Dr. Thomas Hyde, who conducted neurological testing, and Dr. Terry Goldberg, whose independent neuropsychological testing accurately reflected Dr. Appel's results. The lower court confused the term "objective test" with screening or imaging techniques. The neurologic testing performed by Dr. Hyde and the neuropsychological testing performed by Dr. Goldberg are entirely objective. The lower court's dismissal of mental health experts' testimony is based on the fact that Mr. Armstrong showed no abnormalities on either CAT scan or EEG. Both Dr. Goldberg and Dr. Hyde testified that a normal EEG would rule out neither brain damage or a seizure disorder. The State presented nothing to rebut this testimony. The fact remains that crucial evidence went uninvestigated due to trial counsel's ignorance of mental health principles as they apply to Eighth Amendment jurisprudence.

As with the non-statutory mitigation developed by a thorough investigation of Mr. Armstrong's appalling family history, this easily available statutory and non-statutory mental health mitigation is by no means "negligible". Trial counsel's failure to investigate and present this evidence cannot be attributed to strategy or tactic. His failures resulted in "negligible" non-statutory mitigation and no statutory mitigation being presented to the jury. Mr. Armstrong has demonstrated that his trial counsel rendered deficient performance pursuant to Strickland. The standard is not that Mr. Malavenda put on

enough evidence to avoid an ineffective assistance of counsel claim, the standard is whether his decisions were reasonable in light of the mitigation that was available at the time of trial. Clearly, trial counsel missed the most compelling aspects that could have "humanized" his client. Instead, he let the jury believe there was no reason for Mr. Armstrong to react as he did. This is deficient performance under the law.

b. Prejudice.

In addition to deficient performance, Mr. Armstrong has demonstrated prejudice."[T]here is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. In Mr. Armstrong's case, the prejudice is apparent. Mr. Armstrong's sentencing jury was entitled to know the reality of Mr. Armstrong's background, as it "might well have influenced the jury's appraisal of his moral culpability." Williams, 120 S. Ct. at 1515. "Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990) (citing Lockett v. Ohio, 438 U.S. 586 (1978)). Moreover, "[m]itigating evidence ... may alter the jury's selection of penalty, even if it does not undermine or rebut the

prosecution's death eligibility case." Williams, 120 S.Ct. at 1516.

Even without this evidence, the jury returned a recommendation for death by a vote of nine (9) to three (3) (R. 1953). Had only three (3) more jurors voted for life, Mr. Armstrong would have received a life sentence. If defense counsel had presented the jury with all of the available mitigating testimony, the recommendation would have been to impose a life sentence.

In Mr. Armstrong's case, "counsel's error[s] had a pervasive effect, altering the entire evidentiary picture at [the penalty phase]." Coss v. Lackwanna County District Attorney, 204 F. 3d 453, 463 (3d Cir. 2000). That the jury and judge received a wholly inaccurate portrayal of Mr. Armstrong's life is established by a comparison of the trial court's sentencing order with what is now known.

The fact that some mitigation was presented at Mr. Armstrong's penalty phase does not preclude a finding of prejudice and ineffective assistance of trial counsel. See e.g. in State v. Lara, 581 So. 2d 1288 (Fla. 1991), in which this Court affirmed a Dade Circuit Court's grant of penalty phase relief to a capital defendant where the defendant presented at an evidentiary hearing evidence that was "quantitatively and qualitatively superior to that presented by defense counsel at the penalty phase." Id. at 1290. See also Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995), (penalty phase relief granted to

a capital defendant who had been convicted of a strangulation murder and received a unanimous jury recommendation for death.) There, as in Mr. Armstrong's case, this Court noted that at the penalty phase, trial counsel did present "some evidence in mitigation at sentencing" which was **"quite limited."** Id. at 110. n.7. Nonetheless, the Court granted relief, finding that "[a]t his 3.850 hearing, Hildwin presented an abundance of mitigating evidence which his trial counsel could have presented at sentencing." Id. at 110. This evidence included two (2) mental health experts, who testified to the existence of mental health mitigating factors, as well as a number of nonstatutory mitigating factors. Id.

In a special concurrence, Justice Anstead noted that the postconviction judge, who was not the original sentencing judge, struggled with the issue of prejudice precisely because he was not the original sentencing judge. Id. at 111-12 (Anstead, J., specially concurring, in which Kogan, C.J., and Shaw, J., joined). Justice Anstead noted that the postconviction judge was hesitant to grant relief, even though he felt that no adversarial testing had occurred, because he believed that the trial judge would have imposed the death penalty notwithstanding the compelling additional mitigation. Id. The same argument is equally apposite to Mr. Armstrong's case, in which the trial judge and the postconviction judge were not the same. The evidence presented at Mr. Armstrong's hearing is identical to that

which established prejudice in these cases, and Mr. Armstrong is similarly entitled to relief under the standards set forth in Strickland and Williams.

ARGUMENT II

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. ARMSTRONG'S GUILT PHASE CLAIMS

A. INTRODUCTION

A trial court has only two options when presented with a Rule 3.850 motion: "either grant an evidentiary hearing or alternatively attach to any order denying relief adequate portions of the record affirmatively demonstrating that appellant is not entitled to relief on the claims asserted", Witherspoon v. State 590 So.2d 1138 (4th DCA 1992). A trial court may not summarily deny without "attach[ing] portions of the files and records conclusively showing the appellant is entitled to no relief", Rodriguez v. State, 592 So.2d 1261 (2nd DCA 1992). See also Brown v. State, 596 So.2d 1025, 1028 (Fla.1992).

The law strongly favors full evidentiary hearings in capital post conviction cases, especially where a claim is grounded in factual as opposed to legal matters. "Because the trial court denied the motion without an evidentiary hearing and without attaching any portion of the record to the order of denial, our review is limited to determining whether the motion conclusively shows whether [Mr. Armstrong] is entitled to no relief." Gorham v. State, 521 So.2d 1067, 1069 (Fla;

1988). See also LeDuc v. State, 415 So. 2d 721, 722 (Fla. 1982).[10]

Some fact based claims in post conviction litigation can only be considered after an evidentiary hearing, Heiney v. State, 558 So.2d 398, 400 (Fla. 1990). "The need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. Where a determination has been made that a defendant is entitled to such an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process and could never be harmless." Holland v. State, 503 So.2d 1250, 1252-3) Fla. 1087). Accepting the allegations . . .at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing", Lightbourne v. Dugger, 549 So.2d 1364, 1365 (Fla 1989).

Mr. Armstrong has pleaded substantial factual allegations relating to the guilt phase of his capital trial. These include ineffective assistance of counsel, Brady and Ake violations which go to the fundamental fairness of his conviction. "Because we cannot say that the record conclusively shows [Mr. Rodriguez] is entitled to no relief, we must remand this issue to the trial court for an evidentiary hearing", Demps v. State, 416 So.2d 808, (Fla. 1982).

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10 Furthermore, under the latest version of Fla. R. Crim. P. 3.850 evidentiary hearings are mandated for all factually based claims. While the new version of the rule is not strictly applicable to the instant cause since his Rule 3.850 motion had been filed before October 1, 2001, the effective date of the rule, the intent behind the new rule is equally apposite to Mr. Armstrong's case.

Under Rule 3.850 and this Court's well settled precedent, a post conviction movant is entitled to evidentiary hearing unless the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief", Fla R. Crim. P. 3.850. See also Lemon v. State, 498 So. 2d 923 (Fla. 1986); Hoffman v. State, 613 So.2d 1250, (Fla. 1987); O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984); Gorham. Mr. Armstrong has alleged facts relating to the guilt phase, which, if proven, would entitle him to relief. Furthermore, the files and records in this case do not conclusively show that he is entitled to no relief.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

a. Failure to challenge in court identification

Counsel failed to object to unreliable identification of Mr. Armstrong. State witness Bobby Norton stated that he was unsure whether he could identify Mr. Armstrong in court (R. 620). Mr. Norton did not see Mr. Armstrong's face at Church's the night of the incident (R. 620). Mr. Norton identified Mr. Armstrong in court with counsel for the State standing directly behind Mr. Armstrong (R. 621). Defense counsel failed to adequately challenge the reliability of the in-court identification of Mr.Armstrong by Bobby Norton.

Notwithstanding the in court identification of Officer Sallustio, counsel's failure is not refuted by the record, even assuming that Norton had seen Mr. Armstrong earlier that evening with the night

manager. The fact remains that Mr. Norton stated shortly after the incident that he was “unsure” whether he would be able to identify Mr. Armstrong again and that he did not see Armstrong's face that night. All of these inconsistencies should have raised a red flag to defense counsel that there was something wrong with Mr. Norton's later positive identification of Mr. Armstrong. Reasonably effective counsel would have challenged the reliability of his identification.

Had defense counsel challenged the reliability of Bobby Nortion's identification, impeachment evidence would have been available to present to the jury. In addition, Mr. Malavenda's concession that Mr. Armstrong was present at the crime scene does not concede that the witness' identifications were accurate or true.[11] Nor did it vitiate his duty to challenge the in-court identifications of the witnesses. This is obviously so, because he did challenge some of the witness' identifications, but not Mr. Norton's. There is no explanation in the record for why Mr. Malavenda challenged some witness identifications and not others. An evidentiary hearing is required

b. Failure to invoke the Rule of Sequestration

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11 The State suggests at page 14 that Mr. Armstrong had failed to present an argument that he was not present at the crime scene. This argument was not presented because Mr. Armstrong is not required to make such an argument to preserve his claim that Mr. Malavenda improperly failed to challenge the in-court identification of Mr. Norton. Just because Mr. Malavenda conceded Mr. Armstrong’s presence at the scene does not mean that the witness’s recollections of the events or identification of the suspects were accurate. They are two separate issues.

Counsel was ineffective in failing to invoke the rule of sequestration until after the eyewitnesses from Church's testified (R. 661). This gave state witnesses the opportunity to listen to the questions and answers and discuss the testimony with each other prior to facing the similar questions themselves. Counsel failed to object to witnesses identifying Mr. Armstrong's codefendant, Wayne Coleman (R. 1433). Mr. Coleman was tried separately. This identification was irrelevant and confusing.

c. Failure to request a Frye hearing

Counsel was ineffective in failing to request a hearing on the question of whether the jury should have heard the DNA testimony. Whether the jury is to hear certain scientific testimony is a preliminary question about the competence of the evidence and is for the judge alone. See, Ramirez v. State, 651 So. 2d 1164 (Fla. 1995). Counsel should have been aware not only of Florida's evidence rules providing for such hearings; but also, he should have known that in Florida the Frye test is utilized for determining whether the jury can hear evidence of novel scientific principles or tests. See, Stokes v. State, 548 So. 2d 188 (Fla. 1989)(applying Frye test to posthypnotic testimony); Bundy v. State, 471 So. 2d 9 (Fla. 1985)(applying Frye test to posthypnotic testimony).

The question addressed at a Frye hearing is whether the scientific principle or method is "sufficiently established to have gained general

acceptance in the particular field in which it belongs." 651 So. 2d at 1167, *citing* Frye v. United States, 293 F. 1013, 1014 (D.C.Cir. 1923). Reliability of the principle or method is the primary concern of this test. Ramirez, 651 So. 2d at 1167. As to DNA evidence, both the techniques leading to the creation of and comparisons of autoradiograms and the techniques for calculating and arriving at population frequencies must satisfy the Frye test. Murray v. State, 692 So. 2d 157 (Fla. 1997); Brim v. State, 695 So. 2d 268. (Fla. 1997). Because counsel failed to request such a hearing, the jury heard unreliable evidence.

There was no adequate showing that DNA testing or calculations met the Frye test. Although the State proffered the testimony of Dr. Martin Tracey prior to presenting his testimony to the court, and counsel conducted voir dire on the qualifications and testing performed by George Duncan, these did not constitute a proper Frye hearing. A Frye hearing is an adversarial hearing at which the proponent of the evidence has the burden of proving the reliability of the evidence by a preponderance of the evidence. Ramirez, 651 So. 2d at 1168. This did not occur.

During their testimony, the State's DNA witnesses testified that certain aspects of the testing and population frequency calculations were generally accepted by the scientific community without offering evidence to support these statements. See, Ramos v. State, 496 So. 2d

121 (Fla. 1996)(finding that testimony of dog-handler and police officer insufficient, alone, to establish reliability of dog scent determination lineups); Crawford v. Shivashankar, 474 So. 2d 873 (Fla. 1st DCA 1985)(finding that a court is not required to rely upon statements by expert himself that thermography was generally accepted in the relevant scientific community). Counsel did not challenge the use of the Broward Sheriff's Office's data base.

Dr. Tracey testified that the Florida Department of Law Enforcement, the Royal Canadian Mounted Police and others decided to collectively set up a data base (R. 1194-95), but did not testify that the database is generally accepted in the scientific community. The State offered no evidence to show that it is so accepted.

Mr. Duncan testified to the source of samples that make up the database and to the size of the database (R. 1253-54). However, there was no showing that the autoradiograms that make up this database were reliably produced, or that population substructuring would not affect the results. Nor was there an explanation of how 200 or 270 samples is sufficient to arrive at statistically reliable frequency calculations.

No adequate showing was made that the Broward Sheriff's Office uses a reliable protocol. The State called Dr. Tracey to review the BSO protocol and Mr. Duncan's work on Mr. Armstrong's case. However, Dr. Tracey was not qualified to do this. He testified that he reviewed Mr. Duncan's autoradiograms by performing a visual inspection (R.

1195). Because he does not work in a forensic setting, he does not regularly use computers to compare the size of alleles (R. 1165). Mr. Duncan's opinion was based on the results from the computer measuring the weight of the alleles.

When counsel for the State asked how Mr. Duncan knew the computer was correct in calculating the weights of the alleles, he answered,

> How do you know the computer is right, is because of this. Let's say this right here, the computer computes the sizes of this standard lane right here. That's why you use the standards of this girl, this cell line, and it will tell you what the sizes are and you match it to the known values and if you get within your known windows of comparison, you can say that in fact the computer has in fact sized those correctly.

(R. 1249). This was a matter which should have been addressed at a preliminary hearing. It goes to the reliability and accuracy of the results.

Furthermore, Mr. Duncan was unable to answer the question. He said that he knows the computer computes accurately because it arrives at certain "windows of comparison." He did not explain how he knows that the computer correctly arrives at those known windows of comparison. All he could say about the computer detection of matches was that the FBI came down and installed the software and that the software is used around the country (R. 1250). Furthermore, Mr. Duncan's statement that this software is used around the country does not automatically establish that it is generally accepted in the

scientific community. See, Ramos v. State, 496 So. 2d 121 (Fla. 1996)(finding that testimony of dog-handler and police officer insufficient, alone, to establish reliability of dog scent determination lineups); Crawford v. Shivashankar, 474 So. 2d 873 (Fla. 1st DCA 1985)(finding that a court is not required to rely upon statements by expert himself that thermography was generally accepted in the relevant scientific community).

d. Failure to adequately challenge the State's witness' qualifications

Counsel failed to adequately challenge Mr. Duncan's qualifications as a DNA expert. Mr. Duncan testified before the jury that he passed proficiency tests (R. 1213). Mr. Duncan testified that Lifecodes gave him "passing marks" on 50 DNA proficiency tests and that he had passed some FBI tests. There was no showing, however, that proficiency tests administered by Lifecodes and the FBI are generally accepted in the relevant scientific community as a means of determining the reliability of a tester's results. Such a showing was necessary for these results to have been a basis for the court's decision to admit him as an expert in the field of DNA analysis.

Counsel also failed to adequately challenge Mr. Duncan's qualification to testify to the population frequencies in this case. On direct examination, Mr. Duncan admitted that he is not a population geneticist (R. 1208). There was no showing that, and counsel did not

question whether, he had read literature on statistics or population genetics or that he had done the calculations so often and was so familiar with them that he could be qualified as an expert. When the State was attempting to have him qualified as an expert, the showing was related only to the production and measuring of the autoradiogram.

If counsel had retained a competent DNA expert, he would have known that conventional serology is irrelevant to questions concerning DNA testing. He would have objected to George Duncan including his experience in conventional serology when the State was qualifying him as a DNA expert (R. 1212). With competent expert assistance, counsel would have known to object the State and witnesses repeatedly referring to DNA "printing" and "fingerprinting" (e.g., R. 1173, 1174, 1186, 1198, 1187, 1187, 1232). Such references communicated to the jury a false impression of the nature of DNA testing.

e. Failure to object to improper bolstering of the State's witnesses

Counsel failed to object and move to strike a State's witness' statement to the jury, "Trust me." (R. 1344). Counsel failed to object to irrelevant testimony causing undue prejudice and confusion of the issues when Dr. Diameda described the surgical techniques used to remove the bullets from Deputy Sallustio (R. 866, 876). Trial counsel failed to cross examine the State's DNA witness who actually produced the autoradiogram. He failed to object to the State's DNA witnesses repeatedly referring to DNA "fingerprinting" and "prints" (R. 1186,

1198, 1187, 1212, 1213, 1232, 1247. Furthermore, counsel failed to object to testimony regarding traditional serology in conjunction with DNA evidence (R. 1251). Counsel failed to object to George Duncan's being qualified to give DNA testimony in part based on his experience working in traditional serology (R. 1207).

Throughout the trial, the court improperly affirmed the credibility of state witnesses. The Court called these witnesses their first names in the presence of the jury, in contrast to the markedly formal manner in which hit treated other witnesses. The inevitable implication was that the judge especially liked and trusted these witnesses, and that therefore, their testimony was entitled to great weight. However counsel for Mr. Armstrong made no objection to this improper conduct by the court, to Mr. Armstrong's substantial prejudice.

At the close of Dr. Tracey's testimony, the court says, "Come on George. Let's hear from George," meaning George Duncan, and continued, "Doctor, you are excused from the rule." (R. 1206). Clearly the jury was being encouraged to give great credibility believe Mr. Duncan's testimony based on the court's demonstrated friendliness with him, yet Mr.Armstrong's counsel failed to make an objection.

Similarly, when defense counsel challenged Detective Edel's qualification to testify about "searing", the court said, "I think Chuck's an expert. If you want him to be qualified, he can be."

(R.976) Not only had the court made up its mind about the witnesses' qualifications, but also, the court implied that it was because he knew "Chuck" so long and so well.

This occurred again with Bruce Ayala of the Broward Sheriff's Office. When the State offered him as an expert in glass and metal fracture patterns, the court noted that:

> Well, I have declared Bruce as an expert as [sic] forensic chemistry hundreds of times. I will now declare him to be, in addition thereto, an expert in the field of glass and fracture pattern analysis.

(R. 1351-52).

Again, the court implies that because this witness has been declared an expert in other fields and he knows the witness so well, he must therefore be qualified in this additional field. Furthermore, the court's personal vouching for having qualified the witness as an expert "hundreds of times" was an explicit invitation to the jury to apply a different, less critical standard of judgment to Ayala's testimony.

The court's bolstering of he State's "expert" witnesses was improper and misleading. The court's action left the jury with the impression that these witnesses against Mr. Armstrong were especially reliable. However trial counsel for Mr. Armstrong was content to allow the jury this mistaken and misleading view of these witnesses credibility as buttressed buy the court. The failure to object is substantially prejudicial to Mr. Armstrong. Relief is warranted.

f. Failure to object to opinion testimony from unqualified witnesses

Detective Kammerer testified to the coomassie blue method of detecting latent fingerprints even though the court did not qualify him as an expert (R. 1083). Tom Mesick relied on Detective Kammerer's results in his latent print comparison and testified that the latent print Detective Kammerer's coomassie blue method detected matched a known standard taken from Mr. Armstrong (R. 1451, 52). In the absence of a record showing that Dr. Kammerer was an expert, Mr. Mesick's results were unreliable. However trial counsel failed to object to this testimony to Mr. Armstrong's substantial prejudice.

g. Ineffectiveness during jury selection

Furthermore, counsel failed to ensure a reader was present during voir dire, thus rendering Mr. Armstrong effectively absent during a critical stage of the proceedings (R. 191).

Counsel failed to adequately question and/or strike juror Deborah Baker. During voir dire, counsel for the State almost forgot to question her. When he did, it was obvious that he knew her and her circumstances. The following exchange illustrates the situation:

> MR. SATZ: Oh, Mrs. Baker. yeah. All right. I know what she's going to say.
>
> * * * *
>
> MR. SATZ: Any hardship for you to sit here, emotionally, say, hardship to the extent it would interfere with your ability to concentrate?

> MS. BAKER: Less on me than on the others. I mean, they're going to be short a person.
>
> MR. SATZ: But you will be able to concentrate on the sworn testimony?
>
> MS. BAKER: Yeah.
>
> MR. SATZ: The law that Judge Coker says?
>
> MS. BAKER: Yes.
>
> MR. SATZ: I [sic] sure you have some idea what the law is in a criminal case?
>
> MS. BAKER: Yes.

(R. 393-94). Defense counsel never asked Ms. Baker whether she knew Mr. Satz, how she knew him, how she was so familiar with criminal law, why it would be an emotional hardship for her to sit on this jury or why she believed it would be an emotional hardship for anyone else to sit on this jury. Defense counsel never asked how Mr. Satz knew what she was going to say. The record reveals that Ms. Baker sat on Mr. Armstrong's jury.

Mr. Armstrong was entitled to a fair and impartial jury. This exchange demonstrates that Mr. Armstrong's counsel failed to pursue a line of questioning that likely would have revealed bias against Mr. Armstrong on an emotional basis or favor towards the State based on Ms. Baker's familiarity with Mr. Satz.

h. Conclusion

Due to the ineffective assistance of counsel, Mr. Armstrong was denied a reliable adversarial testing. But for the substantial and

unreasonable errors and omissions of counsel, there is a reasonable probability that the outcome of this case would have been different. Mr. Armstrong's capital conviction and sentence of death are the resulting prejudice. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989). The jury did not receive adequate information about the case due to counsel's failures. An evidentiary hearing on all these allegations is warranted.

C. MR. ARMSTRONG LACKED SPECIFIC INTENT

Mr. Armstrong's mental disabilities prevented him from having the requisite intent for a conviction of first degree murder.The state failed to prove the requisite level of intent for first degree murder. Because "there was no direct evidence of a premeditated murder, so we must presume that the conviction rests on the felony murder theory." Menendez v. State, 419 So.2d, 312, 315 (Fla. 1982). If a felony murder theory can be upheld, "[f]or purposes of imposing the death penalty, [Mr. Armstrong's] criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt." Enmund v. Florida, 458 U.S. 781, 801 (1982). Robbery is not "a crime so grievous an affront to humanity that the only adequate response may be the penalty of death." Id. at 797, quoting Gregg v. Georgia, 428 U.S. at 184; See also Menendez v. State, 419 So.2d 312. The imposition of the death penalty for robbery is plainly excessive. Tison v. Arizona, 181 U.S.

137, 148 (1987).

"[A]n essential tenet of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof -- defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307, 316 (1979).

"Because [this Court] affirmed the death penalty in this case in the absence of proof that [Mr. Armstrong] killed or attempted to kill, and regardless of whether [Mr. Armstrong] intended or contemplated that life would be taken," Rule 3.850 relief is warranted. See Enmund, 458 U.S. at 801. To the extent trial counsel failed to pursue this issue Mr. Armstrong received ineffective assistance of counsel. Strickland v. Washington. Mr. Armstrong's capital conviction and sentence of death are the resulting prejudice. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989). This claim requires an evidentiary hearing. Mr. Armstrong is entitled to a hearing followed by Rule 3.850 relief.

D. WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE

The State had or knew of material exculpatory evidence and failed to turn it over to defense counsel in violation of Brady v. Maryland, 373 U.S. 83 (1963). These omissions rendered Mr. Armstrong's counsel's performance prejudicially ineffective.

Mr. Armstrong has discovered through records received from Plantation Police Department that on or about February 22, 1990, internal affairs began an investigation on material witness, officer Ronnie Noriega[12], regarding his involvement in the instant case. During the course of the internal affairs investigation, it became apparent that Mr. Noriega witnessed the incident which ultimately led to Mr. Armstrong's arrest and conviction. Furthermore, Mr. Noriega's recollections of the crime differ substantially from the theory presented by the State and are both material and exculpatory to Mr. Armstrong. Had trial counsel been aware of these material and exculpatory statements, the outcome of Mr. Armstrong's capital trial would have been different.[13]

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12. Upon completion of the internal affairs investigation officer Noriega was terminated.

13If trial counsel were in fact aware of Officer Noriega's statements , or could through due diligence have discovered them, he would have been constitutionally ineffective. Either the material was withheld from counsel or he unreasonably failed to discover it. An evidentiary hearing is warranted to determine where, in fact the breakdown occurred.

The investigation into Mr. Noriega produced two sworn statements from Officer Noriega, giving details of Mr Noriega's eyewitness account of the incident. Mr. Noriega's account of events differs substantially from the theory of the case propounded by the State at Mr. Armstrong's capital case.

To determine materiality, undisclosed evidence must be considered "collectively, not item-by-item." Kyles v. Whitley, 115 S.Ct. 1555 (1995). The statements of Noriega are consistent with and corroborate newly discovered evidence that Mr. Armstrong has received. See Argument II F infra. However, the State never disclosed the existence of the internal affairs investigation into Officer Noriega to Mr. Armstrong's trial counsel to Mr. Armstrong's substantial prejudice. Had trial counsel gained possession of this material, he would have been able to cast reasonable doubt on the State's theory and to have impeached the State's witnesses. There is a reasonable probability that the outcome of Mr. Armstrong's capital trial would have been different. See United States v. Bagley, 473 U.S. 667, 680 (1985). The statements of both individuals support the theory that Mr. Armstrong is not the primary perpetrator of the crime.

Such evidence must be disclosed regardless of a request by the defense, and the State has a duty to evaluate the point at which the evidence collectively reaches the level of materiality. Bagley, at 682; Kyles. However, it is not the defendant's burden to show the

nondisclosure "[m]ore likely than not altered the outcome in the case." Strickland v. Washington, 466 U.S. 668, 693 (1984). The Supreme Court specifically rejected that standard in favor of a showing of a reasonable probability. A reasonable probability is one that undermines confidence in the outcome. Such a probability undeniably exists here.

Under Kyles v. Whitley, 115 S. Ct. 1555 (1995), any evidence that could be construed as favorable to the defense must be disclosed by the prosecution. This includes exculpatory evidence (evidence that indicates someone else did it), impeachment evidence (evidence that could lead to the discovery of evidence to be used against the State's witnesses), or any other evidence the defense could use to represent its client.

In the instance of Mr. Noriega's internal affairs statements, there is evidence that tends to show that Mr. Coleman may have been responsible for killing Officer Greeney. It also showed that Mr. Noriega's statements changed several times, which could have led to impeaching evidence or evidence that was favorable to the defense. Mr. Noriega's statements differed substantially from the State's theory of the case and from the accounts of the State witnesses. These differences could have been favorable to the defense, not only to impeach Noriega, but to use in other areas of the defense or investigation. Upon completion of the internal affairs investigation,

Noriega was terminated. Either type of evidence is considered legitimate Brady evidence. See Brady, Kyles.

Mr. Armstrong has shown that the files and records in the case do not conclusively rebut his claims of ineffectiveness and Brady. See Fla. R. Crim. P. 3.850. Therefore, Mr. Armstrong is entitled to an evidentiary hearing on this claim.

E. NEWLY DISCOVERED EVIDENCE

New facts have come to light that bear on Mr. Armstrong's conviction and sentence. Mr. Armstrong has discovered that Mr. Armstrong's codefendant Wayne Coleman[14] befriended inmate Anthony Cooper in prison.[15] This occurred subsequent to both Mr. Armstrong's and Coleman's own convictions and sentences.

Cooper and Coleman were for a time housed together in a lock-down cell. They remained together for approximately two weeks during which time Coleman discussed the crime with Cooper in detail. On March 3, 1997, inmate Anthony Cooper gave a taped interview with Inspector McCasland. During that interview Cooper stated:

> ". . . [Coleman] went to rob a chicken place . . . **Coleman is the one that killed, the officer**. . . And the police that lived, or suppose to live he really don't know what happened, and the broad was all balled up under the table so she couldn't see. . . . [**Coleman] said I'm the one who killed him."** (Statement of Anthony Cooper p. 33)(emphasis added).

Thereafter, on April 10, 1997, Broward State's Attorney's Office sent investigator Walt LaGraves to Question Anthony Cooper. During that interview Cooper detailed how Coleman was in the doorway when he shot

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14 Coleman was tried capitally and convicted of first degree murder, but on the jury recommendation received a life sentence

15 Mr. Cooper was convicted of a crime unrelated to those of which Mr. Armstrong and Coleman were convicted

his weapon and killed the officer. On May 12, 1997, investigator LaGraves took a second taped statement from Cooper wherein Cooper again gives details of the crime stating that Coleman shot the officer.

The statements of Anthony Cooper cast doubt upon the culpability of Mr. Armstrong for first degree murder. Furthermore, they call into question the proportionality of Mr. Armstrong's death sentence. This error is exacerbated by the emphasis placed on Mr. Armstrong's supposed relative culpability in affirming Mr. Armstrong's death sentence on direct appeal. Armstrong, 642 So. 2d 739-40. The new evidence together with the mitigation erroneously ignored by the trial court and not presented due to counsel's ineffectiveness demonstrate that Mr. Armstrong's death sentence is unreliable and disproportionate.

The evidence presented herein demonstrates that the result of Mr. Armstrong's sentencing proceeding is unreliable. Richardson v. State, 546 So. 2d 1037 (Fla. 1989) When the newly discovered evidence is viewed in conjunction with the evidence never presented at trial because of Brady violations, and because of counsel's deficient performance, there can be no question that Mr. Armstrong's sentence cannot withstand the requirements of the Eighth and Fourteenth Amendments. State v. Gunsby, 670 So. 2d 920 (1996). The evidence establishes that Mr. Armstrong probably would have received a life sentence. Jones v. State, 591 So. 2d 911 (Fla. 1991). An evidentiary hearing and Rule 3.850 relief are proper.

F. CONCLUSION

Each of the above claims is factually based. None is refuted by the record. An evidentiary hearing should be granted .

ARGUMENT III

THE PUBLIC RECORDS ARGUMENT

This Court has ruled that collateral counsel must obtain every public record in existence regarding a capital case or else a procedural default will be assessed against the defendant. Porter v. State, 653 So. 2d 375 (Fla. 1995). The Court has also made it clear that a prisoner whose conviction and sentence of death has become final on direct review is entitled to criminal investigative public records as provided in Chapter 119 and by Fla.R.Crim.P3.852. Public records issues remain outstanding in Mr. Armstrong's case. A motion to compel the disclosure of certain records was filed on March 5, 1997 (PCR. Supp. 25-34) but was never heard by the lower court.[16]

On May 14, 1997, this Court entered an order suspending the operation of the new Fla. R. Crim. P. 3.852 and tolled all public records proceedings in several post conviction death penalty cases,

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16 The agencies involved were the Office of the Attorney General; Broward County Clerk of Court; Broward County Jail; Broward County Sheriff's Office; Office of the State Attorney for the Seventeenth Judicial Circuit; Department of Corrections; Fort Lauderdale Police Department; Metro Dade Police Department;
City of Miami Police Department; Florida Highway Patrol and Oakland Park Police Department.

including Armstrong's case. Following the lifting of the tolling of Mr. Armstrong's public records litigation, counsel for Mr. Armstrong made additional written demands for public records on December 28, 1998. At the order of the lower court,Mr. Armstrong then filed a second motion to compel production of public records requested pursuant to FLa, R, Crim. P. 3.852 on June 3, 1999 (PCR. Supp. 166-169). This second motion to compel detailed issues resulting from supplementary requests filed by Mr. Armstrong in December 1998. It also specifically raised the issues previously raised in the March 5, 1997 motion that had not beenheard due to the tolling of the Rule. However, at a hearing on the June, 3, 1999, the lower court declined to hear the original March 3, 1997 motion on the grounds that Mr. Armstrong had waived the issue. The lower court erred. As counsel made plain at that hearing, Mr. Armstrong has never waived any public records issue, and was prevented by the tolling of Rule 3,852 from litigating this issue. See PCR. 893. In addition, records supplied to Mr. Armstrong from the Repository are illegible, incomplete and truncated. Mr. Armstrong received records originating with the City of Plantation Police Department with missing sections and pages, for which no exemption was taken. Despite having contacted the Repository, Mr. Armstrong has not received all the records that would properly be provided as a result of Mr. Armstrong's request.Until Mr. Armstrong has received adequate copies of the remaining records, he

cannot file a final Rule 3.850 motion. Failure to provide Mr. Armstrong with the records and to permit him to amend his Rule 3.850 motion is error. See, e.g. Muehleman v. Dugger, 623 So. 2d 480 (Fla. 1993) ("Muehleman has sixty days from the date he receives the records to which he is entitled or from the date of this opinion, whichever is later, to amend his 3.850 petition to include any facts or claims contained in the sheriff's records"). Mr. Armstrong should likewise be granted the opportunity to pursue his outstanding public records and amend this Rule 3.850 motion accordingly.

ARGUMENT IV

MR. ARMSTRONG IS INNOCENT OF FIRST DEGREE MURDER AND OF THE DEATH PENALTY

Mr. Armstrong is innocent of the death penalty Sawyer v. Whitley, 112 S. Ct. 2524 (1992). His death sentence is disproportionate. Innocence of the death penalty can also be shown by demonstrating insufficient aggravating circumstances so as to render the individual ineligible for death under Florida law. In this case, Mr. Armstrong's trial court relied upon four aggravating circumstances to support his death sentence:[17]

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(1) prior conviction of a violent felony; (2) committed while engaged in the commission of a robbery or flight therefrom; (3) the capital felony was committed for the purpose of avoiding arrest or effecting an escape from custody; and (4) murder of a law enforcement officer engaged in the performance of official duties.

Mr. Armstrong's jury was given unconstitutionally vague instructions on the aggravating circumstances relied upon by the judge to support Mr. Armstrong's death sentence. As a result, these aggravating circumstances cannot be relied upon to support Mr. Armstrong's death sentence.

Furthermore, Mr. Armstrong's death sentence is disproportionate. Here, the lack of aggravating circumstances coupled with the overwhelming evidence of mitigating evidence and sentences of the co defendant's discussed elsewhere render the death sentence disproportionate. Mr. Armstrong is innocent of the death penalty.

ARGUMENT V

UNCONSTITUTIONAL JURY INSTRUCTIONS

A. AGGRAVATING CIRCUMSTANCES

At the time of Mr. Armstrong's trial, sec. 921.141, Fla. Stat., provided in pertinent part:

> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> ****
>
> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
>
> ****
>
> (e) The capital felony was committed for

> the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
>
> ****
>
> (j) The victim of the capital felony was a law enforcement officerengaged in the performance of his or her official duty.

The United States Supreme Court's opinions in Richmond v. Lewis, 113 S.Ct. 528 (1992) and Espinosa v. Florida, 112 S.Ct. 2926 (1992), require a resentencing before a jury in Mr. Armstrong's case.

Mr. Armstrong's penalty phase jury was not given "an adequate narrowing construction," but instead was simply instructed on the facially vague statutory language. Following the death recommendation, the sentencing judge imposed a death sentence. Under Florida law, the judge was required to give great weight to the jury's verdict. Espinosa.

Trial counsel failed to object. Trial counsel had no strategic reason for his failure to object. He was ineffective for not doing so. To the extent the issue could have been presented on direct appeal, appellate counsel was ineffective for not raising the issue on direct appeal.

B. BURDEN SHIFTING

The State must prove that aggravating circumstances outweigh the mitigation. State v. Dixon, 283 So.3d 1(Fla. 1973), cert denied 416 U.S. 943 (1974). This standard was not applied to Mr. Armstrong's capital sentencing phase, improperly shifting to Mr, Armstrong the burden of proving whether he should live or die, Mullaney v. Wilbur,

4211 U.S. 684 (1975). Relief is warranted.

C. AUTOMATIC AGGRAVATING CIRCUMSTANCE

Mr. Armstrong was convicted of first degree murder, with robbery as the underlying felony. The jury was instructed on the "felony murder" aggravating circumstance. The trial court subsequently found the existence of the "felony murder" aggravating factor.

The jury's deliberation was obviously tainted by the unconstitutional and vague instruction. See Sochor v. Florida, 112 S. Ct. 2114 (1992). The use of the underlying felonies as an aggravating factor rendered the aggravator "illusory" in violation of Stringer v. Black, 112 S.Ct. 1130 (1992).

ARGUMENT VI

THE STATE IMPROPERLY INTRODUCED NONSTATUTORY AGGRAVATING CIRCUMSTANCES

An attempt to prevent the arbitrary imposition of the death penalty is written into Florida's sentencing scheme. Aggravating circumstances specified in Florida's capital sentencing statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Fla. Stat. § 921.141(5)(1996); Miller v. State, 373 So. 2d 882 (Fla. 1979). This Court, in Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977) stated:

> We must guard against any unauthorized aggravating factor going into the equation which

> might tip the scales of the weighing process in favor of death.

In Mr. Armstrong's penalty phase, the State introduced evidence which was not relevant to any statutory aggravating factors. Further, the trial court relied upon several impermissible factors in sentencing Mr. Armstrong to death. Furthermore, in its sentencing order, the Court specifically weighed non-statutory aggravating circumstances. Mr. Armstrong's sentencing jury was presented with non-statutory aggravating circumstances, including that Mr. Armstrong felt no remorse, thereby tainting its recommendation, which the Court considered in sentencing Mr. Armstrong to death.

The Court's and jury's consideration of these non-statutory aggravating circumstances entitle Mr. Armstrong to a new sentencing because the error cannot be found harmless beyond a reasonable doubt. Elledge. Relief is proper.

ARGUMENT VII

MR. ARMSTRONG WAS ABSENT FROM CRITICAL STAGES OF THE TRIAL

The accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings. Faretta v. California, 422 U.S. 806, 819, n.15, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975). A capital defendant is absolutely guaranteed the right to be present at all critical stages of judicial proceedings.

This right is guaranteed by the federal constitution, see, e.g., Drope v. Missouri, 420 U.S. 162 (1975); Counsel failed to ensure a reader was present during voir dire, thus rendering Mr. Armstrong effectively absent during a critical stage of the proceedings (R. 191). He was not able to adequately consult with counsel concerning the panel.

The failure of trial or direct appeal counsel to raise this issue denied Mr. Armstrong the effective assistance of counsel.

Since this error denied Mr. Armstrong his fundamental right to be present this issue cannot be deemed harmless. This court must conduct an evidentiary hearing on this matter and thereafter relief must be granted.

ARGUMENT VIII

MR. ARMSTRONG'S CONVICTIONS AND SENTENCE ARE ILLEGALLY IMPOSED IN VIOLATION OF INTERNATIONAL LAW.

Mr. Armstrong is a Jamaican citizen whose rights pursuant to international law were violated. Article 36 of the Vienna Convention requires that when a foreign national is arrested, the country detaining him must give him immediate notice of his right to see and communicate with his consular representative.

In addition, international law holds that lengthy delay in administering an otherwise lawful death penalty renders the ultimate execution inhuman, degrading or unusually cruel. See e.g. Pratt v.

Attorney General of Jamaica (1994) 2 A.C. 1, 18, 4 All E. R. 769, 773(P.C. 1993).

Mr. Armstrong hereby preserves arguments as to the constitutionality of the death penalty, given this Court's precedent

ARGUMENT IX

FLORIDA'S DEATH PENALTY UNCONSTITUTIONALLY PERMITS CRUEL AND UNUSUAL PUNISHMENT

Florida's death penalty statute denies Mr. Armstrong his right to due process of law and constitutes cruel and unusual punishment on its face and as applied to this case. Execution by electrocution and/or lethal injection constitutes cruel and unusual punishment under the constitutions of both Florida and the United States. Mr. Armstrong hereby preserves arguments as to the constitutionality of the death penalty, given this Court's precedents.

ARGUMENT X

THE JUROR INTERVIEW AND JUROR MISCONDUCT ARGUMENT

Florida Rule of Professional Responsibility Rule 4-3.5(D)(4) provides that a lawyer shall not initiate communications or cause another to initiate communications with any juror regarding the trial.

This prohibition impinges upon Mr. Armstrong's' right to free association and free speech. This rule is a prior restraint. This prohibition violates equal protection in that a defendant who is not in custody can freely approach jurors to ascertain if juror misconduct occurred while an incarcerated defendant is precluded form so doing. Death sentenced inmates are so precluded.

This prohibition restricts Mr. Armstrong's access to the courts. Relief is warranted.

ARGUMENT XI

MR. ARMSTRONG IS INSANE TO BE EXECUTED

Mr. Armstrong is insane to be executed. In Ford v. Wainwright, 477 U.S. 399 (1986), the United States Supreme Court held that the Eighth Amendment protects individuals from the cruel and unusual punishment of being executed while insane.

Mr. Armstrong acknowledges that this claim is not ripe for consideration. However, it must be raised to preserve the claim for

review in future proceedings and in federal court should that be necessary. See Stewart v. Martinez-Villareal, 118 S. Ct. 1618 (1998).

ARGUMENT XII

THE CUMULATIVE ERROR ARGUMENT

Mr. Armstrong did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 841 F.2d 1126 (11th Cir. 1991). It failed because the sheer number and types of errors that occurred in his trial, when considered as a whole, virtually dictated the sentence that Mr. Armstrong ultimately received.

The flaws in the system which sentenced Mr. Armstrong to death are many. They have been pointed out not only throughout this brief, but also in Mr. Armstrong's direct appeal and while there are means for addressing each individual error, addressing each error only on an individual basis will not afford constitutionally adequate safeguards against Mr. Armstrong's improperly imposed death sentence. This error cannot be harmless. The results of the trial and sentencing are not reliable. Relief is warranted.

CONCLUSIONS AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Armstrong respectfully urges this Court to reverse the lower court order, grant a hearing on Mr. Armstrong's public records claims, grant an

evidentiary hearing on the outstanding claims and grant such other relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, to Celia Terenzio Esq., Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, FL 33340-3432 on May 14, 2002.

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The undersigned counsel hereby certifies that this brief complies with the font requirements of rule 9.210(a)(2), Fla. R. App. P.

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