IN THE SUPREME COURT OF FLORIDA

CASE NO. 01-885

DENNIS SOCHOR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

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

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

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

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

"T. ___" -- transcripts of hearings in the lower court during the pendency of Mr. Sochor's postconviction proceedings.

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

REQUEST FOR ORAL ARGUMENT

Mr. Sochor has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital

cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Sochor, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

STATEMENT OF THE CASE

The Circuit Court of the Seventeenth Judicial Circuit, Broward County, entered the judgments of conviction and sentence under consideration. Mr. Sochor was indicted on October 9, 1986 for the crimes of murder in the first degree in count I and kidnapping in count II of the indictment (R. 1143). Mr. Sochor's trial began on October 13, 1989, and the jury returned a verdict of guilty as charged as to both counts of the indictment on October 20, 1989 (R. 1189-1190).

At the penalty phase, the jury recommended death (R. 1225). The trial court subsequently sentenced Mr. Sochor to death on November 2, 1989 (R. 1237-1238). The trial court found the following aggravating circumstances: (1) prior violent felony; (2) the crime was committed during the course of a felony, kidnapping and the uncharged crime of sexual battery; (3) heinous, atrocious, or cruel; and (4) cold, calculated, and premeditated manner (R. 1231-1236). The trial court found no statutory or

non-statutory mitigating circumstances (R. 1231-1236).

On direct appeal, this Court struck the "cold, calculated, and premeditated" aggravating circumstance while affirming Mr. Sochor's convictions and death sentence. Sochor v. State, 580 So. 2d 595 (Fla. 1991). The United States Supreme Court granted certiorari, vacated Mr. Sochor's death sentence, and remanded the case to this Court because it failed to conduct an adequate harmless error analysis. Sochor v. Florida, 504 U.S. 527 (1992).

On remand, this Court again affirmed Mr. Sochor's death sentence. Sochor v. State, 619 So. 2d 285 (Fla. 1993). The United States Supreme Court denied certiorari. Sochor v. Florida, 114 S. Ct. 638 (1993).

On July 25, 1995, Mr. Sochor filed a Rule 3.850 motion to vacate judgment of conviction and sentence, including the sentence of death imposed upon him by this Court. On February 21, 1996, Mr. Sochor filed an Amended Rule 3.850 motion. Following public records litigation, Mr. Sochor filed a Second Amended Rule 3.850

motion on January 23, 1998 (PCR. 796-853). The State filed its response on March 27, 1998. Mr. Sochor filed a reply to the State's response on April 16, 1998.

Following a Huff hearing on June 12, 1998, the lower court granted a limited evidentiary hearing on Mr. Sochor's claims. The evidentiary hearing took place on April 19, 20, 21, and 22, 1999. The lower court denied postconviction relief by order dated 28 March 2001 (PCR. 1137 et seq). This appeal follows.

SUMMARY OF THE ARGUMENTS

1. The lower court misconstrued the law and misunderstood the facts in erroneously denying Mr. Sochor's postconviction motion because trial counsel unreasonably failed to investigate and present evidence, inter alia, of Mr. Sochor's childhood trauma, poverty, abuse, neglect, brain damage, Posttraumatic Stress Disorder, Manic-Depressive Illness, Substance Abuse Disorder and other mental health issues which would have supported statutory and non-statutory mitigation. Mr.

Sochor's counsel was constitutionally deficient and ineffective.

2. The lower court erroneously denied Mr. Sochor a new trial as a result of trial counsel's constitutionally inadequate performance at Mr. Sochor's guilt phase, Brady violation, incompetence during the trial and Ake violations.

3. The lower court erroneously failed to disqualify itself after conducting ex parte hearings during Mr. Sochor's postconviction proceedings.

4. Mr. Sochor was erroneously denied a full and fair evidentiary hearing on several claims relating to the guilt phase of his capital trial. Mr. Sochor pleaded specific facts, including, inter alia, issues of ineffective assistance of trial counsel at the guilt phase and pretrial, Mr. Sochor's inability to make a knowing, intelligent and voluntary waiver of his rights, and the unconstitutionality of Broward County's method of appointing special public defenders, that were legally sufficient and were not refuted by the record.

5. The lower court erred in summarily denying Mr. Sochor's claim that constitutional error occurred during the jury instructions and trial counsel was ineffective for failing to object. These errors include the burden-shifting instruction, the heinous, atrocious, or cruel aggravating circumstance, the cold, calculated and premeditated aggravating circumstance, the prior violent felony aggravating circumstance and the automatic felony-murder aggravating circumstance.

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

7. The prohibition against Mr. Sochor's counsel interviewing jurors is unconstitutional and fundamentally unfair.

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

9. The lower court's failure to conduct a proper cumulative error analysis and the court’s failure to consider the effects of those errors on the jury

deprived Mr. Sochor of due process and a meaningful review of his appellate postconviction issues.

ARGUMENT I

THE LOWER COURT ERRED IN FAILING TO GRANT MR. SOCHOR A NEW PENALTY PHASE FOLLOWING THE EVIDENTIARY HEARING

The lower court misunderstood and misinterpreted the facts and law presented at Mr. Sochor's evidentiary hearing. Mr. Sochor established that he received ineffective assistance of counsel in that his trial counsel failed to adequately investigate and prepare mitigating evidence at penalty phase.

Contrary to the hearing court’s findings, Mr. Sochor is entitled to a resentencing before a newly empaneled jury.

Counsel in a capital case has a duty to conduct a "requisite, diligent investigation" into his client's background for potential mitigation evidence. Williams v. Taylor, 120 S. Ct. 1495, 1524 (2000).[1] See also Id.

[1] The Supreme Court granted relief to Mr. Williams, the first time the Court has granted relief on the basis

at 1515 ("trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); State v. Riechmann, 777 So. 2d 342 (Fla. 2000) ("an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence"). "It seems apparent that there would be few cases, if any, where defense counsel would be justified in failing to investigate and present a case for the defendant in the penalty phase of a capital trial." Id. It is very clear from both the record of Mr. Sochor's penalty phase and of the evidence presented at his evidentiary hearing that Mr. Sochor's trial counsel's performance did not comport with these essential principles.

The record of Mr. Sochor's penalty phase reflects that only four lay witnesses were presented to the

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of ineffective assistance of counsel as to the penalty phase of a capital case. As demonstrated at the hearing and in this memorandum, Mr. Sochor's case is even stronger than Mr. Williams' and his entitlement to relief is clearly established under the Williams decision.

jury,[2] and no statutory or nonstatutory mental health mitigation was presented at that stage. Furthermore, those witnesses were not contacted prior to the commencement of the penalty phase, and were not prepared by trial counsel prior to their testimony. By contrast, at the evidentiary hearing, Mr. Sochor presented additional testimony from these family members, as well as from other siblings (Blaine Sochor, Gary Sochor, Melanie Wheeler and Lisa Fisher), friends (Helen Foley, Rachel Moore, Marvin Droste and Bill Mitchell), teachers (Father Melvin Fox, Louis LaScala and Christine Thatcher) and two mental health professionals (Richard Greer M.D. and Karen Froming Ph.D.) This evidence showed that counsel did not conduct the requisite "thorough investigation" of Mr. Sochor's background. There was an evidentiary void at the sentencing phase of Mr. Sochor's case. Because of trial counsel's

[2] Charles Sochor and Rose Sochor, Mr. Sochor's parents, Gary Sochor, a brother, and Kathy Cooper, his older sister.

unprofessional errors in developing a mental health and family history mitigation case, including his failure to investigate and to provide adequate background materials to the expert he retained, his failure to call any mental health expert and his failure to present anything other than the most superficial family history evidence to the jury, the jury and the sentencing judge failed to learn of significant mitigating evidence.

The lower court found that trial counsel " . . . was in preparation long before the penalty phase even began" based solely on the fact that "[h]e was the Defendant's attorney during the entire development of the trial" (PCR. 1152). This analysis flies in the face of the record and applicable case law. First of all, the fact that Mr. Rich was Mr. Sochor's counsel "during the entire development of the trial" does not logically support the court's contention that Rich did adequate investigation. If the court's logic is taken to its ultimate conclusion, and the length of time since counsel's appointment was the sole factor in determining

whether adequate investigation was done, no reversal based on ineffective assistance would ever occur. The court's reasoning is simply absurd. The unrebutted testimony at the evidentiary hearing shows that trial counsel failed to conduct the "requisite, diligent" investigation into Mr. Sochor's background to unearth available and plentiful mitigation. Williams, 120 S. Ct. at 1524.

At the evidentiary hearing, it became clear that Mr. Rich had not even considered the possibility of developing any mental health or other mitigation before the guilty verdict was returned. Numerous family and other witnesses would have testified on Mr. Sochor's behalf, had they only been asked. For example, Christine Thatcher (T. 269), Father Melvin Fox (T. 296-7) and Helen Foley (T. 306) all testified that they would have been able and willing to testify in Florida at Mr. Sochor's penalty phase, as would Blaine Sochor, Melanie Wheeler, Lisa Fisher, Louis LaScala, Marvin Droste and Bill Mitchell. Each witness had valuable,

non-cumulative testimony to offer in support of mitigation.

Even the witnesses presented by Mr. Rich were not prepared for their testimony. As Charles Sochor testified, he was not contacted by Mr. Rich about testifying until the guilt phase was over:

> Q: [by Mr. Malnik] When was it that you knew that you were coming to Florida to testify at the penalty phase?
>
> A: [by Charles Sochor] I don't understand the question.
>
> Q: Before the trial started, did you know that at some point --
>
> A: Yes.
>
> Q: -- that you would be coming --
>
> A: Yes.
>
> Q: To Florida, you and your wife?
>
> A: Yes. Before the penalty phase of the trial yes.
>
> Q: What about before the trial started?
>
> A: No.

(T. 135).

Furthermore, even once the family witnesses arrived in Florida, Mr. Rich's preparation of them for their penalty phase testimony was constitutionally inadequate. He made no attempt to develop mitigation, but merely asked them to prepare a statement to read to the jury. At the evidentiary hearing, Rosemary Sochor testified that Mr. Rich only called her and her husband when they reached the hotel in Fort Lauderdale:

> A: [by Rosemary Sochor] I think he called us, if I remember. I think he called us and asked us to write out everything that we would want to say in court. And I think he said he'd be up that evening or the next day or something like that and talk to us. And that's when I talked to him.
>
> Q: [by Mr. Malnik] When you talked to him how long did you talk to him for?
>
> A: Not very long.
>
> Q: Less than 20 minutes?
>
> A: Maybe half an hour.

(T. 198).

In fact, by his own admission on the record of the penalty phase, trial counsel failed to even speak to one of these witnesses (R. 1032). In addition, of the few family members who testified at the penalty phase, one, Kathy Cooper, Mr. Sochor's sister, only testified at her own insistence. Had it been left up to Mr. Rich, even Kathy Cooper would not have been brought down to Florida from Michigan for the penalty phase, as Mrs. Cooper testified at the evidentiary hearing:

> Q: [by Mr. Malnik] Do you recall the circumstances in how you came down here to testify?
>
> A: [by Ms. Cooper] Uh-huh, very clearly. I received a call from my mother on the night saying that Dennie had been found guilty and the next day would be the sentencing. And I had told my mom before she left that if there was anything I could do while they were down there or if they just needed me or something, to just call. And so I got this call. It was like early evening, I think.
>
> And so I just you know, automatically told her I would be there. And it was like my husband was at work, because he worked midnights. And I think my daughter was like a

> freshman in high school then. So I told her what was going on -- no. Actually I think it was later in the evening because I woke her up.
>
> So I had to get plane reservations to come down here, and I'd never flown before, and I didn't know what to do. So I called my brother Blaine and I got him up and I told him what was going on. So he called an airline and made a reservation for me. And then the next morning he had me at the airport at six o'clock in the morning.

(T. 210-211).

Mrs. Cooper only testified at her own insistence, and like her parents, she was not prepared for testimony by Mr. Rich:

> Q: [by Mr. Malnik] Did you ever speak to an attorney before you flew down here, did you ever speak to Dennie's attorney?
>
> A: [by Ms. Cooper] I talked to him, I think, it was like downstairs before we came up to the courtroom.
>
> Q: Just so we understand, you never talked to him on the telephone before you came down to Florida?
>
> A: No.
>
> Q: You talked to him downstairs

before you went up an elevator to the courtroom?

A: Yes.

Q: How long did you talk to him for?

A: Maybe two minutes.

Q: And do you recall what you talked to him about?

A: Oh, yeah, because it really ticked me off.

Q: What was said?

A: I believe he said "Why are you here?" And I was kind of like, I would think he would know why I was there. I said "Because I got a call from mom that Dennie needed help." I said I'm here to do whatever I can do."

And mom had said that the lawyer had said to think about things I wanted to say on the plane on the way down here and write them down. And so I had done that. And then he said something like "Well, what do you think you can do?" And I said, "Well, I don't know, but I've written this up, some things about Dennie when he was younger and stuff. And this is what mom told me to do."

And he said "Well, let me see it." **So I handed to him and he kind of**

> **looked at it. And I mean, like glanced at it. He didn't read it, because it was about three pages long. And he said "Okay" and he handed it back to me.**
>
> Q: And did you go into that courtroom and testify?
>
> A: Yes I did.

(T. 211-212) (emphasis added).

The court acknowledged that Mr. Rich was not able to testify as to his strategy at the evidentiary hearing, being deceased by the time of Mr. Sochor's evidentiary hearing (PCR. 1151). However, despite the unrebutted testimony of Ms. Cooper, Rosemary and Charles Sochor as to his lack of preparation, the lower court maintained the analysis that this was "reasonable strategy" (PCR. 1150). This conclusion is borne out neither by the record nor applicable case law.

Mr. Rich's performance at the penalty phase was constitutionally deficient. The law requires that an attorney charged with the responsibility of conducting a capital trial begin investigating for the penalty phase

before the guilt phase of the trial and not wait until the guilt phase is over. Blanco v. Singletary, 943 F. 2d at 1501-02. "To save the difficult and time-consuming task of assembling mitigation witnesses until after the jury's verdict in the guilt phase almost insures that witnesses will not be available." Id.

In this case, especially, the logistical aspects of the case rendered it crucial that the penalty phase investigation be commenced as early as possible and not just at the commencement of the penalty phase. Furthermore, this Court has previously found that any purported strategic or tactical reason evinced by Mr. Rich for failing to commence investigation until after the guilt phase amounts to deficient performance. See Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993). In Deaton this Court found that Mr. Rich's performance was deficient because his "shortcomings were sufficiently serious to have deprived Deaton of a reliable penalty phase proceeding." Id. At a 1989 evidentiary hearing in Deaton, the following colloquy took place between

post-conviction counsel ("Q") and Mr. Rich ("A"), Mr. Sochor's trial counsel:

> Q: In terms of preparing for trial in advance of conviction, what did you do to prepare for the penalty phase?
>
> A: Very little. I usually don't try to prepare the penalty phase in advance of the verdict, so for some reason I just don't like to get psyched up and get a defeated attitude. I usually don't prepare until I lose [the conviction phase], then I started scrambling for something to do about the penalty phase . . .
>
> Q: In terms of the penalty phase, did you explain to [Deaton] mitigating circumstances that you could pursue?
>
> A: No, except he could testify as to his treatment and how he was emotionally abused as a child. Just very briefly, if he wanted to testify . . .
>
> Q: Now in terms of documentation, records such as the hospital reports or divorce records or any of those H.R.S. files, did you talk to Jason about finding those records in order to try to introduce them at the penalty phase?
>
> A: No.
>
> Q: Were you aware that documents

such as that may be admissible even if it's hearsay at the penalty phase?

A: Yes.

Q: Was there any reason why you didn't try and locate any of those documents prior to trial?

A: No, no reason . . .

Q: Now do you recall how much time you had spent between the return of the guilty verdict and the start of the penalty phase?

A: Very little time.

Q: Was it like overnight?

A: I think overnight or the next day, couple of days. It was very little time.

Q: Do you recall what you tried to do in terms of developing the record or witnesses to testify?

A: Nothing at that point. There wasn't time to do it, except to wonder where his mother was. She indicated she would be back to ask Jason if he would like her to testify on his own behalf on the penalty phase.

Deaton v. Dugger, 635 So. 2d 4, 9 (Fla. 1993).

It is true that, at Mr. Sochor's evidentiary

hearing, Mr. Sochor was unable to elicit similar testimony from Mr. Rich due to the fact that, in the interim between the Deaton hearing and the Sochor hearing, Mr. Rich had died. However, in Deaton, this Court found that Mr. Sochor's trial counsel was ineffective for failing to present available mitigation evidence during a capital penalty phase. This Court ultimately concluded in Deaton that Mr. Rich was ineffective because his "shortcomings were sufficiently serious to have deprived Deaton of a reliable penalty phase proceeding." Id. Notwithstanding the lack of any testimony as to his strategy, or lack thereof, in Mr. Sochor's case, it is clear from the unrebutted testimony of Kathy Cooper, Rosemary Sochor and Charles Sochor that Mr. Rich employed the same modus operandi in the Sochor case as he had done in Deaton. Moreover, Mr. Rich's testimony in Deaton occurred in 1989, two years after Mr. Sochor's penalty phase. It is clear that in 1989, it was still Mr. Rich's modus operandi to leave the penalty phase investigation and preparation until the

last minute. ("I usually don't try to prepare the penalty phase in advance of the verdict.") Deaton at 9.

Numerous mitigating circumstances were presented at the evidentiary hearing which were either not presented at all at the penalty phase or which, if alluded to, were glossed over so superficially as to render the testimony misleading. A case in point is the mitigating circumstance of physical abuse. At the penalty phase, Mr. Rich elicited some testimony that Mr. Sochor had been abused as a child. However, the horrific nature and extent of the physical abuse endured by Mr. Sochor in his home were glossed over in the most superficial way. Moreover, he never even came close to giving the jury a true picture of the nature and extent of the abuse that permeated the daily life within the Sochor family. He failed to portray the true image of Dennis as the target child in the family. He failed to describe the random beatings that would descend on all the children, and the true extent to which Dennis protected the others by taking their beatings for them.

By contrast, at the evidentiary hearing, Kathy Cooper testified that the children lived in fear of their father. Rose Sochor would always say to the children, "You're in trouble and I'm going to tell your dad when he gets home" (T. 214). When Charles Sochor got home, somebody would usually get a beating with either his hand or a belt (T. 214). As a child, Kathy was hit only a couple of times (T. 235) since she was Charles' favorite.[3]

Kathy Cooper gave a detailed account of the frequency and random nature of the beatings meted out by Charles, and the targeting of Dennis by Charles:

> Q: [by Mr. Malnik] [W]hen your dad would get home what would he do?
>
> A: [by Ms. Cooper] Someone usually got a beating, you know. That's if you got in trouble. He didn't sit you down and talk to you or anything. You just had a spanking coming.

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[3] By his own admission, Charles worshiped Kathy and gave her everything. He treated Kathy better than the other kids. She was the joy of his life (T. 109; 2-3,15-17).

* * *

Sometimes he used his hand, sometimes he used a belt.

Q: Did you get spanked very often as a child?

A: No.

* * *

Q: Do you have recollection of Dennis being spanked as a child?

A: Uh oh, real often.

(T. 215-6).

Kathy Cooper went on to describe specific instances of beatings she had seen her father administer to Dennis:

Q: [by Ms. Cooper] . . . I don't know if dad was using the belt or hitting him with just his fist or what. I don't remember that part. But Dennie had had enough and he like just kind of fell to the ground in the heat.

And my dad started kicking him in the ribs and then kind of got down on the floor and straddled over Dennie and he was like punching him with his fist.

(T. 416) (emphasis added).

* * *

> Q: [by Ms. Cooper] There was another time that my dad was hitting him. **And he put Dennie into a corner and was hitting him and punching him and stuff until Dennie, he just kind of went down on the floor right straight on his bottom. And then my dad got down on the floor, and he like grab [*sic*] a hold of Dennie's hair or his head and took his head and was throwing it back like that and beating it against the wall.**

(T. 217) (emphasis added).

Kathy related that on both occasions, Dennis was only around ten to twelve years old but that nevertheless, both times Charles had to be pulled off Dennis.

Kathy noted the marks she would frequently see on Dennis:

> Q: [by Ms. Cooper] He was -- like **he would have bruises all over his body and his back, the tops of his legs, things like that. He always had split lips or one side of his lips would be all swollen and he'd have cuts, little cuts around his eyes or black eyes.**

(T. 218) (emphasis added).

Kathy would try to help Dennis after the beatings, but he would just want her to leave him alone (T. 219). He felt humiliated (T. 220).

Blaine Sochor also testified at the evidentiary hearing as to nature and extent of the beatings:

> Q: [by Mr. Malnik] What type of big brother was [Dennis] to you?
>
> A: [by Blaine Sochor] Oh, he was my protector.
>
> Q: Who was he protecting you from?
>
> A: Mostly my Dad and Gary.
>
> Q: Did you ever see times where Dennis was punished by your father?
>
> A: Yeah, everyday.
>
> Q: What kind of things would Dennis be punished for?
>
> A: Anything that happened, whether it was his fault or not. The baseball through the window, not weeding enough rows in the garden.

(T. 239-40).

Blaine Sochor also described the belt used by Charles Sochor to mete out his beatings on Dennis and

his modus operandi:

> [by Blaine Sochor] A lot of the time he'd start off with his leather strap and then finish up with his fist. He had a leather strap about yah [*sic*] long, about that thick.
>
> * * *
>
> When he doubled it up it'd be a good three feet.
>
> * * *
>
> **It was the thickest piece of leather I'd ever seen.**

(T. 240) (emphasis added).

Blaine Sochor also vividly described the extreme force used by Charles in his assaults on Dennis:

> Q: [by Mr. Malnik] [H]ow hard would your dad hit him with the belt?
>
> A: [by Blaine Sochor] **As hard as he could.**
>
> Q: Was your dad a strong man back then?
>
> A: **Incredibly, incredibly strong. He'd poke me with his fingers like that and it'd crack my ribs.**
>
> Q: Did you ever see your dad hit Dennie with his fist?

A: All the time.

Q: How old was Dennie when he was getting hit with his fist?

A: As young as I can remember. Before I went to school.

Q: How old were you when you started school, like four or five?

A: Five. Five.

Q: When he would be hitting him with his fist, would he hit him just one time or would he hit him a number of times?

Would you like to take a break for a little bit?

A: No. I want to do this, okay? Please.

No. **My dad was a boxer and he held like three weight divisions in the South Pacific during World War II. And he would do his boxing thing.** He would -- and then he'd jab, jab, jab and he'd keep working the body. Work the body. And he's jab and he'd move.

Dennie was defensive and Dennie never fought back. And then he'd get so much blood on his face he couldn't see. And then Dad would set him up, just one big one. Boom. Dennie would go down.

Q: **Would your dad ever hit him in the head?**

A: **Oh yes.**

Q: **Would your dad ever knock him unconscious?**

A: **All the time. That's how he finished the fight.**

(T. 241-2) (emphasis added).

Blaine Sochor's testimony as to Charles' extensive use of the belt to beat Dennis was corroborated by the testimony of other family members and others including Charles Sochor (T. 111), Rosemary Sochor (T. 186), Kathy Cooper (T. 215-216), Melanie wheeler (T. 310), Gary Sochor (T. 326-7),[4] and Helen Foley (T. 300).

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[4] Gary Sochor had testified at the penalty phase, but his testimony was extremely muted compared with his statements at the evidentiary hearing. At the evidentiary hearing he said that it would get "to the point that Denny couldn't take it, he'd step in and physically take Dad on to the point that Dad would leave us alone and beat him" (T. 327). Denny couldn't have been more than 15 or 16 years old at the time (T. 327). Mr. Rich failed to elicit from Gary Sochor that Charles did not appear to like Dennis (T. 330; 2) and that he spoke to him mostly in anger (T. 330), and that Charles cursed at the children (T. 330), called them names (T. 330), even if there were other people around (T. 331). If any of the boys struck

In addition to the constant random physical abuse, Dennis suffered neglect at the hands of his parents. The neglect by Rose Sochor is evident from her refusal to interfere when her husband beat Dennis and the other children because she loved him (Charles) and was afraid that he would leave (T. 114, 218). Mrs. Sochor's neglect of her son was a nonstatutory mitigator that should have been presented to the jury. The cumulative effect of both the physical abuse and neglect have left Dennis Sochor without any positive role models to look to for guidance and protection, which is another nonstatutory mitigator the jury could have considered.

Another nonstatutory mitigator the jury should have considered is childhood trauma. Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988) (childhood trauma has been recognized as a mitigating factor). While the sentencing jury was made aware of the incident where Mr.

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out on their little league team, Charles would scold them on the field (T. 326). This kind of treatment was very embarrassing and humiliating for Dennis (T.331).

Sochor fell on a tin horn (although not aware of the significance of this incident) (R. 1038 & 1039), it was unaware of the brutal head injuries Dennis received at the hands of his father (T. 217, 242, 328, 329), as well as the injuries he received from fist fights as a teenager (T. 151). Similarly, although the jury heard evidence of Terry Sochor's severe burns as a child, the jury was not aware that Dennis was present the day of the fire and actually saw Terry's pajamas burst into flames (T. 117). This is evidence which should have been before the jury.[5]

The jury should also have considered the nonstatutory mitigator of poverty in this case. Although Charles Sochor had a relatively steady job, he was the sole supporter of a family of twelve. Blaine Sochor testified at the evidentiary hearing that it was not uncommon for the children to have to hunt for food

[5] As Dr. Karen Froming testified, one of her diagnoses of Mr. Sochor was Posttraumatic Stress Disorder. The trauma inflicted on Mr. Sochor by parental abuse and neglect further buttresses Dr. Froming's diagnosis.

(T. 247). He also remembered suffering from boils on his legs which he attributed to malnutrition (T. 247). See Foster v. State, 654 So. 2d 112, FN5 (Fla. 1995) (trial court found as nonstatutory mitigation, among others, the defendant's poverty). Had Mr. Rich investigated and contacted any of Dennis Sochor's friends or teachers, he also would have discovered that Dennis Sochor had difficulty in school (T. 293) and that he did not interact well with other students, two other nonstatutory mitigators (T. 293). See Neary v. State, 384 So. 2d 881, 886 (Fla. 1980) (jury recommendation for life was influenced by mitigating evidence that the defendant was a slow learner and needed special assistance to keep up in school).

Mr. Rich similarly failed to investigate evidence of Mr. Sochor's pervasive drug and alcohol habits. At the evidentiary hearing, Gary Sochor testified to Dennis' extensive and varied drug use (T. 337). This was further expanded upon by the evidentiary testimony of Dennis' then close friend, Bill Mitchell, who described

his drug taking habits:

> Q: [by Mr. Malnik] Did [Dennis] and the group, the circle that you were hanging with back in the years 1970 to 1973 get involved in drug usage?
>
> A: [by Mr. Mitchell] Yes we did.
>
> Q: Can you tell us what drugs you guys were using?
>
> A: Well of course everyone smoked marijuana, but there was also quite a bit of LSD usage, different hallucinogens, mescaline, mushroom.
>
> Q: I take it you partook of those substances back then?
>
> A: Yes
>
> Q: **Do you remember seeing Dennis dropping acid?**
>
> A: **Many times.**
>
> Q: How frequently were you guys dropping acid?
>
> A: **During the year 1971, we'll say, Dennie and I together conservatively tripped over 150 times.**

(T. 154) (emphasis added).

Moreover, had he investigated Mr. Sochor's family background, Mr. Rich would have been able to present

strong positive character traits. Evidence was presented at the hearing that Dennis was known for protecting his siblings (T. 22, 237, 243, 254, 255, 315, 228, 2491, 327), and his friends (T. 155), and that he was also a loving son and brother. Furthermore, Dennis convinced his father not to commit suicide at a particularly low ebb in his father's life (T. 122). Dennis then quit high school to help with the family income (T. 120, 23-25). The jury could have considered all of these things in mitigation. See Dolinsky v. State, 576 So. 2d 271, 275 (Fla. 1991) (Jury's life recommendation may have been partially based on evidence of the defendant’s good qualities as a hardworking man who had, at least to some extent, overcome serious adversities); Washington v. State, 432 So. 2d 44, 48 (Fla. 1983) (Jury's recommendation could have been partially based on the nonstatutory mitigating factor of the defendant’s character as testified to by members of his family); Gilliam v. State, 582 So. 2d 610, FN1 (Fla. 1991) (trial court found as nonstatutory mitigating

circumstance that the defendant's family desired that his life be spared); Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988) (trial court's override of jury life recommendation reversed as the jury could have concluded that the defendant's positive character traits showed potential for rehabilitation and productivity within the prison system).

Notwithstanding the plethora of mitigation presented at the evidentiary hearing as to Mr. Sochor's abusive and deprived background, the lower court found that the testimony of Blaine Sochor, Melanie Wheeler and Lisa Fisher was "cumulative" and "less significant" that the testimony of the older family members who testified at Mr. Sochor's penalty phase (PCR. 1150). The lower court's finding is not borne out by the record. First of all, the lower court ignores the fact that testimony of Rose Sochor, Charles Sochor and Kathy Cooper at the evidentiary hearing is vastly superior to that elicited by Mr. Rich asking them to read a prepared statement at the penalty phase. Secondly, the testimony of Blaine

Sochor, Melanie Wheeler and Lisa Fisher not only adds further weight to the testimony of the others, but adds additional mitigating circumstances which should have been considered by the jury. For example the true extent of childhood trauma and physical abuse and alcohol and substance abuse was glossed over at the penalty phase. There was minimal testimony about Mr. Sochor's demonstrated love for his family, and numerous instances which showed that Mr. Sochor was a good son and sibling were omitted due to counsel's failure to investigate. In State v. Lara, 581 So. 2d 1288 (Fla. 1991), this Court affirmed a Dade circuit court's grant of penalty phase relief to a capital defendant where the defendant presented at an evidentiary hearing evidence that, as the State conceded in that case, was "quantitatively and qualitatively superior to that presented by defense counsel at the penalty phase." Id. at 1290. Here the quality of evidence presented at the evidentiary hearing is far superior to that adduced at trial. The lower court erred by not considering the

"totality of available mitigation -- both that adduced at trial and the evidence presented at the evidentiary hearing." See Williams v. Taylor, 120 S. Ct. 1495, 1515 (2000).

Furthermore, the extensive sexual abuse within the family recalled by Kathy Cooper (T. 221) and Melanie Wheeler (T. 316),[6] the poverty, hunger and neglect experienced by the Sochor children (T. 242-247) and Mr. Sochor's artistic ability (T. 303) were not brought out at trial at all. Similarly, Mr. Sochor's educational difficulties and his inability to interact with other children were not alluded to at all by Mr. Rich.[7]

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[6] The lower court asserted that defense counsel made a "strong effort" to present evidence of sexual abuse to the jury (PCR. 1147). This is simply not borne out by the record.

[7] The lower court completely mischaracterized the testimony of Louis LaScala and Christine Thatcher. The lower court stated that these witnesses would have testified that the "Defendant had basketball skills . . . and acting skills" (PCR. 1150). In fact the testimony of Mr. LaScala was that, despite Mr. Sochor's ability as a shooter, his apparent mental impairments and lack of concentration made it impossible to function within a team (T. 276). Ms. Thatcher testified that Mr. Sochor, while enthusiastic about his theatrical studies, was "untrained"

Moreover, whether or not the testimony of these additional witnesses is considered to be "less significant" than those of the witnesses who did testify at the penalty phase, the individual significance of each witness' testimony is not the appropriate test for determining ineffectiveness. Williams v. Taylor, 120 S. Ct. 1495 (2000) (holding that a proper analysis of prejudice also entails an evaluation of the totality of available mitigation -- both that adduced at trial and the evidence presented at the evidentiary hearing). Williams at 1515.

The same considerations apply equally well to Mr. Sochor's case. Had he interviewed the numerous potential mitigation witnesses, Mr. Rich not only would have developed compelling nonstatutory mitigation, but would have gained valuable insights into Mr. Sochor's mental health background. Armed with this information, he would have been able to suggest the possibility of

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and unskilled" (T. 268).

neuropsychological evaluation and psychiatric examination to appropriately qualified mental health professionals, and been able to provide collateral background material, including access to family members, to aid the experts in the formulation of their opinions. Mr. Rich failed to investigate Mr. Sochor's family and mental health background and provide adequate background materials, necessary for an adequate and appropriate evaluation. Ake, 470 U.S. 68 (1985); Morgan v. State, 639 So. 2d 6 (Fla. 1994). He failed to obtain a competent evaluation. The mental health evaluations that he relied on were neither competent nor adequate for the purposes of developing mental health mitigation.

While three experts had been appointed on the case,[8]

[8] Dr. Patsy Ceros-Livingston, a clinical psychologist, and Dr. Richard Castillo, a psychiatrist, were appointed by the trial court prior to Mr. Rich being appointed to represent Mr. Sochor. Dr. Zager, a psychiatrist, was appointed by the trial court on motion of Assistant Public Defender Thomas Gallagher and conducted his evaluation in January, 1987, six months before Mr. Rich was appointed to represent Mr. Sochor in Mr. Gallagher's place.

Mr. Rich neither asked them to prepare for a penalty phase proceeding, nor provided them with background information necessary to develop and support any mental health mitigation. As a result, the nature and extent of the debilitating mental illnesses suffered by Mr. Sochor was never presented to the jury.

Mr. Sochor suffers from Manic-Depressive Illness and organic brain damage. The nature and extent of his illnesses mean that Mr. Sochor was unable to conform his conduct according to the law, and that he was under extreme mental and emotional disturbance at the time of the crime. However, because of the inadequate mental health assistance, evidence of these statutory mitigating circumstances was never heard by either the sentencing jury or the judge, to Mr. Sochor's substantial prejudice.

Dr. Patsy Ceros-Livingston conducted an evaluation of Mr. Sochor on June 17, 1987. She subsequently furnished a report to the Court and was called by Mr. Rich to testify at Mr. Sochor's guilt phase proceeding,

but did not testify at Mr. Sochor's penalty phase. Dr. Ceros-Livingston's report indicated that she conducted only the Carson Psychological Survey, the Minnesota Multiphasic Personality Profile (MMPI), and a mental status examination. As she testified at the evidentiary hearing, she did not conduct a neuropsychological battery of tests (T. 579).

Dr. Ceros-Livingston's testimony at the evidentiary hearing shows clearly that the question of performing an examination of Mr. Sochor in preparation for his penalty phase was never broached by Mr. Rich. Indeed, during Dr. Ceros-Livingston's guilt phase testimony it became clear that Mr. Rich had never even spoken to her before putting her on the stand. See R. 698. Neither had Mr. Rich provided her with background materials or access to family members:

> Q: [by Mr. Malnik] Back in 1987, you were asked to do an evaluation by the Court, correct?
>
> A: [by Dr. Ceros-Livingston] Yes Counselor.

Q: And you were asked by Judge Sea [*sic*], to do that?

A: That's correct.

Q: **And specifically the questions that you were asked to determine whether Mr. Sochor was competent?**

A: **Right**

Q: And whether he was sane, correct?

A: That's correct.

* * *

Q: Now, back in 1987, you didn't perform a mitigation examination. That wasn't your function, was it?

A: No, it was not.

(T. 553-554) (emphasis added).

The reports of Dr. Zager and Dr. Castillo also indicate that they were merely asked to address competency and sanity and make no reference to the presence or absence of mitigating factors. See Defense Exhibit 3, October 21, 1987.

Moreover, as Dr. Ceros-Livingston testified at the evidentiary hearing, she neither requested nor was

provided with any background material or access to family members concerning Mr. Sochor's family history, educational background and medical history, without which she admitted a complete evaluation could not be performed.

> Q: [by Mr. Malnik] Well let's go back in time to 1987 and see what Mr. Rich gave you back then.
>
> A: [by Dr. Ceros-Livingston] I did not get any of those records.
>
> Q: Well let's specifically state what you didn't get. You didn't get jail records form Mr. Rich back then?
>
> A: No, I did not.
>
> Q: You didn't get school records from Mr. Rich back then, did you?
>
> A: No, I did not.
>
> Q: You didn't get military records from Mr. Rich back then?
>
> A: No, I did not.
>
> Q: You didn't get an opportunity to speak to family members back then, did you?
>
> A: No.

> Q: You didn't have the opportunity to speak to jail guards or anything?
>
> A: I'm not sure of that. I usually check the contact card and all of that, so I'm not sure whether I did that or not.
>
> Q: So essentially, when did [*sic]* this evaluation, you had no collateral information?
>
> A: That's correct.

(T. 555-556).

Similarly, the lower court found that Dr. Arnold Zager made an evaluation "based on Defendant's head trauma, child abuse, psychiatric and medical history and life experience" (PCR. 1145). However the lower court fails to mention that Dr. Zager had to admit on cross examination that this was based on self reporting and that the doctor had not spoken with any family members (R. 670). It is clear from his report and testimony that Dr. Zager did not receive any background information from trial counsel. Dr. Zager's report does not mention having received, reviewed or relied on any

collateral information, either documentary or from third parties. Moreover, as the trial record makes plain, Dr. Zager was appointed as a confidential expert, yet counsel did not even consult with him before putting him on the stand (R. 659). Given this fact, together with Mr. Rich's total failure to develop mitigation until after the guilt phase, it is clear that Dr. Zager was not provided with access to background materials or family witnesses. His report is couched in terms of sanity and competence. There is absolutely no evidence that Dr. Zager was asked to look at the possibility of statutory or nonstatutory mental health mitigation.

At the evidentiary hearing, Mr. Sochor presented compelling testimony from two qualified mental health experts who testified to the existence of statutory mental health mitigating factors, as well as providing nonstatutory mitigating factors. Dr. Richard Greer, a quadruple-Board Certified psychiatrist, testified that he evaluated Mr. Sochor in April, 1999. His evaluation consisted of a face-to-face evaluation of Mr. Sochor,

together with a review of background materials. Dr. Greer testified as to the materials he had reviewed:

> A: [by Dr. Greer] . . . from the proceeding [*sic*] trial, I reviewed the testimony of many of the witnesses, including the doctors, witnesses at the time of the murder, the reports of those doctors. Of course, I have an eye for finding psychological testimony or psychological reports. I'm looking for that, in other words.
>
> But I'm also looking for witnesses who might be able to describe the behavior of an individual at any given point in time. So I was looking at testimony describing Mr. Sochor around the time of the murder.
>
> Q: [by Mr. Malnik] Did you also review documents that contained medical records, jail records, prison records?
>
> A: Many years worth, as a matter of fact, from the time he was incarcerated at the Broward County Jail through the present time where he's incarcerated.

(T. 385).

As a result of his evaluation of Mr. Sochor and review of background material, Dr. Greer concluded that Mr. Sochor suffers from three major mental disorders:

Bipolar I Disorder, Alcohol Abuse Disorder, and a history of polysubstance abuse (T. 386).

Dr. Greer explained the nature of Bipolar Disorder:

> A: [by Dr. Greer] Ordinarily, bipolar disorder or manic depressive illness is a lifelong, genetically transcribed mental illness in which the individual has mood swings. It should be thought of as on an [*sic*] continuum, that at any given point in time the person may fall at any particular place on the continuum.
>
> At one end, the manic end of the continuum, the person can be blatantly psychotic, meaning hallucinating, incoherent, disoriented, in a rage. That's how far the illness can go on the manic end of the spectrum.
>
> On the depressive end of the spectrum, the person can be so markedly depressed as to commit suicide. In fact this is one of those illnesses where the chance over the lifetime of an individual with the illness committing suicide is far greater than in the general population, more than ten-fold greater than in our population.

(T. 387).

Dr. Greer explained the bases of his opinion that Mr. Sochor suffers from Bipolar Disorder as being the

medical records, including other physicians' diagnoses of Mr. Sochor as suffering from Bipolar Disorder, his treatment with Lithium, and his own clinical impression of Mr. Sochor:

> A: [by Dr. Greer] The history in mind [*sic*] anyway, was quite clear that I could trace his manic depressive illness back for many years.
>
> Simply looking at the records when he was observed over a period of time during his incarceration, he repeatedly received the diagnosis of manic depressive or bipolar disorder. From 1986, 1987 to the present date.

(T. 388).

* * *

> [by Dr. Greer] And even if you note the medications being used to treat him, they are Lithium. They are medicines to use to stabilize people who have manic depressive illness. These medicines are not used habitually and they are not used predominantly for any other mental illness.[9]

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[9] Incredibly, Dr. Zager and Dr. Castillo both noted in their reports that Mr. Sochor was being medicated with Lithium, but they neither reported on its significance as a treatment for bipolar disorder (and no other mental disorder), nor made any attempt to quantify the effect of

* * *

> **As I alluded to briefly, that the diagnosis of bipolar or manic depressive illness is not in doubt in my mind. Obviously it was not in doubt in other physicians' minds as well.**

(T. 389) (emphasis added).

Dr. Greer was referring not only to records he had reviewed from Mr. Sochor's treatment while incarcerated in Broward County Jail, Florida State Prison and Union Correctional Institution, but also to reports filed with the Court by clinical psychologists Dr. Brannon and Dr. Seligson, who had evaluated Mr. Sochor on April 19, 1999 for a competency determination.[10] Both psychologists noted symptoms of Manic-Depressive Illness in their examination of Mr. Sochor.

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the medication on Mr. Sochor's performance at their evaluation. This is particularly significant in light of the fact that Mr. Sochor was **not** medicated with Lithium at the time of the crime. Dr. Greer's testimony shows that both Dr. Castillo's and Dr. Zager's evaluation of Mr. Sochor fell well short of constitutionally adequate pursuant to Ake.

[10] See Defense Exhibits 1 & 2, entered into evidence at T. 58, 62.

Dr. Greer made specific reference to several of the classic symptoms characteristic of Bipolar Disorder, all of which Mr. Sochor demonstrated to him during his clinical evaluation of Mr. Sochor:

> A: [by Dr. Greer] **The clinical interview was consistent with the diagnosis.** I was entertaining the diagnosis rather early in the interview, not simply from the records but because of the obvious symptoms that he manifested when I saw him. I could name just a couple of them, for you. Mr. Sochor exhibited what is known as tangentiality and flight of ideas.
>
> * * *
>
> There was yet a third example, what we call rapid, or even pressured speech, that these people can talk so rapidly that you have difficulty interrupting them, that they talk so fast and furiously. And there was evidence of what we call grandiosity.
>
> * * *
>
> Just one more thing, and that was that Mr. Sochor exhibited the almost euphoric, certainly hypomanic or somewhat manic type of mood. Here he was, sitting on death row with his life on the line, and I asked him how he was feeling. And he says he's feeling good.

> And it was not consistent with what one would expect for a person in his position. His euphoria is a well known manifestation of bipolar disorder. **He shouldn't be feeling that good.**

(T. 391-393) (emphasis added).

Dr. Greer also referred to Mr. Sochor's religiosity, both from records from the time of the crime, and his own clinical interview. Dr. Greer testified that religiosity, again, is a sign of Manic-Depressive Illness (T. 396).[11]

Dr. Greer went on to review the bases of his diagnoses of alcohol abuse and polysubstance abuse as being the history given by Mr. Sochor as confirmed by records review (T. 394).[12]

As a result of his complete evaluation of Mr. Sochor, Dr. Greer opined that Mr. Sochor's capacity to conform his conduct to the requirements of the law was

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[11] At the evidentiary hearing, Gary Sochor also testified as to Dennis Sochor's religiosity prior to the night of the crime. See T. 338.

[12] Mr. Sochor's past alcohol and substance abuse were also testified to by several lay witnesses including Bill Mitchell (T. 154), and Marvin Droste (T. 169).

substantially impaired at the time of the offense, a statutory mental health mitigating factor. Dr. Greer opined that the combination of Mr. Sochor's Manic-Depressive Illness and his alcohol consumption at the time of the offense created a synergistic effect, greater than the individual components:

> A: [by Dr. Greer] [T]here was a combination of his manic depressive illness and alcohol at that time, which was the factor that set him off, which made him furious or into the manic state, that I would call it, at that time. So he could not conform his conduct to the law at that time.
>
> * * *
>
> When you have a manic depressive person who is intoxicated, all bets are off, meaning that the entire mental disorder becomes ratter confused. **And there's the element of intoxication which can both trigger the manic episode, as well as the manic episode driving somebody to drink more. So it is a confused mental state, but both mental disorders are operative at that time.**

(T. 394-5) (emphasis added).

Dr. Greer was also of the opinion that Mr. Sochor

was under extreme mental and emotional disturbance at the time of the crime.

> A: [by Dr. Greer] Yes, the evidence was quite clear to me. Manic depressive illness, again, is a chronic mental illness. It is not something that would have come after he was arrested. It is likely to have been present for years before this murder, so it would have been present at the time of this murder.
>
> It's also my opinion that combined with alcohol, too is more likely that the manifestations of manic depressive illness were going to be apparent and problematic for him. That is also to be combined with just the intoxication effects of alcohol, meaning that he was going to be disinhibited.
>
> In other words, **I feel he was substantially impaired by the mental illnesses of manic depressive illness and alcohol abuse.**

(T. 398) (emphasis added).

Dr. Greer explained that the synergistic effect of Mr. Sochor's alcohol consumption on his Manic-Depressive Illness was further enhanced by the fact that he had abstained from alcohol for a long period of time prior

to the night of the crime. The fact that Mr. Sochor had consumed at least some alcohol on the night of the crime is clear from the record of Mr. Sochor's capital trial.[13] Dr. Greer showed that even a small amount of alcohol would have had a disproportionally large effect on Mr. Sochor's mental illness:

> [H]is body would not have any longer the enzymes built up to metabolize the alcohol as we normally do when we drink regularly, which is known as tolerance, so he would of [*sic*] lost tolerance. **So at the time that he then resumes drinking, the alcohol would of [*sic*] had had a more profound effect than it might of [*sic*] had in years past. Coupled with, again, the manic depressive illness, the two are going to drive one another.**

(T. 399)(emphasis added).[14]

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[13] Gary Sochor also testified at the evidentiary hearing as to Dennis Sochor's abstinence from alcohol before the night of the crime and his consumption of at least some alcohol in the period leading up to the crime.

[14] Dr. Karen Froming quantified the amount of alcohol that it would take for Mr. Sochor to become acutely intoxicated on the night of the incident "as little as one to three drinks" (See T. 450). The record of Mr. Sochor's capital trial is unrefuted that he had at least that amount to drink.

The lower court attempts to fault Dr. Greer's testimony on the ground that he "could not say whether the Defendant was floridly manic at the time of the murder," and that he could not say whether the intoxication or the manic-depression triggered the murder" (PCR. 1143). However, the lower court once again evinces its lack of knowledge or understanding of medical testimony. Dr. Greer stated that his opinion as to the existence of statutory mitigating circumstances was based upon a "reasonable medical certainty" (T. 386). The lower court appears to be unaware that mitigation need not be proven beyond a reasonable doubt, and that Mr. Sochor need not establish his claim by a preponderance of the evidence; rather the standard is less than a preponderance. Williams, 120 S. Ct. at 1519. Dr. Greer's opinion within "reasonable medical certainty" is sufficient to establish such mitigation.

Dr. Greer's testimony was further supported by the testimony of Dr. Karen Froming, a qualified neuropsychologist who examined Mr. Sochor in 1996. Dr.

Froming explained to the Court that she had conducted a review of materials and interviewed several of Mr. Sochor's family members, in addition to conducting a neuropsychological battery of tests and a clinical interview of Mr. Sochor. Dr. Froming testified that as a result of her complete evaluation, she diagnosed Mr. Sochor as suffering from organic brain damage, in addition to his Bipolar Disorder. Dr. Froming first explained the multitude of injuries that Mr. Sochor suffered in early life which were risk factors for brain injuries. These factors were evident from the materials review and family interviews she conducted[15]:

> [by Dr. Froming] . . . Rose Sochor smoked up to a pack of cigarettes a day, which is associated with low birth weight and possible ADD.
>
> There were birth factors, which included an extended labor with a forceps delivery, and possible misshapen. Forceps deliveries are associated with birth complications.

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[15] The pregnancy, difficult birth and various head traumas were described during the evidentiary hearing by Charles and Rosemary Sochor. See, e.g., T. 181, T. 118.

> He had head injuries, and these included multiple abusive head injuries that were perpetrated by either Charles Sochor or Rose Sochor, what occurred in the course of the family environment. And those included head banging on the wall, when he was a child, breaking broomsticks over his head and being boxed.

(T. 435).

> At the age of two to three, he banged his head against a cupboard. Age of 10 to 12 he was riding a horse and slammed in to the asphalt with his foot still stuck in the stirrups, and so he was dragged down the asphalt. And he did lose consciousness with that one. And when he did regain consciousness, he went home and fell asleep, which is a sign of consciousive [*sic*] syndrome.
>
> Again 11 to 12, he had a right frontal injury when he fell from the bleachers and he split his right eye open.
>
> And then I forgot, in 1956, at age 4, he was playing with a tin horn and fell on the tin horn and rammed the horn into his soft pallet [*sic*] and up through, it's reported to me by one family member, at least two inches. And two inches from the soft pallet [*sic*] is the orbit of frontal cortex. And they reportedly took him to an osteopath or something, who pulled it

> out and then they stitched it up. So that sounded like a fairly significant potential injury to me.
> At age 24, 1976, after the military, he had a motorcycle accident with equivocal loss of consciousness when he tumbled and went head over heels on his motorcycle.

(T. 435-436).

Dr. Froming testified that in addition to all of the head and other injuries suffered by Mr. Sochor, his extensive alcohol abuse increased his risk of organic brain damage. Especially significant was Mr. Sochor's frequent binge drinking and excessive substance abuse, in addition to the general background of family violence which modern research shows also has an actual and deleterious effect on brain development[16] (T. 437).

Dr. Froming further testified that the multiplicity

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[16] The background of extreme and violent abuse within the family, the sexual abuse and the neglect within the family generally, and that directed at Mr. Dennis Sochor specifically, was testified to at the evidentiary hearing by Charles Sochor, Rose Sochor, Gary Sochor, Blaine Sochor, Kathy Cooper, Melanie Wheeler and Helen Foley, and was uncontroverted by the State. See Argument II.

of risk factors she had identified were borne out by her neuropsychological test results. According to her test results, Mr. Sochor suffers from significant impairment to his frontal and temporal lobes. She stated that overall, Mr. Sochor scored .7 on the impairment index, which is moderately severely impaired. She then continued on to explain that:

> [by Dr. Froming] [P]rimariliy his deficits occur in memory function, both verbal and non-verbal memory function. He has very slowed learning. And he is also has very severe motor impairments. And also impaired, kind of problem solving as well as motoric problem solving.
>
> And these things are primarily related to anterior brain functions, which means frontal lobe functions and temporal lobe functions, the front part of the brain.

(T. 439).

As a result of the frontal and temporal lobe damage evidenced by her neuropsychological testing, Dr. Froming diagnosed Mr. Sochor as suffering from a persistent dementia resulting from multiple etiologies. This

means:

> [by Dr. Froming] [A] reduction in brain functions and cognitive functions that are related to some degenerative force whether it's an acquired injury or a substance abuse or if it's a degenerative central nervous system condition. So there's a decline in function. And he's got all these various areas of difficulty including memory and frontal lobe function.

(T. 442).

Like Dr. Greer, Dr. Froming found Bipolar Disorder and a Substance Dependence Disorder. She also found evidence of Posttraumatic Stress Disorder as a result of the severe physical and sexual abuse both to Mr. Sochor and generally in the home (T. 442).

Dr. Froming explained that the net effect of the various conditions suffered by Mr. Sochor was that he has disordered interpersonal skills, as well as an inability to self-regulate, and he frequently misinterprets information. This is yet further exacerbated by the Bipolar Disorder diagnosed by both Dr. Froming and Dr. Greer:

> [by Dr. Froming] Then we add on top the bipolar affective disorder and substances, it's a really dangerous combination, **because then all of the manic like symptoms that one would have, they're essentially impulse control problems. And so put alcohol on top of that and you have no self control whatsoever.**

(T. 444) (emphasis added).

> [by Dr. Froming] If you add on top of that head injuries where there's a frontal lobe impairment and disinhibition, and on top of that a psychiatric disorder, which has its hallmark impaired impulse control and behavioral disintegration, you're going to have a really bad combination and **almost no ability to self regulate, no ability to inhibition impulse.**

(T. 446) (emphasis added).

Dr. Froming's diagnoses, in conjunction with her review of records and the trial record and her interviews of family members, led her, like Dr. Greer, to opine that Mr. Sochor suffered from extreme mental and emotional disturbance at the time of the crime.

Similarly, she also opined that her findings support the fact that Mr. Sochor's ability to conform his

conduct according to the law was substantially impaired, indeed almost totally impaired. Given Mr. Sochor's period of abstinence from alcohol consumption prior to the night of the crime, Dr. Froming opined that it would take as little as one to three alcoholic drinks for him to become acutely intoxicated, to the extent of blacking out.

> [by Dr. Froming] [H]is impulse control would have been substantially reduced, as I said before to the point of nonexistence. So it would have been instantaneous action that would of [*sic*] occurred with the possibility of thinking only after it happened.

(T. 451).

The testimony of both the mental health experts retained by Mr. Sochor therefore supports two statutory mental health mitigating circumstances. Had such testimony been presented at Mr. Sochor's penalty phase, it would have provided the jury with even more powerful reasons to recommend a life sentence and the trial court to impose one.

The testimony of the two doctors as to Mr. Sochor's

extreme mental and emotional disturbance at the time of the crime is yet further buttressed by the evidentiary hearing testimony of Gary Sochor about the events at the time of the crime. Gary Sochor first testified that Dennis had had a history of being less successful with the opposite sex than Gary, and that Dennis was resentful of this. See T. 334. He testified that Dennis even accused him of trying to have sexual relations with Dennis' wife - on the night of Dennis' wedding (T. 334-5). Gary Sochor further testified that on the evening of the crime:

> [by Gary Sochor] Dennis and (the victim) went off towards the back of the parking lot talking and went just off the parking lot pavement by a tree.
>
> * * *
>
> They were making out in the parking lot for approximately 15 to 20 minutes.

(T. 344-5).

Gary Sochor then told of how the victim had walked towards her vehicle, but that Dennis wanted her to go with them (Dennis and Gary):

> [by Gary Sochor] We proceeded to leave the bar and he mentioned something about he wishes she could have gone -- went with us because -- whatever. I said "Well, if you want her to go with us, swing back round."
>
> * * *
>
> We swung round. I asked her to -- we were going to get breakfast, and your girlfriend's intoxicated, you might as well give her time to sober up. Let's go get something to eat.
>
> * * *
>
> She agreed, got in the vehicle.

(T. 345-6).

The victim sat between Dennis and Gary, and then Gary asked her for a "New Year's kiss." He then described what happened next:

> [by Gary Sochor] I leaned towards her, like I expected a little New Year's peck, which happened but it didn't stop, led into -- basically she kissed me back. It didn't quit, continued into more of a sexual nature.

(T. 347).

Gary Sochor vividly described the sexual encounter with the victim:

A: [by Gary Sochor] When I said it was more than just a kiss, was because I had my hands on her, touching her breast, lifting her sweater blouse up. I don't recall if it was a sweater or blouse. Basically I was touching her.

Q: [by Mr. Malnik] Did you remove or did she remove any items of clothing?

A: Her sweater, blouse, whatever top she was wearing.

Q: Did she do that or did you do that?

A: It was a mutual -- I lifted it. She helped get it off.

(T. 369) (emphasis added).

Gary Sochor also described his brother Dennis' reaction to Gary's touching of the victim:

A: [by Gary Sochor] He asked me what I was doing. Would you please stop.

Q: [by Mr. Malnik] And did you stop?

A: No.

Q: What was his tone of voice

like?

A: He didn't like what was happening.

Q: Did he keep speaking to you, when you were doing what you were doing?

A: Not so much speaking -- his breathing. His breathing was -- I could hear his breathing. I could tell he was upset.

(T. 347).

Gary Sochor's testimony both adds to and complements the testimony of Dr. Greer and Dr. Froming about Dennis Sochor's state of mind that night. Not only was he propelled into a manic episode by his long abstinence followed by consumption of alcohol, but he was further fueled by yet another manifestation of Gary's real or imagined good fortune with the opposite sex at his own expense. The combination of expert mental health testimony and Gary Sochor's new revelations clearly show that both statutory mental health mitigating factors were present.

Furthermore, the testimony of Dr. Froming and Dr.

Greer supports a plethora of nonstatutory mental health mitigation. For example, his organic brain damage, his Bipolar Affective Disorder, his Posttraumatic Affective Disorder, his alcohol abuse, his polysubstance abuse, impulsivity and poor memory functioning should have been considered by the sentencing jury whether they considered the statutory mitigating circumstances established or not.

In addition, Dr. Froming testified about the psychological effects on Dennis of the brutal sexual and physical abuse that pervaded the Sochor family as he grew up. Dr. Froming explained that from her experience and knowledge base, the best predictors for aggressiveness are physical injury, birth injury, and primary caretaker rejection, all of which applied in Mr. Sochor's case. As to the caretaker rejection, Dr. Froming opined that:

> [by Dr. Froming] [I]t wasn't just rejection in this family. **It was significant and ongoing abuse**, not only of Mr. Sochor who all family members that I interviewed identified as being

> the person who took the brunt of the physical abuse, but all members did. And they were the kind of classic family dynamics in this family of families in which physical and sexual abuse occur.
>
> These very identifiable dynamics included the lack of predictability. There was never any relationship -- not never any relationship, but there was often little relationship between the abuse and the physical beatings that occurred and the event that precipitated it.
>
> **And there was humiliation.** The kids had to go to school when they had bruises and welts, and I got family statements about what it would be like to be in gym class and have both the teacher and the children laughed them because they had bruises and welts that everyone knew they had gotten at the hands of the parents.
>
> There was also the typical divide and conquer mentality where they would play children against each other. There were favorites. There were people that would get picked on in the family.

(T. 464-5) (emphasis added).

> **They witnessed each other's terror**, so they were either made to wait outside the door when they knew someone was going to be beaten. They

were asked to watch and witness when people were being beaten.

* * *

And then there's the scapegoating. So Dennie, again, and Melanie, the black sheep, their [*sic*] identified as troublemakers.

(T. 456) (emphasis added).

Dr. Froming also explained how the sexual abuse of Dennis Sochor's sisters Melanie and Kathy by his brother Gary and his father would have an effect on Dennis' development:[17]

[by Dr. Froming] [F]amily members knew that something had happened to Melanie. When I would ask them about it, they knew that there was a severe change her personality around the age of 11 or 12, and she became regressive and withdrawing from the family.

* * *

So it became apparent in the family tensions that kids pick up that something is going wrong in the family.

---

[17] Both Melanie Wheeler and Kathy Cooper testified that they were sexually abused; Melanie by Gary Sochor (her and Dennis' brother) and Kathy Cooper by Charles Sochor (the father of the family). See T. 317, 226.

> Other things that came out of family interviews, people talk about each other, not to each other, directly to their face. And the other fascinating thing that is very consistent in these kinds of families is that only fragments of the family history are known to any individual.
>
> * * *
>
> Family secrets, and then a denial of family secrets.
>
> So all of these elements are kind of the classic family abuse and sexual abuse are there in this family, and contributed to the kind of person that Mr. [Dennis] Sochor went out and became.

(T. 458).

The lower court, however, found that the evidence elicited at the evidentiary hearing from Dr. Greer and Dr. Froming "differed slightly" from the trial experts, but "do not render the opinions of the trial experts deficient" (PCR. 1149). The lower court's analysis is flawed and once again demonstrates the lower court's failure to understand mental health mitigation. Firstly, as Dr. Ceros-Livingston testified, her testing

was simply for competency and sanity, not mitigating factors. Secondly, her review of background materials took place twelve years after her evaluation of Mr. Sochor, and so her assertion that her opinion would not have been any different even with the materials is open to doubt. Furthermore, the lower court totally ignored the fact that Dr. Ceros-Livingston had never, neither prior to the trial nor to the evidentiary hearing, met with Mr. Sochor's family members, a fact which the lower court markedly omitted to address. Given this omission, Dr. Ceros-Livingston's bald statement that her opinion would not have been any different is simply incredible, since she clearly did not know what it would have been.[18] Similarly, Dr. Ceros-Livingston did not conduct any neuropsychological testing on Mr. Sochor, and so cannot

[18] It is axiomatic that the credibility of mental health evidence is much less when based solely on self reporting than if collateral sources are factored into the equation. See, e.g., Grayson v. Thompson, 257 F. 3d 1194, 1220 (11th Cir. 2001), finding that records showing the defendant's intoxication on the night of the crime were based on "self report" and therefore "no more credible than Grayson's own testimony in this regard."

refute the results of Dr. froming's neuropsychological testing.[19] Dr. Ceros-Livingston's assertion that Mr. Sochor's average intelligence (as tested by Dr. Froming, not herself) indicates that no frontal lobe brain damage flies in the face of accepted psychiatric and psychological theory. Organic brain damage can occur whether an individual is a genius or is profoundly retarded. Similarly, low intellectual functioning has a plethora of causes, only one of which is brain damage. In short, organic brain damage can and does occur independently of low intellectual functioning, as Dr. Froming had testified:

> Q: [by Ms. Day] Dr. Froming, intelligence testing is not included with a standard neuropsychological battery, is that right?
>
> A: [by Dr. Froming] It's not a

---

[19] The lower court complains of the fact that Dr. Froming did not perform an MMPI test (PCR. 1143), and yet conveniently omits mention that Dr. Ceros-Livingston did not perform any neuropsychological testing at all and could neither replicate nor refute Dr. Froming's neuropsychological tests through her own battery of neuropsychological tests.

> standard neuropsychological instrument. It is sometimes included as providing the context for the neuropsychological battery but it's not a neuropsychological instrument.
>
> Q: Does the fact that Mr. Sochor tested an average IQ have any bearing at all on the diagnoses that you provided?
>
> A: Not at all.
>
> Q: So if he was of lower intelligence, he would still have the same problems; if he was a much higher intelligence, he may still have the same problems?
>
> A: That's right. The norm that I used takes that into account.

(T. 482).

Dr. Ceros-Livingston simply did not address the issue of Mr. Sochor's brain injury during her testing and thus Dr. Froming's diagnosis of brian damage is unrefuted.

Moreover, the lower court simply ignored the fact that Dr. Ceros-Livingston's administration and interpretation of the MMPI test was seriously flawed. Dr. Ceros-Livingston made much of the fact that her

interpretation of the MMPI, administered in 1987, showed a "fake bad" result which, by inference, led her to believe that Mr. Sochor was malingering in his clinical interviews. Again this conclusion is flawed. First of all, as Dr. Froming pointed out, Dr. Ceros-Livingston's report is internally contradictory - she measured one scale but then goes on to say that it supports the "fake bad" profile - an oxymoron in terms. See T. 460. The lower court simply cannot have it both ways. Either the MMPI is invalid or it is not. Dr. Ceros-Livingston cannot properly use one part of it to support an invalidation of the whole.[20] Furthermore, Dr. Froming pointed out that an "F" scale of 94 - which Mr. Sochor obtained in Dr. Ceros-Livingston's administration of the

[20] As part of Dr. froming's testing, she administered tests specifically to determine if Mr. Sochor was malingering. She testified that Mr. Sochor "performed flawlessly" on these tests, indicating that there was no malingering (T. 440). Furthermore, the overall consistency of her test results indicated an absence of malingering; a person of even average intelligence such as Mr. Sochor would simply not know what would constitute a "bad" result in neuropsychological tests.

MMPI - can mean several things other than malingering. It could merely mean the exaggeration of existing symptoms, as opposed to the faking of absent ones. This could be caused, inter alia, by serious underlying distress. It is entirely consistent, for example, with depression - one end of the continuum of Bipolar Disorder as described by Dr. Greer. In summary, even if Dr. Ceros-Livingston's MMPI result was accurate, her interpretation is open to serious doubt, a fact totally lost on the lower court.

Dr. Ceros-Livingston's views as to Mr. Sochor were based solely on her cursory and subjective interview and minimal testing, rather than on neuropsychological test data, review of background materials and interviews with family members. Dr. Ceros-Livingston's evidentiary hearing testimony thus did not refute either Dr. Froming's nor Dr. Greer's diagnoses of Bipolar I Disorder and findings of statutory mental health mitigating circumstances. The evaluation as performed by Dr. Ceros-Livingston was superficial, and totally

inadequate as the basis for her ex post facto opinion that no statutory mental health mitigating circumstances applied. However, even if Dr. Ceros- Livingston's opinion as to the lack of mitigation were validly based, the lower court's analysis of trial counsel's effectiveness regarding mental health mitigation is contradictory. The lower court asserts that "Defense counsel made a strong effort to present to the jury the mitigating factor that the defendant was not able to appreciate the criminality of his conduct." Given Dr. Ceros-Livingston's testimony that she was not instructed to look at mitigation (T. 553-554), this is oxymoron. Trial counsel did not speak to Dr. Ceros-Livingston about the presence of mitigation. He did not supply her with any collateral information. The minimal argument he presented was therefore not based on any solid evidence.

As a result of the aforementioned omissions, Mr. Sochor was denied his constitutional right to a competent mental health evaluation at his capital

penalty phase, which would have established the existence of statutory and nonstatutory mitigating factors. None of the additional testimony solicited by the State at the evidentiary hearing bolstered Dr. Ceros-Livingston's conclusion. Dr. Greer's and Dr. Froming's testimony remain unrefuted.

The lower court displayed a profound lack of understanding of the mental health mitigation presented. The lower court's failure to grasp of the basic principles of mental health mitigation is clear. First of all, the lower court found that "defense counsel did present as a mitigator that the Defendant was diagnosed as extremely dangerous and violent" (PCR. 1145). If this was strategy it was based on ignorance. The finding of being "extremely dangerous and violent" is more akin to the nonstatutory aggravating circumstance of future dangerousness than any kind of mitigation. By contrast the statutory and nonstatutory mental health mitigation presented by Mr. Sochor at the evidentiary hearing in conjunction with the testimony as to

nonstatutory mitigation form the lay witnesses is compelling. No reasonable strategy would present the former in favor of the latter. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance. Harrison v. Jones, 880 F. 2d 1279, 1281 (11th Cir. 1979); See Brewer v. Aiken, 935 F. 2d 850 (7th Cir. 1991), on the failure to properly investigate or prepare. See Kenley v. Armontrout, 937 F. 2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986). The lower court is, incredibly, unclear as to the difference between the various mental health disciplines and the different approaches taken thereby. The lower court finds that the "Defendant has not established that Dr. Ceros-Livingston, Dr. Zager or Dr. Castillo conducted inadequate psychological evaluations." Mr. Sochor was not attempting to say that they were. Firstly, Dr. Zager and Dr. Castillo are psychiatrists and therefore did not conduct any psychological evaluation at all. This sloppy analysis demonstrates both contempt for, and obliviousness to,

the basic mental health disciplines. Contrary to the lower court's implicit thinking mental health professionals are not fungible between disciplines. Second, while Dr. Ceros-Livingston is a clinical psychologist, she did not perform any neuropsychological testing on Mr. Sochor. Given Mr. Sochor's history of birth trauma, brain injury and substance abuse, trial counsel should have been on notice that specialist testing for brain injury was warranted rather than a standard competency and sanity evaluation. However, contrary to the lower court's inclination, the use of medical and other mental health testimony to establish deficient performance is well established in postconviction litigation. For example, in Lockett v. Anderson, 230 F. 3d 695 (5th Cir. 2001), the Fifth Circuit Court of Appeals noted that "[t]he medical evidence [introduced at the evidentiary hearing] similarly indicates that Lockett's possible problems were inadequately investigated." Lockett at 712. As the doctor hired in Lockett testified, "[b]ased on the

medical and other records which were available in 1986 at the time of Carl's original trial, if I had been hired as an expert for Carl, I would have advised that the aforementioned tests to evaluate the extent of Mr. Lockett's brain damage and/or other mental disorders be given to provide mitigating evidence at his sentencing trial." Lockett at 712. In other words, the existence of a mental health condition that existed at the time of the trial that could have been discovered by reasonable use of medical and other mental health professionals supports deficient performance to the extent that trial counsel unreasonably failed to investigate it. There is "no doubt that [Mr. Rich's] failure to conduct an adequate investigation hampered his ability to make strategic decisions regarding the penalty phase." See Battenfield v. Gibson, 236 F. 3d 1215, 1228 (10th Cir. 2001).

The same considerations apply equally to Mr. Sochor's case whatever the lower court's personal feelings about mental health mitigation. In fact, the

record establishes clearly that the lower court displayed a marked bias against any form of mental health mitigation. Even before either Dr. Greer or Dr. Froming testified the court characterized Mr. Sochor's claims of mental health mitigation caused by familial trauma as "nonsense" (T. 316). In his order, Judge Backman sneered at the mental health mitigation found by Dr. Greer and Dr. Froming as a "laundry list" (PCR. 1141). Clearly the lower court rejected such mitigation as a result of personal bias as well as its ignorance of the subject matter.

The lower court's analysis of the prejudice prong of the Strickland[21] test is in error. The lower court's characterization of the evidence presented at the evidentiary hearing as "practically the same" (PCR. 1153) as that presented by Mr. Rich is not borne out by the postconviction record. Mr. Sochor has demonstrated prejudice. "[T]here is a reasonable probability that,

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[21] Strickland v. Washington, 104 S. Ct. 2052 (1984).

but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. In Mr. Sochor's case, the prejudice is apparent. See Williams v. Taylor, 120 S. Ct. 1495 (2000), in which the Court granted relief based on ineffective assistance of counsel because " . . . the graphic description of [Mr. Sochor's] childhood, filled with abuse and privation . . . might well have influenced the jury's appraisal of his moral culpability." Williams v. Taylor, 120 S. Ct. 1495 at 1515. A proper analysis of prejudice also entails an evaluation of the totality of available mitigation -- both that adduced at trial and the evidence presented at the evidentiary hearing. Id. at 1515. "Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." Cheshire v. State, 568 So. 2d 908,

912 (Fla. 1990) (citing Lockett v. Ohio, 438 U.S. 586 (1978)). Moreover, "[m]itigating evidence . . . may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death eligibility case." Williams, 120 S. Ct. at 1516.

The lower court's analysis is flawed. As Mr. Sochor demonstrated at his postconviction evidentiary hearing, a plethora of statutory and nonstatutory mitigation was available had trial counsel only investigated it in anything other than the most superficial manner. Counsel's failure to investigate and present this evidence, as well as his fundamental ignorance of mental health mitigation, was the direct cause of Mr. Sochor's jury recommendation of death. Mr. Sochor has demonstrated both deficient performance and prejudice. A new penalty phase should issue.

Mr. Sochor has established his entitlement to relief. In assessing the information that was presented at the evidentiary hearing, the fact that the trial court found that there were no mental health mitigating

factors is in no way binding. In fact, the trial court's finding that no mental health mitigation existed simply highlights Mr. Sochor's ineffective assistance of counsel claim, particularly the prejudice prong. At the evidentiary hearing, Mr. Sochor presented evidence of both statutory and nonstatutory mental health mitigating factors. This evidence was not presented at the penalty phase. Neither the trial court nor the jury would have been free to ignore the evidence of mitigation presented by Mr. Sochor at the evidentiary hearing, had it been presented at trial. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1991) ("when a reasonable quantum of uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved"). In no way has the state controverted Mr. Sochor's evidence of organic brain damage, Bipolar Disorder, Polysubstance Abuse Disorder, and Posttraumatic Stress Disorder.

Even without this evidence, the jury did not return a unanimous verdict in favor of death (R. 1115). Had

all the available mitigation been properly investigated and presented, Mr. Sochor would have received a life sentence.

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

This Court has not hesitated to determine that a capital defendant received ineffective assistance of counsel despite the presentation of some mitigation at the time of trial, particularly when the trial courts in those cases found no mitigation to exist. See, e.g., State v. Lara, 581 So. 2d 1288 (Fla. 1991), in which this Court affirmed a Dade circuit court's grant of penalty phase relief to a capital defendant where the defendant presented at an evidentiary hearing evidence

that, as the State conceded in that case, was "quantitatively and qualitatively superior to that presented by defense counsel at the penalty phase." Id. at 1290. In Mr. Sochor's case defense counsel did no penalty phase mitigation investigation prior to the guilty verdict being returned. He interviewed only four family members, and then, only the night before their testimony. He did nothing to prepare them for their testimony. He merely asked them to talk about Mr. Sochor's life, without familiarizing them with the nature of mitigation in a capital sentencing proceeding in Florida. As lay witnesses from Michigan, Charles Sochor, Rose Sochor and Kathy Cooper could not be expected to understand what constitutes mitigation, yet Mr. Rich put the burden squarely onto their shoulders rather than formulating a proper plan himself. He obtained no documents. He did not talk to a mental health expert. The jury was left to decide Mr. Sochor's fate in a vacuum. The result would have been different if the jury had known the man the State wanted executed

was not only brain damaged, but suffered from Bipolar Disorder, polysubstance abuse and Posttraumatic Stress Disorder. Prejudice has clearly been shown.

Mr. Sochor was prejudiced by counsel's failures notwithstanding the existence of aggravating factors. In cases such as Mr. Sochor's, where trial counsel failed to present available substantial mitigation, this Court has granted relief despite the presence of numerous aggravating circumstances. See Rose v. State, 675 So. 2d 567 (Fla. 1996) (prejudice established "[i]n light of the substantial mitigating evidence identified at the hearing below as compared to the sparseness of the evidence actually presented [at the penalty phase]"); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995) (prejudice established by "substantial mitigating evidence"); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992) (prejudice established by "strong mental mitigation" which was "essentially unrebutted"); Mitchell v. State, 595 So. 2d 938, 942 (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, 1289 (Fla. 1991) (prejudice established by evidence of statutory mitigating factors and abusive childhood); Bassett v. State, 541 So. 2d 596, 597 (Fla. 1989) ("this additional mitigating evidence does raise a reasonable probability that the jury recommendation would have been different"). This Court has also granted relief based on penalty phase ineffective assistance of counsel when the defendant had a prior murder conviction. Torres-Arboleda v. Dugger, 636 So. 2d 1321 (Fla. 1994).

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

superior to that presented by defense counsel at the penalty phase." Id. at 1290. See also Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995), (penalty phase relief granted to a capital defendant who had been convicted of a strangulation murder and received a unanimous jury recommendation for death.) There, as in Mr. Sochor's case, this Court noted that at the penalty phase, trial counsel did present "some evidence in mitigation at sentencing" which was "quite limited." Id. at 110 FN7. Nonetheless, the Court granted relief, finding that "[a]t his 3.850 hearing, Hildwin presented an abundance of mitigating evidence which his trial counsel could have presented at sentencing." Id. at 110. This evidence included two (2) mental health experts, who testified to the existence of mental health mitigating factors, as well as a number of nonstatutory mitigating factors. Id.

In a special concurrence, Justice Anstead noted that the postconviction judge, who was not the original sentencing judge, struggled with the issue of prejudice

precisely because he was not the original sentencing judge. Id. at 111-12 (Anstead, J., specially concurring, in which Kogan, C.J., and Shaw, J., joined). Justice Anstead noted that the postconviction judge was hesitant to grant relief, even though he felt that no adversarial testing had occurred, because he believed that the trial judge would have imposed the death penalty notwithstanding the compelling additional mitigation. Id. The same argument is equally apposite to Mr. Sochor's case, in which the trial judge and the postconviction judge were not the same. The evidence presented at Mr. Sochor's hearing is identical to that which established prejudice in these cases, and Mr. Sochor is similarly entitled to relief under the standards set forth in Strickland and Williams. This Court should grant Mr. Sochor a new penalty phase.

ARGUMENT II

IT WAS ERROR FOR THE LOWER COURT TO DENY MR. SOCHOR A NEW GUILT PHASE FOLLOWING THE EVIDENTIARY HEARING

A. GARY SOCHOR'S COERCED TESTIMONY

The State unreasonably failed to disclose that it had coerced Gary Sochor to provide evidence against Mr. Dennis Sochor. The State failed to disclose that it had provided Gary Sochor with benefits, including assistance on his potential criminal charges, in exchange for his testimony against Mr. Dennis Sochor. The State knowingly allowed Gary Sochor to testify falsely regarding both evidence incriminating Mr. Sochor and the benefits he received from the State, in violation of Brady v. Maryland, 373 U.S. 83, 87 (1963). Failure to disclose impeachment evidence also results in a violation of Brady and Giglio v. United States, 405 U.S. 150, 154 (1972), as does the failure to disclose evidence which supported the theory of defense. United States v. Spagnoulo, 960 F. 2d 995 (11th Cir. 1992).

At the evidentiary hearing, Gary Sochor testified as to the coercion he had received while assisting with the investigation, through sleep deprivation and harassment:

A: [by Gary Sochor] Well each

day, which I described before there were three days of interrogation. Each day I was given a polygraph test and told on each of them that I was lying.

Q: [by Mr. Malnik] How long would you be in a given police station? Would you be kept there for long periods of time?

A: I never left the police station, I was for four days in a police station.

Q: Were you being deprived of sleep?

A: Yes.

Q: At the end of those four days how did you feel? What was your emotional state?

A: It was so bad that at the last day on the fourth day in Florida -- I offered to come back to Florida and retrace my steps and help them. So the two of the four days I spent in Florida with the detectives.

And on the fourth day it was during a polygraph test, **that during some of the questions that he was asking me, that I had a nervous breakdown.**

(T. 350) (emphasis added).

[by Gary Sochor] I was exhausted.

> I was unsure of anything I was saying. At this point I didn't know -- **I was beginning to believe that whatever I was told -- or another feeling I had, a real hard feeing I had was that just telling whatever they wanted to hear, so they'll leave you alone.**

(T. 352) (emphasis added).

The State preyed on Mr. Sochor's mental state, lack of sleep and ambiguous legal position to bolster the case against Dennis Sochor. It was aware, or should have been aware, that he was an in individual suffering from a serious mental illness, Bipolar Disorder, and they ruthlessly exploited him into making statements favorable to their case.

The State's manipulation of Gary Sochor continued into the time when the State was preparing for his testimony against his brother Dennis. During the preparation, Assistant State Attorney Kelly Hancock told Gary not to reveal that he had kissed the victim during the night of the crime:

> [by Gary Sochor] Well, during my preparation, I was talking to the prosecuting attorney and mentioning

> flashes, what I always called picture frames, that I could never explain in that I knew there was something to these picture frames, because of my photographic memory in that they were never in order, so that I couldn't explain them. But I knew there was something to those picture frames, but I didn't understand what they were. **So I started to tell him of each individual picture frame, I got to one of kissing the girl and he told me not to say that.**

(T. 353) (emphasis added).

Evidence which supported the theory of the defense at trial was exculpatory evidence which the State was obligated to disclose.

Likewise, Kelly Hancock's instruction to Gary Sochor not to talk about this exculpatory and material evidence constitutes a violation of due process. Brady v. Maryland, 373 U.S. 83 (1963). When trial counsel is misled by the State's failure to disclose, the defendant is deprived of the effective assistance of counsel. See United States v. Cronic, 466 U.S. 648 (1984). Mr. Gary Sochor's testimony at the evidentiary hearing undermines confidence in the outcome of Mr. Sochor's trial. Kyles

v. Whitley, 115 S. Ct. 1555 (1995).

At the evidentiary hearing Gary Sochor also testified as the promises of immunity in exchange for testimony against his brother. As he disclosed,

> A: [by Gary Sochor] The detective that escorted me to the courtroom, just before we entered, as a matter of fact I was reaching for the doorknob, that's approximately three feet away, I was putting my hand out, he goes -- the detective said to me, "By the way you have been granted immunity for your statement."
>
> And I totally didn't understand why he said that entering the courtroom. During my testimony, half my brain was trying to figure out why he chose to say it at that particular time or even what it meant.
>
> Q: [by Mr. Malnik] **Did there ever come a point in time when you were questioned on the witness stand that somebody asked you whether you'd been given immunity or not?**
>
> A: **Yes. The defense attorney**
>
> Q: **And do you recall what your response was?**
>
> A: **I looked at the prosecuting attorney because I still didn't quire**

understand why I was told this as I entered, by a detective. So I looked at the prosecuting attorney, and answered no.

Q: **Thank you.**

A: **The prosecuting attorney turned his head away from me. And when he did that, I just said "No."**

(T. 354-5) (emphasis added).

However, despite this compelling testimony from the State's star trial witness, the lower court found Gary Sochor's testimony to be "unreliable and not credible" and that it would not change the outcome of the trial" (PCR 1140). However, it is not the lower court's personal view of Gary Sochor that is at issue but the jury's. Had the jury heard this testimony the outcome would have been different. The lower court's analysis is so contradictory as to amount to oxymoron. Clearly Gary Sochor was considered credible by the jury at the time of the trial. His testimony was instrumental for the State in obtaining a conviction against Dennis Sochor. As prosecutor Kelly Hancock testified at the evidentiary

hearing, the testimony of Gary Sochor was an important factor in the State's case. See T. 494. If Gary Sochor is suddenly not credible despite the conviction having been based in large part on his testimony, then the whole outcome of the trial is undermined.

Furthermore, the lower court's attempt to bolster its finding based on the testimony of State witness, Assistant State Attorney Kelly Hancock, who had prosecuted the case, is seriously misplaced. The lower court found that "[b]ased on the record and the testimony of the witnesses at the evidentiary hearing [the lower court] finds that immunity was never offered to Gary Sochor in exchange for his testimony at trial, nor was he told to lie. Mr. Hancock's testimony at the evidentiary hearing was candid, trustworthy and credible" (PCR. 1140). However, the lower court ignored Mr. Hancock's blatant bias, his misstatement of the facts and his testimony to a factor about which he clearly knew nothing. Mr. Hancock testified that Gary Sochor had never told him that he (Gary) had kissed the

victim and that he (Kelly Hancock) had not told Gary Sochor to lie to the jury:

> Q: [by Ms. Bailey] Did Gary Sochor ever tell you that he, Gary, began kissing and fondling the victim, Patty Gifford when she was in the truck with Gary and the defendant Dennis?
>
> A: [by Mr. Hancock] Never.
>
> Q: Did Gary ever tell you that the victim, Patty Gifford, helped Gary in taking off her sweater as he was kissing her in the truck?
>
> A: Never. And I don't think it was -- it was never in any of his statements. I think he gave two or three statements to the police department.
>
> Q And this was never --
>
> A: Never.
>
> Q: Nor did he testify to this in his deposition?
>
> A: **No. In fact Mr. Rich took his deposition before the trial, about a week before the trial, I know Mr. Rich took his deposition.**
>
> Q: **Did Gary Sochor ever tell you that the victim, Patty Gifford was getting sexual with Gary as the Defendant drove the truck?**

A: **Never told me that.**

(T. 497).

However, the fact that Gary Sochor had kissed the victim in the car was in Gary Sochor's deposition taken by Charles Rich on October 5, 1987. During cross examination Mr. Hancock was effectively impeached:

> Q: [by Mr. Malnik] Do you recall Gary Sochor indicating in that his deposition that he gave Patty Gifford a New Year's kiss.
>
> A: [by Mr. Hancock] In the bar?
>
> Q: In the car.
>
> A: No I sure don't.
>
> Q: Would it refresh your recollection if I showed you that deposition?
>
> A: I'm sure if it's in there, that's what he would have said at the deposition.

(T. 530).

Mr. Hancock did not remember, or chose to forget, that Gary Sochor had testified in deposition that he had kissed Patty Gifford in the car. The veracity of his

assertion that he had not told Gary Sochor not to testify to the jury that he had kissed Ms. Gifford is tainted, contrary to the lower court's finding.

Furthermore, the lower court's finding that Gary Sochor was not offered immunity in exchange for his testimony is not borne out by the record. Gary Sochor's testimony was that he was offered immunity by a police officer. No rebuttal from any police officer was presented. While Mr. Hancock testified that this would not have happened, and that police officers do not have the power to offer immunity (T. 531), he admitted on recross that :

> A: [by Mr. Hancock] . . . as to immunity I think that what they would do, they might talk to a witness and say, well grant you immunity but we have to go to the State and get the State to do it. That's what would generally happen.

(T. 531).

Thus Mr. Hancock's testimony does not rebut Mr. Sochor's, contrary to the court's finding.

Moreover, Mr. Hancock is biased in the extreme.

Despite having been away form the Office of the State Attorney for over ten years, Mr. Hancok admitted that he still harbors a strong feeling that Mr. Sochor should be executed:

> Q: [by Mr. Malnik] . . . isn't it a fact that you said "I wish I could wish you [Mr. Malnik] well on this case"?
>
> A: [by Mr. Hancock] I say. I did say.
>
> Q: And isn't it a fact that your mind set is that you right now believe that the death penalty is warranted for Mr. Sochor?
>
> A: Absolutely.

(T. 504).

In sum, the prosecutor's bias, together with his selective memory, render his testimony implausible. Contrary to the lower court's assertion, his testimony was not "candid, trustworthy and credible." The lower court's apparent bias in favor of Mr. Hancock apparently blinded him to the testimony in the record. A new trial is warranted.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Charles Rich was ineffective for failing to impeach Gary Sochor with his deposition assertion. The burden of investigating and presenting exculpatory evidence rests with defense counsel. Strickland v. Washington, 104 S. Ct. 2052 (1984). Here, Mr. Rich was in possession of evidence which countered the State's theory of events. He was under a duty to fully investigate all the facts pertaining to the case. He had deposed Gary Sochor a week before the trial. During the deposition, Gary Sochor said that he had kissed the victim. See Deposition of Gary Sochor, p.27. However, Rich failed to elicit the fact that Gary Sochor had done rather more than kiss the victim. Gary Sochor testified at the evidentiary hearing that he had removed the victim's top and touched her breast. This fact is both material and exculpatory, and relevant to both guilt and punishment. However, Rich failed to develop it in his deposition, to Mr. Sochor's prejudice. Charles Rich was also prejudicially ineffective for failing to impeach

Gary Sochor with his deposition statement. See Driscoll v. Delo, 73 F. 3d 701 (8th Cir. 1995).

When trial counsel is misled by the State's failure to disclose, the defendant is deprived of the effective assistance of counsel. See United States v. Cronic, 466 U.S. 648 (1984). Gary Sochor's testimony at the evidentiary hearing undermines confidence in the outcome of Mr. Sochor's trial. Kyles v. Whitley, 115 S. Ct. 1555 (1995).

In its order denying relief to Mr. Sochor, the lower court completely fails to address the issues relating to ineffective assistance for failing to impeach Gary Sochor. Relief is warranted.

C. AKE V. OKLAHOMA ARGUMENT

Mr. Sochor received a constitutionally adequate mental health evaluation pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985). Trial counsel failed to investigate Mr. Sochor's family and mental health background and provide adequate background materials necessary for an adequate and appropriate evaluation. Ake, 470 U.S. 68

(1985); Morgan v. State, 639 So. 2d 6 (Fla. 1994). He failed to obtain a competent mental health evaluation. The mental health evaluations that he relied on were neither competent nor adequate for the purposes of developing mental health mitigation.

Mr. Sochor suffers from Manic-Depressive Illness and organic brain damage. See Argument I, supra. The nature and extent of his illnesses, however, was not presented to the guilt phase jury, despite the fact that trial counsel appeared to be attempting a voluntary intoxication defense. However, because of the inadequate mental health assistance, compelling evidence of Mr. Sochor's substance abuse disorder, Bipolar Disorder, brain damage and Posttraumatic Stress Disorder never reached the guilt phase jury. The jury never heard that Mr. Sochor was a manic-depressive suffering from brain damage, and was especially susceptible to alcohol so that even a comparatively moderate amount would have drastic consequences on his intoxication levels and concomitant impulse control. See Argument I,

supra.

However, despite the compelling evidence as to the true nature of Mr. Sochor's mental illness, the lower court sloughed it off stating that the mental health testimony presented at the evidentiary hearing was "practically the same" as that elicited at trial. This conclusion is not borne out by the record. The record reflects that the scope of the evaluations conducted by Dr. Zager, Dr. Ceros-Livingston and Dr. Castillo on the one hand, as compared with Dr. Greer and Dr. Froming on the other, was radically different. The materials reviewed by the doctors were different. Although Dr. Ceros-Livingston claimed at the evidentiary hearing that she would not have changed her impression given the background materials, she neither asked for nor was provided access to Mr. Sochor's family members, unlike Dr. Froming. Her opinion as to the reliability of her original impression is thus open to question.

Mr. Sochor's mental health conditions, if properly presented, would have thrown his conviction, as well as

his death sentence, into doubt. Quite simply, the evaluations that were done were not sufficient for the purpose for which they were utilized. A new trial is warranted.

D. MR. SOCHOR WAS INCOMPETENT DURING HIS CAPITAL TRIAL

At the evidentiary hearing, Mr. Sochor showed that the competency evaluations performed prior to his trial were seriously flawed. The record of the trial shows that Mr. Sochor was evaluated for competency by Dr. Patsy Ceros-Livingston, a clinical psychologist, Dr. Arnold Zager, a psychiatrist, and Dr. Richard Castillo, a psychiatrist. All three found him competent, but, as shown in Argument I, supra, their evaluations were lacking. As a consequence, Mr. Sochor was deprived of his right to be competent during his capital trial. As noted supra, Mr. Sochor has demonstrated through the testimony of Dr. Richard Greer and Dr. Karen Froming that he suffers from Bipolar Disorder, organic brain damage, Posttraumatic Stress Disorder, Alcohol Abuse Disorder and polysubstance abuse, all major psychiatric

conditions. As Dr. Greer also testified, Mr. Sochor was prescribed the drug Lithium while incarcerated in the Broward County Jail prior to his capital trial. Dr. Greer noted that Lithium is a salt used to treat Bipolar Disorder **and no other mental condition**. However, although Dr. Zager and Dr. Castillo both noted in their reports that Mr. Sochor was being medicated with Lithium, they neither reported on its significance as a treatment for Bipolar Disorder -- and no other mental condition, nor made any attempt to quantify the effect of the medication on Mr. Sochor's performance at their evaluations. They also did not see fit to opine what would happen should Mr. Sochor be suddenly withdrawn from the drug. This is particularly significant in the light of the fact that Mr. Sochor was not medicated with Lithium at the time of the crime. Dr. Greer's testimony shows that both Dr. Castillo's and Dr. Zager's evaluation of Mr. Sochor fell well short of constitutionally adequate. Trial counsel was ineffective for failing to question the doctors' failure

to take into account Mr. Sochor's treatment with Lithium. Relief is warranted.

E. CONCLUSION

Any one of the errors shown above should entitle Mr.Sochor to a new trial. Taken together, the sheer number and types of errors that occurred in his trial, when considered as a whole, virtually dictated the conviction received. A new trial is warranted.

ARGUMENT III

THE LOWER COURT ERRED IN REFUSING TO DISQUALIFY ITSELF FROM MR. SOCHOR'S POSTCONVICTION PROCEEDINGS

On the afternoon of March 21, 1997, the lower court held a hearing in the above-styled cause without providing notice to Mr. Sochor or his counsel. Counsel for Mr. Sochor only learned of the ex parte March 21, 1997 hearing at a subsequent hearing, held on July 25, 1997, for which he did receive notice.

Having learned of the ex parte hearing held on March 21, 1997, counsel for Mr. Sochor obtained a transcript

of the ex parte hearing. As the transcript of the ex parte proceeding made plain, the Assistant State Attorney informed counsel for Mr. Sochor that the Court had ruled on pending defense motions at the March 21, 1997 hearing

> THE COURT: State of Florida versus Dennis Sochor.
>
> MS. BAILEY: Good afternoon. Susan Bailey on behalf of the State of Florida.
>
> THE COURT: This is a matter that was set for 2:30 this afternoon, pursuant to correspondence received by this Court on the 11th of February, indicating that Mr. McClain on behalf of Mr. Sochor, was filing an additional motion to compel disclosure of documents, pursuant to 119.01.
>
> MS. BAILEY: And the motion for clarification.
>
> THE COURT: That's what I am looking for.
>
> MS BAILEY: Regarding Your Honor's ruling. I have a copy.
>
> THE COURT: And a motion for clarification with respect to public records withheld by the Office of the State Attorney. And there is a second

motion for clarification with regard to the ore tenus orders of this Court on November 22nd, 1996, all of which are dated by Mr. McClain on the 4th of February, 1997, and they had accompanying them a cover letter to the clerk's office with a copy to the Court.

It is now five minutes to three in the afternoon. These are matters which the Court has previously addressed. **The defense is not here. The Court has inquired of its judicial assistant as to whether or not there have been any phone conversations indicating that Mr. McClain was not going to be here, and there were no conversations.**

Accordingly, his motion for clarification, both first and second, are presently denied. His motion for 119 disclosure is denied, inasmuch as this Court on the 10th of August, if I am not mistaken, of 1996, had the opportunity to set time aside, review all of these matters, listen to argument, and this seems to be a duplicative motion. They are all denied.

MS. BAILEY: Thank you, Your Honor. Have a real nice weekend.

(Thereupon, the proceedings were concluded.)

(T. 709-710).

As the transcript indicates, neither Mr. Sochor nor his counsel were present. No inquiry was made by the Assistant State Attorney or Court as to whether or not either Mr. Sochor or his counsel were noticed of the hearing. Following Counsel's receipt of the transcript on July 29, 1997, counsel for Mr. Sochor filed a Motion to Disqualify Judge and Supporting Memorandum of Law with the lower court (PCR. 368-384). The lower court denied the motion by written order (Supp. PCR 105). The lower court erred in refusing to recuse itself.

The lower court's conduct of an official court proceeding without either notice to or the presence of Mr. Sochor or his counsel constituted an impermissible ex parte communication and was sufficient grounds to require the court to recuse himself. The prejudice to Mr. Sochor is manifest. At this hearing, this Court denied three (3) pending defense motions without argument by counsel for Mr. Sochor. While the Court stated it believed one of the motions was "duplicative," counsel was never granted an opportunity to argue why it

was not a "duplicative" motion, yet the State was allowed to attend and had the opportunity to be heard.

The Court's ex parte communication was improper and as a result of the above facts, Mr. Sochor feared that he would not receive a fair hearing before Judge Backman.[22] The lower court's conduct also demonstrated a disregard for the duty of the Court to avoid the appearance of impropriety.

Because of Judge Backman's impermissible ex parte communications, "a shadow is cast upon judicial neutrality so that disqualification is required." Chastine v. Broome, 629 So. 2d 293, 295 (Fla. 4th DCA 1993).

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[22] At the evidentiary hearing, Judge Backman further indicated his bias against Mr. Sochor and his disregard for Mr. Sochor's mental health issues. Melanie Wheeler, Mr. Sochor's sister, testified as to her sexual abuse by her brother, Gary Sochor. The State objected. The lower court then enquired of counsel whether this was "going to be another one of those that you're going to show through the psychologist, all that nonsense?" (T. 316). Judge Backman clearly showed a predisposition to disregard important mental health mitigation without even having heard it. Mr. Sochor's fear was well founded.

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

> A judge should accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. **A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties** concerning a pending or impending proceeding except that:
>
> (a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that **do not deal with substantive matters or issues on the merits** are authorized, provided:
>
> (i) The judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communications, and
>
> (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communications and allows an opportunity to respond.

Canon 3B (7)(a)(i-ii) (1995) (emphasis added).

Judge Backman's conduct on March 21, 1997, under the circumstances presented herein, was clearly prohibited by the Canon. Relief is warranted.

ARGUMENT IV

THE LOWER COURT ERRED IN SUMMARILY DENYING SEVERAL OF MR. SOCHOR'S CLAIMS

A. INTRODUCTION

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

The law strongly favors full evidentiary hearings in capital postconviction cases, especially where a claim is grounded in factual, as opposed to legal, matters. "Because the trial court denied the motion without an

evidentiary hearing and without attaching any portion of the record to the order of denial, our review is limited to determining whether the motion conclusively shows whether [Mr. Sochor] is entitled to no relief." Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988). See also LeDuc v. State, 415 So. 2d 721, 722 (Fla. 1982).[23]

Some fact-based claims in postconviction litigation can only be considered after an evidentiary hearing. Heiney v. State, 558 So. 2d 398, 400 (Fla. 1990). "The need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. Where a determination has been made that a defendant is entitled to such an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process and could never be harmless."

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

Holland v. State, 503 So. 2d 1250, 1252-3 (Fla. 1087). Accepting the allegations . . . at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing." Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla 1989).

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

Under Rule 3.850 and this Court's well settled precedent, a postconviction movant is entitled to evidentiary hearing unless the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850. See also Lemon v. State, 498 So. 2d 923 (Fla.

1986); Hoffman v. State, 613 So. 2d 1250 (Fla. 1987); O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984); Gorham. Mr. Sochor has alleged facts relating to the guilt phase which, if proven, would entitle him to relief. Furthermore, the files and records in this case do not conclusively show that he is entitled to no relief.

B. THE STATE WITHHELD IMPEACHMENT EVIDENCE

The State's star witness Gary Sochor had been interviewed by Broward Sheriff's Office (BSO) officers Feltgen and Lauria on numerous occasions in Lansing, Michigan and in Fort Lauderdale. He had been subjected to polygraph examination both in Michigan and in Florida. Neither the polygraphed interviews nor the polygraph reports were used to impeach Gary Sochor's trial testimony. The state failed to disclose, and the defense unreasonably failed to discover, this evidence. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and `material either to guilt or punishment.'" United

States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Failure to disclose impeachment evidence also results in a violation of Brady. To the extent that trial counsel should have discovered the exculpatory evidence, counsel's performance was deficient. See Provenzano v. State, 616 So. 2d 428 (Fla. 1993).

During one polygraphed "interview," Gary Sochor stated that he did not remember a lot of what happened on the night in question:

> Q: You haven't been truthful about what went on that night. I'm not saying that you, hey, look -
>
> A: A lot of it **I probably don't remember.**
>
> Q: You look, things as far as drinking, I've been there too. There's a lot of places you've been, I can say this here, a lot of the time when a person's drinking, were you drinking that night?
>
> A: **I was drinking every night and every day.**
>
> Q: Okay

A: **For six days, the whole time I was down there.**

* * *

I kind of thought we went out and cleaned some pools the next day but like the officer and the detective told me the other yesterday, your not going to get me to believe that you were drunk the whole time I was down there. **I did nothing but drink every night, half of the day, I'm sorry, I apologized to everybody but I was drunk the whole time I was down there.**

(Polygraph Interview, Gary Sochor).

Gary's lack of memory of the events of the night in question was used against him through a number of barely veiled threats against Gary:

Q: . . . in prison is full of a lot of guys that don't know when to talk, there's a time, don't let your brother drag you down if you, the principal [*sic*] of this thing completely then ah don't say anything.

* * *

Q: You know what went on that night. You know if you got in that van with that girl, you know if you killed that girl you know of all those incidents and what I'm telling you today is to make it perfectly clear to

> you that you have not been truthful
>
> * * *
>
> There's no doubt in my mind that there's things here that, you know, I don't really honestly think your the one that killed her
> . . .
>
> * * *
>
> You don't want to have people thinking that your a killer or some something that your not.

(Polygraph Interview, Gary Sochor).

Following the polygraph examination in Broward County, Gary Sochor gave a taped statement that he had driven away from the Banana Boat with Dennis and Patricia Gifford, and that he (Gary) was driving.

In addition to the statements contained in the polygraphed interviews, the polygraph reports themselves were exculpatory to Mr. Sochor. The Michigan polygrapher's report states

> It is the opinion of the undersigned examiner, after the analysis of Gary Sochor's polygraph examination that he is not telling the truth to the pertinent test questions.

1. The last time you saw Patty, was she alive?

Answer: Yes.

2. Right now, can you tell me where Patty is?

Answer: No

3. Are you deliberately withholding information on what happened to Patty?

Answer: No

4. Did Dennis tell you he killed Patty?

Answer: No

5. As far as you know, are you telling the truth about what happened to Patty?

Answer: yes

The polygraph report resulting from the examination on January 19, 1982, at the Broward Sheriff's Office reads in relevant part:

> Following the pretest interview and a thorough review of the questions to be used for the examination, the following relevant questions were propounded to Gary Charles Sochor:

1. Do you know for sure where Patty is buried?

Answer: No

2. Did you kill Patty?

Answer: No

3. Did you rape Patty after Dennis?

Answer: No

4. Right now, can you take me to where Patty is buried?

Answer: No

5. Did you tell the entire truth about Patty being raped and murdered?

Answer: Yes

A peak of tension test was also administered and the following questions were asked: Was the last time you saw Patty -

1. At the Banana Boat?

Answer: Yes

2. In the median strip of State Road 84?

Answer: No

3. In a truck?

Answer: No

4. In a construction site?

Answer: No

5. On a canal bank?

Answer: No

6. In an orange grove?

Answer: No

Some other place I haven't mentioned?

Answer: No

Due to circumstances beyond the examiner's control it was requested that Gary Charles Sochor be thoroughly rested and he be re-examined the following day. The request was ultimately declined and no other procedure was extend.

This material, taken with the context of the "interview," is exculpatory to Mr. Sochor. The polygrapher's conclusion that Gary was lying is both material and exculpatory to Dennis Sochor. This undisclosed and/or undiscovered information was material and exculpatory, and the failure to present this information to the jury undermines confidence in the

outcome of Mr. Sochor's trial.

The lower court, however, found that this claim was "refuted by the record" (Supp. PCR 110). However, there is no reference to the substance of the polygraph within the record of the trial proceedings (Order at 4). Contrary to the lower court's finding, this claim is not refuted by the record. Evidentiary development is warranted.

C. INEFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND DURING VOIR DIRE

Trial counsel provided ineffective assistance regarding suppression of Mr. Sochor's statements to law enforcement. Counsel failed to conduct an adequate investigation regarding the circumstances of these statements and failed to adequately litigate the suppression issues. The State withheld material, exculpatory evidence regarding the statements, further rendering counsel ineffective. See Argument B, supra. The statements were obtained in violation of the Fifth, Sixth and Fourteenth Amendments to the United States

Constitution. Mr. Sochor was prejudiced by counsel's omissions.

D. INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE

Counsel failed to raise proper objections at trial, and thus failed to preserve numerous meritorious issues for appellate review, as this Court's direct appeal opinion makes clear. Sochor v. State, 619 So. 2d 285 (Fla. 1993). Counsel failed to object to the following errors:

(1) prosecutorial comments on facts not in evidence;

(2) State witnesses' opinions regarding Mr. Sochor's truthfulness and guilt;

(3) a defense witness's statement on cross-examination that someone in the prosecutor's office said Mr. Sochor was another Ted Bundy;

(4) State arguments that this trial was the only time the State could try Mr. Sochor for his crimes;

(5) the State's presentation of evidence regarding Mr. Sochor's bad character;

(6) perjured testimony by a jailhouse

informant regarding his deals with the State;

(7) the court's failure to properly instruct the jury on noncapital lesser-included offenses, manslaughter, third-degree murder, and kidnapping;

(8) the court's failure to instruct the jury on voluntary intoxication as a defense to felony murder based on kidnapping;

(9) the court's failure to instruct the jury on the statute of limitations as an absolute defense to felony murder and kidnapping; and

(10) the court's failure to give the long-form excusable homicide instructions.

Counsel's failure to object to these errors individually and cumulatively undermines confidence in the outcome of Mr. Sochor's trial. Further, counsel's failures to object deprived Mr. Sochor of appellate review of these errors. Because of counsel's failures, on direct appeal this Court only reviewed these issues for fundamental error. Trial counsel failed to preserve meritorious issues for appellate review to Mr. Sochor's

prejudice. A hearing is warranted.

E. MR. SOCHOR DID NOT MAKE A KNOWING INTELLIGENT AND VOLUNTARY WAIVER OF ANY CONSTITUTIONAL RIGHT OR OF EXTRADITION

To waive any right guaranteed by the United States Constitution the defendant must be able to make a knowing and intelligent waiver of these rights. Mr. Sochor was incapable of making any such waiver. Mincey v. Arizona, 437 U.S. 385 (1978); Miranda v. Arizona, 384 U.S. 436 (1966).

Mr. Sochor's rights were violated when the State exploited his mental disabilities stemming from organic brain damage, Manic-Depressive Illness and Attention Deficit Disorder, and his inability to make a knowing and voluntary waiver of his rights in order to obtain a statement. Undue pressure by law enforcement officers resulted in Mr. Sochor's waiver of his rights and statements which were not voluntary, intelligently and knowingly made. Further, Mr. Sochor did not make a knowing and intelligent waiver of his right to testify in his own behalf during guilt and penalty phase.

At the evidentiary hearing, Mr. Sochor presented evidence of his various and severe mental illnesses and brain damage in support of his Ake claim and claim of ineffective assistance of trial counsel at the penalty phase. The same conditions were pled as a basis for Mr. Sochor's inability to make any kind of waiver knowingly and intelligently. However, the lower court found that the claims were "legally insufficient" (Supp. PCR 114). The lower court erred. Mr. Sochor has pled a factual predicate that is not conclusory as to this claim. An evidentiary hearing should issue.

F. THE PROCEDURE FOR APPOINTING AND FUNDING SPECIAL ASSISTANT PUBLIC DEFENDERS AND EXPERT WITNESSES IN BROWARD COUNTY CREATES CONFLICTS OF INTEREST

The co-mingling and easy transfer of funds between court costs accounts, from which special public defenders and witnesses are paid, and Judicial Administrative funds, such as salaries and wages, creates a conflict of interest for all circuit court judges. This conflict prevents the judge from being independent and neutral. Ward v. Village of

Monroeville, 409 U.S. 57 (1972).

The lower court denied a hearing on this claim because it is "legally insufficient" (Supp. PCR 115) Mr. Sochor has pleaded facts with sufficient specificity to warrant an evidentiary hearing. Mr. Sochor hereby preserves arguments as to the constitutionality of the death penalty, given this Court's precedents.

G. CONCLUSION

The prejudice that results from the failures of trial counsel is yet further exacerbated by the fact that the sentencing order was prepared by the State. Following complete evidentiary development, Mr. Sochor should be afforded a new penalty phase. An evidentiary hearing on this issue is warranted

ARGUMENT V

COUNSEL'S FAILURE TO OBJECT TO UNCONSTITUTIONAL JURY INSTRUCTIONS

A.AGGRAVATING CIRCUMSTANCES

At the time of Mr. Sochor's trial, §921.141, Fla.

Stat., provided for the following aggravating circumstances:

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

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

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

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

B. BURDEN SHIFTING

The State must prove that aggravating circumstances outweigh mitigation. State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert denied 416 U.S. 943 (1974). This standard was not applied to Mr. Sochor's capital sentencing phase and counsel failed to object to the court and prosecutor

improperly shifting to Mr. Sochor the burden of proving whether he should live or die. Mullaney v. Wilbur, 421 U.S. 684 (1975). Relief is warranted.

C. CALDWELL ERROR

Mr. Sochor's jury was repeatedly instructed by the court and the prosecutor that its role was merely "advisory." Defense counsel did not object to this erroneous instruction. Here, the jury's sense of responsibility would have been diminished by the misleading comments and instructions regarding the its role in sentencing. This diminution of the jury's sense of responsibility violated the Eighth Amendment. Caldwell v. Mississippi, 472 U.S. 320 (1985). Throughout the proceedings in Mr. Sochor's case, the lower court and the prosecutor frequently made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase. Relief is warranted.

D. AUTOMATIC AGGRAVATING CIRCUMSTANCE

Mr. Sochor was convicted of first degree murder, with kidnapping as the underlying felony. The jury was instructed on the "felony murder" aggravating circumstance. The trial court subsequently found the existence of the "felony murder" aggravating factor (R. 276).

The jury's deliberation was obviously tainted by the unconstitutional and vague instruction. See Sochor v. Florida, 112 S. Ct. 2114 (1992). The use of the underlying felonies as an aggravating factor rendered the aggravator "illusory" in violation of Stringer v. Black, 112 S. Ct. 1130 (1992). Because the jury was instructed regarding an automatic statutory aggravating circumstance, Mr. Sochor entered the penalty phase already eligible for the death penalty, whereas other similarly (or worse) situated petitioners would not.

The death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance.

Trial counsel's failure to object, which is a

cognizable claim in Rule 3.850 proceedings (see, e.g., Davis v. State, 648 So. 2d 1249 (Fla.4th DCA 1995)), constituted ineffective assistance. No tactical motive existed for failing to object. An evidentiary hearing is warranted.

ARGUMENT VI

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

The United States Supreme Court has held that, where a person convicted of first degree murder and sentenced to death can show either innocence of first degree murder or innocence of the death penalty, he is entitled to relief for constitutional errors which resulted in the conviction or sentence of death. Sawyer v. Whitley, 112 S. Ct. 2514 (1992).[24] This Court has recognized that innocence of the death penalty also constitutes a claim. Scott (Abron) v. Dugger, 604 So. 2d 465 (Fla. 1992).

[24] According to Sawyer, where a death sentenced individual establishes innocence, his claims must be considered despite procedural bars.

Mr. Sochor can show both innocence of first degree murder and innocence of the death penalty.

Of the four aggravating circumstances found by the trial court, all are invalid. Mr. Sochor's jury was given unconstitutionally vague instructions on the cold, calculated, and premeditated and heinous, atrocious, and cruel aggravating circumstances. This Court later determined that, as a matter of law, the cold, calculated, and premeditated aggravating circumstance did not apply. As a result, these two aggravating circumstances cannot be relied upon to support Mr. Sochor's death sentence.

The aggravating circumstance of "prior conviction of a crime of violence" depends upon the validity of the prior conviction. However, that conviction is invalid. This aggravating circumstance cannot support Mr. Sochor's death sentence.

The fourth aggravating circumstance -- "in the course of a felony" -- has been held insufficient standing alone to establish death eligibility. Rembert

v. State, 445 So. 2d 337 (Fla. 1984); Proffitt v. State, 510 So. 2d 896 (Fla. 1987). Further, as discussed elsewhere in this pleading, Mr. Sochor's jury was improperly instructed that it could consider "kidnapping" and the uncharged crime of "sexual battery" to support this aggravator.

Furthermore, Mr. Sochor's death sentence is disproportionate. Here, the lack of aggravating circumstances coupled with the available but unpresented evidence of mitigation render the death sentence disproportionate. Mr. Sochor is innocent of the death penalty.

ARGUMENT VII

THE RULES PROHIBITING MR. SOCHOR'S LAWYERS FROM INTERVIEWING JURORS ARE UNCONSTITUTIONAL

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

This prohibition impinges upon Mr. Sochor's right to

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

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

ARGUMENT VIII

FLORIDA'S DEATH PENALTY UNCONSTITUTIONALLY PERMITS CRUEL AND UNUSUAL PUNISHMENT

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

precedents.

ARGUMENT IX

THE CUMULATIVE ERROR ARGUMENT

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

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

CONCLUSIONS AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Sochor respectfully urges this Court to reverse the lower court order and grant a new trial and penalty phase, grant an evidentiary hearing on the outstanding claims and grant such other relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

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

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CERTIFICATE OF COMPLIANCE

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

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