IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2007

JOHN D. FREEMAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

MICHAEL P. REITER
Capital Collateral Regional Counsel-North
Florida Bar No. 0320234

HARRY P. BRODY
Assistant CCRC-N
Florida Bar No. 0977860

JEFFREY M. HAZEN
Assistant CCRC-N
Florida Bar No. 0153060

OFFICE OF THE CAPITAL COLLATERAL COUNSEL
Northern Region of Florida
1533-B South Monroe Street
Tallahassee, FL 32301

PRELIMINARY STATEMENT

This appeal is from the denial of Mr. Freeman's motion for post-conviction relief by Circuit Court Judge Donald Moran, Fourth Judicial Circuit, Duval County, Florida. This appeal challenges Mr. Freeman's death sentence. References in this brief are as follows:

"R1. ___." The record on direct appeal to this Court in Circuit Court Case No. 86-11599.

"R2. ___." The record on direct appeal to this Court in Circuit Court Case No. 87-3527.

"PC-R. ___." The post-conviction record on appeal.

"EHT. ___." The transcript of the post-conviction evidentiary hearing.

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

REQUEST FOR ORAL ARGUMENT

This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to develop the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Freeman, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

On December 4, 1986, Mr. Freeman was charged in Case No. 86-11599 with burglary and the first-degree murder of Alvin Epps (that case is hereinafter referred to as Freeman I or the "Epps case") (R1. 12-13). On April 23, 1987, Mr. Freeman was charged with burglary and the first-degree murder of Leonard Collier in Case No. 87-3527 (that case is hereinafter referred to as Freeman II or the "Collier case") (R2. 145).

In Freeman I, Mr. Freeman was found guilty of first-degree murder and burglary on October 9, 1987 (R1. 399-401). On October 13, 1987, the jury recommended a life sentence (R1. 441). Subsequently, the trial court overrode the jury's recommendation and sentenced Mr. Freeman to death on December 11, 1987 (R1. 572-97). On direct appeal of Freeman I, this court affirmed Mr. Freeman's convictions, but ordered that a life sentence be imposed. Freeman v. State, 548 So.2d 125 (Fla. 1989).

On September 15, 1988, while Freeman I was on direct appeal, Mr. Freeman was convicted of first-degree murder and burglary in Freeman II (R2. 1564). The jury recommended a death sentence by a vote of 9-3 on September 16, 1988 (R2. 1752). On November 2, 1988, the trial court sentenced Mr. Freeman to death (R2. 257-59). On direct appeal of Freeman II, this Court affirmed Mr. Freeman's

convictions and death sentence. Freeman v. State, 563 So.2d 73 (Fla. 1990).

Mr. Freeman proceeded in postconviction only as to Freeman II and filed his first Rule 3.850 motion on June 29, 1992. Mr. Freeman filed an amended Rule 3.850 motion on October 26, 1994. On July 29, 1996, the lower court summarily denied all eleven claims raised by Mr. Freeman. On direct appeal of that summary denial, this Court affirmed in part, but remanded the case for an evidentiary hearing on two claims.[1] Freeman v. State, 761 So.2d 1055 (Fla. 2000).

On July 16-17, 2001, the lower court conducted an evidentiary hearing on the issues of racial bias in seeking the death penalty and ineffective assistance of counsel. Subsequent to the evidentiary hearing, the lower court entered an order denying relief on July 24, 2001 (PC-R. 155-67). This appeal follows.

II. STATEMENT OF THE FREEMAN II PENALTY PHASE FACTS

At the penalty phase of the Collier trial, the State called Debra Epps and detective W.R. Dewitt in order to support the prior violent felony aggravator (R2. 1611-26). Debra Epps was the victim's wife in the Epps case and Dewitt was the lead detective on the Epps case.

---

[1]This Court ordered an evidentiary hearing on the issues of ineffective assistance of counsel at the penalty phase and the allegation that the state improperly sought the death penalty against Mr. Freeman because of considerations of race.

The defense first called Mary Freeman, John Freeman's mother (R2. 1627). Mary Freeman testified that John was born in 1963 and that his last name at birth was Jewell, after his biological father, Charles Jewell (R2. 1628). Mary testified that John's father left her when John was approximately 6 months old (R2. 1630). Mary married Charles Freeman who she felt was too harsh of a disciplinarian (R2. 1631). Mary stated she would have to step in and stop Charles Freeman when he went too far in disciplining the children (R2. 1632). Mary stated that she loves John (R2. 1632). Charles Freeman never legally adopted John (R2. 1633).

Robert Jewell testified that he is John's older brother by 3 years (R2. 1635). Robert stated that he does not have good feelings toward his stepfather (R2. 1635). Charles Freeman once whipped he and John with switches (R2. 1635). On another occasion, Charles beat them with neckties (R2. 1636). Robert recalled Charles hitting John with a closed fist (R2. 1636). Charles verbally assaulted the brothers (R2. 1637). Charles did not show the brothers attention or give them praise (R2. 1637). Robert stated that John draws well (R2. 1639). Robert testified that John was nice to his girlfriend's children (R2. 1641).

Dr. Louis Legum testified that he is a clinical psychologist and that he evaluated John Freeman (R2. 1647). Dr. Legum explained his testing and stated that he looks for indication of

neuropsychological disturbance (R2. 1648). Legum stated that John Freeman scored an 83 on the Wechsler Intelligence test (R2. 1648). This is below average intelligence (R2. 1648). John Freeman's results on academic achievement tests were especially low, in the mentally retarded range (R2. 1649). Dr. Legum was unable to explain why John would place so low on the achievement tests, given his I.Q. score (R2. 1650). Legum opined that John may suffer from a learning disability (R2. 1651). The low scores may be a result of environmental factors (R2. 1651). Legum found no indication of malingering in John (R2. 1657). Dr. Legum did not get the sense that John was trying "to play dumb" (R2. 1657). Legum stated that John probably processes information more slowly than most (R2. 1658). John admitted culpability for the Collier homicide, but denied any involvement in Epps (R2. 1660). Dr. Legum stated that he did not talk to any witnesses (R2. 1662). Legum testified that he thinks there "is some impairment" in John's ability to conform his conduct to the requirements of the law (R2. 1665).

David Sorrells testimony from the Epps trial was done via readback. Sorrells testified that he has known John since junior high school (R2. 1683). Sorrells knew John was beaten and has seen marks on John's body (R2. 1684). John did not spend much time at home (R2. 1684). John was a hard worker and liked kids (R2. 1684).

III. STATEMENT OF THE EVIDENTIARY HEARING FACTS

At the evidentiary hearing, Brad Stetson testified that he is currently a Circuit Judge in Duval County and has been so for 10 years (EHT. 13). Prior to that, Stetson served as a prosecutor in the 4th Circuit for 11 years (EHT. 13).

Stetson stated that he tried both the Collier and Epps cases (EHT. 14). At the time of the trials, Stetson was the Supervisor of Circuit Courts and a member of the State Attorney's Office "Homicide Team" (EHT. 14-15). Stetson was assigned to both cases "early on" (EHT. 15).

Stetson testified that he recalls a pre-trial conversation with Mr. Freeman's trial attorney, Patrick McGuiness, regarding the race of the victims in the cases (EHT. 16). The conversation, according to Stetson, took place over the phone (EHT. 16). Stetson stated that the conversation took place in the context of a plea negotiation wherein Mr. McGuiness was offering a plea to life (EHT. 17). Although Stetson did not recall the exact words, he stated that he rejected Mr. McGuiness' offer and "added some sarcasm" (EHT. 17). Again, according to Stetson, he told McGuiness that if he agreed to the plea, McGuiness would use that against him in an argument that the State seeks death against white defendants less often than against black ones (EHT. 18). Stetson testified that he took offense at the argument that the state seeks death more often in black-on-white murders. (EHT. 18).

Stetson testified that this was an obvious death penalty case and that he had a duty to seek death (EHT. 19-20). Stetson cited the fact that both victims were home owners and that Mr. Freeman had a prior record (EHT. 19). Stetson stated that his belief that Mr. Freeman could have escaped without killing was "another factor" (EHT. 21). Further, Stetson testified that he believed racism was a motive for the murder and that he considered the perceived racism when deciding to seek death (EHT. 21-22). Stetson added that he thinks it is a death case without the racism element (EHT. 24). Stetson recalled that Judge Parsons, who tried the Epps case, permitted him to argue racism to the jury, but Stetson decided to forego such an argument because of appellate prospects (EHT. 22). Stetson didn’t feel introducing the racism element was prudent (EHT. 29).

Stetson testified that the cases would have been presented to the Homicide Team (EHT. 25). The team had 5 to 7 members and included State Attorney Ed Austin (EHT. 25). Everyone on the team agreed this was a death case (EHT 25). As the lead prosecutor, Stetson would have presented the case to the team (EHT. 26). Stetson added that he and Austin did not talk extensively about the racial element (EHT. 30).

Stetson remembered that Mr. Freeman was from an integrated neighborhood where people got along well (EHT. 27). Mr. Freeman lived in the same basic neighborhood as the victims (EHT. 27).

On cross-examination, Stetson testified that he had tried 4 to 5 other first-degree murder cases at the time of Mr. Freeman's trials (EHT. 32). Stetson had sought the death penalty previously (EHT. 32).

Stetson stated that the Collier case involved a home burglary where the factual proof of guilt was strong (EHT. 34). According to Stetson, the prior conviction for the Epps murder was the strongest aggravator in the Collier case (EHT. 35). Stetson felt that Collier was a much stronger case on the facts than Epps (EHT. 36).

Stetson testified that the racial-motive evidence was circumstantial and that, when weighed against the strong factual evidence of guilt, he decided not to use it (EHT. 36).

Stetson testified that race is "certainly" a factor which a prosecutor considers when deciding whether to seek death (EHT. 37). Stetson added that "Mr. Austin would probably tell you this also" (EHT. 37). Stetson went on to state that community perception is a consideration when deciding to seek death (EHT. 37). The State Attorney's Office was sensitive to the wishes and needs of the community (EHT. 38). On this point, Stetson added that he took offense at the argument that the state is racially biased in seeking the death penalty and that he thought it important that the public "perceive" that he was doing his job fairly (EHT. 38). Stetson went on to state that he felt if he agreed to Mr. McGuiness' plea offer,

he would be lending credence to the racial bias argument (EHT. 38). Stetson concluded by saying that the State Attorney's Office never sought death because of the race of the victim or defendant (EHT. 38).

Ed Austin testified that he was the State Attorney for the Fourth Circuit from 1969 to 1991, during which time the Freeman cases were tried (EHT. 43). Austin stated that Brad Stetson was a division chief and a member of the Homicide Team (EHT. 43). All cases involving the death penalty would come to Austin's attention after review by the Homicide Team (EHT. 43). Austin said he "would have" had some direct discussion with Stetson about the propriety of the death penalty in Mr. Freeman's case (EHT. 46). However, Austin had no personal recollection of the Freeman cases and no independent recollection of discussions about the Freeman cases (EHT. 44).

Austin stated that he was aware of criticism of his office regarding the propensity to prosecute black-on-white crime (EHT. 47). Austin added that prosecutors are aware of public opinion (EHT. 49). Austin maintained that he never prosecuted a case because of race, but he was aware of the consequences of his decisions (EHT. 49). Austin testified that racial hatred could be an element to consider in a case (EHT. 50).

On cross-examination, Austin stated that, while he was generally in charge of office policy, the Homicide Team would be

headed by a separate lawyer (EHT. 51). He added that the Homicide Team would bring him a collective recommendation (EHT. 52). Austin maintained that he never filed a case because of public opinion (EHT. 52).

Ann Finnell testified that she has been an Assistant Public Defender in the Fourth Circuit for 23 years (EHT. 55). She was co-counsel with Patrick McGuiness in representing Mr. Freeman on the Epps case (EHT. 55). Prior to the Epps trial, Finnell asked McGuiness where negotiation efforts stood on the Freeman case (EHT. 56). McGuiness told Finnell that the case could not be pled out because of a race factor (EHT. 57). McGuiness told Finell that Stetson wanted to "even out the playing field" by prosecuting a white person for killing a black one (EHT. 58). Finnell recalled that the McKleskey[2] case was before the 11th Circuit Court of Appeals at the time of Mr. Freeman's trials (EHT. 58).

Finnell recalled Brad Stetson making statements during the Epps case to the effect that death was justified because of Mr. Freeman's alleged racial attitudes (EHT. 58). After the Epps penalty phase (wherein the jury recommended a life sentence), but prior to sentencing, Finnell received a call to report to Judge Parson's[3]

---

[2]McKleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

[3]The Epps case was tried by Judge William Parsons. Judge Parsons recused himself pursuant to a defense motion to

chambers (EHT. 59). When she arrived, Stetson was also present along with Assistant State Attorney George Bateh and Judge Parsons (EHT. 60). Judge Parsons stated that he felt race was a motive for the murder of Epps (EHT. 60). Stetson stated that he agreed with that assessment (EHT. 60). Finnell objected, asked that a court reporter be brought in, and asked that Mr. Freeman be present (EHT. 60). Judge Parsons denied Finnell's request and stated that he would not have the conversation on the record (EHT. 60). Finnell then asked to be excused in order to call Chief Assistant Public Defender Bill White (EHT. 60). After this, Finnell again requested that the conversation be put on the record (EHT. 61). At this point Stetson and Bateh spoke privately, after which Stetson receded from his position that a racial motive should be considered in sentencing (EHT. 61).

Finnell identified a Motion to Disqualify Judge Parsons from presiding over the Collier trial (EHT. 64, Defense Exhibit 2). Finnell testified that there was no doubt that Stetson was arguing race as a basis to override the jury's recommendation in Epps (EHT. 64). At the sentencing hearing for the Epps case, while Judge Parsons denied that the off-record conversation took place, Stetson and Bateh said nothing (EHT. 65). In his sentencing order overriding

---

disqualify prior to the Collier case. The Collier case was tried by Judge Donald Moran.

the jury's recommendation, Judge Parsons cited race as a motivating factor for the Epps murder (EHT. 65, Defense Exhibit 3). Finnell stated that the defense could have rebutted the notion that Mr. Freeman harbored racial hatred (EHT. 66). However, no evidence was ever presented to support this notion (EHT. 66).

On cross-examination, Finnell testified that she is currently the felony court supervisor and was in that position at the time of the Freeman trials (EHT. 68). She stated that she has defended numerous homicide defendants and is a member of the Public Defender's Homicide Team (EHT. 69). Finnell volunteered to try the Epps case with Pat McGuiness (EHT. 68).

Finnell testified that although she doesn't know exactly what Stetson thought about the death penalty in this case, it is fair to say he was intransigent in his efforts to seek death (EHT. 74). Although she doesn't remember hearing Stetson make a statement about "getting the numbers up", she does remember McGuiness talking to her about it (EHT. 75). Finnell agreed that State Attorney is an elected office and that the office must consult with victims regarding pleas (EHT. 78). In response to prosecutor Taylor's suggestion that it would be naive for the state ***not*** to consider race in deciding whether to seek death, Finnell responded that it would be naive ***to*** in fact consider race in such a determination (EHT. 78). Finnell added that she believes death should be sought as a penalty based on an

application of the facts to the law (EHT. 79). Finnell testified that she believes the off-record conversation in Judge Parsons chambers shows both Stetson's and Parsons' frame of mind regarding race in this case (EHT. 81).

Finnell testified that she and McGuiness worked together on Epps and that she did some preparation of mitigation evidence (EHT. 70). In the Epps case, there were major questions about Mr. Freeman's guilt and, thus, there was a major focus on the guilt phase (EHT. 71). In terms of mitigation, Finnell testified that the objective would have been to hire a mental health expert, talk to as many family witnesses as they could find, and obtain records (EHT. 72). Finnell added that they would want to find out as much positive information about John as possible (EHT. 73).

On redirect examination, Finnell stated as to mitigation that she would want to use evidence of head injuries, would want to establish non-statutory mental health mitigation if possible, would want to give evidence of suicidal ideation by the defendant to a psychologist, and would want to present evidence of physical or sexual abuse of the defendant or a close sibling (EHT. 82-83). In mitigation, she would want to present good things the defendant has done or bad things that happened to him (EHT. 83). The purpose of mitigation is to "pave" the life history of the defendant for the jury (EHT. 83).

Upon inquiry by the court, Finnell testified that it is her understanding that the mitigation presented in Epps and Collier was virtually the same (EHT. 86-87).

Patrick McGuiness was called to testify at the evidentiary hearing on two separate occasions. Once by Mr. Freeman, once by the state.

When called by Mr. Freeman, Patrick McGuiness testified that he has been an Assistant Public Defender for 23 years and that he represented Mr. Freeman on the Epps and Collier cases (EHT. 88).

McGuiness spoke with Mr. Freeman prior to the trials (EHT. 89). Mr. Freeman admitted the Collier murder, but denied killing Epps (EHT. 89). McGuiness felt that Mr. Freeman would be convicted in both cases so he suggested to Mr. Freeman that he plea to consecutive life/25 sentences (EHT. 89).

McGuiness undertook plea negotiations with Brad Stetson (EHT. 88). McGuiness and Stetson had a conversation during the discovery phase of the trials regarding those negotiations (EHT. 89). The conversation took place at the copy center of the Public Defender's Office (EHT. 89). McGuiness believed that they were conducting depositions at the time (EHT. 90). McGuiness told Stetson that he had authorization from Mr. Freeman for a plea to consecutive life/25 sentences (EHT. 90). McGuiness tried to sell Stetson on the finality and mutual benefit of such a plea (EHT. 90). McGuiness testified "*He*

(Stetson) responded that normally he would consider it, but he couldn't in this instance because they had to get their numbers up on whites killing blacks" (EHT. 90). McGuiness remembered that McKleskey was pending at that time (EHT. 90). McGuiness testified that he understood what Stetson was saying and that it struck him as ironic given the issue in McKleskey (EHT. 91). McGuiness urged Stetson to consider the offer, which remained open (EHT. 91).

McGuiness mentioned the conversation with Stetson to his co-counsel, Ann Finnell (EHT. 92). Other than that, McGuiness testified that he did nothing to address the issue (EHT. 92). McGuiness testified that he did not know what vehicle he could use to address the issue (EHT. 91).

McGuiness recalled that Judge Parsons addressed race in his sentencing order from Epps and that he moved to disqualify Parsons as a result (EHT. 93-94).

In terms of mitigation, McGuiness testified that head injuries to the defendant could be important if tied to the defendant's conduct or as a basis for statutory mitigation (EHT. 95). McGuiness would want an expert to consider suicidal ideation by a defendant (EHT. 96). The presentation of evidence of drug and/or alcohol use would depend on context (EHT. 96). McGuiness stated he put on evidence of physical abuse to Mr. Freeman, but that he had no evidence that Mr. Freeman was sexually abused (EHT. 96). McGuiness

remembered that Mr. Freeman's family members were somewhat uncooperative (EHT. 96).

McGuiness was aware that Mr. Freeman was hoarding pills and that he was hospitalized for suicidal ideation (EHT. 97). McGuiness was also aware of a childhood head injury where Mr. Freeman was run over by a car (EHT. 97). McGuiness made attempts to verify the injury (EHT. 97). He felt he could not connect the head injury to the murder and, as a result, did not use evidence of the head injury (EHT. 97-98). McGuiness testified that he was aware that Mr. Freeman had a history of drug use (EHT. 98). McGuiness agreed that a document from his file indicated Mr. Freeman had used drugs (EHT. 101, Defense Exhibit 4).

Although he was "painfully aware" that he had the additional aggravator of a prior murder in Collier, McGuiness did not remember developing any further mitigation (EHT. 102-03).

On cross-examination by the state, McGuiness testified that he did not know how to address the McKleskey issue and that there was no avenue of relief that occurred to him (EHT. 103). While McGuiness didn't raise the issue at trial, he did raise the issue before a Clemency board in the early 1990's because "Mr. Freeman was in the posture he was in ... because of his race" (EHT. 104). McGuiness stated he was aware of criticisms by the defense bar that death was not sought proportionally in cases involving white defendants as

opposed to black ones (EHT. 105). Further, he has made that criticism himself (EHT. 105).

On redirect, when asked whether he thought a Clemency board was the proper place to raise a constitutional challenge to the death penalty, McGuiness stated that he did not know the proper place to raise the issue (EHT. 109).

When recalled by the state, McGuiness testified on direct examination that he has been a member of the Homicide Team since 1981 and that the team is staffed with seasoned attorneys (EHT. 298-300).

Mr. Freeman had been charged with the Collier murder and was under suspicion for Epps when McGuiness was assigned to the case (EHT. 301). McGuiness' initial strategy was to get death out of the picture as a possible sentence (EHT. 301). One of McGuiness' objectives in a potential death penalty case is to undermine the prosecutor's confidence in the charge (EHT. 302).

McGuiness stated that it is his procedure to develop as much evidence as possible for guilt phase first, and then to develop the penalty phase if death is involved (EHT.302). McGuiness recognized that Mr. Freeman faced a legitimate threat of the death penalty (EHT. 302).

McGuiness' strategy in the Collier case was to obtain a jury pardon of second-degree murder (EHT. 303). In Epps, McGuiness stated that he tended to believe Mr. Freeman's claim of innocence and

investigated the case thoroughly (EHT. 303). McGuiness still has "grave doubts" about the correctness of the Epps verdict (EHT. 303). While the evidence of guilt in the Epps murder was largely circumstantial, there was really no defense available in Collier (EHT. 305). The Epps case was tried first (EHT. 306).

As part of mitigation development, McGuiness relied on Mr. Freeman for biographical information, ordered records, and retained a mental health expert (EHT. 307). McGuiness interviewed Mr. Freeman's brother and step-brother as well as their respective wives (EHT. 307-08). Physical abuse was a common theme related by the witnesses, who testified that John's stepfather was harsh disciplinarian (EHT. 308-09).

McGuiness stated that he personally interviewed Mr. Freeman's brother, Robert Jewell, and took notes (EHT. 309). McGuiness identified his notes of the Jewell interview (EHT. 310). The notes were admitted into evidence (EHT. 310, State Exhibit 1). In the notes, Robert described physical and verbal abuse by Charles Freeman, stated that John received no affection or encouragement, and stated the he would like to kill Charles Freeman himself (EHT. 311-12). The notes of the interview also indicated that Robert told McGuiness about potential witnesses Joann Sorrells, David Sorrells, and Faith McQueen (EHT. 312). Robert also told McGuiness that John was artistic, quiet, liked fishing, and could not write or spell well

(EHT. 311-13). McGuiness testified that he thought Robert would make a good witness and that Robert did in fact testify at the Epps and Collier trials (EHT. 314-15). McGuiness added that when assessing a witness, he considers direct knowledge and articulation (EHT. 314-15).

McGuiness also personally interviewed Mr. Freeman's mother who, although she loved her son, feared her husband (EHT. 315-16). McGuiness felt she was not as strong a witness as Robert (EHT. 316).

McGuiness also determined that David Sorrells, a friend of John's, would make a good witness (EHT. 318). Sorrells testified in the Epps trial (EHT. 318). McGuiness planned to call Sorrells at the Collier trial, but Robert, who was managing witness contacts for the defense, could not find Sorrells (EHT. 319-20). The judge denied a continuance in order to find Sorrells, but allowed a readback of his testimony from Epps (EHT. 320). McGuiness asserted that his reason for failing to subpoena Sorrells was that putting Sorrells under subpoena would have allowed the state to determine who his mitigation witnesses were (EHT. 320). McGuiness stated he assumes that the state checks the clerk file for copies of subpoenas (EHT. 321).

McGuiness also interviewed David Sorrells' mother, Joann (EHT. 322). McGuiness recognized notes of his interview with the Sorrellses (EHT. 322). The notes were moved into evidence (EHT. 323, State Exhibit 2). McGuiness' notes indicated Joann had known John

for 13 or 14 years, that John was neglected, that he had been hurt by his parents, that he was a hard worker, and that he was a child in a man's body (EHT. 323-24). The notes also indicated that Joann felt John was where he is because no one cared for him (EHT. 324). Joann was not presented as a mitigation witness (EHT. 325). McGuiness testified that the notes suggest he felt David was a more compelling witness than Joann (EHT. 326).

McGuiness testified that he wanted to satisfy himself that Mr. Freeman was competent to stand trial and, thus, he hired a mental health expert, Dr. Louis Legum (EHT. 326). Legum evaluated Mr. Freeman for statutory and non-statutory mitigation (EHT. 327). McGuiness believed that he sent Legum all of the background materials that he had on Mr. Freeman (EHT. 327). McGuiness personally attended Dr. Legum's evaluation of Mr. Freeman (EHT. 327). McGuiness stated that he met with Legum personally (EHT. 329). McGuiness recognized notes from his file of an interview with Legum (EHT. 330). McGuiness testified that the notes reflect that Mr. Freeman has an I.Q. of 83 and has low academic achievement (EHT. 331). The notes contain the statements "no organic" and "high percentage diagnosed as perhaps organic" (EHT. 331). Also, the notes reflect that Legum felt John had trouble processing information, that he was an Anti-Social personality, that he was passive-agressive and passive-dependent, anxious, and tended to avoid conflict (EHT. 332). Legum felt John

was not psychotic (EHT. 332). The notes further reflect that Legum felt he could not testify to statutory mitigation (EHT. 333). McGuiness testified that he used Legum primarily to demonstrate Mr. Freeman's lack of academic instruction and development (EHT. 335).

McGuiness testified that he did not want to put on evidence that his client was a "doper or a drunk" (EHT. 337). Further, he does not view drinking as mitigation and most of the population views drug use negatively (EHT. 337). McGuiness felt that he did not want to put on evidence of drugs or alcohol use in mitigation in order to explain the crime (EHT. 336).

McGuiness testified that he had information from family members that Mr. Freeman suffered a head injury from being hit by a car as a child (EHT. 339). However, because McGuiness could not document the injury with medical records, he did not present the information (EHT. 340). McGuiness acknowledged that the information would have been useful if he could have documented it (EHT. 340). McGuiness recognized records from his file that indicate Mr. Freeman was treated at a Waycross, Georgia hospital in March, 1966 (EHT. 341). McGuiness felt this was not enough to document the injury (EHT. 342). The records were moved into evidence (EHT. 341, State Exhibit 4).

McGuiness stated that he obtained school records on Mr. Freeman, but that he did not want to use them because the records contained negative information (EHT. 343).

McGuiness was aware that Mr. Freeman was being prescribed medication while housed at the Duval County jail (EHT. 351). Further, he was also aware that Legum had found Mr. Freeman to be depressed (EHT. 350).

McGuiness testified that the sentencing phase in Collier presented a much different dynamic because of the application of the Epps conviction as an aggravator (EHT. 347). McGuiness felt the jury in Collier was shocked to learn of the Epps conviction (EHT. 347). McGuiness stated that in his opinion a prior murder is the most damaging aggravating factor (EHT. 348). McGuiness testified that the decision was made to present identical mitigation to that presented in Epps (EHT. 347). McGuiness stated that he considered ways to combat the prior murder as an aggravator, but could not come up with a winning solution (EHT. 349).

On cross-examination by the defense, McGuiness agreed that the situation in Collier was different in terms of the prior murder, yet he did not interview any new witnesses or have Mr. Freeman seen by the doctor again (EHT. 352). McGuiness did not remember obtaining any new mitigation for the Collier trial (EHT. 359). McGuiness stated that he presented little, if any, of the defense theory of the Epps murder at the Collier penalty phase (EHT. 353). McGuiness did not think it would be to his advantage to retry Epps (EHT. 354).

As to the head injury to Mr. Freeman, McGuiness stated that he

had no doubt that the family was telling the truth about the incident, but he still had "no evidence" of it (EHT. 355). McGuiness did not think the lack of success indicated by the school records showed possible brain damage (EHT. 356).

McGuiness thinks he met with Joann Sorrells personally (EHT. 357). He did not recall whether she had seen markings from beatings to Mr. Freeman (EHT. 358). McGuiness did not attempt to put forth Joann's testimony in Collier when David could not be found (EHT. 359).

McGuiness testified that he would have wanted to present evidence of sexual abuse to Mr. Freeman's sister if he could connect it to Mr. Freeman (EHT. 360). McGuiness did not talk to Danette Freeman (EHT. 360). McGuiness would want to present the most compelling evidence of abuse possible (EHT. 360). McGuiness stated that no one from the Freeman family told him about the sexual abuse (EHT. 360).

McGuiness testified that he utilized investigators for record acquisition in the Freeman case and that he and co-counsel did witness interviews (EHT. 361).

If McGuiness had evidence that Mr. Freeman's drug and alcohol use caused brain damage, he would have wanted to use it (EHT. 362). McGuiness conceded that he possibly should have delved deeper into this issue (EHT. 362). McGuiness knew that Mr. Freeman drank and used

drugs, but McGuiness did not think this evidence would "do me any good in the penalty phase" (EHT. 371).

McGuiness stated that he would want to present statutory mitigation if he had it, but Legum did not feel it was present (EHT. 365). Legum did not talk to any of the witnesses (EHT. 365).

McGuiness conceded that failing to have David Sorrells under subpoena was an error and that Sorrells' live testimony would have been preferable (EHT. 366). Not having Sorrells under subpoena was not a strategy (EHT. 369).

McGuiness testified that he would want to put on non-family mitigation witnesses as to abuse of Mr. Freeman (EHT. 367). Presenting cumulative evidence was not something McGuiness was concerned about given the heavy aggravation (EHT. 367). McGuiness agreed that witness Jimmy Holliman's testimony would have been compelling, but that he did not talk to Holliman (EHT. 371). McGuiness would have wanted to use Joann Sorrells testimony (EHT. 373). McGuiness testified that he thought he had the best mitigation case possible, but that, if there was additional mitigation of which he was not aware, he would have wanted it (EHT. 374). McGuiness did not speak to additional witnesses between the Epps and Collier trials (EHT. 375).

McGuiness was aware that Mr. Freeman was hospitalized for suicidal ideation prior to trial and says he told Legum about it

(EHT. 376). Nothing in his notes of conversations with Legum indicate he told Legum about the condition (EHT. 376). McGuiness did not recollect Legum testifying about it at trial (EHT. 377). McGuiness did not ask Legum about the suicidal ideation at trial because he didn't feel it would help (EHT. 378). Further, McGuiness analogized contemplation of suicide to an escape attempt (EHT. 378).

McGuiness testified that the client is a starting point for gathering mitigation, but certainly not the most reliable source (EHT. 379). McGuiness stated that it is sometimes a problem that clients asserting innocence are not as helpful with mitigation (EHT. 380). McGuiness believed, and still believes, Mr. Freeman is innocent of the Epps murder, but that did not effect his presentation of mitigation (EHT. 381).

On redirect examination, McGuiness testified that he was aware that Mr. Freeman denied being suicidal and that Mr. Freeman never personally told him he was suicidal (EHT. 385).

Dr. James Larson testified that he is a licensed psychologist who has testified in over 50 death penalty cases (EHT. 114, 118). Larson has been qualified as an expert in psychology and has testified for both the state and the defense (EHT. 118). The state stipulated to Dr. Larson's expertise in the area of forensic psychology (EHT. 119).

Dr. Larson stated that he first evaluated Mr. Freeman in 1992

at Florida State Prison (EHT. 120). Larson consulted on the case with neuropsychologist Karen Haggerott who performed a full neuropsychological battery (EHT. 120). Larson conducted a full mental status test and a review of records related to Mr. Freeman (EHT. 121). The records were admitted into evidence (EHT. 295, Defense Composite Exhibit 5)

Dr. Larson reviewed Haggerott's neuropsychological testing results (EHT. 123). Larson testified that Haggerott's testing revealed that Mr. Freeman has an I.Q. of 84 (EHT. 124). Larson stated that the testing revealed Mr. Freeman's actual academic achievement was lower than what would be expected for someone with his I.Q. (EHT. 124). Mr. Freeman's academic skills range from the third to seventh grade level, a discrepancy indicative of a learning disability (EHT. 125). The neuropsychological battery performed by Dr. Haggerott showed neuropsychological impairment and Haggerott offered a diagnosis of organic mental disorder (EHT. 125).

Dr. Larson was provided with and reviewed Mr. Freeman's school records (EHT. 125). Larson stated that Mr. Freeman's school records were instructive and important in evaluating Mr. Freeman (EHT. 126). The records indicated early and continuing academic problems for Mr. Freeman, as well as difficulties in social behavior (EHT. 126). Larson testified that academic problems typically lead to frustration, anger, low self esteem, and boredom (EHT. 126). Also,

academic records set a pattern for future behavior (EHT. 129). The school records were consistent with the psychological testing (EHT. 127).

Larson reviewed affidavits from family members regarding Mr. Freeman's home environment, school life, and substance abuse problems (EHT. 127). Larson also obtained, from Mr. Freeman and affidavits of friends and family, a history of head injuries to Mr. Freeman (EHT. 128). Larson learned that at age 2, Mr. Freeman was run over by a car and treated at a hospital (EHT. 128). In another incident, Mr. Freeman was involved in a bicycle accident where he lost consciousness for 10 minutes (EHT. 128).

Larson testified that the combination of academic failure and head injury is a red flag indicator of neuropsychological impairment (EHT. 128).

Larson also testified that Mr. Freeman had a history of polysubstance abuse (EHT. 129). This included the abuse of alcohol at an early age, marijuana, and cocaine (EHT. 129). This history was developed from interviews with Mr. Freeman and affidavits of his family and friends (EHT. 128). Larson testified that the history of head injuries and substance abuse is important in that it allows the psychologist to evaluate how an individual functions at a given point in time (EHT. 129).

Dr. Larson testified that brain damage can alter personality

functioning and that people, like Mr. Freeman, who are brain damaged, may function differently than people without compromised brains (EHT. 130). Brain damage puts someone at greater risk for substance abuse (EHT. 130). Larson testified that while the cause of Mr. Freeman's brain damage remains unknown, it may have been caused by head injuries or substance abuse, it could be congenital, or it could be multi-causal (EHT. 131-32).

Dr. Larson stated that Mr. Freeman is very concrete in his decision making, not dealing well with abstractions (EHT. 132). Mr. Freeman does not see as many possible solutions to problems as others do (EHT. 132). Mr. Freeman has difficulty processing new information (EHT. 132). Mr. Freeman's impairments in this regard cause him to be quite impulsive, making decisions on the spur of the moment without thinking about the consequences (EHT. 132-33). Mr. Freeman acts on the emotion of the moment (EHT. 133).

Dr. Larson reviewed records from University Hospital related to Mr. Freeman (EHT. 133). The records revealed that Mr. Freeman had been hospitalized because of "suicidal ideation" (EHT. 133). Mr. Freeman had been placed on the anti-depressants Pamelor and Vistaril while detained pre-trial (EHT. 133). It was discovered that Mr. Freeman was hoarding the pills to, as Mr. Freeman expressed, commit suicide (EHT. 133). As a result of this discovery, Mr. Freeman was hospitalized and diagnosed with depressive disorder (EHT. 133). Mr.

Freeman's suicidal thinking is something Larson, as a psychologist, would want to know about in conducting his evaluation (EHT. 134). Larson testified that Mr. Freeman's contemplation of suicide indicates depression, a strong sense of hopelessness, and a sense of futility (EHT. 134). Dr. Larson testified that, in his opinion, at the time of the Collier homicide Mr. Freeman's capacity to conform his conduct to the requirements of the law was substantially impaired (EHT. 135). Larson based this opinion on the fact that Mr. Freeman is a compromised individual (EHT. 135). Larson stated that Mr. Freeman suffers from organic mental disorder which is associated with impulsivity (EHT. 135). Larson's opinion as to statutory mitigation is also based on the fact that Mr. Freeman suffers from a learning disability and that he endured a violent childhood marked by verbal and physical abuse (EHT. 135). All of these factors combined to form Dr. Larson's opinion as to statutory mitigation (EHT. 136).

Dr. Larson reviewed Dr. Legum's testimony from the Collier case (EHT. 136). Legum's testing results were similar, a fact which Larson testified increases the accuracy of both results (EHT. 136). However, Dr. Legum did not perform the extensive neuropsychological battery performed by Larson and Haggerott (EHT. 136). Larson testified that Mr. Freeman's neuropsychological impairment existed at the time of the Collier homicide and resulting trial (EHT. 137).

On cross-examination, Larson testified that Dr. Haggerott's

testing was done in 1992 (EHT. 138). She conducted a full neuropsychological battery, with many tests (EHT. 138-39). Dr. Legum performed only four of the tests that Haggerott did (EHT. 139). Larson stated that Legum did merely a screening test, whereas what Haggerott did was a full neuropsychological battery (EHT. 140). Haggerott is not a medical doctor (EHT. 141). Larson did not agree that medical testing, such as a brain scan, is the best way to diagnose organic damage (EHT. 141). This is because some impairments are in cognition, not physical brain structure (EHT. 141). Larson stated that brain scans do not reveal organic damage that is sufficient enough to effect behavior, yet not sufficient enough to show up on a scan (EHT. 141). Neurological scans will only detect gross impairment of the brain (EHT. 142).

Larson testified that poor school performance is a "red flag" indicator of possible organic damage (EHT. 143). Larson noted that Mr. Freeman's school performance was even worse than his I.Q. would indicate which would raise the possibility of brain damage (EHT. 164). Another indicator of organic damage is behavioral problems (EHT. 144). Larson identified these indicators in the records he reviewed on Mr. Freeman (EHT. 145-47). Based on the poor school performance, Larson stated that he feels the organic impairment occurred during Mr. Freeman's early years (EHT. 164). Headaches, blackouts, and stuttering are also indicators of organic damage, but

Larson did not see evidence of these in Mr. Freeman (EHT. 143-49).

Larson testified that the best evidence of head injury would be clear documentation at the time of the injury (EHT. 151). Larson stated that he assumes that attorneys look for this documentation (EHT. 151). Larson agreed that, if available, documentation would be better evidence than a mother's subjective observations (EHT. 151). Larson testified that he had evidence of two head injuries in Mr. Freeman's history, the incident where he was run over by a car and a bike accident when Mr. Freeman was a child (EHT. 163).

Larson testified that he is aware that Mr. Freeman has demonstrated artistic ability (EHT. 140). However, Larson stated that artistic ability is not contrary to a finding of brain damage (EHT. 153).

Larson testified that he is aware Mr. Freeman denied being suicidal while at the jail prior to trial (EHT. 155). Larson stated that hoarding pills is common in planning suicide (EHT. 155). Futher, diagnostic statements by the admitting psychiatrist at University Hospital indicate that Mr. Freeman was suicidal upon admission (EHT. 157-58). Larson stated that suicidal patients are often not truthful about their intentions (EHT. 159).

Larson testified that there was a discrepancy between the drug use admitted to by Mr. Freeman and that which was outlined in the affidavits (EHT. 160-61). Mr. Freeman did admit to Dr. Haggerott

that, in addition to alcohol and marajuana, he had used qualudes, amphetamines, valium, and cocaine (EHT. 161).

Larson testified that Dr. Legum found Mr. Freeman to be depressed, of low intelligence, the victim of a poor school system, and possibly suffering from a learning disorder (EHT. 162). Larson stated that these are legitimate conclusions (EHT. 162). Legum determined Mr. Freeman's I.Q. to be at the same level as Haggerott and Larson did (EHT. 165).

Larson restated his opinion that, at the time of the Collier homicide, Mr. Freeman's ability to conform his conduct to the requirements of the law was substantially impaired (EHT. 167).

Upon inquiry by the court, Larson testified that Dr. Legum did not have access to school records, hospital records, or information from third parties who had contact with Mr. Freeman (EHT. 168-69). Also, Legum did not have the benefit of a neuropsychological battery (EHT. 169).

On redirect examination, Larson testified that Haggerott performed a greater variety of tests than Legum did (EHT. 171). Larson stated that it is common for addicts or alcoholics to minimize the extent of their addiction (EHT. 172). Larson did not recall, from his review of Legum's testimony, that Legum was asked about suicidal thoughts in Mr. Freeman (EHT. 173).

On recross-examination, Larson testified that he is aware that

documents he reviews as part of his evaluation can be inquired about in front of the jury (EHT. 173).

Mary Kate Holliman testified that she now lives in Bryceville and that in the 1980's she lived in Jacksonville (EHT. 175). The Freemans lived right next door to her family for approximately 30 years (EHT. 175). Mary stated that John Freeman was a really nice, well-mannered boy (EHT. 176).

Mary's son Jimmy and John were close friends (EHT. 176). John often stayed at the Holliman's house (EHT. 176). When Jimmy Holliman was a child, he fell out of a tree and was in a coma for a month (EHT. 177). As a result of this accident, Jimmy was crippled and could not walk (EHT. 177). While Jimmy was hurt, John Freeman took care of Jimmy by helping him walk and watching out for him (EHT. 178). John would often go on camping trips with the Hollimans and take care of Jimmy (EHT. 178). Mary stated her belief that John "was good to Jimmy" (EHT. 178).

Mary recalled an incident where Charles Freeman was cursing her son Jimmy (EHT. 177). Charles was using foul language and Mary had to call the police (EHT. 177). Mary recalled hearing a loud slap from the Freeman house one night (EHT. 178). Later, Deana Freeman, John's sister, told Mary that Charles Freeman had hit their mother (EHT. 178). Deana Freeman also told Mary that their mother had attempted suicide (EHT. 180).

Dannette Rucker is John Freeman’s older sister by five years (EHT. 182). Danette and John have one other full brother, Robert Jewell, a stepbrother, Doug Freeman, and a stepsister, Deana Freeman (EHT. 182).

Danette testified that John and Robert were physically abused by their stepfather, Charles Freeman (EHT. 182). Danette was sexually abused by Charles (EHT. 182). Danette testified that the beatings were frequent and occurred as early as she can remember (EHT. 183). Danette described the physical abuse as “beatings”, "not spankings, not whippings" (EHT. 183). Charles would strike John with whatever was available, including belts, boards, sticks, and fists (EHT. 183, 188). Often, no reason was given for the beatings (EHT. 183). Dannette recalled John and Robert being tied to the bed and beaten (EHT. 183). In another incident recalled by Danette, John and Robert were taken to the woods and beaten just short of death with a board (EHT. 186). As a result of this beating, the boys, who were less than 10 years old, were bruised and bleeding (EHT. 186). Charles was also verbally abusive and exhibited no love at all towards John (EHT. 189). John’s mother, Mary Freeman, did nothing to protect John from the abuse (EHT. 188).

The first time Danette remembers being sexually abused was when her mother was in the hospital giving birth to Danette’s stepbrother (EHT. 184). Danette believes she was 5 years old at this point (EHT.

185). Charles had intercourse with her (EHT. 185). Danette stated that she knows her mother was aware of the sexual abuse because her mother witnessed it (EHT. 185). Sometimes Danette's mother was in the bed when it happened (EHT. 185). Danette started running away from home when she was 14 years old and lived away from home most of the time after that (EHT. 186). Danette stated that she was afraid of and hated her stepfather (EHT. 189).

Danette recalled the incident where John was run over by a car as a child (EHT. 187). Danette stated that John had marks on his head from this incident (EHT. 187). Danette remembered that John was sitting on a curb and a car backed over him (EHT. 188).

Danette was never contacted by John's attorneys at the time of trial (EHT. 190). She would "definitely" have testified had she been asked (EHT. 190).

On cross-examination, Danette stated that she could not remember the respective ages of she and John at the time John was run over by the car (EHT. 191-92). The first time she told anyone within the legal system about the sexual abuse was when she discussed it with John's postconviction representatives (EHT. 192). She has told others about it (EHT. 192). To her recollection, neither her brothers or mother reported the sexual abuse (EHT. 193). Danette stated that the sexual abuse was not embarrassing and that by the time she realized it was wrong, she left home (EHT. 193).

On redirect examination, Danette testified that she would have tesified at John’s trial consistently with the way she testified at the evidentiary hearing (EHT. 194).

Jesse Jewell testified that she lives in Jacksonville and that she was formerly married to John’s brother, Robert (EHT. 196). Jesse and Robert were married in November, 1985, but she knew John prior to this (EHT. 197). Jesse described John Freeman as a very nice, quiet person (EHT. 197). Jesse testified that she knew Charles Freeman and that he was a rude man who was verbally abusive to both John and Robert (EHT. 197). Finally, Jesse stated that Robert has told her that his sister Danette was sexually abused (EHT. 198).

Sherry Raymond testified that she is the daughter of Jesse Jewell (EHT. 199). Sherry officially met John Freeman after he got out of prison the first time, but she knew of him when he was boy (EHT. 199, 205). Sherry stated that she was around John often after her mother and Robert were married (EHT. 200).

Sherry recalled John and Robert riding along while she took her kids on an Easter egg hunt (EHT. 200). She found it to be "heartbreaking" that John and Robert had never been on an Easter egg hunt (EHT. 200).

Sherry testified that she and John became good friends in the period after he was released from prison and before he was arrested for murder (EHT. 205). Sherry stated that during this period, she

and John were both "as strung out as they come" on powder cocaine (EHT. 210). John was also smoking pot and drinking alcohol to excess (EHT. 210).

Sherry remembered the Freeman family during the time John was a child (EHT. 205). John and Robert came to her mother-in-law's house once after Charles Freeman had beaten them (EHT. 206). The boys were afraid to go home (EHT. 209). Their skin was broken and they had been beaten about the back and neck (EHT. 206). The boys were seeking refuge from their step-father (EHT. 206). Sherri stated that her mother-in-law tried to protect the boys and eventually called the police (EHT. 206-07). John and Robert were approximately 11 or 12 years old at this point (EHT. 207). Sherri described the beatings from Charles Freeman as "unmerciful" (EHT. 207). Charles Freeman was physically, verbally, and mentally abusive (EHT. 207). Sherri stated that nothing the boys did was good enough for Charles Freeman (EHT. 210). Sherri received a call just before the evidentiary hearing from a childhood friend of the Freemans, Jeff Strickland (EHT. 211). Strickland told Sherri that he was in and out of the Freeman house as a child (EHT. 212). Strickland remembered an incident where Charles Freeman forced John to continue fighting a boy who had beaten him up (EHT. 212). Charles Freeman also beat John for losing the fight (EHT. 212). Strickland described Charles Freeman as "the most horrible, wickedist man that ever walked the earth" (EHT. 213).

Sherri stated that John's mother did not have the nerve to stand up to Charles Freeman (EHT. 208). People were scared to say things about Charles Freeman (EHT. 214).

Sherri and her mother came to the courthouse during John's trial to lend support to Mrs. Freeman (EHT. 213). Sherri stated that she would have testified had she been asked (EHT. 214).

On cross-examination, Sherri stated that she would have testified about her drug use at John's trial despite concerns about her employer (EHT. 216).

Faith McQueen Hickman testified that she knows John Freeman and that he became her boyfriend sometime around 1986 (EHT. 218-19).

Faith stated that she had 3 kids at the time and that John was great with them (EHT. 219). John would get the pool ready and would play in the pool with them (EHT. 219). John was especially fond of her son, Kaylin (EHT. 220).

Faith met Charles Freeman while she and John were dating (EHT. 220). Faith found Charles to be "hard-core" and abusive (EHT. 220). When John brought Faith home, Charles asked her, "What are you doing with that piece of shit?," referring to John (EHT. 221). Charles told her John would never become anything (EHT. 221). John told Faith that once when he was a child his father made him continue to fight an older, bigger boy who had beaten him up (EHT. 222). Each time the boy beat John up, Charles would beat John once he got home

(EHT. 222).

Faith became aware that John was using cocaine while they were dating (EHT. 221). John did not use cocaine at her house (EHT. 221).

At the time of trial, one of John's attorneys called Faith on the phone (EHT. 223). Faith was never called to testify (EHT. 223).

Jimmy Holliman testified that he grew up in the same neighborhood as John Freeman and that they were childhood friends (EHT. 225). They have been friends since age 7 (EHT. 226). Jimmy testified that John is a good person (EHT. 226). When Jimmy was a child, he fell out of tree and was paralyzed on his left side and could not go to school (EHT. 226). John would come by after school and take Jimmy fishing, helping Jimmy ride his bike and carrying Jimmy's fishing equipment (EHT. 226). Other kids would make fun of Jimmy, but John stood up for him (EHT. 227). Jimmy stated that he has nothing but love in his heart for John (EHT. 227). John treated him "the best any person could be treated" (EHT. 229).

Jimmy stated that Charles Freeman was a "hard man" (EHT. 227). Jimmy saw and heard beatings given to John (EHT. 228). Jimmy saw John and Robert strapped to a bed and beaten (EHT. 228). He could hear John and Robert plead for the beatings to stop (EHT. 229).

Jimmy testified that he thinks he remembers talking to one of John's representatives at the time of trial (EHT. 229). Jimmy would

have testified had he been asked to do so (EHT. 230).

David Sorrells testified that he knows John Freeman and that they grew up together as teenagers (EHT. 231). David and John became friends at school and the friendship extended outside of school (EHT. 233). David testified that he would pick John up at his house, but would not go inside because John's father was "rowdy" and "noisy" (EHT. 233). John would tell David about beatings he received (EHT. 234). David remembered seeing marks on John's back from the beatings (EHT. 234). David's mother also witnessed these marks (EHT. 234). David stated that his mother was in disbelief at the markings (EHT. 234).

David testified at the Epps trial (EHT. 231). David stated that he would have testified at the Collier trial, but was not asked to do so (EHT. 231). No one contacted him for the Collier trial (EHT. 232). He would have testified at Collier if asked (EHT. 235).

Robert Jewell testified that he is John Freeman's biological brother and that they grew up in the same house together (EHT. 240). Robert is 2 years older than John (EHT. 242).

Robert remembered his stepfather being physically and verbally abusive to both he and John (EHT. 241). Robert remembered an incident where they were taken to the woods and beaten with a stick (EHT. 241). He also recalled he and John being tied to the bed with neckties and being whipped until they were "black and blue" (EHT.

241). On another occasion, Charles Freeman threw a knife at John for dipping butter with a fork (EHT. 242). Robert stated that Charles Freeman once threatened him with a shotgun when he was going to run away (EHT. 243). Charles Freeman would hit them with his open fists and hands (EHT. 242).

Robert testified that his sister Danette told him she had been sexually abused by Charles Freeman (EHT. 240). A friend of Danette's also told him about this (EHT. 240).

Robert recalled the incident where a drunk neighbor ran over John's head with a car (EHT. 242).

Robert testified that John used marijuana, alcohol, and cocaine (EHT. 243).

Robert testified at the Collier trial (EHT. 244). Robert stated that he answered all of the questions asked to him at the Collier trial (EHT. 244). He was willing to answer all questions asked of him (EHT. 244).

On cross-examination, Robert testified that he was 21 years old when he learned of the sexual abuse to Danette (EHT. 245). Danette was young when the abuse occurred and she was embarrassed and hurt by it (EHT. 245).

Robert stated that he met with Pat McGuiness and discussed his testimony (EHT. 246). Robert gave McGuiness the information that he had (EHT. 247). Robert thinks he gave McGuiness the information

about the alcohol and cocaine (EHT. 247). Robert recounted things he testified to at the Collier trial (EHT. 247-49).

Robert stated that he thinks the beatings with fists happened when he was as young as 5 to 8 years old (EHT. 248). He thinks he was around 5 years old when John was hit by a car (EHT. 249). He remembers the car incident happening and also what his mother told him about it (EHT. 250).

Robert knows David Sorrells (EHT. 250). Robert made an unsuccessful attempt to find Sorrells during the Collier trial (EHT. 251).

On redirect examination, Robert agreed that he is not sure now of every detail he testified to at trial (251).

Upon court inquiry, Robert testified that he is serving a sentence of 29 months in the Department of Corrections for cocaine possession and prescription fraud (EHT. 252-53).

Joann Sorrels testified that she knows John Freeman and that he grew up with her son, David (EHT. 254). Joann first met John when he was approximately 14 years old (EHT. 254). The Sorrelses lived close to the Freemans (EHT. 255). Joann described John Freeman as a "good kid", very polite, mannerly, soft spoken, and gentle (EHT. 255). John always said "yes, ma’am" and "no ma’am" (EHT. 255). Joann stated that John always treated her with respect (EHT. 255). Joann recalled an incident where John vowed to protect her when she was

going to break up a neighborhood fight (EHT. 257).

Joann recalled seeing large bruises on John’s back (EHT. 256). John told Joann that the bruises were a result of his stepfather hitting him "for nothing" (EHT. 256). Unlike most of the kids in the neighborhood, John always kept his shirt on (EHT. 257).

Joann contemplated having John move into her house so she could protect him (EHT. 256). She often wishes that she had done so (EHT. 256). Joann always thought of John as one of her children (EHT. 256).

Joann did not recall testifying at Mr. Freeman’s trials (EHT. 257). She would have done so if asked (EHT. 257).

On cross-examination, Joann testified that she could not recall anyone from the Public Defender’s office contacting her (EHT. 258).

Zachary Marchalleck testified that he grew up near John Freeman and met John when he was 5 or 6 years old (EHT. 260). As a child, John was quiet and polite (EHT. 260). Marchalleck described John as "probably the greatest person you would ever want to meet" (EHT. 260).

Marchalleck remembers seeing bruises all over John’s body and hearing yelling and profanity coming from the Freeman house, including insults from Charles Freeman such as "dumb MF", "sorry", and "no good" (EHT. 261). These insults were directed at John and Robert (EHT. 261).

Marchalleck recalled John using drugs and alcohol (EHT. 261).

Marchalleck doesn’t recall being contacted about testifying at Mr. Freeman’s trial (EHT. 261). He would have testified if asked to do so (EHT. 262).

Mitchell Tanner testified that he knows John Freeman (EHT. 263). Tanner and John were raised together in the same neighborhood and went to school together (EHT. 263-64). The two lived 5 or 6 blocks from each other (264).

Tanner testified that Charles Freeman was not a very good stepfather (EHT. 264). Tanner witnessed physical abuse from Charles Freeman "as often as the sun went down" (EHT. 265). Charles Freeman would hit John with fists, belt buckles, rubber hoses, and sticks (EHT. 265). Tanner witnessed injuries to John from the abuse, including black eyes, bruises, and busted lips (EHT. 265). Tanner recalled an incident when John ran to his house after being beaten and Charles followed John (EHT. 265). Once Charles arrived, he "snatched" John out of Tanner’s mother’s car (EHT. 265). Tanner testified that while John was at the Freeman house, he was scared, "plain and simple" (EHT. 266). John would be afraid to do or say the wrong thing while at home (EHT. 266). John and Robert often ran away to Tanner’s house to avoid beatings from their stepfather (EHT. 266). John and Robert often could not dress out for gym class because of bruises on their bodies (EHT. 266). Tanner recalled that his mother

once called the police after John was severely beaten by his stepfather (EHT. 267). Tanner's mother desired to adopt John (EHT. 267).

Kelly Pelley testified that her mother was married to John Freeman's brother and that she knew the Freeman family (EHT. 269). Kelly remembered John as relaxed and easy-going (EHT. 269). Kelly remembers John drinking alcohol (EHT. 270).

Kelly recalled that after the Epps murder, John did not seem paranoid or worried (EHT. 270). A police officer lived next door to where John was playing cards and John did not seem worried (EHT. 270).

Kelly remembers Charles Freeman as a belligerent man (EHT. 271). Kelly would often answer the phone at her mother's house when Charles Freeman would call for Robert (EHT. 271). Kelly could not recall a time when these calls did not result in a verbal conflict (EHT. 271). This was because of Charles Freeman's abusive nature (EHT. 271). Charles Freeman never said anything good about John or Robert (EHT. 271). He belittled them constantly (EHT. 271). Kelly stated that most people in the neighborhood had a "Freeman story" about the abuse, the beatings, and having to take John and Robert into their home (EHT. 272).

Kelly was never asked to testify on John's behalf (EHT. 273). She wasn't interviewed about John's case until after he was sentenced

(EHT. 273). Kelly would have testified at John's trial if asked to do so (EHT. 273).

On cross-examination, Kelly testified that John seemed to be well-mannered and she never had any problems with him (EHT. 274). Kelly did not notice changes in John's personality when he drank (EHT. 275).

Bobbie Hart testified that she is Jimmy Holliman's sister and that she lived next door to the Freemans (EHT. 275-76). Bobbie knew John Freeman (EHT. 276).

Danette Freeman was Bobbie's best friend in the Freeman family (EHT. 276). Danette told Bobbie about being sexually abused by her stepfather (EHT. 276). Bobbie saw Charles Freeman beat John with a belt (EHT. 277). Charles Freeman did not know when to stop the beatings (EHT. 277). Bobbie stated that she could not stand to watch the beatings (EHT. 277). Bobbie was in the Freeman house a lot while visiting Danette (EHT. 278). Charles Freeman would beat Robert and John even when other people were around (EHT. 277).

Bobbie was not interviewed at the time of John's trials (EHT. 278). She would have testified at the trials if asked to do so (EHT. 279).

On cross-examination, Bobbie testified that Danette told her about the sexual abuse when Bobbie was 15 or 16 years old (EHT. 279). Danette told her this as a friend and did not want her to tell anyone

about it (EHT. 280).

Sonja Rigdon testified that she is John Freeman's aunt, the younger sister of Mary Freeman, John's mother (EHT. 282). Sonja is 13 years younger than Mary (EHT. 283). She spent summers with the Freemans when she was younger (EHT. 282).

Sonja testified that Charles Freeman was a loud and gruff man who was "really rough on the kids" (EHT. 282). Sonja was afraid of Charles Freeman when she was younger (EHT. 282). Charles was physically abusive to John and Robert and was always yelling at them (EHT. 283). Sonja stated that Mary Freeman yelled and screamed at John and Robert too (EHT. 284). There was a lot of yelling and screaming in the Freeman house generally (EHT. 284). Mary could do nothing to stop the beatings (EHT. 284).

Sonja would have testified at John's trials had she been asked to do so (EHT. 285).

Dwayne Watson testified that he has known John Freeman since the first or second grade (EHT. 286). Dwayne and John went to school together (EHT. 286).

Dwayne met Charles Freeman twice (EHT. 288). Dwayne stated that John's stepfather was very rough on him (EHT. 288). No one wanted to go in John's house (EHT. 288).

Dwayne recalled John using cocaine and alcohol (EHT. 287). John drank to excess at times (EHT. 287).

Dwayne remembered an incident where he and John were jumping ramps on their bicycles as youngsters (EHT. 287). John came off the ramp at a wrong angle and hit a tree (EHT. 288). Afterward, John did not move for several minutes (EHT. 288).

Deana Harrell testified that she is John Freeman's younger stepsister (EHT. 292). John was always her favorite brother (EHT. 292). John always took time with her and treated her nicely (EHT. 293).

Deana was not asked to testify at John's trials (EHT. 293). She would have done so if asked (EHT. 293).

SUMMARY OF THE ARGUMENT

(A) The lower court erroneously denied Mr. Freeman relief on his claim that the state's decision to seek death in his case was intentionally discriminatory and thoroughly tainted by consideration of racial factors. Further, counsel failed to litigate this issue at trial despite knowledge of its factual predicate and constitutional magnitude.

(B) The lower court erroneously denied Mr. Freeman relief on his claim that he was denied effective assistance of counsel at the penalty phase of his trial when trial counsel failed to present available mitigating evidence, both statutory and non-statutory, and failed to subpoena a crucial witness.

STANDARD OF REVIEW

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

ARGUMENT

THE LOWER COURT'S RULING FOLLOWING THE POSTCONVICTION EVIDENTIARY HEARING WAS ERRONEOUS.

At the evidentiary hearing, Mr. Freeman presented evidence substantiating his claims that improper racial factors tainted his sentence and that counsel was ineffective at the penalty phase.

A. The Lower Court Erroneously Denied Mr. Freeman Relief On His Claim That The State's Decision To Seek The Death Penalty In His Cases Was Based Upon Racial Considerations, In Violation Of Mr. Freeman's Right To Equal Protection And His Rights Under The Sixth, Eighth, And Fourteenth Amendments.

1. Equal Protection and Eighth Amendment Violations

The United States Supreme Court has held that it is improper for state prosecutorial authorities to seek the death penalty against a defendant on the basis of race. McKleskey v. Kemp, 481 U.S. 270, 107 S.Ct. 1756 (1987). To do so would exhibit a discriminatory purpose in violation of a defendant's rights under the Equal Protection Clause. Id. at 293, 1767. As the Court held in

McKleskey, a defendant who alleges such a constitutional violation "has the burden of proving 'the existence of purposeful discrimination'". Id. (quoting Whitus v. Georgia, 385 U.S. 545, 550, 87 S.Ct. 643, 646, 17 L.Ed.2d 599 (1967)). The McKleskey Court further held that a defendant must prove that the purposeful discrimination had a discriminatory effect. Id. In sum, a defendant must prove that the prosecutorial decision makers in his case acted with discriminatory purpose. Id.

In McKleskey, the defendant sought to prove purposeful discrimination through a statistical study (the Baldus study) which demonstrated racial disparities in application of the death penalty. Id. The study showed, among other things, that the death penalty was significantly more likely to be sought and assessed in cases where the defendant was black and the victim white. Id. at 286-87, 1764. Based on the study, McKleskey sought to argue that the Court should infer that purposeful discrimination occurred in his sentencing. Id. at 293, 1767. The Court rejected such an argument, refusing to make such an inference without "exceptionally clear proof. . . that the (prosecutorial) discretion has been abused." Id. at 297, 1770. Unlike the defendant in McKleskey, Mr. Freeman has established clear proof of purposeful discrimination.

Remanding Mr. Freeman's case for an evidentiary hearing, this Court held that as a general principle, the judiciary is prohibited

from interfering with the prosecutorial decision to seek the death penalty. State v. Bloom, 497 So.2d 2 (Fla. 1986). However, the judiciary may indeed act to curb prosecutorial discretion "where impermissible motives may be attributed to the prosecution, such as bad faith, race, religion, or a desire to prevent the exercise of the defendant's constitutional rights." Id. at 3 (quoting United States v. Smith, 523 F.2d 771, 782 (5th Cir.1975), cert. denied, 429 U.S. 817, 97 S.Ct. 59, 50 Led.2d 76 (1976). The type of impermissible motive cited in Bloom was proven at the evidentiary hearing below.

The United States Supreme Court has also held that "the risk of racial prejudice infecting a capital sentencing proceeding" may result in cruel and unusual punishment, violating the Eighth Amendment. Turner v. Murray, 476 U.S. 28, 35, 106 S.Ct. 1683, 1688 (1986). Based on the facts presented at the evidentiary hearing below, it is apparent that such an "unacceptable risk" exists in Mr. Freeman's case. See Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985).

At the evidentiary hearing below, Patrick McGuiness stated that in the course of his representation of Mr. Freeman, he spoke with Mr. Freeman regarding potential plea offers and suggested that Mr. Freeman plea to consecutive life sentences (EHT. 90). After Mr. Freeman agreed to enter such a plea, McGuiness undertook negotiations with the prosecutor on the case, Brad Stetson (EHT. 90, 88).

McGuiness stated that he and Stetson had resolved numerous cases over the years through negotiation (EHT. 89). During a break between pre-trial depositions taken at the Public Defender's Office, McGuiness and Stetson engaged in a conversation regarding a potential plea (EHT. 90)[4]. During the conversation, McGuiness communicated to Stetson that he had Mr. Freeman's authorization to enter into a plea to consecutive life/25 sentences (EHT. 90). McGuiness testified that Stetson responded that he normally would entertain such an offer, but he could not in this case because "*they had to get their numbers up on whites killing blacks*" (EHT. 90). McGuiness stated that he had never encountered such a situation before and did not know what legal mechanism to address it with (EHT. 91). McGuiness mentioned the conversation to his co-counsel Ann Finnell, probably on the same day the conversation occurred (EHT. 91-92).

Ann Finnell testified that McGuiness told her Brad Stetson refused to plea the Freeman cases out "because of race being a factor" (EHT. 57). Finnell noted that McKleskey was pending before the appellate courts at that time (EHT. 57-58). To Finnell, the import of what McGuiness was telling her was that Stetson wanted to "even out the playing field" (EHT. 57).

Brad Stetson recalled that at the time of the Freeman trials,

---

[4]McGuiness stated that this conversation took place prior to either the Epps or Collier trials.

he was Supervisor of Circuit Courts and a member of the Homicide Team, in addition to being the lead prosecutor on the Freeman cases (EHT. 14-15). Stetson was assigned to the Freeman cases early on (EHT. 15). Stetson recalled that the conversation with McGuiness regarding plea negotiations took place over the phone (EHT. 16).[5] Stetson stated that McGuiness called him and tried to "get him to come off the death penalty", offering a plea to life (EHT. 16-17). Stetson responded with what he called “sarcasm”, stating to McGuiness that if he agreed to the plea, McGuiness would use the plea as a basis for the argument that death is sought more often when defendants are black and the victim white (EHT. 18). Stetson was not sure of the exact words he used (EHT. 19). Stetson stated that he took offense at the McKleskey type argument made by defense lawyers (EHT. 18). Despite the conversation, Stetson says he felt a "duty" to seek death (EHT. 18). Stetson testified that he would have presented the case to the Homicide Team and State Attorney Ed Austin, all of whom felt this was a death case (EHT. 25-26).

In addition to testimony regarding race as it affected plea negotiations, there was testimony as to the state’s general consideration of race when deciding whether or not to seek death. Brad Stetson testified that race is "certainly" a factor a prosecutor

[5]Stetson also recalled that the conversation took place prior to the trials.

considers in deciding to seek death as a penalty (EHT. 37). Stetson added that Ed Austin would echo the sentiment that race is a factor to be considered (EHT. 37). Stetson further stated that in the racial context, a prosecutor should consider the way the community perceives his job performance (EHT. 37). Stetson added that in his tenure with the State Attorney's Office, the office was sensitive to the needs and wishes of the community and "that's the whole point I was trying to communicate to Pat" (EHT. 37).

Finally, there was testimony at the evidentiary hearing regarding the prosecution's theory that Mr. Freeman's crimes were motivated by racism. Brad Stetson testified that he knew Mr. Freeman had "racist tendencies", citing alleged incidents where Mr. Freeman yelled racial insults at black people (EHT. 20). Stetson stated that he felt "racist hatred", while not the main motive, was a motive for the homicides (EHT. 21). Further, Stetson stated that the alleged racism was "something that I considered when weighing all these - - all this information in making the decision" (EHT. 22). Stetson added that, despite having leeway from Judge Parsons, he declined to introduce evidence of alleged racism because of the prospects of being reversed on appeal (EHT. 22). On this point, Ann Finnell testified that at an off-record conference after the Epps jury had recommended life, Judge Parsons stated his belief, to which Brad Stetson agreed, that racism was a motive for the homicides (EHT.

60).[6] Finnell added that there was no evidence of racial motive presented at trial and that had it been so presented, the defense was prepared to rebut it (EHT. 66).

It is apparent from the facts presented at the evidentiary hearing that race was a factor, if not the driving force, behind the state's decision to seek death against Mr. Freeman. Race, in multi-layered ways, common to its insidious nature, dominated the prosecutorial decision to seek the ultimate penalty. Mr. McGuiness' clear testimony, corroborated by Ms. Finnell, establishes that the lead prosecutor in Mr. Freeman's case refused to entertain a plea offer because the prosecutor needed to get his "numbers up on whites killing blacks." The prosecutor's own testimony indicates that he responded to Mr. McGuiness' plea offer by stating that racial considerations prevented him from entertaining such a plea. Thus, the unrebutted, uncontested fact is that the state considered Mr. Freeman's race and the race of the victims when deciding whether to seek death as a penalty.

Beyond the prosecutor's response to Mr. McGuiness' plea offer is his testimony that race, generally, is a factor a prosecutor considers when deciding whether to seek the death penalty. The prosecutor justified the consideration of race with his testimony

---

[6]Finnell testified that she attempted to have the conversation put on the record, but Judge Parsons maintained that he would not do so (EHT. 60).

that prosecutors always consider the public's perception of prosecutorial decision making. The impropriety of those dual considerations could not be more clear.

The infiltration of race into the prosecutorial decision making process did not end there. At the evidentiary hearing, the prosecutor stated flatly that he considered Mr. Freeman's alleged "racist tendencies" when engaging in the ultimate prosecutorial discretion. Such a factor, both false and improper as evidence before a capital jury, was certainly an inappropriate consideration for the prosecutor.

Clearly, racial considerations played a prevalent role in the prosecutorial decision making process. Not only considerations of the biological race of both Mr. Freeman and the victims, but alleged racism and race generally, including the public's perception of the prosecutor's treatment of the issue. These factors are improper and well outside the bounds of sentencing factors contemplated by this Court in State v. Dixon, 283 So.2d 1 (Fla. 1973) or by the Florida legislature in its enactment of the Florida capital sentencing statute.[7]

The lower court erred in failing to adequately evaluate the role racial considerations played in Mr. Freeman's case. The lower court determined that the evidence presented below amounted to

[7]Fla. Stat. 921.141.

"nothing more than a somewhat ill-considered retort" (PCR. 156), apparently accepting the prosecutor's explanation of his reply to Mr. McGuiness' plea offer as "sarcasm". First, the lower court is incorrect in its rendition of Mr. McGuiness' and Ms. Finnell's testimony wherein the court writes that they remembered the prosecutor "stating that if he accepted the offer, counsel for the defense would use that fact to support future allegations of discriminatory application of the death penalty against black defendants" (PCR. 156). This incorrect statement of the testimony is consistent with the prosecutor's "sarcasm" explanation, not the defense attorney's testimony. In fact, McGuiness testified that Stetson stated he could not consider a plea offer because he had to get his "numbers up on whites killing blacks." Finnell corroborated McGuiness' testimony. Neither McGuiness or Finnell indicated that Stetson was being sarcastic. Thus, the lower court erred failing to evaluate the constitutional magnitude of the prosecutor's statement in light of the actual testimony at the evidentiary hearing.

Additionally, the lower court erred in failing to evaluate the extent to which race infiltrated the prosecutorial decision-making process. In its order, the lower court makes no mention of the prosecutor's general consideration of race or of the prosecutor's factoring of Mr. Freeman's alleged "racist tendencies." The lower court's order is deficient in that regard.

As demonstrated by the evidence put forth below, the prosecution in Mr. Freeman's case was motivated by racial considerations in violation of the Equal Protection Clause. Consistent with McKleskey and this Court's interpretation of article II, section 3, of the Florida Constitution in State v. Bloom, a prosecution motivated by racial considerations is prohibited. The racially-based decision to seek death in Mr. Freeman's case is an arbitrary, unjustifiable classification which has no rational relationship to accomplishing a legitimate objective. McKleskey at 291, n. 8. The state's decision to seek death was based upon purposeful discrimination which had a discriminatory impact on Mr. Freeman. Id. at 292.

In addition to the Equal Protection violation, Mr. Freeman's prosecution also ran afoul of the Eighth Amendment. The near astounding extent to which improper racial factors infiltrated Mr. Freeman's case created an unacceptable risk that his sentencing was tainted by such factors. Turner; McKleskey. The state's selection of Mr. Freeman as a candidate for the death penalty was based upon arbitrary factors unrelated to the circumstances of the offense or character of the defendant. The central tenet of Eighth Amendment jurisprudence is "to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976). Thus, the Supreme Court has required that "any decision to impose the

death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). It is clear that the dictates of Gregg and Gardner were not adhered to in Mr. Freeman's case.

2. Ineffective Assistance of Counsel

Trial counsel was ineffective in litigating this crucial constitutional issue. At the evidentiary hearing, Mr. McGuiness testified that he had never encountered a situation like this before (EHT. 91). Further, he did not know what legal mechanism to employ in addressing it (EHT. 91). Because he was not sure how to address the issue, McGuiness brought the issue up at Mr. Freeman's clemency hearing several years after the trials (EHT. 109). McGuiness stated that he was aware of the McKleskey type issue and that he had raised this criticism himself previously (EHT. 105).

Clearly, Mr. McGuiness was aware of the issue involved and its constitutional magnitude. A seasoned attorney such as Mr. McGuiness should have raised the issue in a legal forum where an appropriate judicial remedy was available, not for the first time in a clemency proceeding. Counsel's failure to raise this issue before the trial court was prejudicially deficient performance, in violation of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d

674 (1984).[8]

B. The Lower Court Erroneously Denied Mr. Freeman Relief On His Claim That He Was Denied Effective Assistance Of Counsel At The Penalty Phase Of His Capital Trial, In Violation Of His Rights To Due Process And Equal Protection Under The United States Constitution, As Well As His Rights Under The Fifth, Sixth, And Eighth Amendments.

In order to prevail on his claim of ineffective assistance of counsel, Mr. Freeman must prove two elements, deficient performance by counsel and prejudice. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish that counsel's performance was deficient, Mr. Freeman "must show that counsel's representation fell below an objective standard of reasonableness" based on "prevailing professional norms." Id. at 688. To establish prejudice Mr. Freeman "must show that there 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." Id. At 694. Based on the evidence presented at the evidentiary hearing below, Mr. Freeman can prove both elements of Strickland.

1. Failure To Present Mitigation

---

[8]Notably, the lower court fails to address the ineffective assistance of counsel issue. It is unclear whether the lower court felt that it need not address the IAC element, given its finding on the other constitutional issues, or simply overlooked that aspect of the claim.

At the evidentiary hearing below, evidence was presented that trial counsel for Mr. Freeman failed to present available mitigation, both non-statutory and statutory. This mitigating evidence was available through lay witnesses, both family and friends of Mr. Freeman, and expert testimony. Counsel's failure to present this evidence was deficient performance which prejudiced the penalty phase of Mr. Freeman's trial.

a. Lay Witnesses

At the evidentiary hearing below, lay witnesses testified to numerous elements of non-statutory mitigation. In addition to being non-statutory mitigation in and of itself, much of this evidence would have supported expert testimony as to statutory mental health mitigation.

Several witnesses below testified to Mr. Freeman's general good character. Mary Holliman, a neighbor of the Freeman family, testified that John Freeman was a really nice, well-mannered boy (EHT. 176). Holliman also testified that when her son Jimmy was crippled as a child, John Freeman was very good to him, taking care of him when he couldn't walk and generally watching out for him (EHT. 177-78).

Jesse Jewell testified that she was married to John Freeman's brother, Robert, and that she knew John as a very nice, quiet person (EHT. 197).

Faith Hickman testified that she was John Freeman's girlfriend around 1986 and that he was great with her children (EHT. 219). Faith remembered that John would get the pool ready for her kids to swim in and would swim with them (EHT. 219). Faith testified that John was especially fond of her young son, Kaylin (EHT. 220).

Jimmy Holliman testified that he was a childhood friend of John Freeman's (EHT. 225). When Jimmy was partially paralyzed as a child, John would come by after school and take him fishing (EHT. 226). When other kids would make fun of Jimmy because of his handicap, John would stand up for him (EHT. 227). Jimmy stated that he "has nothing but love for John Freeman" and that John treated him "the best any person could be treated" (EHT. 227, 229).

Joann Sorrells testified that John Freeman was a childhood friend of her son, David (EHT. 254). Joann described John as a good kid, well behaved, very polite, and very mannerly (EHT. 255). Joann stated that John always said "yes ma'am, no ma'am", was respectful, soft spoken, and gentle (EHT. 255). Joann at times considered having John move into her house to protect him from his abusive home life (EHT. 256). Joann added that John was always protective of her (EHT. 257).

Zach Marchalleck testified that he and John Freeman were childhood friends (EHT. 260). Zach described John as quiet, polite, and "the nicest person you would ever want to meet" (EHT. 260).

Kelly Pelley, whose mother was married to John Freeman's brother, testified that John was relaxed and easy going (EHT. 270).

Deana Harrell, John Freeman's stepsister, testified that John was her favorite brother, that he treated her nicely, and that he always took time with her when he was around (EHT. 292-93).

Witnesses at the evidentiary hearing testified as to suicide attempts by John Freeman's mother. Robert Jewell, John's brother, testified that when he was approximately 8 or 9 years old, his mother made threats to cut her wrists (EHT. 241). Mary Holliman testified that John's stepsister, Deana, told her that Mary Freeman tried to commit suicide (EHT. 180).

At the evidentiary hearing, numerous witnesses testified as to the physical and verbal abuse inflicted on John Freeman by his stepfather, Charles Freeman, and as to the otherwise violent nature of Charles Freeman. Mary Holliman witnessed Charles Freeman berating her 9 year old son with foul language to the point that she had to call the police (EHT. 177). Mary once heard a loud slap coming from the Freeman house after which Deana Freeman told her that Charles Freeman had slapped Deana's mother (EHT. 178).

Danette Rucker, John Freeman's biological sister, testified that John was physically beaten by Charles Freeman as far back as she can remember (EHT. 183). Charles beat John, often without reason, with belts, boards, sticks, or whatever was available (EHT. 183).

Danette recalled John and his brother Robert being taken to the woods and beaten with a board just short of killing them (EHT. 186). At the time of this beating, John and Robert were younger than 10 years old (EHT. 186).

Jesse Jewell, Robert Jewell's former wife, testified that Charles Freeman was a "rude man" who she remembered being verbally abusive to both John and Robert (EHT. 197).

Sherry Raymond, Jesse Jewell's daughter, testified that she remembers John and Robert seeking refuge at her mother-in-law's house after being savagely beaten with a hose by Charles Freeman (EHT. 206). This occurred in 1974 or 1975 (EHT. 206). John and Robert were afraid to go home (EHT. 209). Sherry remembers her mother-in-law calling the police about this incident (EHT. 206). Sherry stated that the beatings, which she described as "unmerciful", were common knowledge in the neighborhood (EHT. 208). Sherry further testified that, at the time of the evidentiary hearing, she had recently spoken with Jeff Strickland, a person who grew up in the neighborhood with John Freeman (EHT. 211). Strickland recounted that he was in and out of the Freeman house as a child (EHT. 212). Strickland described Charles Freeman as "the most horrible, wickedest man that ever walked the earth" (EHT. 213). Sherry added that Mary Freeman never acted to protect John (EHT. 208).

Faith Hickman, John's former girlfriend, stated that she

remembered Charles Freeman as “hard-core” and “abusive” (EHT. 220). Faith recalled Charles Freeman telling her that John was “a piece of shit” who would never become anything (EHT. 221). Faith remembered John telling her a story in which his father made him fight a larger boy on three consecutive days, despite the fact that John continued to get beat up (EHT. 222). John also told Faith that his father had “knocked him unconscious” (EHT. 222).

Jimmy Holliman described Charles Freeman as a “hard man” (EHT. 227). Jimmy saw and heard John being beaten (EHT. 227). Jimmy, who lived next door to the Freemans, testified that he could hear John and Robert begging Charles Freeman to stop the beatings (EHT. 228). Jimmy witnessed John being strapped to a bed and beaten (EHT. 228). Jimmy stated that Charles Freeman was a “big fella”, approximately 6'2, 250-300 lbs (EHT. 228).

David Sorrels, a childhood friend of John’s, testified that Charles Freeman was a rowdy, unpleasant man (EHT. 233). David stated that saw strap marks on John’s back from beatings (EHT. 234).

Robert Jewell testified that his stepfather was verbally and physically abusive to he and John (EHT. 241). Robert recalled he and John being taken to the woods and beaten with a stick (EHT. 241). Robert also recalled that he and John were tied to the bed with neckties and beaten until they were black and blue (EHT. 241). Robert recalled Charles Freeman throwing a knife at John (EHT. 242).

Charles threatened Robert with a shotgun when he attempted to run away from home (EHT. 243). Robert stated that Charles would beat he and John with his fists when they were as young as 5 to 8 years old (EHT. 242).

Joann Sorrells recalled seeing large bruises across John's back and that John stated his father had beaten him for "nothing" (EHT. 256). Joann remembered that, unlike other boys in the neighborhood, John always kept his shirt on (EHT. 257).

Zach Marchalleck remembered seeing bruises all over John's body (EHT. 261). Zach also recalled hearing shouts of profanity coming from the Freeman house (EHT. 261). These shouts were Charles Freeman insulting John and Robert (EHT. 261).

Mitchell Tanner, a childhood friend of John's, testified that he witnessed John being physically abused and that the abuse happened "as often as the sun went down" (EHT. 265). Mitchell stated that Charles hit John with fists, belt buckles, rubber hoses, and sticks (EHT. 265). Mitchell saw John with black eyes, bruises, and busted lips (EHT. 265). Mitchell remembered that John would run away to Mitchell's house and that John acted "scared" in his own house (EHT. 266).

Kelly Pelley, daughter of Robert Jewell's ex-wife, testified that Charles Freeman was a belligerent and abusive man who constantly belittled John (EHT. 271). Kelly recalled that everyone in the

neighborhood had a story about the Freeman boys being abused and having to take them in (EHT. 272).

Bobbie Hart testified that she was a good friend of John's sister Danette and that she spent a lot of time in the Freeman household (EHT. 278). Bobbie witnessed John being beaten (EHT. 277). Bobbie stated that Charles Freeman "didn't know when to stop" the beatings (EHT. 277). Bobbie added that when the beatings occurred, she would often walk away because she "couldn't watch it" (EHT. 277).

Sonja Rigdon, John's aunt, described Charles Freeman as loud, rough, and gruff (EHT. 282). Sonja testified that Charles was rough on John, verbally and physically abusing him (EHT. 283).

Dwayne Watson testified that John's stepfather was "very rough on him" (EHT. 288). Dwayne added that "nobody really wanted to go to John's house" (EHT. 288).

Evidence was also presented at the hearing that Charles Freeman sexually abused his stepdaughter, Danette. Danette Rucker testified that she was approximately 5 years old the first time Charles Freeman sexually abused her (EHT. 185). The sexual abuse eventually included intercourse (EHT. 185). Danette stated that her mother knew it was happening because she was a witness to the abuse, sometimes being in the same bed when it occurred (EHT. 185). Danette began running away from home at the age of 14 (EHT. 186).

Jesse Jewell stated that Robert Jewell told her that his sister Danette had been sexually abused by Charles Freeman (EHT. 198). Robert Jewell testified that his sister told him that she had been sexually abused when he was approximately 21 years old (EHT. 245). Bobbie Hart testified that Danette told her that she had been sexually abused (EHT. 277).

Further, evidence was presented through lay witnesses that John Freeman suffered head injuries as a child. Danette Rucker recalled witnessing an incident where John was struck by a car when he was approximately 2 years old (EHT. 187). Danette stated that the car ran over John's head and that he had marks on his head as a result (EHT. 187-88). Robert Jewell remembered that John was run over by a drunk neighbor (EHT. 242). Robert described his own memory of the event, but also stated that his mother had told him about the incident (EHT. 250). Dwayne Watson, John Freeman's childhood friend, remembered an incident where John fell off a bike while jumping a ramp (EHT. 287). John fell off the bike, hit a tree, and "didn't move for a few minutes" (EHT. 287-88).

In addition to evidence regarding head injuries, lay witnesses testified that John Freeman suffered from drug and alcohol addiction. Sherri Raymond testified that she and John were close friends between the time he was released from his first stint in prison and his arrest for the instant crimes (EHT. 204-05). During this time,

Sherry stated that John was using alcohol to excess and smoking pot (EHT. 210). Additionally, both Sherry and John were "as strung out as they could come" on cocaine (EHT. 210). Faith Hickman testified that while she and John were dating, she became aware that he was using cocaine (EHT. 221). Robert Jewell testified that John drank alcohol on a regular basis and smoked marijuana (EHT. 243). Robert also recalled John using cocaine (EHT. 243). Zach Marchalleck and Dwayne Watson both recalled John using alcohol, at times to excess, and cocaine (EHT. 267, 287).

Lay Witnesses Danette Rucker, Sherri Raymond, Zachary Marchelleck, Mitchell Tanner, Kelly Pelley, Bobbie Hart, Sonja Rigdon, and Dwayne Watson all testified that they were not contacted about testifying at Mr. Freeman's trials, but had they been asked, they would have testified (EHT. 190, 214, 261, 267, 273, 279, 285, 289). Faith Hickman, Jesse Jewell, Jimmy Holliman, and David Sorrells remembered being contacted, but not asked to testify (EHT. 223, 230, 235). All stated that they would have testified had they been asked to do so. Joann Sorrells testified that she did not remember being contacted prior to the Freeman trials and that she would have testified had she been asked (EHT. 258). Robert Jewell testified at both trials and the evidentiary hearing. At the evidentiary hearing, Robert stated that he answered all of the questions asked of him at the trials (EHT. 244).

b. Expert testimony

At the evidentiary hearing below, Dr. James Larson, a clinical psychologist, testified as to his evaluation of Mr. Freeman. Based on his evaluation, Dr. Larson was able to provide compelling testimony as to both non-statutory and statutory mental health mitigation. Dr. Larson's testimony revealed that such evidence was available at trial, but not presented.

Dr. Larson testified that he personally performed a mental status evaluation of Mr. Freeman and reviewed school records, hospital records, and affidavits of lay witnesses (EHT. 121, 125, 133, 127). Additionally, Dr. Larson consulted with Dr. Karen Haggerott, a neuropsycholgist who administered a battery of neuropsychological tests to Mr. Freeman (EHT. 120).

The tests administered by Dr. Haggerott included intelligence testing, academic achievement tests, and a full neuropsychological battery (EHT. 120). The testing indicated that Mr. Freeman has an I.Q. of 84 which is in the low average range (EHT. 124). Further, Mr. Freeman's academic achievement is even lower than would be expected, given his I.Q. score (EHT. 124). Mr. Freeman's present academic skills range from the third to seventh grade level (EHT. 125). Dr. Larson stated that this type of discrepancy is usually indicative of a learning disability (EHT. 125). Dr. Larson testified that the neuropsychological battery indicated neuropsychological

impairment (EHT. 125). Dr. Haggerott offered a diagnosis of organic mental disorder (EHT. 125).

Dr. Larson's review of Mr. Freeman's school records were "instructive and important" in his evaluation (EHT. 126). The records indicated early academic problems and associated social problems (EHT. 126). Dr. Larson testified that academic problems lead to frustration and anger, the outgrowth of which is behavioral problems (EHT. 126). Dr. Larson stated that the school records were consistent with testing done by Dr. Haggerott (EHT. 127).

Dr. Larson testified that he had, based on affidavits of lay witnesses and interviews with Mr. Freeman, a history of head injuries and drug abuse in Mr. Freeman (EHT. 127-29). Dr. Larson had information that Mr. Freeman had been run over by a car and treated in a hospital at approximately age 2 (EHT. 128). Dr. Larson also had information that Mr. Freeman fell off a bike as a child and was unconscious for 10 minutes (EHT. 128).

Dr. Larson also had information from affidavits and interviews that Mr. Freeman engaged in polysubstance abuse, including use of alcohol, marijuana, and cocaine (EHT. 129). Mr. Freeman also experimented with qualudes, valium, and amphetamines (EHT. 161).

Dr. Larson stated that the cause of Mr. Freeman's brain damage remains unknown, but the likely causes are the head injuries or substance abuse (EHT. 130-31). Dr. Larson testified that people with

compromised brains have altered personality functioning (EHT. 130). Specifically, Mr. Freeman is very concrete in his decision making, not dealing well with abstractions (EHT. 132). Mr. Freeman does not see as many possibilities as the average person when making decisions (EHT. 132). Individuals like Mr. Freeman are “quite impulsive”, making decisions on the spur of the moment and not thinking about the consequences (EHT. 133).

Dr. Larson reviewed medical records from University Hospital in Jacksonville (EHT. 133). Those records revealed that Mr. Freeman was hospitalized for “suicidal ideation” while in jail prior to trial (EHT. 133). Mr. Freeman had been placed on the anti-depressant drugs Pamelor and Vistaril and was hoarding the pills while at the jail (EHT. 133). Mr. Freeman had been diagnosed with depressive disorder (EHT. 133). Dr. Larson stated that hospital records on Mr. Freeman, which indicated a depressed component and a strong sense of hopelessness, are something that he would want to know as an evaluating psychologist (EHT. 134).

Dr. Larson testified that, in his opinion, at the time of the Collier homicide Mr. Freeman’s capacity to conform his conduct to the requirements of the law was substantially impaired (EHT. 135). Dr. Larson based this opinion on the fact that Mr. Freeman is a compromised individual, suffers from a learning disability, was raised in a violent environment, was a substance abuser, and suffers,

based on test measures, from an organic mental disorder (EHT. 135). Dr. Larson stated that people with such organic disorders "frequently have difficulty in looking at a wide range of consequences, and they also are quite frequently impulsive in their acts" (EHT. 135).

Dr. Larson compared his evaluation with that done by the mental health expert at trial, Dr. Louis Legum. Dr. Larson noted that the results were similar with respect to the I.Q. scores and academic achievement (EHT. 137). However, Larson stated that the neuropsychological battery given by Dr. Haggerott went far beyond the testing Legum did (EHT. 139). Dr. Larson did not believe that Legum had access to school records, hospital records, or affidavits from lay witnesses (EHT. 168). Dr. Larson felt that Dr. Legum's evaluation was deficient in that he did not follow up indications of brain damage with neuropsychological testing (EHT. 169).

c. Trial Attorney's Response

At the evidentiary hearing, Patrick McGuiness, Mr. Freeman's trial counsel, was called to testify and responded to the claim that he failed to present available mitigating evidence.

McGuiness recognized early on that there was a legitimate threat of the death penalty in Mr. Freeman's case (EHT. 302). McGuiness felt that there was no defense available in the Collier homicide (EHT. 305). In the Collier case, McGuiness was confronted with the Epps murder conviction as an aggravtor, something he

referred to as “the 500 pound gorilla” (EHT. 347). McGuiness stated that he feels a prior murder conviction is the worst aggravating factor (EHT. 348). McGuiness testified that, despite this, he made a decision to present the same mitigation that he had presented in the Epps case (EHT. 347). McGuiness did not recall having any new mitigation for the Collier trial (EHT. 359).

In terms of lay witnesses, McGuiness testified that he remembered talking to Mary Freeman, Robert Jewell, Doug Freeman, David Sorrells, Joann Sorrells, and Jesse Jewell (EHT. 357). Of those witnesses he spoke with, he remembered calling Mary Freeman, Robert Jewell, and David Sorrells to testify (EHT. 311-18). Sorrells testimony had to be done by readback (EHT. 319). In point of fact, these were the only three lay witnesses to testify at the Epps and Collier penalty phases on behalf of Mr. Freeman (R2. 1627-43, 1682-89). McGuiness testified that, at the Collier trial, putting on what could be construed as cumulative evidence would not have been a concern, given the heavy aggravation (EHT. 367).

In terms of physical abuse to John Freeman by his stepfather, McGuiness testified that he thought he presented this evidence (EHT. 373). McGuiness stated that he would want to put on non-family witnesses to testify to abuse by John’s stepfather (EHT. 367). McGuiness felt he did this through David Sorrells’ testimony (EHT. 367). McGuiness added that if there were additional mitigation

available to him, he would have presented it (EHT. 374). McGuiness did not investigate further mitigation between the Epps and Collier trials (EHT. 352).

As to the sexual abuse of Danette Freeman, McGuiness testified that he did not have this evidence at the time of trial because neither John or his family members told McGuiness about it (EHT. 360). McGuiness conceded that he never talked to Danette Freeman (EHT. 360). McGuiness admitted that he would want to put this evidence on if he could "connect it to John" (EHT. 360).

McGuiness testified that evidence of John Freeman's good nature and character "might well" have been presented to the jury (EHT. 371).

As to evidence of John Freeman's head injuries as a child, McGuiness testified that he "had no doubt" that John's family was telling the truth about his being run over by a car (EHT. 355). However, he did not question family members about the head injury because he had no evidence of a "brain injury" (EHT. 356). McGuiness stated that the evidence of John being run over by a car would only have been useful if he had been able to document the injury with medical records (EHT. 340). McGuiness had a record indicating John was treated and released at a Waycross, Georgia hospital on March 15, 1966, but felt this was not enough to "document" the injury (EHT. 341-42).

In terms of evidence that Mr. Freeman abused drugs and alcohol, McGuiness testified that he would want this type of information (EHT. 373). Further, if he had lay witness testimony on this point to support a finding of brain damage, he would want to use it (EHT. 362). McGuiness stated that he knew about John's use of drugs and alcohol, but didn't use the evidence because he could not relate it to the crime (EHT. 362). McGuiness pointed out that Dr. Legum told him that statutory mitigation was not present in the Collier case and thus, McGuiness did not think drug and alcohol use was relevant (EHT. 372). However, McGuiness also stated that Dr. Legum did not interview any lay witnesses (EHT. 365). McGuiness conceded that perhaps he should have "delved more deeply" into John's use of drugs and alcohol and its relation to mitigation (EHT. 362).

As to his preparation of mental health expert testimony, McGuiness testified that he hired Dr. Louis Legum to satisfy himself that there was no competency issue involved and to evaluate Mr. Freeman for non-statutory and statutory mitigation (EHT. 327). McGuiness stated that Dr. Legum found Mr. Freeman to have an I.Q. of 83 and a learning disability (EHT. 331-33). McGuiness also testified as to notes from his interview with Dr. Legum wherein the words "no organic" were written (EHT. 331). Also written in the notes was "high percentage perhaps diagnosed as organic" (EHT. 331). Legum was not provided with school records and did not talk to any lay

witnesses (EHT. 343, 365). Ultimately, according to McGuiness, Dr. Legum indicated he did not find the statutory mental health mitigators present (EHT. 333). McGuiness testified that he advised Dr. Legum that Mr. Freeman had been hospitalized based on Mr. Freeman's suicidal ideation (EHT. 353). McGuiness explained that he did not ask Dr. Legum about the hospitalization at trial because he did not think it would "advance [his] cause" (EHT. 378).

d. Strickland Analysis

The aforementioned testimony verifies that the penalty phase evidence did not serve to individualize Mr. Freeman, the very purpose of mitigation evidence and essence of a reliable penalty phase. See Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995). In its order denying relief, the lower court found that the deficient performance and prejudice prongs of Strickland had not been met (PC-R. 165). However, in sustaining Mr. Freeman's sentence, the lower court erred in failing to follow this court's precedent regarding the prejudice prong of Strickland.

In Rose v. State, 675 So.2d 567 (Fla. 1996), this Court ordered a new penalty phase because counsel did not obtain school, hospital, prison, and other records. Rose 675 So.2d at 572. Certainly, in Rose, as in this case, the evidence presented in postconviction was far more compelling than that presented at trial. See also Phillips v. State, 608 So.2d 778 (Fla. 1992) (prejudice established by strong

mental mitigation: which was “essentially unrebutted”); Mitchell v. State, 595 So.2d 938 (Fla. 1992) (prejudice established by expert testimony identifying statutory and nonstatutory mitigation and evidence of brain damage, drug and alcohol abuse, and child abuse); State v. Lara, 581 So.2d 1288 (Fla. 1991) (prejudice established by evidence of statutory mitigating factors and abusive childhood); Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995) (quality of mitigating evidence presented at hearing established that counsel’s errors deprived defendant of a reliable penalty phase proceeding); Rutherford v. State, 727 So.2d 216 (Fla. 1998) (prejudice factors are balance of aggravation and mitigation and whether evidence presented at hearing is cumulative); see also Haliburton v. Singletary, 691 So.2d 466 (Fla. 1997); Lush v. State, 498 So.2d 902 (Fla. 1986); Breedlove v. State, 692 So.2d 874 (Fla. 1997); LeCroy v. Dugger, 727 So.2d 236 (Fla. 1998); Stevens v. State, 552 So.2d 1082 (Fla. 1989); Heiney v. State, 620 So.2d 171 (Fla. 1993); Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995); and Chandler v. United States, 193 F.3d 1297 (11th Cir. 1999).

State and federal courts have repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration. See, e.g. Deaton v. Dugger, 635 So.2d 4, 8 (Fla. 1993); Phillips v. State, 608 So.2d 778 (Fla. 1992); State v. Lara,

581 So.2d 1288 (Fla. 1991); Stevens v. State, 552 So.2d 1082 (Fla. 1989); Bassett v. State, 541 So.2d 596 (Fla. 1989); State v. Michael, 530 So.2d 929, 930 (Fla. 1988); O'Callaghan v. State, 461 So.2d 1154, 1155-56 (Fla. 1984); Eutzy v. Dugger, 746 F. Supp. 1492 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. 1990); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), vacated and remanded, 104 S.Ct 3575 (1984), adhered to on remand, 748 F.2d 1462 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded for reconsideration, 104 S.Ct 3575, adhered to on remand, 739 F.2d 531 (11th Cir. 1984). In this case, counsel settled for the convenient path, choosing to present the minimal mitigating evidence that had been previously presented at the Epps trial. This scant evidence was readily available to counsel, who, despite an awareness that he faced a much tougher road at the penalty phase of the Collier trial, decided to proceed with that which worked before. Counsel’s decision to proceed with the mitigation case that he presented in Epps, without any further investigation and with the knowledge that the case in aggravation was heavier in the Collier case, is inexplicable.

No tactical motive can be ascribed to an attorney whose

omissions are based on ignorance, see Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or 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). In the instant case, Mr. McGuiness conceded that he did not investigate or speak with many of the witnesses presented at the evidentiary hearing. McGuiness conceded that he would want to present the best mitigation case possible.

Had the jury heard the true scope of abuse, both physical and sexual, that prevailed in the Freeman house and which John was subjected to, there is no reasonable probability that the results of the sentencing phase of the trial would not have been different. Strickland, 466 U.S. at 694. Having heard only a sliver of the mitigating evidence available, the jury and judge were incapable of making an individualized assessment of the propriety of the death sentence in this case.

The evidence presented by Mr. Freeman at the evidentiary hearing presents a far different picture than that presented at trial. See, Chandler, Lara, and Baxter, supra. The jury and judge were never made aware of the extent of Charles Freeman's abuse, the general chaotic and violent atmosphere in which John Freeman grew up, or the good character of John Freeman. Nor were Mr. Freeman's sentencers made aware of John Freeman's substance abuse and childhood

head injuries, both of which were necessary to support mental health expert testimony.

In Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985), the Federal Court of Appeals explained the essential constitutional mandate the United States Supreme Court has annunciated and emphasized:

> In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the [sentencer] receiving accurate information regarding the defendant. Without that information, a [sentencer] cannot make the life/death decision in a rational and individualized manner. Here the [sentencer] was given no information to aid [him] in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to confidence in that decision.

Tyler v. Kemp, 755 F.2d 531, 743 (11th Cir. 1985) (citations omitted).

Therefore, in preparing and presenting penalty-phase evidence, counsel's highest duty is to individualize the human being in jeopardy of losing his or her life. See, e.g, Harris v. Dugger; Middleton v. Dugger; Kimmelman v. Morrison, 106 S.Ct at 2588-89 (1986) (failure to request discovery based on mistaken belief that the state was obliged to hand over evidence); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses); Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986) (little effort to obtain mitigating evidence), cert. denied,

107 S.Ct 602 (1986); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984) (failure to present additional character witnesses was not the result of a strategic decision made after reasonable investigation), cert. denied, 471 U.S. 1016 (1985); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978) (defense counsel presented no defense and failed to investigate evidence of provocation); Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972) (refusal to interview alibi witnesses); see also Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985) (counsel did not pursue a strategy, but "simply failed to make the effort to investigate").

The lower court's order fails to evaluate the constitutional magnitude of trial counsel's failure to present the testimony of lay witnesses. In doing so, the lower court makes several curious and erroneous findings. In dismissing the weight of evidence that Mr. Freeman was severely abused as a child, the lower court seems to suggest that Mr. Freeman was responsible for incuuring the wrath of his stepfather. The lower court wrote, "Thus, while the witnesses' combined testimony of several incidents established that the defendant's stepfather was overzealous in his punishment of the defendant, the combined evidence also established that *the defendant engaged in conduct that drew that punishment*" (PC-R. 162)(emphasis added). Unbelievably, the court discounts the testimony regarding physical abuse because it finds, essentially, that Mr. Freeman

deserved the abuse. Such a conclusion is simply not credible.

Further, the court erroneously finds that evidence of Charles Freeman's systematic molestation of his daughter was not available at the time of trial. As to this issue, the lower court found that Mr. Freeman's sister "testified that she intentionally repressed any memory of this information and that she only 'recently' recalled it" (PC-R. 163). Nowhere in the transcript is there anything resembling such testimony from Mr. Freeman's sister. The lower court also found in its order that Danette Rucker "never told her brothers or her mother about this information" (PC-R. 163). In fact, Ms. Rucker testified that she told her mother and her brother Robert about the abuse (EHT. 185, 189). Also, Ms. Rucker testified that her mother witnessed the abuse (EHT. 185). Beyond Ms. Rucker's testimony, Robert Jewell testified that his sister told him of the sexual abuse when he was approximately 21 years old (EHT. 245).[9] Thus, the lower court's finding that evidence of sexual abuse was not available is completely belied by the evidence presented below.

Had Mr. Freeman's jury and judge been presented with the poignant, powerful mitigation now of record and available at trial, there is a reasonable probability that the outcome would have been

[9]Robert Jewell is approximately 2-3 years older than John Freeman, making John Freeman 18-19 years old at the time Danette told Robert of the sexual abuse. John Freeman was born in 1962, making him 26 years old at the time of the Collier trial.

different, particularly when considered with available mental health expert testimony.

Mr. Freeman was entitled to expert psychiatric assistance when the state made his or her mental state relevant to the proceeding. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Fessel; Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Mason v. State, 489 So.2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

The mental health expert plays a critical role in criminal cases:

> [W]hen the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role,

> psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they might believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, and tell the jury why their observations are relevant.

Ake, 105 S. Ct. at 1095 (citation omitted).

This historical data must be obtained not only from the patient but from sources independent of the patient because a patient's self-report is inherently suspect:

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information in the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Mason, 489 So.2d at 737, quoting Bonnie & Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case of

Informed Speculation, 66 Va. L. Rev. 727 (1980).

Under the Ake standard, Mr. McGuiness failed to provide his client with "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake, 105 S. Ct. at 1096 (1985). Dr. Legum was retained to do a competency evaluation; however, because of the information provided to him by counsel, Dr. Legum's testimony was lacking. Dr. Legum did not, and was not qualified to, conduct a neuropsychological battery in order to confirm his suspicions that Mr. Freeman suffered from brain damamge. Dr. Legum never talked with family members or friends of Mr. Freeman in order to obtain an adequate and accurate evaluation of Mr. Freeman. Further, Dr. Legum was never questioned about Mr. Freeman's contemplation of suicide which could have demonstrated both Mr. Freeman's depression and remorse for the Collier homicide.

At the evidentiary hearing, Dr. Larson's testimony was much more powerful than Dr. Legum's trial testimony. Dr. Larson had the benefit of his neuropsychological consultation with Dr. Haggerott and affidavits from friends and family of Mr. Freeman. As a result, Dr. Larson, unlike the underinformed Dr. Legum, was able to testify as to statutory mental health mitigation. The lower court ignores this fact in holding that Dr. Larson's opinions would have "established non-statutory and not statutory mitigation" (PC-R. 159). Dr.

Larson's testimony as to statutory mitigation was based on a thorough evaluation, including records review and a complete neuropsychological battery. Such competent, uncontroverted evidence was more than sufficient to establish statutory mental health mitigation. Nibert v. State, 574 So.2d 1059 (Fla. 1990), Spencer v. State, 645 So.2d 377 (Fla. 1994). The lower court's finding to the contrary is erroneous.

Thus, Mr. Freeman was denied the competent mental health evaluation and assistance that he was entitled to. The lower court's order ignores the litany of evidence of which Dr. Legum was deprived. This evidence, properly evaluated and presented by the expert, would have provided the sentencer with a wealth of both non-statutory and statutory mitigation which was never presented.

The mitigation available in this case is comparable to that produced by the defendant in Hildwin. See Hildwin v. Dugger, 654 So.2d at 110. The "quite limited" mitigation testimony at trial in Hildwin is equally limited in this case. Moreover, as in Chandler, Lara, and Baxter, the evidence presented at the evidentiary hearing paints a different, darker picture than the trial testimony did. The aggravators in this case simply do not outweigh the mitigation. See, Chandler, supra, Baxter, supra, Rutherford, Haliburton, and Jones. The new mitigation of childhood abuse, positive character, and psychiatric diagnosis is of the kind and quality that has been held

to be compelling. Baxter, supra; Rose, supra; Mitchell; Lara; LeCroy. Further, this case does not include a finding of HAC or CCP, befitting the most egregious murders. Chandler; Baxter; and Rutherford.

Finally, the evidence presented at the evidentiary hearing is not, as the lower court found, "largely cumulative" to that presented at the trial (PC-R. 163). The testimony of lay and expert witnesses presented is different than, and additional to, that testified to at trial. At the evidentiary hearing below, Mr. Freeman presented the testimony of 3 siblings, an Aunt, a former girlfriend, 8 friends, 3 mothers of friends, and an adequately informed mental health expert. The evidence presented through these witnesses is more direct, providing specific acts of good will and accounts of abuse, and there is a very substantial amount of mitigation regarding drug abuse and alcoholism as well as a long well documented history of such abuse. Such evidence could and should have been presented at trial. Had it been presented, there is a reasonable probability that Mr. Freeman would not now be facing a death sentence.

2. Failure To Subpoena David Sorrells

Prior to the commencement of the penalty phase on Friday, September 16, 1988, Mr. McGuiness requested a brief continuance until the following Monday or Tuesday. The following reflects what transpired regarding the defense motion:

(Defendant not present)

MR. MCGUINNESS: We would be seeking a continuance, Your Honor, till Monday or Tuesday. There is a gentleman, Mr. David Sorrells, who previously testified on Mr. Freeman's behalf, and we would be seeking to elicit his testimony again in this penalty phase. He is basically Mr. Freeman's best friend and could give evidence regarding Mr. Freeman's work habits, how he relates to other people, particularly children and a number of other matters which we feel germane to non-statutory mitigation.

We have undertaken to try and reach Mr. Sorrells and word was left last night at the home he shares with his girlfriend asking him to be here this morning to meet with us.

He did not. Earlier this morning when it became apparent he wasn't going to show up at the appointed time Mr. Cofer of our office went out to that location. Neither Mr. Sorrells or his girlfriend were present. We obtained a phone number from a neighbor as to where the girlfriend might be reached, and there is no answer at that number. We are unable at this time to locate him, and we have tried diligently since the Court decided that we would definitely be going with the penalty phase today.

I -- yesterday when we had preliminary discussions about this actually going today I had sought and I think the state had sought also at that time to continue the matter to early next week for a variety of reasons, one of which I indicated at that time was my uncertainly of our ability to have all of our witnesses together. We have spoken to a number of people that we wish to put on and have them here, but this gentleman we can't reach.

THE COURT: Well, I will be glad -- but the only person I thought you were going to

have trouble with is Dr. Legum.

MR. MCGUINNESS: We had some trouble there. He hopes to be here by 12:30 or 12:40.

THE COURT: I was concerned about having Dr. Legum, but as far as having this best friend all I can do is give you the opportunity. I told you all on Monday this is what we were planning on is having the -- and it only makes sense because I have the 12 jurors, and I have some difficulty in continuing these -- they are under subpoena for this week and so they can't tell me that they can't come next week.

They have been subpoenaed for this entire week, and I have told them it would last this week. I want you to have his best friend. Don't get me wrong, and you can -- if you know where he is fine, but I don't -- I can't continue it where you don't know where he is and don't know if you are ever going to find him if I pass it till Tuesday.

MR. MCGUINNESS: Well, we know where he lives, that he works in town.

THE COURT: Where does he work? We will send somebody out to get him.

MR. MCGUINNESS: I have been trying to locate that. We know he works with apparently a small moving outfit that is located here in town, and from the information we have gathered these days he makes runs in Jacksonville and the St. Augustine area delivering things. We don't have the name of the outfit which is obviously why we are trying to get back with the girlfriend to see if we can get any further information about how to locate this gentleman.

Obviously if I had any further leads at this moment I would already have had an investigator out, and Mr. Cofer who is an attorney has already made the trip to find what

we could this morning.

THE COURT: When they went there last night was the girlfriend there where he lives?

MR. MCGUINNESS: The girlfriend was there. Mr. Freeman's brother went by to contact Mr. Sorrells and tell him that we would need him at a particular time this morning. The girlfriend was there. Mr. Sorrells was not. We don't know if he ever got the message.

THE COURT: Why didn't you give him a subpoena last night or sent them out with a subpoena?

MR. MCGUINNESS: If the Court will recall when we finished court yesterday I guess it was in the neighborhood of 6 o'clock and none of our secretaries were available nor was the clerk's office open to validate the subpoena for us.

THE COURT: Well, why didn't you give him a subpoena on Monday when we said we are going to try to finish this case and have the jury come back on Friday for deliberations --

MR. MCGUINNESS: I have --

THE COURT: -- if they reached that verdict?

MR. MCGUINNESS: I have no explanation I can give the Court on the incompetence on my part.

THE COURT: Well, it's not incompetence. I mean --

MS. SASSER: The problem is, Judge, we didn't have his address. We have asked the family members to help us in this matter, and they have helped us, but they are not -- but they have also had trouble. It wasn't until the brother got involved -- in other words we

> asked the mother and tried to explain to her last weekend that we needed him, David Sorrells, this weekend -- this week.
>
> She cares for an invalid husband and also a small child, and I don't think they understood the urgency of it. We tried to explain it to them. We know David Sorrells is in town. We know if we were given until Monday or Tuesday we could locate him and have him here. We also do not have numerous witnesses to put on in this case. We have two or three witnesses that we need to testify.
>
> I think from reviewing this -- and I have reviewed the past record -- <u>that David Sorrells is absolutely crucial for us to put on in the sentencing hearing because he knew John Freeman growing up. He can corroborate that John Freeman was the victim of child abuse because he saw the scars</u>.
>
> He also knew what kind of person John Freeman was, what his work habits were and what -- everything Mr. McGuinness has said which I won't repeat, but given 24 hours we can get Mr. Sorrells here. The fact we have not gotten him here so far is because we did not know where he was, but we have located him now. It's just a matter of being able to get him into court.

(R2. 1569-73) (emphasis added). After discussing the matter a bit further, the court inquired as to why Mr. Sorrells' prior testimony could not simply be read to the jury:

> THE COURT: Why don't we use his prerecorded testimony given under oath? What's the matter with that? First of all it appears to me that the testimony he is going to give could be given by other individuals, whoever they may be. They could be given by Mr. Freeman. They could be given by Mr. Freeman's mother who apparently you know she is available, could be given by his father, given

> by his brother. You mentioned all these people. The testimony is to corroborate is the word you used or cumulative is the word I am using. The point is it could be given by other people.

(R2. 1574). Defense counsel went on to explain the difficulties with this position (R2. 1576), but the court went on to indicate that only if there were problems with having Dr. Legum would he consider granting a continuance (R2. 1578). Defense counsel made his final plea to the court:

> MR. MCGUINNESS: Essentially all we can do, Your Honor, is tell the Court that we believe this gentleman's testimony would be material and helpful. It is non-statutory mitigation that we wish him to address. John Freeman at this point is in a posture where the recommendation will be made either as to life or death, and I as his counsel would very much wish to put on as much as we can in support of the life recommendation. I can assure the Court that if we cannot reach and subpoena this fellow by Tuesday we will go forward anyway, but I believe we can do it.

(R2. 1579).

After noting that "this trial has been continued for a long time since 1986 for a lot of different reasons" (R2. 1580), the court explained:

> I told all of you on Monday I intended based on the representation that the trial wouldn't take but a couple of days that we would have on Friday the sentencing hearing and that everyone should make an effort to be prepared on that date. You've known that the trial was set this week for months, and <u>if the witness was available during those preceding</u>

> months he should have been served with a subpoena for this week and then by having him under subpoena I could have extended the subpoena to another week or another day, but -- just like we do with all the witnesses.

(R2. 1580-81) (emphasis added). The court denied the motion for continuance, and allowed Mr. Sorrells' prior testimony to be read to the jury.

At the evidentiary hearing, Mr. McGuiness was questioned as to why he did not have Sorrells under subpoena for the Collier penalty phase. McGuiness testified that he simply thought Sorrells would show up because he had been advised of the trial (EHT. 369). McGuiness further testified that not having Sorrells under subpoena was an error and that he advised the court of this (EHT. 366). Finally, McGuiness stated that not having Sorrells under subpoena was not a strategic decision EHT. 369).[10]

David Sorrells stated that he testified at the Epps trial, but was not contacted about testifying at the Collier trial (EHT 231-32). Sorrells stated that he would have testified at the Collier trial had

[10]The lower court erroneously characterizes Mr. McGuiness' failure to subpoena David Sorrells as a "tactical decision" in that not having Sorrells under subpoena would prevent the state from knowing who his witnesses were (PC-R. 165). In fact, Mr. McGuiness conceded that he simply thought Sorrells would show up (EHT 369). Further, the fact is that Sorrells testified at the Epps trial and state was well aware of who he was.

he been asked (EHT 231-32).[11]

There is no question that defense counsel failed to subpoena this critical witness for Mr. Freeman's penalty phase. Such a failure prejudiced the outcome of the Collier penalty phase. It was important for the jury to consider live testimony of a non-family member witness who was able to provide insight as to the Freeman household that a family member could not. It was also important for the jury to know that Mr. Freeman did have the support of a friend who took the time to testify on his behalf, particularly since the court informed the jury that Mr. Sorrells was "not available to testify" (R2. 1681). Counsel was deficient in failing to subpoena this critical witness.

When considered in conjunction with trial counsel's failure to procure the available testimony of numerous other lay witnesses, the prejudice becomes clear. Without Sorrells and the many other non-family witnesses, the jury was inclined to believe that only family members were willing to come and stand by Mr. Freeman's side. Such was simply not true, yet counsel's deficient performance left the jury with that impression. Mr. Freeman is a human being with positive qualities and characteristics. He has friends who care for

[11]The lower court's veiled query as to why Sorrells was not asked why he did not testify at the Collier trial is curious (PC-R. 165). Sorrells stated plainly that he was not contacted about testifying at Collier.

him. The jury never understood that.

CONCLUSION AND RELIEF SOUGHT

Mr. Freeman prays that his sentence of death be vacated on the grounds stated herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to Barbara Yates, Assistant Attorney General, The Capitol-PL-01, Tallahassee, Florida 32399, on this _____ day of April, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

This is to certify that the Initial Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

MICHAEL P. REITER
Capital Collateral Regional
Counsel-North
Florida Bar No. 0320234

HARRY P. BRODY
Assistant CCRC-N
Florida Bar No. 0977860

JEFFREY M. HAZEN
Assistant CCRC-N
Florida Bar No. 0153060

OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL-NORTH
1533-B South Monroe Street
Tallahassee, FL 32301
(850) 488-7200

Attorneys for Appellant