IN THE SUPREME COURT OF FLORIDA

CASE NO. 01-0885

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

REPLY BRIEF OF APPELLANT

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ARGUMENT I

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

The State asserts that the trial court correctly denied Mr. Sochor's claim that his trial counsel was ineffective at his penalty phase. In its argument the State echoes the lower court's finding that trial counsel's strategy was "reasonable," that the additional testimony presented at the evidentiary hearing was "cumulative" and that the mental health evidence presented was "almost identical" to that adduced at trial. This argument is at odds with the prevailing law and is not borne out by the record.

The Eleventh Circuit Court of Appeals has set forth the proper analysis for investigation omission in death

penalty cases:

> First it must be determined whether a reasonable investigation should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a tactical choice by trial counsel. If so, such a choice must be given a strong presumption of correctness and the enquiry is generally at an end. If however the failure to present the mitigating evidence was an oversight and not a tactical decision, then a harmlessness review must be made to determine if there is reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different.

Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988). Both the lower court's and the State's analysis fall well short of this standard.

The record of the Rule 3.850 evidentiary hearing established unequivocally that trial counsel did not start his penalty phase investigation until after the guilt phase was over. Both Charles and Rosemary Sochor testified that they were not contacted by trial counsel until the trial was under way (T. 135, T. 198) and that counsel neither enquired about Mr. Sochor's background nor spent any more than half an hour preparing them (T. 198). Kathy Cooper testified that she was not contacted by

anyone until her mother called her the night that Mr. Sochor was found guilty (T. 210) and that she only testified at her own insistence and not on any request from trial counsel (T. 212). She spent "maybe two minutes" talking with trial counsel before taking the stand (T. 212). The record of the penalty phase shows that Kathy Cooper, Rosemary Sochor and Charles Sochor were not subjected to traditional direct examination about Mr. Sochor's life but rather asked to prepare statements that they would like the jury to hear. Trial counsel was actually delegating the responsibility of developing mitigation to the witnesses themselves. Essentially trial counsel abandoned his responsibility to Mr. Sochor to three lay witnesses who could not be expected to have a thorough understanding of Eighth Amendment jurisprudence and understand the nature of mitigation in a penalty phase of a capital trial. This was not "reasonable" and did not represent a "very thorough investigation." (Answer Brief at 11).

Moreover, the numerous other witnesses presented at Mr. Sochor's evidentiary hearing were not even contacted by trial counsel. Several other family members, school

teachers and friends who would have been ably willing and ready to testify were never even telephoned by trial counsel. Had they been asked, they would have been willing to testify at Mr. Sochor's capital trial. This does not constitute the "very thorough investigation" claimed by the State, (Answer Brief at 11), nor does it pass constitutional muster.

Trial counsel was similarly incompetent in his investigation of Mr. Sochor's mental health mitigation. The State claims that the evidence presented by Mr. Sochor's post conviction counsel at his evidentiary hearing was "almost identical" to that adduced at trial from Dr. Zager, Dr Ceros-Livingston and the State's trial expert, Dr. Castillo. Answer Brief at 16. This is not borne out by the record. First of all, the purpose of Dr. Zager and Dr. Ceros-Livingston's evaluation was not to develop mental health mitigation, but simply to evaluate Mr. Sochor for competency and sanity, a fact which the State notably omits form its argument. The reports of Dr. Zager and Dr. Castillo 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. See also Dr. Ceros-Livingston's evidentiary hearing testimony, T. 553-554. The Eleventh Circuit has held that

> Regarding mental health mitigating evidence our court has distinguished between its use during the guilt phase to establish competency to stand trial and presenting mental health mitigating evidence at the penalty phase:
>
> "There is a great difference between presenting evidence to establish incompetency at trail and failing to pursue mental health mitigating evidence at all. One can be competent to stand trial and yet suffer form mental health problems that the sentencing jury and judge should have had an opportunity to consider. Blanco v. Singletary, 943 F.2d 1503 n. 147 (11th Cir. 1991).
>
> Where mental health mitigating evidence was available and absolutely none was presented [by counsel] to the sentencing body and no strategic reason was put forward for this failure" our court determined that this omission was objectively unreasonable." Id. citing Middleton v. Dugger, 849 F.2d 491, 493-95 (11th Cir. 1988).

Hardwick v. Crosby, 320 F.3d 1127, 1163-64 (11th Cir. 2003). The same considerations apply equally to Mr. Sochor's case. "The primary purpose of the penalty phase is to ensure that the sentence is individualized by focussing on the particularized characteristics of the

defendant." Brownlee v. Haley, 396 F.3d 1043, 1074 (11th Cir. 2002), citing Cunningham v. Zant, 928 F.2d 1006, 1019 (11th Cir. 1991). To address the particularized characteristics of a defendant in any meaningful way it is necessary to perform a much more in-depth evaluation than that required for the determination of competency and/or sanity. Competency and sanity are purely legal concepts. As such they are narrowly defined, and to determine their presence or absence, only a relatively few number of questions have to be answered. By contrast, mental health mitigation is a much more open ended concept. Since the Eighth and Fourteenth Amendments require that sentencer "not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence of less than death," Lockett v. Ohio, 486 U.S. 586, 604, it requires a much more thorough evaluation on the part of the mental health professional. Thus the development of mental health mitigation requires a much more thorough investigation in to the defendant's background, including obtaining collateral information in order to find out about those

aspects of the defendant's life and the offense that would allow the sentencer to make a meaningful decision as to sentence. This was manifestly not done in Mr. Sochor's case.

Trial counsel's preparation and examination of Dr. Zager and Dr. Ceros-Livingston revealed a total lack of awareness of the nature of mitigation. As Dr. Ceros-Livingston testified on cross examination at the evidentiary hearing, no background materials had been supplied to the experts up front. No jail records, school records or military records were provided to the doctors. See T. 555-556. They had not been given any access to any family or friends of Mr. Sochor for any independent verification of his childhood experiences and substance abuse history. Id.[1] Nor indeed could they have been,

[1] The State complains that much of the material supplied to Mr. Sochor's experts prior to the evidentiary hearing were prison records generated after Mr. Sochor's death sentence was imposed. Admittedly, the background materials provided to Dr. Froming and Dr. Greer contained prison records generated after Mr. Sochor's capital trial and sentence of death, in addition to the aforementioned records dating from before his trial. However, to the eextant that any of the experts relied on these records, they served merely to supplement the information contained within the documents generated prior to Mr. Sochor's trial. For example, Dr. Greer testified that prison medical records indicated that Mr. Sochor was being treated with Lithium for manic depressive illness, and that this was consistent with the jail records and Dr. Greer's own clinical diagnosis.

since at that time Mr. Rich had no idea of what the family members knew and could describe. Whether these evaluations were adequate for sanity and competency determinations is a separate and distinct issue from that of mitigation.

Dr. Zager and Dr. Ceros-Livingston were obliged to rely entirely on their own observations and testing of Mr. Sochor, based on Mr. Sochor's self-reporting. This inevitably diminished the value of the testimony of Dr. Zager and Dr. Ceros-Livingston. In particular, it opened the door to an accusation by the State that Mr. Sochor was self-serving, which in turn rendered their testimony less compelling. Had Dr. Zager and Dr. Ceros-Livingston had the benefit of such independent corroboration of Mr. Sochor's life history as well as proper instructions from counsel, the outcome would have been different.[2]

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[2] This is particularly true given Dr Ceros-Livingston's conclusion that Mr. Sochor exhibited a tendency to malinger. Had she had access to family members to verify Mr. Sochor's history of poverty, abuse, neglect, physical abuse and emotional trauma, as well as substance abuse, her findings would have been different. While admittedly Dr. Ceros-Livingston did not think that her conclusions would have been different had she had access to the documents provided to Dr. Froming and Dr Greer, she never was afforded the chance to speak to any family members. She was not in a position to know or say what her conclusion would have been had she been afforded that opportunity. The State's reliance on her evidentiary hearing testimony as rebuttal is therefore misplaced.

At the evidentiary hearing Dr. Froming established the absolute necessity of reviewing extensive background information about the subject, including documentary evidence and interviews with family members:

> [by Dr. Froming] Okay, first of all in doing a neuropsychological evaluation you're looking for various areas of potential risk factors. And when you look at these various areas, you are attempting to determine whether or not there is a possibility of the existence of brain damage.
>
> If there are no risk factors there, then I generally will not proceed with the evaluation. So I was very careful to kind of comb through all of this and see if, in fact, there was an evaluation really warranted.

(T. 435).

Thus, while Dr. Froming determined the need for neuropsychological testing from her review of background information, such a course was not open to Dr. Ceros-Livingston or Dr. Zager because they were not provided with these resources. Had such background information been made available, the multiple risk factors for potential brain damage were apparent. Dr. Froming noted risk factors including Mr. Sochor's mother's smoking during pregnancy; a complicated birth involving the use of

forceps; numerous head injuries caused by physical abuse; Mr. Sochor's childhood head banging; his fall from a horse; a fall from the bleachers at school; his fall onto a toy tin horn resulting in the horn being rammed up into his soft palate; a motor cycle accident involving loss of consciousness; alcohol abuse; binge drinking; and severe family violence (T. 435-436). All of these factors indicate possible brain injury and dysfunction and should have been factored into the Doctors' evaluations. Because they were not, the evidence of Mr. Sochor's brain damage was not discovered or presented to the jury.[3]

Additionally, trial counsel's failure to provide his experts with access to family members meant that the experts never heard the true nature and extent of the endemic family violence within the Sochor home. While it is true that Mr. Sochor did report some childhood physical abuse, the extent and gravity of his childhood trauma could only have been made available through interviews of

[3] The State contends that Dr. Froming's testimony should not be considered in determining Mr. Sochor's claims because she was not personally available in 1989 for the penalty phase. The State's assertion is absurd. The issue is not whether Dr. Froming was personably available, but whether competent neuropsychological testing should have been afforded Mr. Sochor at the time of his trial. The State does not contend that the type of evaluation performed by Dr. Froming was not available in 1989.

family members. Had this been considered, evidence of Mr. Sochor's post traumatic stress disorder would have been uncovered and available to be presented to the jury.

Even despite the shortcomings of the findings of Dr. Zager and Dr. Ceros-Livingston in terms of developing mental health mitigation, the self-revelations made to these doctors by Mr. Sochor should have put trial counsel on notice that further mental health investigation was necessary. Dr. Zager found that Mr. Sochor had a history of substance and alcohol abuse, including a history of alcoholic blackouts. However trial counsel failed to investigate the logical corollary of this finding by having Mr. Sochor's brain functioning evaluated. Trial counsel should have been aware that excessive substance abuse can lead to brain injury and functional deficits. Had he done so through the use of a neuropsychologist he would have discovered extensive brain damage which would have supported statutory and non-statutory mental health mitigation. Dr. Froming testified that Mr. Sochor sufferers from brain damage caused in part by his excessive ingestion of LSD. The failure to follow up Mr. Sochor's reports to Dr. Zager about his alcohol and

substance abuse thorough appropriate neuropsychological testing is not "reasonable" and does not constitute "a very thorough investigation".

Similarly, trial counsel was on notice that Mr. Sochor was being medicated with Lithium. He should have investigated the uses of Lithium and would thus have discovered that it is a psychiatric medication used in the treatment of manic depressive illness or bipolar disorder. Had he investigated further, he would have been able to ascertain that Mr. Sochor does indeed suffer from bipolar disorder. At the evidentiary hearing Dr. Greer testified that Mr. Sochor exhibited "tangentiality" and "flight of ideas" both typical of manic depressive illness (T. 391) and that he exhibited inappropriately euphoric behavior (T. 393). If trial counsel had followed up the avenue of Mr. Sochor's bipolar disorder, he would have been able to present Mr. Sochor as an individual with major psychiatric disorder which would better explain his actions and pride an individualized sentence which took account of Mr. Sochor's individual circumstances. These mental health issues form the basis of statutory and non statutory mitigating circumstances which should have been presented

to the triers of fact who would have been obliged to consider them:

> [T]he Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstance of the offense that the defendant proffers as a basis for a sentence less than death.

Eddings v. Oklahoma, 465 U.S. 104, 110, quoting Lockett v. Ohio, 486 U.S. 586, 604. Mr. Sochor's brain damage, his bipolar disorder and his post traumatic stress disorder, together with the statutory mental health mitigating circumstances they support, should have been considered by the jury. Because of trial counsel's incompetence they were not.

By no stretch of the imagination can these significant disabilities be described as "in most respects identical" to the substance abuse disorder and antisocial personality suggested by the trial experts. The only way in which they are similar is that there is a diagnosis at all, as opposed to a conclusion that Mr. Sochor was in sound mental health. The diagnoses of manic depressive illness, brain damage, PTSD, and substance abuse disorder are not

fungible. They are separate and distinct psychiatric and psychological conditions with different causes, manifestations and symptoms. The State's allegation that this mental heath evidence was "in most respects identical" to that adduced at trial (Answer Brief at 13) is inaccurate to the point of frivolity.

The State similarly complains that the lay witnesses' testimony is cumulative and offers little to that adduced at trial. The record shows that this is not so. First of all, there were certain mitigating circumstances that were briefly touched on at trial but of which the true extent and severity was not disclosed. The graphic horror of the physical abuse that Mr. Sochor suffered growing up is a case in point. That Mr. Sochor was beaten frequently with a belt (T. 215) that was doubled up to fashion a very thick strap (T. 240), and that he was kicked repeatedly and punched with a fist (T. 216) was not graphically described to the jury. The fact that these beatings sometimes resulted in Mr. Sochor being rendered unconscious (T. 241) was not presented to the jury. This was relevant, not only as mitigation its own right, but also to show an etiology for the brain damage that should

have been presented as a mental health mitigating circumstance.

The same argument applies to the neglect and poverty suffered by Mr. Sochor as a child. While this was alluded to by Rosemary Sochor in her prepared statement that was read to the jury, the true extent of the childhood neglect was not brought out at Mr. Sochor's penalty phase. The neglect by Rose Sochor is evident from her evidentiary hearing testimony that she refused to interfere when her husband beat Dennis and the other children because she loved 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. Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988). Similarly, the true extent of Mr. Sochor's childhood poverty was not presented to the jury. Blaine Sochor testified at the evidentiary hearing that it was not uncommon for the children to have to hunt for food (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).

Several family members and others testified to positive character traits which were not presented at trial, a point which the State conveniently omits to mention. For example, Helen Foley testified as to Mr. Sochor's artistic ability (T.303). This was something which was not brought out at trial at all despite the State's argument.

The State completely mischaracterizes the testimony offered by Louis LaScala and Christine Thatcher as "limited" to Mr. Sochor having "basketball talent" and "acting talent" (Answer at 26, 27). To the contrary, these witnesses offered first-hand testimony regarding Mr. Sochor's inabilities to function. Mr. LaScala testified that Mr. Sochor some basketball abilities limited to shooting, but that he was introverted, could not interact with other members of the team, and would "disappear" on the court (T. 280). Mrs. Thatcher testified that Mr. Sochor's performances were strange, and that people were uncomfortable and unable to accept how different Mr. Sochor was (T. 266).

The State similarly tries to dismiss the fact that

"Lascala never meet [sic] Sochor's parents" (Answer 27). This fact is significant because Mr. LaScala testified that as a basketball coach in a small town, he knew "90 to 95 percent" of the players' parents, and that it was "very unusual" (T. 276) to not know Mr. Sochor's parents. This again is symptomatic of Mr. Sochor's dysfunctional upbringing.

The State fails to address the testimony of Father Melvin Fox that within one school year Mr. Sochor's personality changed, he was on a "downward spiral," he became unmotivated and depressed, and he no longer participated in student life (T. 293). Fr. Fox also testified that Mr. Sochor was a loner, a follower, and that he suspected an "abusive situation" (T. 294). None of this significant information was elicited at trial.

The same considerations apply to the presentation of Mr. Sochor's childhood trauma, another recognized mitigating circumstance. Mr. Sochor's early years were marked by numerous physical accidents which should have given trial counsel further clues as to the possibility of brain impairment. Admittedly, Charles Sochor had testified at the penalty phase as to Mr. Sochor's accident

with the toy tin horn which punctured his soft palate. However, the effects of such an injury, or the numerous other instances of physical trauma, some of which resulted in loss of consciousness to Mr. Sochor, were not fully developed.

Furthermore, there was no mention at all at the penalty phase of the pervasive sexual and emotional abuse that permeated the Sochor household during Mr. Sochor's childhood and teenage years. The State complains that "the only additional information provided by the parents and the siblings involved events not directly related to or even known by Appellant." Answer Brief at 26. However, the State notably fails to mention the fact that this kind of childhood trauma can result from factors which are not specifically known to the patient but cause an atmosphere of mistrust and uncertainty in the home. As Dr. Froming testified, it is not necessary to be consciously aware of the traumas experienced by other family members to be traumatized in turn by them:

> [by Dr. Froming] [F]amily members knew something had happened to Melanie. When I would ask them about it they knew that there was a severe change in her personality around the age of 11 or 12

> and she became regressive and began withdrawing form the family. She had developed a significant hatred of Gary and to this day has difficulty even being in the same hotel with him.
>
> So, I mean it's apparent in the family tensions that kids pick up that something is going wrong in the family.

(T. 457).

Similar considerations apply to the family histories related by Charles and Rosemary Sochor. Charles Sochor's own traumatic childhood in turn adversely reduced his ability to function in the role of a caring parent to his ten children. Because he never knew what a normal childhood was, he was never able to provide it for his children. This, together with the effects of his own traumas on his actions, made for additional family tensions which affected Mr. Sochor, even though he was not aware of their specific cause. These facts are part of the picture that should have been painted at trial to ensure Mr. Sochor was afforded the requisite individualized sentencing, but which the jury never heard. The presentation of mitigation is not a mere list of factors that can be checked off on a list, and the State's insistence that this information is not relevant shows a

concrete approach in conflict with Eighth Amendment jurisprudence.

The State's dismissal of the evidentiary hearing testimony as to Mr. Sochor's drug and alcohol habit is similarly misplaced. Again, while some superficial reference was made to these issues by Charles Sochor at the penalty phase, the graphic extent of Mr. Sochor's prior drug habit was not presented to the jury. As Bill Mitchell testified at the evidentiary hearing, "During the year 1971, we'll say, Dennis and I together conservatively tripped over 150 times" (T. 154). The penalty phase jury was not presented with anything like this specific graphic testimony. Once again, it is quantitatively and qualitatively superior to that presented by defense counsel at the penalty phase." State v. Lara, 581 So. 2d 1288, 1290 (Fla. 1991). Again the State's argument is misleading and not borne out by the record.

Moreover the State's assertions regarding Mr. Sochor's intoxication on the night of the crime are fatally inconsistent. First of all, the State alleges that, "Critical to [the] diagnosis that statutory mitigation existed is a requirement that Sochor was significantly

intoxicated on the night of the murder." Answer Brief at 24. This is not actually the case. Dr. Greer's finding of statutory mental health mitigating circumstances was predicated on a combination of some alcohol consumption combined with Mr. Sochor's pre-existing bipolar disorder. Dr. Greer further testified that even a small amount of alcohol would have had an effect given Mr. Sochor's condition and his previous abstinence for over a year (T. 399). Mr. Sochor's appearance some hours before or after the murder are simply not germane to his state at the time of the crime.

Furthermore, the State's position is internally inconsistent. In arguing that the mental health mitigation adduced at the evidentiary hearing was "virtually identical" to that presented during the guilt phase of Mr. Sochor's capital trial, the State argues that Dr. Zager was of the opinion that Mr. Sochor suffered from an alcoholic blackout at the time of the crime. Yet now it says that there is no evidence that Mr. Sochor was intoxicated at all. The State cannot have it both ways. On the one hand the State seeks to bolster Dr. Zager's testimony by stating that the evidence adduced at the

evidentiary hearing was "virtually identical" to that at the trial, and then it disputes any intoxication at all, notwithstanding its complete failure to rebut Dr. Greer's testimony regarding the interaction of alcohol with manic depressive illness.

Additionally the State completely ignores the testimony of Gary Sochor regarding his conduct on the evening of the crime. At the evidentiary hearing Gary Sochor testified that Dennis Sochor had become agitated because he (Gary Sochor) had begun kissing the victim in the car (T. 347). It is the combination of Gary Sochor's admitted provocative behavior with Mr. Dennis Sochor's consumption of alcohol after a long abstinence, and his preexisting brain damage and bipolar disorder, which establishes the existence of the statutory mental health mitigation. The State's argument is misplaced.

Both the State and the lower court apparently failed to understand the interplay and connections between the expert testimony and lay witness testimony. The State ignores that fact that even that evidence that was presented at the penalty phase was done in a piecemeal and haphazard fashion without regard for the integrated

picture of Mr. Sochor that would have permitted a truly individualized sentencing. This is evidenced by trial counsel's delegation of his duty to present mitigating evidence to his witnesses and instructing them to read a statement to the jury rather than any independent planning or strategy. Without expert testimony to explain the significance of many of the events relayed by the witnesses, the true impact on Mr. Sochor was lost and the jury was not able to consider the individualized sentencing that Mr. Sochor was entitled to.

The record of the evidentiary hearing shows clearly that it was only after Mr. Sochor's conviction for first degree murder that trial counsel began to give any thought to the penalty phase. As this court has recently emphasized, "a defendant's penalty phase attorney clearly must have adequate time to prepare for the proceeding to protest the Defendant constitutional rights." State v. Lewis, 838 So. 2d 1102, (Fla. 2002). In doing so, this Court affirmed the standard set forth in Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993). As this Curt noted in Lewis, "In Deaton the record revealed that defense counsel did not prepare for the penalty phase until after the guilty

verdict was returned and then spent only a minimal amount of time in preparation . . . and did not search for any records to establish mitigating circumstances. State v. Lewis, 838 So. 2d 1102 (Fla. 2002). Just as in Lewis and Deaton, this constituted deficient performance in Mr. Sochor's case.

Trial counsel's omissions can not be put down to strategy. As noted in Mr. Sochor's initial brief, Mr. Sochor's trial counsel, Charles Rich, was also Mr. Deaton's trial counsel. The State asserts that Mr. Sochor is attempting to rely on Mr. Rich's testimony in Deaton as evidence of what he did in Mr. Sochor's case. This is not the case. The unrebutted testimony of Charles Sochor, Rosemary Sochor and Kathy cooper, as well as that of the other witnesses who never testified at Mr. Sochor's capital penalty phase, shows that Mr. Rich unreasonably failed to instigate penalty phase investigation before the trial began. Since Mr. Rich was not available to testify at Mr. Sochor's evidentiary hearing, nobody knows whether he would have ascribed his omissions to strategy, as in Deaton, or to oversight. Mr. Sochor's argument is thus that even if Mr. Rich had been available to testify at Mr.

Sochor's hearing, and even if he had testified the same way as in Deaton that his last minute preparation was "strategy," just as in Deaton, this would not have cured a finding of deficient performance. As the Eleventh Circuit has made plain, a "tactical or strategic decision is unreasonable if it is based on a failure to understand the law." Horton v. Zant, 941 F.2d 1462 (11th Cir. 1991). Thus, even in the absence of testimony from Mr. Rich, it is of no consequence whether his performance was based on purported strategy as in Deaton or not.

The State does not address the issue of prejudice as it appears to be confident that no deficient performance occurred. The appropriate analysis of the prejudice prong of Strickland requires an evaluation of the totality of the available mitigation evidence -- both that adduced at trial and the evidence adduced in the [evidentiary hearing] in reweighing it against the evidence in aggravation. Bottoson v. Moore, 234 F.3d 526, 534 (11th Cir. 2002) (quoting Williams, 529 U. S. at 397-98). It is clear from the record that "a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and

explained the significance of all the available evidence. Hardwick, 320 F.3d at 1191 (quoting Williams, 529 U.S. at 399. Relief is warranted.

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 contends that the trial court properly denied Mr. Sochor's claim that the State withheld Brady[4] material and coerced Gary Sochor to testify against his brother, Dennis Sochor. The State's argument is based on its assertion that no Brady violation occurred; that Gary Sochor's evidentiary hearing testimony was not credible; and that the State's rebuttal witness, trial prosecutor Kelly Hancock, was credible. Each of the State's assertions are refuted by the record.

First of all, the fact that Gary had been coerced in to testifying at all was appropriate impeachment evidence. Gary Sochor's testimony was unequivocal as to the fact that he was coerced through, inter alia, sleep deprivation during the State's interrogation of him, which confused him further in his weakened mental state (T. 350). Common sense dictates that if the jury had been aware that Mr. Sochor had been coerced into giving his statements by a

[4] Brady v. Maryland, 373 U.S. 83 (1963).

form of brainwashing, his credibility would have suffered during the guilt phase. Gary Sochor was, after all, the State's star witness against Mr. Sochor. He was the only other person who was present at the time of the commission of the crime. Without Gary Sochor's testimony the State would not have obtained a conviction. Prosecutor Hancock exhibited overwhelming zeal in his efforts to gain not only a conviction but also a death sentence for Mr. Sochor. If the jury had been aware of the fact that Gary Sochor had been cornered into making untrue statements through techniques more usually seen in a third world dictatorship, they would not have believed this testimony, and no conviction would have resulted.

Gary Sochor's testimony regarding the promise of immunity by a police officer is equally something that the jury should have been made aware of. At trial, defense counsel specifically asked Gary Sochor if he had been offered immunity. Gary replied in the negative. Again had the jury been made aware of the fact that he had been offered immunity, the conviction that Hancock wanted so badly would have slipped beyond his reach. There is no doubt that these revelations would have caused the jury

not to believe Gary Sochor, and therefore not to find Dennis Sochor guilty of murder.

The State makes much of the lower court's findings that Gary Sochor was not credible, and by contrast prosecutor Kelly Hancock was "trustworthy, candid and credible" (PCR.) The State makes much of the fact that Gary Sochor could not remember the name of the police officer and that a police officer would not have authority to offer immunity anyway. However Gary Sochor is not a lawyer, and there is no reason that the would know that only a prosecutor can offer such immunity. Furthermore, his failure to remember which of several police officers communicated the immunity to him is not in itself fatal.

The lower court found Gary Sochor's testimony to be "unreliable and not credible" (PCR. 1140). This blanket assertion was accompanied by no rational explanation save for the fact that a police officer could not have offered him immunity. The question remains as to what he was "incredible" about. This is especially true given that the testimony at the evidentiary hearing would necessarily have undermined the State's case if it had been heard by the jury. The lower court provides no real explanation

for the conclusion that Gary Sochor was "incredible" other than the fact that prosecutor Hancock had said that it could not have been done because police officers cannot offer immunity. For such a credibility determination to be of any assistance to this Court, it must provide some detailed explanation for its basis. Moreover, that the lower court determined that Gary Sochor "incredible" in order to defeat Mr. Sochor's claim says nothing about how the jury would have viewed his testimony at the time of the penalty phase. The Second District Court of Appeals has observed that while "a trial court's determinations of credibility are afforded great weight by a reviewing court," the focus of a court's determination should be on "whether the nature of the evidence is such that a reasonable jury may have believed it." Light v. State, 796 So. 2d 610, 617 (Fla. 2d DCA 2001). Thus, a trial judge's capacity to determine the credibility of the witnesses in a post conviction motion is more limited when the trial judge is examining whether the particular testimony would have had an effect *on the jury*, and the question is not whether the judge "believes the evidence presented as opposed to contradictory evidence presented

at trial, but whether the nature of the evidence is such that a reasonable jury may have believed it." Id. This is the analysis that Mr. Sochor submits is proper. The fact that Gary Sochor's evidentiary hearing testimony necessarily undermines his trial testimony is even more compelling rather than less so. The lower court's rationale for finding Gary Sochor "incredible" is flawed.

The same considerations apply to the credibility findings made by the Court in favor of the State's witness prosecutor Kelly Hancock. Neither the lower court nor the State offer sufficient explanation as to why he was deemed "credible" despite being impeached on cross examination. By his own admission, Hancock was eager to gain not only a first degree murder conviction, but also a death sentence against Mr. Sochor. See PCR. 503. His evidentiary hearing testimony also shows that his memory of the trial was, at best, selective. On direct examination the State asked Mr. Hancock if Gary Sochor had ever told him that he (Gary Sochor) was "kissing and fondling" the victim in the truck, to which Hancock relied emphatically, "Never" (T. 496). He didn't say "I don't remember" or "I'm not sure," but "Never." The State asked

if he testified to this in the deposition taken by defense counsel, and he again replied "No." (T. 497). Again, the response was emphatic and suggested clear memory. However, in fact during the deposition Gary Sochor had explicitly stated that he had kissed the victim in the car and Hancock's memory was shown to be, at best faulty. However, no mention of this impeachment was made by either the lower court or the State. The kind of misrepresentation engaged in by Hancock did not make him "candid, trustworthy and credible," but rather the reverse. The State's assertion is not borne out by the record. Relief is warranted.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

The lower court did not address this issue, and neither did the State in its answer brief. Mr. Sochor reiterates his point that trial counsel was ineffective in two respects with regard to his cross examination of Gary Sochor. Firstly, he was ineffective in his deposition for failing to follow up Gary Sochor's assertion that he had kissed the victim Patricia Gifford in the truck. In fact, as Gary Sochor stated at the evidentiary hearing, he did rather more than kiss her, but helped her off with her

sweater and fondled her breasts. The fact that Gary had become heavily sexual with the victim is germane to Dennis Sochor's state of mind a the time of the crime, especially in combination with Mr. Sochor's alcohol ingestion and underlying psychiatric conditions detailed in Argument I, supra. This would have cast doubt on the premeditation element and the cold, calculated and premeditated aggravating circumstance. The outcome of the trial would have been different. There was no reason for failing to investigate this fact.

ARGUMENT III

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

The State contends that Mr. Sochor's motion to disqualify Judge Backman for conducting an improper ex parte hearing was correctly denied as legally insufficient. However the State's factual assertions regarding the circumstances surrounding the ex parte hearings are misleading and are not borne out by the record.

First of all, the State asserts that Mr. Sochor "is accusing the trial court of intentionally setting a hearing without notice to him." Answer Brief at 44. This is not what Mr. Sochor alleged. Mr. Sochor's claim was that the hearing was conducted without counsel for Mr. Sochor being present. The State further asserts that the lower court was under the impression that both parties had been notified. That is completely irrelevant. The fact remains that the hearing was conducted and several pending motions were denied. Mr. Sochor was not accusing the court of intentionally failing to inform Mr. Sochor's counsel of the hearing. However the lower court clearly

exhibited intent by denying Mr. Sochor's motions outside of presence of Mr. Sochor's counsel and thereby denying Mr. Sochor an opportunity to offer argument on those motions. The State's attempts to distinguish this instant case from the circumstances described in Chastine v. Broome, 628 So. 2d 293 (Fla. 4th DCA 1993). In other words, it is immaterial whether the ex parte hearing resulted from an intentional omission to provide notice to Mr. Sochor or from an administrative oversight. The fact remains that ex parte communication occurred and caused Mr. Sochor to fear that, due to the lower court's bias, he would not receive a fair hearing in front of Judge Backman. The fact that further public records hearings were conducted after the ex parte hearing does not cure the fear of judicial bias that resulted from the ex parte communication. Mr. Sochor's motion was legally sufficient being based on sound case law. It was error for the lower court to deny the motion. Relief should be granted.

ARGUMENT IV

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

The State claims that the lower court's summary denial of certain of Mr. Sochor's claims relating it ineffective assistance of counsel pretrial and at guilt phase was correct. However the State ignores the basic standard for granting an evidentiary hearing which is that if the files and records do not conclusively show that the defendant is entitled to no relief, and evidentiary hearing must be granted. See e.g. Demps v. State, 416 So.2d 808 (Fla. 1982). The State also ignores the fact that 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), which was not done in this instance.

The State opposed, and the lower court denied, an evidentiary on certain of the allegations alleging ineffective assistance of trial counsel at the guilt phase of Mr. Sochor's capital trial. First, the State opposed an evidentiary hearing with reference to certain of these matters relating to the pretrial statements of Gary Sochor

which could have been used to impeach his trial testimony but which were not adequately disclosed to the jury. This Claim was pleaded as either a Brady violation or ineffective assistance of counsel. In this case, trial counsel is deceased, a fact which the lower court took judicial notice of at the evidentiary hearing (T. 487). He was therefore not available for post conviction counsel to talk to. Accordingly, this claim was plead in the alternative.

The State claims that the trial court was correct in summarily denying this claim since it was refuted by the record. Answer Brief at 47. However the State notably fails to mention the fact that the State's Response to Mr. Sochor's Rule 3.850 motion appended non-record material to argue these specific allegations should be denied without an evidentiary hearing. See McClain v. State, 629 So. 2d 320 (Fla 1st DCA 1993) (" We consider the State's admitted inability to refute the facially sufficient allegations of ineffective assistance of counsel without recourse to matters outside the record warrants reversal. . .) The State by relying on non-record material has conceded that these allegations cannot be refuted by the record, and

thus an evidentiary hearing regarding the Brady and ineffective assistance of counsel claims as they relate to Gary Sochor's pretrial statements is required. Thus, the State's implicit concession that non-record materials were necessary to disprove Mr. Sochor's claims and therefore evidentiary development is not warranted is directly contradicted by its position on appeal.

The State also argues that Gary Sochor was impeached by trial counsel. The State asserts that, "From the very beginning of his cross examination of Gary, Mr. Rich challenged the witness about the prior statements," Answer Brief at 49, and that Gary Sochor was "thoroughly impeached." Answer Brief at 50. The State contends that because defense counsel was well aware of this information and in fact used it in impeachment evidence, Mr. Sochor's Brady claim is without merit. However, in the lower court proceedings the State argued that Gary Sochor "was thoroughly [sic] impeached and therefore [a]ny additional information would have been cumulative." (PCR. 808). This is a concession that not all of the impeachment contained in the statements was presented to the jury. More importantly, in arguing that Gary Sochor was thoroughly

impeached (and implicitly completely discredited), the State fails to acknowledge that on direct appeal this Court rejected a sufficiency of the evidence challenge to the guilty verdict on the basis of Gary Sochor's testimony. Sochor v. State, 580 So. 2d 595 (Fla. 1991). Thus, if Gary Sochor was thoroughly impeached and discredited, then the State should concede that there was insufficient to support the guilty verdict, and agree to a new trial without further ado.

Additionally, the State again fails to acknowledge that claims of ineffective assistance and Brady violations must be considered cumulatively. Thus, where the State has, as here, conceded an evidentiary hearing as to part of the claim, an evidentiary hearing must be held to the entirety of the claim. A hearing is warranted on this issue.

Furthermore, the State's arguments as to trial counsel's numerous failings during the guilt phase, including failure to object, are without merit and do not show that evidentiary development was not warranted. Mr. Sochor argued that trial counsel improperly failed to object to State witnesses' opinions regarding Mr. Sochor's

truthfulness and guilt. Initial Brief at 83. This related to State witness Dr. Schlein's testimony. The State's position at the lower court level was that the direct appeal ruling that the introduction of the Dr. Schlein evidence was not fundamental error somehow decides whether counsel's failure to object was ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). The test for ineffective assistance of counsel is, of course, an entirely different one than the test for fundamental error. Moreover, this Court recognized that ineffective assistance of counsel claims cannot normally be raised on direct appeal because it requires the consideration of non-record material. Nixon v. State, 572 So. 2d 1336 (Fla. 1991). The same holds true regarding trial counsel's failure to object to damaging cross examination testimony of defense witness Genevieve Hardwich that could have been forestalled by proper preparation of that witness by trial counsel. Furthermore, the State ignores the fact that the analysis requires cumulative consideration of the prejudice of all the alleged failings jointly. State v. Gunsby, 670 So. 2d 920 (Fla. 1994). As the United States Supreme Court

recognized in Kyles v. Whitley, 514 U.S. 419 (1995), cumulative consideration may warrant a reversal even when each constitutional defect considered separately may not. Evidentiary development of these issues is warranted.

The same argument applies equally well to Mr. Sochor's argument that he did not make a knowing, intelligent and voluntary waiver of his rights, and that trial counsel was ineffective for railing to challenge this. The State claims that this allegation is conclusory. However the State ignores the fact that Mr. Sochor's Rule 3.850 claims were all cross referenced to each other by specific reference. The fact of the matter was that Mr. Sochor, in his Rule 3.850 motion, pleaded and presented evidence as to his numerous mental conditions including brain damage, manic depressive illness, post traumatic stress disorder and substance abuse disorder. He presented evidence of these conditions at the evidentiary hearing. However because no hearing was granted on Mr. Sochor's mental state at the time he made his statement, no specific testimony was offered regarding this. The combination of the pleading of these conditions together with the allegation of ineffectiveness at the motion to suppress

was sufficient to merit an evidentiary hearing. The evidentiary hearing testimony merely supports the fact that a hearing should have been granted on this issue as well. Had a hearing been granted, Mr Sochor would have been able to adduce evidence as to his state of mind at the time he made his statements. Further evidentiary development is warranted.

CONCLUSION

Mr. Sochor submits that relief is warranted in the form of a new trial and/or a new sentencing proceeding. At a minimum, a full evidentiary hearing should be ordered. As to those claims not discussed in the Reply Brief, Mr. Sochor relies on the arguments set forth in his Initial Brief and on the record.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, to Celia Terenzio Esq., Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, FL 33340-3432, on May 23, 2003.

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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