IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1471

DWAYNE IRWIN PARKER,

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

DAN D. HALLENBERG
Assistant CCRC
Florida Bar No.0940615

NEAL A. DUPREE
CAPITAL COLLATERAL REGIONAL
COUNSEL-SOUTHERN REGION

101 N.E. 3rd Avenue. Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284; FAX (954) 713-1299

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Mr. Parker's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

The following symbols will be used to designate references to the record in this appeal:

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

"(PCR. ___)" -- record on instant 3.850 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Parker 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. Parker, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

A Broward County grand jury indicted Mr. Parker on one count of first-degree murder, two counts of attempted first-degree murder and nine counts of armed robbery. *See Parker v. State*, 641 So. 2d 369, 372 (Fla. 1994). Mr. Parker's trial was held in Broward County from April 30 to May 9, 1990. On May 10, 1990, the jury returned a verdict finding him guilty on the murder and armed robbery charges and of the lesser offense of aggravated battery with a firearm on the two counts of attempted murder. *See Parker* at 373; (R. 2026). At the conclusion of the May 25, 1990, penalty phase, the jury recommended a sentence of death by a vote of eight (8) to four (4) (R. 2326). On June 14, 1990, the trial court sentenced Mr. Parker to death (R. 2332). On direct appeal, the Florida Supreme Court affirmed Mr. Parker's convictions and sentences. *See Parker*, 641 So.2d 369 (Fla. 1994), *cert. denied*, 115 S.Ct. 944 (1995).

Pursuant to Chapter 119 of the Florida Statutes, Mr. Parker in 1996 requested that the Sheriff provide public records relevant to the investigation into Mr. Parker's case. *See* (PCR. Vol.1, 146-49)(Sheriff’s pleading acknowledging receipt in 1996 of Mr. Parker’s initial request for public records with attached cover letter from Sheriff indicating records were provided in response). In response, the Sheriff made certain records

available on June 4, 1996. (*Id*.). Mr. Parker filed an initial motion for post-conviction relief pursuant to rule 3.850 and 3.851 of the Florida Rules of Criminal Procedure on March 24, 1997, and requested leave to amend the motion once the state complied with all outstanding public records requests (PCR. 1-112).

Subsequently, in 1998, rule 3.852(h)(2) was enacted by this Court. Rule 3.852(h)(2) permitted capital defendants who were represented by collateral counsel as of October 1, 1998, and who had already initiated the public records process, to file within 90 days of October 1, 1998, a written demand for additional public records that had not previously been the subject of a request for public records. 3.852(h)(2) Fla. R.Crim. P. On December 29, 1998, pursuant to rule 3.852(h)(2), Mr. Parker filed multiple written requests for additional public records, including four separate written requests asking the Sheriff to provide certain additional public records that had not been the subject of a previous public records request. *See* (Attached Appendix Exh. A-D). The Sheriff objected and the circuit court sustained the objection (PCR. 146-48). As a result, the Sheriff provided to Mr. Parker provided none of the record requested in the 3.852(h)(2) requests.

On June 5, 2000, Mr. Parker filed his final Amended Motion

to Vacate Judgment of Conviction and Sentence with Special request for Evidentiary Hearing (PCR. 299-426). The State filed its Response on November 6, 2000 (PCR. 469-616). With leave of the court, Mr. Parker filed a Reply on December 15, 2000 (PCR. 1150-1172).

The court scheduled the *Huff* hearing for April 18, 2001. Meanwhile, in March of 2001, Mr. Parker filed requests for additional public records under rule 3.852(i) based upon newly learned information of allegations of improper conduct by the Sheriff's office in several murder cases that included allegations against some of the detectives that investigated Mr. Parker's case (PCR. 1183-1257,1258-1267,1268-1286, 1287-1296, 1313-1387). He also renewed his previous motions for production of records of personnel and internal affairs investigation files of several officers involved in the investigation into Mr. Parker's case PCR. 1183-1257,1258-1267,1268-1286, 1287-1296, 1313-1387). At a hearing held on April 18, 2001, the court heard argument and thereafter denied Mr. Parker's requests for additional public records (PCR. 1390-1395). The court also denied his renewed requests for the personnel and internal affairs files for the officers involved in the investigation of Mr. Parker's case, however, the Sheriff agreed to provide internal affairs records of two detectives (PCR. 1395-1399).

The court issued a written order summarily denying all of Mr. Parker's claims on February 8, 2002 (PCR 1484-1511). Mr. Parker filed a motion for rehearing and an amendment to the motion for rehearing (PCR. 1512-1535, 1537-1539). The court denied the motions for rehearing on May 24, 2002 (PCR. 1580).

Mr. Parker filed a timely notice of appeal on June 24, 2002 (PCR 1581-1582). This appeal from the trial court's summary denial of Mr. Parker's initial motion for post-conviction relief follows.

SUMMARY OF THE ARGUMENT

Point I: The circuit court erred in summarily denying claims of ineffective assistance of counsel during the guilt-innocence and penalty phases of the trial.

Point II: The circuit court improperly denied Mr. Parker access to public records and abused its discretion when conducting an *in camara* inspection if sealed records.

Point III: The circuit court erred in summarily denying Mr. Parker’s claims of ineffective assistance of counsel related to juror misconduct during penalty phase deliberations.

Point IV: The circuit court erred in summarily denying Mr. Parker’s claim of ineffective assistance during *voir dire*.

Point V: The circuit court erred in summarily denying Mr.

Parker’s claim of systematic discrimination in the selection of the venire.

Point VI: The circuit court erred in summarily denying Mr. Parker’s claim of ineffective assistance for failing to effectively object to instructions and comments that shifted the burden to Mr. Parker to prove that death was an inappropriate sentence.

Point VII: The circuit court erred by denying Mr. Parker's claim that trial counsel was ineffective for not objecting to comments that unconstitutionally diluted the jury's sense of responsibility towards sentencing.

Point VIII: The death penalty is disproportionate in Mr. Parker’s given the significant evidence not presented to the jury due to trial counsel’s ineffectiveness.

Point IX: The circuit court erred in denying Mr. Parker’s claim that the death penalty is being pursued due to the systematic discrimination inherent in the Florida death penalty scheme.

Point X: The circuit court erred by denying Mr. Parker's claim that the jury received inadequate guidance concerning the aggravating circumstances to be considered.

Point XI: The trial court erred by denying Mr. Parker's claim that Florida's capital sentencing statute is

unconstitutional. Point XII: The circuit court erred by denying Mr. Mendoza's claim that electrocution and lethal injection are cruel and/or unusual punishments and constitute inhuman and degrading treatment and/or punishment.

Point XIII: The circuit court erred in denying Mr. Parker's claim that he did not receive a fair trial due to the cumulative effect of constitutional error.

Point XIV: Mr. Parker is insane to be executed.

ARGUMENT

POINT I

THE TRIAL COURT ERRED BY SUMMARILY DENYING MR. PARKER'S CLAIMS; MR. PARKER IS ENTITLED TO AN EVIDENTIARY HEARING.

A. Erroneous Summary Denial

In his Amended Motion To Vacate Judgment Of Conviction And Sentence With Special Request for Evidentiary Hearing (hereinafter the "Amended Motion"), Mr. Parker set forth substantial and detailed claims demonstrating entitlement to an evidentiary hearing. These claims include specific fact-based allegations that Mr. Parker's trial counsel was ineffective both during the guilt-innocence and penalty phases of the trial. The circuit court refused to grant an evidentiary hearing and summarily denied these claims (PCR. 1484-1511). The circuit court erred because Mr. Parker has alleged facts not conclusively rebutted by the record and which demonstrate deficient trial counsel performance that prejudiced Mr. Parker. This Court should reverse the circuit court's order summarily denying these claims and remand for an evidentiary hearing.

Under rule 3.850, a post-conviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief. *See Gaskin v. State*, 737 So. 2d 509 (Fla. 1999); *Rivera v.*

State, 717 So. 2d 477 (Fla. 1998). The defendant is entitled to an evidentiary hearing on a claim of ineffective assistance of counsel if he alleges specific facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant. *See Gaskin* at 516 *citing Roberts v. State*, 568 So. 2d 1255, 1259 (Fla. 1990). The trial court must accept all allegations in the motion as true to the extent they are not conclusively rebutted by the record. *See Gaskin* at 516; *Valle v. State*, 705 So. 2d 1331 (Fla. 1997).

On appeal, in order to uphold a trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially or conclusively refuted by the record. *See Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999). Where no evidentiary hearing is held below, this Court must accept the defendant's factual allegations to the extent they are not refuted by the record. *Id*. An evidentiary hearing is presumed necessary absent a conclusive demonstration that the defendant is entitled to no relief. *Gaskin* at 516. There is a presumption in favor of granting evidentiary hearings on initial 3.850 motions asserting fact-based claims. *See Gaskin* 737 So. 2d 509, 517 (Fla. 1999) n.17.

B. Ineffectiveness At Guilt-Innocence Phase

The circuit court erred in denying Claim VI of Mr. Parker's Amended Motion for post-conviction relief. In Claim VI, Mr. Parker asserts that he was denied an adversarial testing at the guilt-innocence phase of his trial due in significant part to the ineffective assistance of trial counsel *See (*PCR. 319-36). The circuit court summarily denied the claim on the grounds that the claim was either "procedurally barred, conclusory in nature, not supported by the record, and/or legally insufficient to require an evidentiary hearing" (PCR 1491-92). For the reasons set forth below, the circuit court's reasons for denying an evidentiary hearing are erroneous. This Court should reverse the circuit court's order and remand from an evidentiary hearing.

In denying Claim VI, the circuit court first concludes that "[t]here is no allegation that there <u>is</u> any exculpatory evidence that could have been presented to the jury that would have benefitted the defendant, or that any further investigation of the case would have resulted in finding any evidence that would be beneficial to the defendant." (PCR.1491)(emphasis in original). In so concluding, the court ignored the fact that, in Mr. Parker's Amended Motion, he specifically alleges multiple instances of trial counsel's failure to investigate and present evidence that, if presented at trial, would have created a

reasonable probability that the outcome of the guilt-innocense phase would have been different.

Specifically, Mr. Parker asserts that trial counsel failed to present available expert testimony that the color of the photographs showing the bullet lodged in the victim's sacrum that the State entered into evidence as representing the bullet that killed the victim was subject to manipulation and did not necessarily reflect the true color of the bullet shown in the photographs (PCR. 326; Amended Motion p.28) and failed to present expert testimony that it could not be established by a reasonable degree of scientific certainty that the bullet that killed the victim was the same bullet the State claims was fired from Mr. Parker’s gun (PCR. 358; Amended Motion p.60, paragraph 70). The Amended Motion also sets forth in detail how defense counsel's failures in this regard prejudiced Mr. Parker (PCR. 322-26; Amended Motion p.24-8).

As explained in the Amended Motion and as set forth clearly in the record, the penultimate issue at the guilt-innocence phase of the trial was whether the bullet that killed the victim was fired from Mr. Parker's gun or from the gun of one of the various deputies who, at the time the victim was shot, were closing in on the area near Mr. Parker and the victim. The defense argued at trial that a deputy, and not Mr. Parker,

actually fired the fatal bullet. The defense's case was bolstered by the very compelling fact that the medical examiner represented in his notes from the autopsy, in the autopsy report itself, and in his initial sworn deposition that the fatal bullet he removed from the victim was silver in color, had little deformations, and had not been cut during its removal. These facts virtually exonerated Mr. Parker from being the shooter and implicated the deputies because it was undisputed that the bullets in Mr. Parker's gun were copper color, not silver, and that the standard issue bullets for Broward Sheriff deputies at the time were silver in color. However, on the eve of trial, the medical examiner, after receiving a telephone call from the State Attorney, made known his intention to testify that he had been mistaken and that the bullet he removed from the victim was actually copper color and had a large cut on it - a description which exactly matched the bullet the State presented at trial and argued was the bullet that killed the victim.

The two photographs showing the color of the fatal bullet lodged in the victim's sacrum were critical in that, if the bullet was in fact truly silver in color, then no reasonable jury would have believed that Mr. Parker shot the victim. On the other hand, a truly copper-colored bullet would cast serious

doubt on Mr. Parker's defense. As the record shows, the photographs showed the bullet as having a yellow hue, which suggested that the bullets were copper colored and not silver. As explicitly set forth in the Amended Motion, Mr. Parker asserts trial counsel was ineffective because he failed present available expert testimony that the color of the bullets as shown in the two photographs was subject to manipulation and did not necessarily reflect the true color of the bullet (PCR.326; Amended Motion p.28) and that it could not be established by a reasonable degree of scientific certainty that the bullet that killed the victim was the same bullet the State claims was fired from Mr. Parker’s gun (PCR.358; Amended Motion p.60, paragraph 70). As also argued in the Amended Motion (PCR. 326; Amended Motion p.28), trial counsel attempted to cast doubt on the accuracy of the photographs' representation of the color of the bullet by cross-examining the State's photographer based on trial counsel's own lay-person’s knowledge of photography. As the record shows, trial counsel's attempt to cast doubt on the photographs' representation of the color of the bullet failed. Mr. Parker now specifically claims in the Amended Motion that trial counsel was ineffective for not presenting available expert testimony that would have done what defense counsel tried, but failed, to do: present compelling evidence that cast

doubt on the whether the bullet shown in those photographs was truly copper in color. Not only was this evidence that trial counsel failed to present exculpatory, but, given the extraordinary circumstances surrounding the bullet - most notably the medical examiners initial reports and sworn statement that the bullet was indeed silver and not cut - there is a reasonable probability that the outcome of the trial would have been different had defense counsel presented such expert testimony.

Defense counsel can be ineffective for failing to present expert testimony on an issue even if defense counsel addressed the issue at trial using an expert if the expert presented at trial was not qualified to give an opinion on a particular issue. In *Freeman v. State*, 761 So. 2d 1055, 1064 (Fla. 2000), defense counsel presented an expert witness in the penalty phase that was not qualified to give an opinion on drug and alcohol abuse. This Court reversed the trial court's summary denial of the claim and held that defense counsel may have been ineffective for failing to present an expert "who was qualified to give an opinion on this issue" *Id*. In Mr. Parker's case, trial counsel presented no expert on photography but instead relied on counsel's own lay-person's knowledge of photography in a failed attempt to cast doubt on the photographs'

representation of the color of the bullet. Under *Freeman*, Mr. Parker is entitled to an evidentiary hearing on the issue of whether trial counsel was ineffective for failing to obtain available expert testimony that could have provided the jury with an expert opinion that the photographs did not represent the true color of the bullet.

In a related issue, the circuit court ignored Mr. Parker's claim that, while the State had originally turned over to trial counsel through the discovery process a negative of a photograph showing the bullet removed from the victim that appeared silver in color, trial counsel failed to present this highly exculpatory evidence into evidence (PCR. 325-26; Amended Motion p.27-28, para. 17 and 19). Had trial counsel presented evidence to the jury of this photograph showing a silver-colored bullet, again, for the reasons outlined above and in the Amended Motion, there is a reasonable probability that outcome would have been different.

The circuit court also failed to acknowledge the fact the Mr. Parker specifically alleges that trial counsel failed to discover and present available evidence that there were bullets fired from Mr. Parker's gun that were never accounted for by police investigators. This evidence, as alleged in the motion, would have supported Mr. Parker's defense that police secretly

recovered one of these unaccounted for bullets and switched it with the silver bullet that the medical examiner removed from the victim (PCR. 328-29; Amended Motion pp.30-31, para..26).

The circuit court also overlooked the fact that Mr. Parker specifically alleges that trial counsel failed to present evidence that Mr. Parker was at least twenty (20) feet from the victim at the time witness Tammy Duncan heard the fatal shot (PCR. 329; Amended Motion p.31). This evidence was highly exculpatory because Dr. Bell, the medical examiner, testified at trial that, according to his examination of the victim, the gun that fired the fatal bullet was no more that two (2) feet away from the victim when the fatal shot was fired. In light of Dr. Bell's testimony, if Mr. Parker was at least twenty feet from the victim, Mr. Parker could not have been the person who fired the fatal bullet. Trial counsel failed to present this evidence to the jury. Had he done so, there is a reasonable probability that the outcome of the trial would have been different, especially when considered with the other evidence that trial counsel failed to present as discussed above.

Mr. Parker's Amended Motion also specifically alleges that trial counsel failed to present available evidence that the deputies who were chasing Mr. Parker were aware that there had been another robbery in the area that night, that the victim was

involved with a group of persons suspected of being involved other local robberies, and that a description of one of the robbery suspects had been circulated that resembled the victim (PCR. 332; Amended Motion p.34). Mr. Parker also alleges specifically that trial counsel also failed to present evidence that the victim had been with these robbery suspects on the night of the incident and may have been running from police when he heard the sirens (*Id*.). As specifically alleged in the Amended Motion, this evidence would have provided further support for the defense's theory that a deputy shot the victim believing the victim to be an armed robber (*Id*.). The evidence that trial counsel failed to present regarding the origin of the fatal bullet is entirely consistent with the post-trial testimony of Brent Kissinger who, at the hearing on Mr. Parker's motion for new trial, testified that he saw a deputy stand in a firing position with a shiny object and yell "H[a]lt or I'll shoot" just before hearing one shot and seeing a man (the victim) lying on the ground (R. 2053).

The circuit court also ignored the fact that Mr. Parker asserts that trial counsel failed to present evidence that several persons at the scene indicated that a deputy, and not Mr. Parker, shot the victim (PCR. 331; Amended Motion p.33), and that a deputy, other than deputy McNesby, was approaching the

victim at the time of the fatal shot and could have been the shooter (*Id*.). Mr. Parker also asserts that trial counsel failed to effectively impeach Tammy Duncan to the extent that counsel failed to impeach her with the fact that, while she testified at trial that Deputy McNesby got to the location of the victim several minutes after the victim was shot, in her prior sworn statement, she stated that Deputy McNesby was in front of and close to the victim at the time the fatal shot was fired (PCR. 330-31; Amended Motion pp.32-3). This strongly suggests that Deputy McNesby fired the fatal shot in light of Dr. Bell's testimony that, based on his expert opinion, the shooter fired the gun from within a distance of no more than two (2) feet of the victim.

In sum, as outlined above, the circuit court's conclusion that Mr. Parker's Amended Motion makes no allegations of exculpatory evidence that could have been presented to the jury and benefitted Mr. Parker is simply incorrect. The allegations asserted by Mr. Parker are sufficient to entitle him to an evidentiary hearing.

Also with regard to Claim VI, the circuit court erroneously concludes that Mr. Parker's claim is procedurally barred because the sufficiency of the evidence presented at trial was considered on direct appeal (PCR. 1491-92). In its order

summarily denying Claim VI, the circuit court found the claim procedurally barred because:

> The legal sufficiency of the evidence was an issue on direct appeal. In its opinion, the Florida Supreme court found, "Our review of the record shows that Parker's convictions are supported by competent substantial evidence. We therefore affirm those convictions." Parker [v. State,]641 So. 2d [..] at 376 [Fla. ...].
>
> Other peripheral issues relating to the sufficiency of the evidence and the fairness of the trial were again the subject of direct appeal and discussed at length in the Supreme Court opinion, and rejected.

(PCR. 1491-92). As the circuit court itself acknowledged in its order (PCR. 1491), Mr. Parker's claim is grounded on trial counsel's failure to present certain evidence to the jury (as specifically set forth in the Amended Motion and reviewed above) during the guilt-innocence phase of the trial. Because trial counsel did not present this evidence, obviously this Court did not consider it, and could not have considered it, on direct appeal. The fact that this Court on direct appeal found the evidence presented at trial sufficient to support the convictions cannot be a basis to deny Mr. Parker's ineffective assistance of counsel claims. Contrary to the circuit court's conclusion, this claim is not procedurally barred. Due to this error of law, the circuit court's order should be reversed.

The circuit court also denied this claim on the basis that

the facts asserted by Mr. Parker as constituting evidence that trial counsel failed to present to the jury was not "supported by the record" (PCR. 1492). In its order, the circuit court concluded:

> Paragraph six of [Claim VI] alleges that "From the beginning, substantial evidence existed and was available to Parker's counsel which exonerated Parker." ***There is absolutely no evidence in the record*** to support this bare conclusion. All of the allegations in Claim VI are procedurally barred, conclusory in nature, ***not supported by the record***, and/or legally insufficient to require an evidentiary hearing. Claim VI is therefore denied.

(PCR. 1492)(emphasis added). As the order indicates, the circuit court denied this claim in part because the allegations in the claim are not supported by the record. While certainly true, this is no basis to deny the claim. The facts and allegations supporting Mr. Parker's claim that trial counsel was ineffective for failing to present specific evidence at trial necessarily are not "supported by the record" because the evidence was never presented below. Indeed, the purpose of an evidentiary hearing is to allow Mr. Parker to place on the record the evidence that trial counsel failed to present. The circuit court's reasoning is circular and erroneous.

For the reasons already discussed, contrary to the circuit court's order, the claim is not legally insufficient and not

conclusively rebutted by the record. *See Gaskin*. Mr. Parker is entitled to an evidentiary hearing on a claim of ineffective assistance of counsel because he has alleged specific facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant. *Gaskin* at 516 *citing Roberts v. State*, 568 So. 2d 1255, 1259 (Fla. 1990).

C. Ineffectiveness At Penalty Phase

1. Denial of Right To Competent Mental Health Assistance and Counsel's Failure To Present Substantial Mitigation

The circuit court erred in denying Claim VII[1] of Mr. Parker's Amended Motion for post-conviction relief. In Claim VII, Mr. Parker asserts that he was denied an adversarial testing at the penalty phase of his trial due in significant part to the ineffective assistance of trial counsel *See (*PCR. 336-73). Mr. Parker asserts in this claim that trial counsel failed to competently investigate and present significant mitigation evidence of Mr. Parker's tortuous childhood and mental health (PCR. 336, 353, 354, 358; Amended Motion pp.38, 55, 56, 60) and failed to present evidence in rebuttal to the State's penalty phase evidence regarding the origin of the fatal

[1]Due to a typographical error, the heading for Claim VII on page 38 of the Amended Motion (PCR. 336) incorrectly reads "Claim IV".

bullet (PCR 354-59; Amended Motion pp.56-61). As for the mitigation evidence, the circuit court summarily denied the claim on the grounds that the mitigation evidence alleged in the claim was “not supported by the record”, cumulative to the evidence presented at the penalty phase, or refuted by the record. (PCR. 1492-96). As for trial counsel’s complete failure to challenge the State’s penalty phase litigation of the bullet issue, the circuit court held that the claim is procedurally barred (PCR.1495-96). For the reasons set forth below, the circuit court’s reasons for denying an evidentiary hearing are erroneous. This Court should reverse the circuit court’s order and remand for an evidentiary hearing.

In summarily denying Mr. Parker's claim that trial counsel failed to competently present significant and available mitigation evidence, the circuit court concluded that the record refutes the claim because, according to the circuit court, the evidence Mr. Parker alleges was not presented is cumulative to the evidence presented at the penalty phase. The circuit court concluded that it "cannot imagine any more testimony that could or should have been presented that would not be cumulative in nature." (PCR. 1494-95). The circuit court’s conclusion is erroneous for several separate, but equally compelling, reasons:

a. *Trial counsel failed to establish the facts trial*

counsel alleged in mitigation

First, the circuit court's reasoning is belied by the fact that, as this Court held on direct appeal, the circuit court, in sentencing Mr. Parker to death, "found that the facts alleged in mitigation were not supported by the evidence . . . [t]he record supports the trial court's conclusion that no mitigators had been established." *Parker v. State*, 641 so. 2d 369, 377 (Fla. 1994). Therefore, the circuit court itself concluded not that the unfortunate circumstances of Mr. Parker's life were not mitigating but that trial counsel failed to establish the facts necessary to prove that this mitigation evidence actually existed. Because Mr. Parker now contends in post-conviction that trial counsel was ineffective in part because counsel failed to establish the facts alleged in mitigation during the penalty phase, Mr. Parker will necessarily have to establish these facts at an evidentiary hearing in order to show that, had trial counsel been effective, trial counsel could have done the same. The circuit court's denial of an evidentiary hearing because some of the facts alleged in the Amended Motion were presented at trial, and, per the circuit court, cumulative, is erroneous.

On direct appeal, Mr. Parker argued that the circuit court failed to consider the non-statutory mitigation evidence that trial counsel attempted to present (*See* Mr. Parker's initial

brief on direct appeal at 51). This Court rejected this argument and held:

> Contrary to Parker's contention, the [trial] court gave ample consideration to all of the evidence Parker submitted in mitigation. "A trial court must consider the proposed mitigators to decide if they have been established and if they are of a truly mitigating nature in each individual case." *Johnson v v. State*, 608 So. 2d 4, 11 (Fla. 1992), *cert. denied*, 508 U.S. 919, 113 S.Ct. 2366, 124 L.Ed.2d 273 (1993); *Campbell v. State*, 571 So. 2d 415 (Fla. 1990). The court did this, **but found that the *facts alleged* in mitigation were not supported by the evidence**. . . . The record supports the trial court's conclusion that no mitigators had been established.

Parker v. State, 641 So. 2d 369, 377 (Fla. 1994)(emphasis added). As found by the circuit court and affirmed by this Court, trial counsel completely failed to establish any of the asserted facts to support the claimed mitigation. The circuit court therefore cannot properly summarily deny Mr. Parker's post-conviction claim that trial counsel was ineffective for failing to competently present the voluminous mitigation related to Mr. Parker's ill-fated life. In other words, since this Court concluded that, per the circuit court's own sentencing findings, "the facts alleged in mitigation were not supported by the evidence" (*id.*), Mr. Parker's post-conviction claim that effective counsel could have established not only the facts

asserted in mitigation during the penalty phase proceedings but also significant and substantial additional mitigation that trial counsel never even tried to prove at the penalty phase (*see, infra,* pp.24-30), the circuit court erred in summarily denying the claim on cumulative evidence grounds. In order to establish this claim, Mr. Parker necessarily will have to assert and establish facts at an evidentiary hearing that trial counsel **tried**, **but failed**, to establish at the penalty phase. The circuit court misses this important point by summarily deny this claim on the basis that Mr. Parker is alleging some of the same facts defense counsel tried (but, again, failed) to establish at the penalty phase.

Given trial counsel's deficient presentation of the case for mitigation, there is little wonder that the circuit found that the defense failed to establish the facts alleged in support of the claimed mitigation. To establish the asserted mitigation, trial counsel relied primarily on the testimony defense investigators and Dr. Caddy, all of whom relayed to the jury simply what Dwayne and a few family members told them. The investigators repeatedly qualified and expressly limited much of their testimony as being nothing but what Dwayne or his family members told them (R. 2207, 2209, 2215). Incredibly, one investigator insisted that Mr. Parker had a twin brother while

the other investigator said he did not (R. 2202, 2211, 2212, 2284). One investigator did not know who Mr. Parker's girlfriend was and could not recall the name of Mr. Parker's wife or sister (R. 2284, 2285). Instead of presenting first-hand accounts of Mr. Parker's horrendous life, trial counsel resorted to qualified, second and third-hand accounts. While Mr. Parker's mother did testify, her testimony was short, relatively limited and lacked meaningful detail (R. 2184-93).

As for Dr. Caddy, the trial record establishes that his opinion was based on an incomplete, inadequate, and cursory investigation. Dr. Caddy admitted that his opinions were not the result of a "traditional . . . diagnostic work-up of" Mr. Parker (R. 2238) but, instead, were based merely on "impressions about diagnostic indicators" (R. 2239). Indeed, Dr, Caddy testified that "the focus of my consultation here has **not been** in the traditional sense to do a diagnostic work-up of this man" (R. 2238)(emphasis added). Dr. Caddy admittedly failed to review all the available information and conduct a meaningful psychological evaluation. Dr. Caddy admitted during his penalty phase testimony, and therefore, the trial record affirmatively establishes the following: that the vast amount of the facts Dr. Caddy relied upon came from Mr. Parker himself (R. 2251, 2256); that Dr. Caddy's "perspective" was "limited" ("I mean I could

have asked other people, but the question of how far you go depends on whole variety of sets of events" (R. 2257-58)) even though relying on one person, especially a criminal defendant, can "compromise" his opinion and the more people he talks to the "more clear it becomes" (R. 2257,2258, 2261-62, 2268); that Dr. Caddy based his opinion only on an interview with Mr. Parker, a telephone call to Mr. Parker's mother, and a review of Mr. Parker's statement to police and the co-defendant's deposition (R. 2258); that a mental health expert's opinion should be based on objective observations and based on more than just what one person tells him (R. 2268); that Dr. Caddy did nothing to substantiate Mr. Parker's self-reporting and admitted that, if Mr. Parker "misstated" the facts, Caddy's opinion is a "misstatement" (R. 2270); that talking to Mr. Parker's wife, who lived locally in Broward county, would have given Dr. Caddy an additional perspective but he did not talk to her (R. 2259); that Dr. Caddy did not know who Melissa Preston was (she was Mr. Parker's girlfriend for four years and the co-defendant's sister)(R. 2259); that Dr. Caddy did not attempt to talk to Mr. Parker's father or brother on the telephone (R. 2260); that Dr. Caddy did not give Mr. Parker an intelligence test and did not do a Minnesota Multiphasic Personality Inventory (R. 2260, 2261); that Dr. Caddy did not talk to the co-defendant but

instead relied on the co-defendant's deposition (R. 2263-64).

As expected, during penalty phase closing arguments, the prosecutor hammered on Dr. Caddy's admitted failure to seek out and rely upon additional sources of information in support of his opinion (R. 2300). In sum, because the circuit court found that trial counsel failed to establish the facts in support of the alleged mitigation, Mr. Parker must necessarily establish those particular facts at an evidentiary hearing in order to prove his claim of ineffective assistance of counsel. To summarily deny the claim because many of the same mitigation facts are necessarily asserted in post-conviction is erroneous.

b. *Trial counsel failed to discover and present additional mitigation*

The circuit court's finding that the facts alleged in the motion are cumulative to the facts asserted at the penalty phase is also erroneous because many significant facts and details asserted in Mr. Parker's Amended Motion were clearly not known and not even attempted to be presented at trial by trial counsel. In *Freeman v. State*, 761 So. 2d 1055, 1065 (Fla. 2000), this Court held that summary denial is not proper when the defendant alleges in a claim of failing to investigate and present penalty phase evidence "details about specific events

not presented" at trial. In summarily denying this claim, the circuit court has overlooked the following substantial facts and details that Mr. Parker alleges he can establish and that were not discovered and presented at trial by trial counsel:

i. Mr. Parker's Mental Health - While the circuit court's order notes that trial counsel presented evidence at trial that Mr. Parker "had serious troubles in school, did not do well academically and was of below average intelligence" and "often had tantrums in school, throwing himself on the floor, kicking and screaming as though having a fit." (PCR. 1493), the circuit court overlooked that, as alleged in Mr. Parker's Amended Motion, defense counsel did not present or even allege the following evidence:

- that Mr. Parker suffers from mental illness and possible organic brain damage (PCR. 376; Amended Motion p.78). In its Response to the Amended Motion filed below in which the State urged the circuit court to deny an evidentiary hearing, the State strained to argue that evidence of Mr. Parker's mental illness was presented to the jury in the form of testimony that Mr. Parker has below average intelligence and was placed in a special education class: "[O]bviously the jury would understand that 'below average intelligence' and being in a special education class are indicators of mental illness" (PCR. 554;

State's Response at 86). The fallacy if this argument is readily apparent. Mental illness is not limited to persons with low or below average intelligence. Certainly the fact that a person has below average intelligence does not make the person mentally ill. Even if below average intelligence is in some manner an "indicator" of mental illness, a jury could not reasonably be expected to know or properly rely on this fact absent expert testimony, which there was none presented on this question at trial.

- that Mr. Parker was diagnosed borderline retarded at age 14 and had a mental age of 7 years old which would likely regress under pressure (PCR. 347; Amended Motion p.49, para.39);

- that tests results indicated that he had weaknesses in his logical and abstract thinking ability, along with difficulty in interpreting social situations (*id*.);

- that he was deficient in simple assembly skills, and that his inability to concentrate and apply himself was indicative of the influence of emotional factors (*id*.);

- that tests also showed he had a primary reading disability and faced daily frustration and shame over the fact that while he was in the ninth grade, he could only read at a fourth grade level (*id*.);

- that doctors suspected he suffered from childhood schizophrenia or autism when, at the age of eight, he simply stopped talking entirely (PCR. 348; Amended Motion p.50, para. 40);

- that he suffered from head injuries and physical trauma as a child (PCR. 376; Amended Motion p.78, para. 12);

- that when he first entered the juvenile system he was showing signs of acute mental distress (*id*.);

- that he received little or no mental health assistance as a child, which he desperately needed, due to his mother's own schizophrenic condition (PCR 348-49; Amended Motion p.50-1).

ii. Mr. Parker's Mother's Aberrant Behavior and its Effect on Mr. Parker - The circuit court's order notes that trial counsel presented evidence at trial that Mr. Parker was in and out of HRS custody "due to his mother's diagnosis of and hospitalization for paranoid schizophrenia" (PCR. 1493). The circuit court overlooked that trial counsel failed to present evidence, which Mr. Parker now asserts in his Amended Motion, of numerous examples of specific and detailed manifestations of his mothers schizophrenia and its wide-ranging effects on Mr. Parker through his life-long continued exposure to her behavior(PCR 347-49; Amended Motion p.39-51). Simply telling the jury that Mr. Parker's mother suffered from schizophrenia and that, as a

result, he was in and out of foster homes does not even begin to convey the mental stress and psychological confusion suffered by Dwayne as a result of growing up with a single parent who was so seriously mentally ill. Her illness was not under any meaningful control until 1986 (PCR. 346; Amended Motion p.48, para. 34). Specific details not presented at the penalty phase by trial counsel include examples of her abnormal behavior such as walking naked through the house, hiding naked in a closet, running naked through the neighborhood, and not buying food because of delusional fears of government poisoning (PCR. 340, 341, 343, 345; Amended Motion p.42, para.17; p.43, para. 19, 20; p.45, para. 24; p.47, para. 32). Also not presented at the penalty phase was the effect on Dwayne of her abnormal interactions with Dwayne himself, not to mention the wide-ranging consequences caused by her periodic absence due to involuntary commitments to mental hospitals (PCR. 340-43, 345; Amended Motion p.42-5,47, para's. 18-24, 33). As a result of her illness, Dwayne's mother was abnormally agitated, unable to communicate, not motivated, and socially withdrawn (PCR. 340-42; Amended Motion p.42-4). She was stripped of her nursing license because of illness-related behavior such as not administering prescribed medication to patients because she feared the medication was poisoned by the "tax people"(PCR. 345; Amended

Motion p.47, para. 32). It got so bad that, while Dwayne was a child living with her, she quit buying food because she thought the food was poisoned and because she simply lost the ability to perform the mechanics of grocery shopping (PCR 346; Amended Motion p.48, para. 34). Other facts not presented by trial counsel include:

- that Dwayne's mother treated him with detachment and hostility, including physical abuse (including beatings using an electrical cord and pouring hot water on him) which reportedly would leave Dwayne screaming under the bed (PCR. 342; Amended Motion p.44, para. 21);

- that his mother was unduly critical, or, in the alternative, obsessively doting. She made him stay home from school which contributed to his inability have any type of normal school experience, academically or socially. Most significant is that she ignored school authorities' plea to get mental health assistance for Dwayne (PCR. 349;Amended Motion p.51, para. 43). The Amended Motion sets forth a myriad of significant details of her illness and the effects on Dwayne's mental health that were not presented at all by trial counsel.

iii. Sexual Abuse - While Dr. Caddy testified that Dwayne reported sexual abuse, trial counsel presented little or no specifics or details. Mr. Parker alleges in the Amended Motion

specific and detailed instances of sexual abuse, including the fact that he was:

- gang raped when he was just nine (9) years old, and, on other occasions, molested by a man living in his neighborhood (PCR. 343; Amended Motion p.45, para. 26);

- raped by an older male when Dwayne was fourteen (14) years old which, when police learned of the incident, Dwayne’s mother told the police to forget about it (PCR. 344; Amended Motion p.46, para. 27);

- forced to have sexual contact with animals

- victim of a two-year sexual relationship by his own legal guardian when he was sixteen (16) years old (PCR. 344; Amended Motion p.46, para. 39);

- routinely forced to submit to sexual activity with men in return for the promise of shelter when Dwayne was living on the streets (PCR. 344; Amended Motion p.46, para. 30). All of these specific instances, and many others set forth in the Amended Motion but not reviewed here, had a direct and powerful influence on Mr. Parker's mental condition.

In sum, the Amended Motion sets forth significant additional facts and specific details of Dwayne's childhood that were not presented or even attempted to be presented by trial counsel. There can be no doubt that these factors, which were unknown to

the jury, had a direct and adverse effect on Dwayne's mental condition. The circuit court's summary denial should be reversed pursuant to the authority of *Freeman*.

c. *Trial court applied incorrect law re: standard for ineffective assistance of counsel claims*

The circuit court also erroneously applied the law in denying an evidentiary hearing on Claims VII and XI. In denying an evidentiary hearing on these claims orally at the *Huff* hearing, the court placed on the record the court's understanding of the governing ineffective assistance of counsel standard of *Strickland* (PCR.1431-32). The court stated the legal standard as follows:

> [The ineffective assistance of counsel standard of *Strickland*] requires a showing that, first of all, trial counsel's performance was so deficient, not only deficient in facts and law, but so deficient that the outcome, the result, ***would have been different or there would have been a substantial probability to be different***.
>
> * * * *
>
> . . . I don't see how any additional evidence ***would change*** the outcome at all.
>
> * * * *
>
> . . . I find the defendant is not entitled to an evidentiary hearing on the issues raised in the motion as to the penalty phase.

(PCR. Vol.9, 1431-32)(emphasis added). As evident by the court's

pronouncement denying an evidentiary hearing, the circuit court erroneously believed that, in order to be entitled to relief under *Strickland*, Mr. Parker had to establish that, but for trial counsel's deficient performance, either the outcome of the penalty phase "would have been different" or that there was a "substantial" probability that the outcome would have been different. Contrary to the court's understanding, the correct standard requires Mr. Parker to show only a "reasonable" probability that the outcome would have been different, not that the outcome "would" have been different or that there is a "substantial" probability that it would be different. *See Strickland*. The court placed on Mr. Parker a much more onerous burden to establish the prejudice prong than required by law. Therefore, the circuit court applied the wrong legal standard and the order denying relief should be reversed.

d. *Trial court applied incorrect law re: the proper purpose and application of the mitigation evidence alleged*

Next, the circuit court's order should be reversed because, in summarily denying the claim, the court misapplied the law relative to the legal role of capital case mitigation. In it's written order, the court evidences a fundamental misunderstanding of the purpose and proper application of the mitigation evidence alleged by Mr. Parker that trial counsel

failed to competently present at trial.

In the order summarily denying Mr. Parker's Claim VII, the court concluded that the record refutes the claim because, according to the circuit court, the mitigation evidence Mr. Parker alleges was not effectively presented by trial counsel is cumulative to the evidence presented at the penalty phase. In so ruling, the court reasoned:

> This claim, in some seventy-three numbered paragraphs, reviews the defendant's childhood, his relationship with his parents, anecdotal history of alleged mental illness in the family, an unstable home life, a dysfunctional family and possible sexual abuse committed on the defendant.
>
> **The inference to be drawn from the allegations in this claim is that everyone in the defendant's life is to blame and is responsible for the defendant's actions in this murder** . . . .
>
> * * * *
>
> . . . The transcript of the trial in this case shows that page after page of testimony was presented to the jury in mitigation of the defendant **in an attempt to cast the defendant as a victim in this case, rather than the perpetrator**.

(PCR. 1493-94, 1495)(emphasis added). As evident from these quoted passages from the circuit court's order, the court viewed the purpose of the mitigation evidence - both as

presented at Mr. Parker's trial[2] and as asserted by Mr. Parker in post-conviction in the Amended Motion - as "an attempt" by Mr. Parker to "blame" others for being "responsible for the defendant's actions in this murder" and to "cast the defendant as a victim in this case, rather than the perpetrator". In addition to these remarks contained in the court's written order, during the *Huff* hearing the court characterized Mr. Parker's argument in mitigation as the "abuse-excuse" (PCR. Vol.9, 1432). The circuit court's understanding of the purpose and effect of mitigation is contrary to, and erroneous application of, the fundamental principles of capital case sentencing guaranteed by the Eighth Amendment. As a result, the court erroneously denied this claim without an evidentiary hearing.

In considering proffered mitigation by the defendant in a capital trial, the trial court must follow the three-step process enumerated in *Rogers v. State*, 511 So. 2d 526, 534 (Fla.

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[2] Because the same trial court judge (Judge Leroy H. Moe) presided over both the original trial and the post-conviction proceedings below, the fact that the judge harbored a serious misunderstanding of the legal application of the mitigation alleged by Mr. Parker both at his trial and in the Amended Motion also establishes that, in sentencing Mr. Parker to death, the trial court misapplied the law and was necessarily precluded from conducting the constitutionally required consideration of the mitigation. Mr. Parker has raised this related claim in his contemporaneously filed Petition For Writ of Habeas Corpus.

1987): First, the court must determine "whether the facts alleged in mitigation are supported by the evidence"; second, if the court finds the facts established, the court "must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, *i.e.*, factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed"; and third, the court must then determine whether the factors found to exist "are of sufficient weight to counterbalance the aggravating factors." *See also Santos v. State*, 591 So. 2d 160, 164 (Fla. 1991). The question of whether the established facts are "truly of a mitigating in nature" (the second step in the process) is a question of law. *See Campbell v. State*, 571 So. 2d 415, 419, n.4 (Fla. 1990), *receded from in part, Trease v. State*, 768 So. 2d 1050 (Fla. 2000).

It follows then that when a trial court, as in the instant case, is faced with a post-conviction claim that the defendant's trial counsel failed to effectively present mitigation evidence, the court , as part of its analysis of the prejudice prong of *Strickland*, must make the legal determination of whether or not the facts alleged by the defendant (*i.e.* the facts that the defendant alleges trial counsel failed to competently present at

trial) are “truly of a mitigating nature” *Santos* at 164. This is so in light of the obvious fact that only if the facts alleged by the defendant are of a mitigation nature could there possibly exist a reasonable probability of a different outcome. For example, in Mr. Parker’s case, a proper analysis of the prejudice prong would require the circuit court to make the legal determination of whether the facts alleged in the claim are truly mitigating. The problem with the circuit court’s analysis in Mr. Parker’s case is that the circuit court could not have made a proper determination as to the whether the facts asserted in the Amended Motion were mitigating because the court expressly failed to understand and apply the correct law.

According to the circuit court, the facts alleged by Mr. Parker in the Amended Motion concerning his “childhood, his relationship with his parents, anecdotal history of alleged mental illness in the family, [ ] unstable home life,[ ] dysfunctional family and possible sexual abuse committed on the defendant” amounted to nothing but “an attempt” by Mr. Parker to “blame” others for being “responsible for the defendant’s actions in this murder” and to “cast the defendant as a victim in this case, rather than the perpetrator" (PCR. 1493-94, 1495). This constitutes an erroneous legal determination by the court of the mitigating nature of the alleged facts. The court

clearly did not view the mitigation asserted by Mr. Parker (both at trial and in the Amended Motion) in its proper constitutionally required context but, instead, treated Mr. Parker's mitigation as an attempt to show that he was not "responsible for [his] actions in this murder". As discussed below, the court's analysis is contrary to the established principles of capital case sentencing.

In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), the Court held that the Eighth and Fourteenth Amendments require that the sentencer in a capital case "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* found this rule mandated by the Eighth Amendment:

> "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

Lockett, 438 U.S. 604 *quoting Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *see also Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976). Accordingly, this Court has made it emphatically clear

that "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)). Only through a process which requires the sentencer to "consider, in fixing the ultimate punishment of death[,] the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind," *Woodson* at 304, can capital defendants be treated "as uniquely individual human beings." *Id*. The *Lockett* principle "is the product of a considerable history reflecting[] the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual. *California v. Brown*, 479 U.S. 538, 562 (1987)(Blackman, J. dissenting) *quoting Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). As explained in *Eddings*:

> [T]he rule in *Lockett* followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all. By requiring that the sentencer be permitted to focus "on the characteristics of the person who committed the crime" *Gregg v. Georgia* [, 428 U.S. 153] at 197 [(1976)] the rule in *Lockett* recognizes that "justice . . .

> requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania v. Ashe*, 302 U.S. 51, 55 (1937). By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.

Eddings, 455 U.S. at 112; *see also Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000)("The United States Supreme Court has held that a sentencing jury or judge may not preclude from consideration any evidence regarding a mitigating circumstance that is proffered by a defendant in order to receive a sentence of less than death." (citations omitted)); *Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990). "'[J]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence . . . .'" *Rogers v. State*, 511 So. 2d 526 (Fla. 1987) *quoting Eddings*, 455 U.S. at 114-15.

The mitigation asserted by Mr. Parker in his Amended Motion regarding his traumatic childhood and upbringing was <u>not</u>, as the circuit court stated, presented in an attempt to show that Mr. Parker was not "responsible for [his] actions in this murder". The court's order reflects a fundamental misunderstanding of the

legal effect and purpose of this type of mitigation (traumatic and abuse-ridden life and childhood). In sentencing Mr. Parker, the court was required to "'determine whether the established facts are of a kind capable of mitigating the defendant's punishment, *i.e.*, factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed.'" *Santos v. State*, 591 So. 2d 160, 164 (Fla. 1991) *quoting Rogers*, 511 So. 2d at 534. Mr. Parker's presentation of this evidence to the court should have been viewed by the court as an attempt to establish circumstances and events that shaped Mr. Parker's character and " result[ed] in [Mr. Parker] succumbing to the passions [and] frailties inherent in the human condition" *Cheshire*, 568 So. 2d at 912 *citing Lockett*. Instead, the court's written order and comment at the *Huff* hearing establish that the court did not consider this evidence in the constitutionally required manner but instead viewed it as "an attempt" by Mr. Parker to show that other persons were "responsible for the defendant's actions in this murder" and to "cast [himself] as a victim in this case, rather than the perpetrator" (PCR. 1493-94). While the circumstances of the offense is a valid issue for mitigation if the circumstances act to lessen the defendant's culpability (*i.e.*

"responsibility") for the crime, mitigation establishing childhood trauma and abuse - contrary to the circuit court's belief - is not mitigating because it shows that the defendant is not "responsible" for the crime, rather, it is mitigating because it is relevant to the defendant's character. The court here did not consider the proffered mitigation as reflecting on Mr. Parker's character, but merely considered whether or not it absolved him of responsibility for committing the crime. This is an erroneous application of the fundamental principles of capital case mitigation.

Because the court misapplied the law governing the function and purpose of the mitigation that Mr. Parker asserts trial counsel failed to effectively present, the court's legal determination of whether or not the facts asserted were of a truly mitigating nature was necessarily erroneous. This in turn precluded the court from conducting the legal analysis required in order to determine if Mr. Parker was entitled to an evidentiary hearing. The order summarily denying Claim VII should be reversed and the issue remanded for an evidentiary hearing.

e. *Trial court's factual findings not supported by the record*

Finally, in denying Mr. Parker's penalty phase-related

claims, the circuit court made several factual findings completely at odds with the trial record. First, the circuit court incorrectly found that, "During the penalty phase proceeding, the defense also presented the testimony of . . . [Mr. Parker's] father, Reverend Elvin J. Parker." (PCR. 1494). As the record clearly shows, Mr. Parker's father, the Reverend Elvin J. Parker did not testify at the penalty phase proceedings, nor did he testify at any other portion of the trial. Secondly, the court found that defense investigators talked to Mr. Parker's foster parents (PCR 1494). This is simply wrong. An investigator talked to one of Mr. Parker's sister's foster parents, not Dwayne's foster parents (R. 2279, 2282). The court relied upon these blatant errors it's factual understanding and analysis of the penalty phase evidence to deny Mr. Parker an evidentiary hearing. Because the court's incorrect understanding of the facts presented at the penalty phase was necessarily critical to the court's decision to deny Mr. Parker an evidentiary hearing on this claim, the court's order should be reversed and the cause remanded for an evidentiary hearing.

2. Origin of the Fatal Bullet

In denying the second portion of Claim VII, in which Mr. Parker contends that trial counsel was ineffective for failing

to present to the jury at the penalty phase the exculpatory testimony of Brent Kissinger (who testified at the motion for new trial that he saw what appeared to be a sheriff's deputy shooting the victim) and failed to present expert testimony to challenge the State's copper bullet theory, the circuit court reasoned that "[b]oth of these claims are issues which were litigated on direct appeal and are therefore not cognizable through collateral attack." (PCR. 1495). The circuit court erred as a matter of law is as these claims were not - and could not have been - raised on direct appeal and, therefore, are not procedurally barred.

No such claims of ineffective assistance of counsel were litigated on direct appeal, nor could they have been. While the this Court reviewed and affirmed the circuit court's denial of Mr. Parker's motion for new trial (*i.e.* a new guilt-innocence phase proceeding) based upon Kissinger's testimony, the Court only decided the issue of whether or not the circuit court abused its discretion in denying the motion for new guilt-innocence phase (trial counsel filed and litigated the motion for new trial prior to the start of the penalty phase. Mr. Parker's present post-conviction claim (as set forth in Claim VII) is that defense counsel should have called Kissinger as a witness during the penalty phase (after Kissinger came forward

and, therefore, made himself known to the defense) and that defense counsel should have challenged the State's copper bullet theory after the State extensively litigated (and thereby opened the door) to the bullet issue during the State's penalty phase case.

Because the circuit court permitted the State (over defense objection) to present evidence during the penalty phase, including expert testimony, that was designed to discredit the defense's argument made in the guilt-innocence phase that the fatal bullet was not the same copper colored bullet presented at trial, the State very widely opened the door for the defense to counter the State's penalty phase case on this issue. In other words, once the State elected to litigate the bullet issue during the penalty phase (using the arguably dubious pretext of supporting the great risk of harm aggravator), the defense had every right to present evidence during the penalty phase on Mr. Parker's defense that a deputy shot the victim. Brent Kissinger would have provided the penalty phase jury with newly discovered eye-witness testimony that a deputy shot the victim. Despite the circuit court's ruling that Kissinger's testimony was not credible such as to require a new guilt-innocence phase proceeding, it cannot be credibly argued that there does not exist a reasonable probability that his testimony would have

affected the outcome of the penalty phase proceedings (an 8 to 4 jury recommendation for death). Add on top of this the fact that trial counsel also failed to challenge the State's copper bullet theory during the guilt-innocence phase as asserted in Claim VI, and defense counsel's failure to effectively present substantial mitigation (Claim VII), the outcome of the penalty phase is simply not reliable. *See State v. Gunsby*, 670 So. 2d 920 (Fla. 1996).

3. Denied competent expert assistance under *Ake v. Oklahoma*

The circuit court erred in denying Claim XI of Mr. Parker's Amended Motion for post-conviction relief. In Claim XI, Mr. Parker asserts that he was denied his constitutional right to competent mental health assistance and the assistance of other experts guaranteed by *Ake v. Oklahoma*, 105 S. ct. 1087 (1985)(PCR 371-84). The circuit court's order addresses only the claim that Mr. Parker was denied competent mental health assistance (PCR. 1497-98). The court summarily denied the claim on the grounds that the claim is legally insufficient, conclusory in nature, and refuted by the record (PCR. 1497-98). For the reasons set forth below, the circuit court's reasons for denying an evidentiary hearing are erroneous. This Court should reverse the circuit court's order and remand from an evidentiary hearing.

a. *Denied competent mental health assistance*

In summarily denying Mr. Parker's claim that he was denied his constitutional right to competent mental health assistance, the circuit court overlooked that Dr. Caddy admitted that his opinions were not the result of a "traditional . . . diagnostic work-up of" Mr. Parker (R. 2238) but, instead, were based merely on "**impressions** about diagnostic indicators" (R. 2239)(emphasis added). Dr. Caddy testified that "the focus of my consultation here has **not been** in the traditional sense to do a diagnostic work-up of this man" (R. 2238)(emphasis added). The court further overlooked that Mr. Parker has specifically alleged in his Amended Motion that Mr. Parker indeed suffers from mental illness and possible organic brain damage but that Dr. Caddy failed to detect or testify to this fact. (see PCR. 376-77; Amended Motion p.78-9, para. 12). Therefore, contrary to the circuit court's findings, Mr. Parker has alleged that Dr. Caddy's assistance was grossly insufficient and that he ignored indications of brain damage.

Contrary to the circuit court's findings, Mr. Parker specifically alleges in his Amended Motion that he can present expert testimony that Mr. Parker's addiction to alcohol, especially when combined with his mental illness, conclusively establishes statutory mitigation and substantial non-statutory

mitigation (as noted, *supra*, pp.19-21) both the circuit court and this Court found that trial counsel completely failed to establish the asserted facts in mitigation, and, therefore, failed to establish any mitigation, statutory or otherwise)(PCR. 375-76; Amended Motion p.77-8). In *Freeman v. State*, 761 So.2d 1055, 1065 (Fla. 2000), the Court held that the trial court erred when it summarily denied the defendant's claim that defense counsel failed to present an expert witness who was qualified to give an opinion on the effects of drug and alcohol abuse. Mr. Parker is similarly entitled to establish his claim at an evidentiary hearing.

The circuit court also overlooked that Dr. Caddy's failure to review all the available information and conduct a meaningful psychological evaluation was not only specifically alleged in Mr. Parker's Amended Motion (PCR. 373-78; Amended Motion p.75-80), but was established in the trial record of Dr. Caddy's testimony and actually formed the basis for the State's highly damaging cross-examination of Dr. Caddy (PCR. 377; Amended Motion p.79, para. 14). *See* previous discussion of Dr. Caddy's admitted failures and omissions in gathering information to support his opinion, *infra*, pp.22-24).

Contrary to the circuit court's conclusion, the fact that the disciplinary sanctions imposed on Dr. Caddy were reversed on

appeal provides no basis to deny Mr. Parker an evidentiary hearing. This is so because the reversal on appeal of the disciplinary sanctions imposed on Dr. Caddy were not in any manner grounded on the insufficiency or inadequacy of the facts alleged that formed the basis for disciplinary proceedings. To the contrary, the District Court noted, "By [Dr. Caddy's] own admission, he violated the challenged rule [prohibiting psychologists from engaging in sexual misconduct with a client]" *Caddy v. State, Dept. of Health, Bd. of Psychology*, 764 So. 2d 625, 628 (Fla. 1st DCA 2000). The District Court reversed the order for sanctions because the court determined the rule in question unconstitutional. However, nothing changes the fact that, per the District Court's opinion, Dr. Caddy admittedly violated the rule, i.e. engaged in sexual conduct with a client.

More importantly, the numerous facts alleged in the Amended Motion that were not admitted to by Dr. Caddy (including allegations of physical and sexual abuse, pedophilic acting out and prejudice against African-Americans) have not been shown as untrue (as the District Court noted, no hearing was held to determine the facts. *Id*. at 625). Because the District Court's opinion in no way undermines the factual allegations against Dr. Caddy, the opinion does not refute the allegations set forth in the Amended Motion. These allegations, if true, cast substantial

doubt on Dr. Caddy's ability to evaluate and render a competent opinion on Mr. Parker's mental condition.

b. *Denied other expert assistance*

As noted previously, the circuit court's order fails to address Mr. Parker's claim that he was denied competent expert assistance in photography and toolmarking in both the guilt-innocence and penalty phases of the trial (PCR. 384-85; Amended Motion, pp.86-87) The court did conclude at the end of its discussion if Claim XI that "[a]ll of the allegations are conclusively refuted by the record, conclusory in nature, legally insufficient and as such are not entitled to a hearing" (PCR. 1498). Assuming these reasons formed the basis for the circuit court's denial of this sub-claim, the court erred.

At the outset, the circuit court incorrectly believed that Mr. Parker's is asserting that he was denied competent experts in these areas only during the guilt-innocence phase. In the order, the court incorrectly states the claim as follows: "In Claim XI, Parker alleges he was denied the adequate assistance of experts in the areas of mental health in the sentencing phase and photography and tool marking experts **during the guilt phase** of his trial" (PCR. 1497)(emphasis added). As the Amended Motion clearly states, however, Mr.Parker's claim is that he was denied the competent assistance of such experts at both the guilt-

innocence phase and the penalty phase (PCR. 384-85; Amended Motion pp.86-87). Because the circuit court's order fails to correctly acknowledge the full extent of the claim and never addresses the claim in any meaningfully specific manner, the order denying an evidentiary hearing on this claim should not be sustained.

Moreover, the claim is not conclusively refuted by the record, conclusory, or legally insufficient. The factual basis for the claim is that Mr. Parker was denied expert assistance in the areas of photography and toolmarking. Because the reason he was denied this expert assistance was due to trial counsel's ineffectiveness, the claim as written in the Amended Motion incorporates and cross-references the facts and argument of the ineffective assistance of counsel claims relating to failure to utilize experts in photography and toolmarking set forth in Claims VI and VII (PCR. 371, 384; Amended Motion pp.73, 86)(incorporating by specific reference "[a]ll other allegations and factual matters contained elsewhere in this motion" and cross-referencing the photography and toolmarking ineffectiveness claims in Claims VI and VII). For the reasons discussed in above and in Claim VI and VII of the Amended Motion, this claim is legally sufficient and requires an evidentiary hearing.

POINT II

THE CIRCUIT COURT IMPROPERLY DENIED MR. PARKER ACCESS TO PUBLIC RECORDS IN VIOLATION OF STATE LAW AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The circuit court improperly denied Mr. Parker access to public records in the possession of the Broward County Sheriff's Office (hereinafter, "Sheriff") and the State Attorneys Office for the Seventeenth Judicial Circuit. Per the authority of Chapter 119 of the Florida Statutes and rule 3.852 of the Florida Rules of Criminal Procedure, Mr. Parker is entitled to these records. Because the court prohibited Mr. Parker from accessing these records, Mr. Parker has been denied his rights to due process and equal protection under both the state and federal constitutions. The court's actions also violated his Sixth and Eighth Amendment rights by depriving him and his counsel the ability to fully and fairly investigate and develop his post-conviction claims for relief.

A. Sheriff's Office Records

Pursuant to Chapter 119 of the Florida Statutes, Mr. Parker in 1996 requested that the Sheriff provide public records relevant to the investigation into Mr. Parker's case. *See* (PCR. Vol.1, 146-49)(Sheriff's pleading acknowledging receipt in 1996 of Mr. Parker's initial request for public records with attached

cover letter from Sheriff indicating records were provided in response). In response, the Sheriff made certain records available June 4, 1996. (*Id*.).

Subsequently, in 1998, rule 3.852(h)(2) was enacted by the Florida Supreme Court. Rule 3.852(h)(2) permitted capital defendants who were represented by collateral counsel as of October 1, 1998, and who had already initiated the public records process, to file within 90 days of October 1, 1998, a written demand for additional public records that had not previously been the subject of a request for public records. *See* Rule 3.852(h)(2) Fla. R.Crim. P. On December 29, 1998, pursuant to rule 3.852(h)(2), Mr. Parker filed four separate written requests asking the Sheriff to provide certain additional public records that had not been the subject of a previous public records request. *See* (Attached Appendix Exh. A-D). Mr. Parker requested the following additional records not previously provided by the Sheriff: (1) records of the personnel files and internal affairs investigations for the law enforcement officers who investigated or assisted in the investigation of the case (*see* attached Appendix Exh. A); (2) records directly related to the investigation of Mr. Parker in the possession of certain specified individual officers, including notes or memoranda created by the officers (*see* Appendix Exh. B); (3) records

regarding the victim, William Nicholson, six (6) named civilians witnesses in the case and five (5) other cases (*see* attached Appendix Exh. C); and (4) jail records of Mr. Parker, the victim, and nine (9) others (*see* attached Appendix Exh. D).

The Sheriff subsequently filed a written objection to Mr. Parker's 3.852(h)(2) requests (PCR. Vol.1, 146-48). The Sheriff objected on the grounds that the request was unreasonable, overbroad, and unduly burdensome "by virtue of sheer volume and breadth" in violation of rules 3.852(g)(3)(D) and 3.852(i)(2)(D) of the Florida Rules of Criminal Procedure and that the requested records are not "relevant to a pending appellate proceeding, or could lead to the discovery of admissible evidence" (PCR. Vol.1, 147).

At a hearing on the matter, counsel for the Sheriff suggested that the Sheriff had already provided the personnel and internal affairs files requested (". . . my gut instinct tells me that [the records provided in 1996] are pretty much the records that [Mr. Parker is] seeking now [through the rule 3.852(h)(2) demand]". (See Transcript p.20, Exhibit H)). Counsel for the Sheriff also implied that counsel for Mr. Parker had not reviewed the original public records provided by the Sheriff in 1996 to determine if those records included the records requested under the rule 3.852(h)(2) demand (PCR. Vol.2, 215).

Counsel for Mr. Parker denied the Sheriff's implication that counsel for Mr. Parker had not gone through the original records provided by the Sheriff and informed the court that the original records had been gone through numerous times by several people (PCR. Vol.2, 216). Furthermore, counsel for Mr. Parker informed the Court that the records requested under rule 3.852(h)(2) demand were records that had not been previously provided by the Sheriff (PCR. Vol.2, 216).

Mr. Parker argued at the hearing that the personnel and internal affairs files and any notes written by the law enforcement officers who investigated or assisted in the investigation of the case are relevant to Mr. Parker's post-conviction proceedings because a central issue at trial and now on post-conviction is whether or not law enforcement officers engaged in misconduct by tampering with evidence regarding the bullet that killed the victim (PCR. Vol.2, 215-16). Indeed, Mr. Parker's Amended Motion alleges in part that trial counsel was ineffective for failing to present evidence at both the guilt-innocence and penalty phases of the trial that supported the defense's bullet-switch theory and countered the State's theory that the bullet that killed the victim was fired from Mr. Parker's gun. This evidence includes evidence that bullet's fired from Mr. Parker's gun were unaccounted for and would have

supported the defense that state officials recovered an errant bullet fired from Mr. Parker's gun and subsequently switched it with the silver bullet Dr. Bell removed from the victim's body (PCR. Vol.2, 328-29, Amended Motion pp.30-31). Additionally, personnel and internal affairs investigation records are reasonably likely to contain impeachment evidence that could have been utilized against the various officers who testified at Mr. Parker's trial[3]

The circuit court found that the Sheriff had substantially complied with Mr. Parker's public records requests (PCR. Vol.2, 217, 273, 285). The circuit court also concluded that Mr. Parker's request was unreasonable, overbroad and unduly burdensome. (*Id*.). The court rejected Mr. Parker's argument that the records sought were relevant to the post-conviction proceedings because, the circuit court reasoned, the jury rejected the defense at trial that the bullet that killed the victim was fired from a deputy's gun and not Mr. Parker's (PCR. Vol.2, 217).

Mr. Parker subsequently filed his Amended Motion To Vacate Judgment of Conviction and Sentence with Special Request for

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[3]The following law enforcement officers testified at trial: Kevin McNesby, Christopher Presley, Bernard McCormes, Mark Shafer, Steven Wiley, Anthony Fantigrassi, James Krammerer, Dennis Shinabery, Roberg Killen, Robert Cerat, and Patrick Garland.

Evidentiary Hearing and a *Huff* hearing was scheduled for April 18, 2001. On or about March 1, 2001, counsel for Mr. Parker learned of recent reports that Broward County Sheriff's deputies involved in the investigation of Mr. Parker's case, including Lead Detective Steven Wiley, Detective Amabile, and then-Sgt. Scheff, had been accused of police misconduct in various murder cases, including cases that Detective Wiley and now-Captain Scheff worked on at or near the time of Mr. Parker's trial. *See Defendant's Rule 3.852(i) Motion And Supporting Affidavit To Obtain Additional Public Records, To Renew Previous Rule 3.852(h)(2) Demand, To Continue Huff Hearing Pending Receipt Of Additional Public Records, And for Leave To Amend Previously Filed Rule 3.850 Motion*, (PCR. Vol.7-8, 1183-1257) and the Rule 3.852(i) demands for additional public records to the various agencies (PCR. Vol.8, 1258-1267, 168-1286, 1287-1296). Counsel also learned at this time that Governor Bush had recently ordered an investigation into whether Captain Scheff lied under oath in order to keep an innocent man on Death Row. (*Id*.). Detective Wiley was the Lead Detective on Mr. Parker's case. (*Id*.) Captain Scheff participated in the investigation and reportedly supervised Detective Wiley. (*Id*.)

The reported allegations involved criminal cases in which

persons arrested and charged with murder by the Sheriff were later determined to be innocent (including Frank Lee Smith, a man who had been condemned to die on Death Row) or had their charges dismissed. (*Id*.). As a result of this newly discovered information, Mr. Parker filed requests for additional public records under rule 3.852(i) related to the persons and cases involved in the charges or claims of police misconduct and also renewed his previous 3.852(h)(2) requests records of the personnel and internal affairs files of the officers involved in the homicide investigation that the circuit court had denied. (*Id*.).

A hearing on the motion was held on April 18, 2001, immediately prior to the start of the *Huff* hearing. After hearing argument from Mr. Parker and the State (PCR. Vol.9, 1391-1395),the circuit court denied Mr. Parker's 3.852(i) request for public records related to the allegations of misconduct by Sheriff detectives who were involved in the investigation in Mr. Parker's case, concluding that "the prejudicial [e]ffect in the interest of justice outweighs the possible probative value of the new information being sought by additional public records" and because the particular records sought by Mr. Parker are "not reasonably to lead to [sic] admissible evidence as to curative issues. There is other [sic]

remedies available to newly discovered evidence" (PCR. Vol.9, 1395).

As for Mr. Parker's renewal of his previously litigated 3.852(h)(2) requests for the personnel and internal affairs files of the officers involved in the investigation of Mr. Parker's case, counsel for the Sheriff agreed at the hearing to provide Mr. Parker access to the internal affairs files of two detectives, Detective Wiley and Captain Scheff (PCR. Vol. 9, 1398-99; 1450-1463). The court denied Mr. Parker's renewed request for all the originally requested personnel files and the internal affairs files for the remaining officers (other than Wiley and Scheff) involved in the investigation of Mr. Parker's case (PCR. Vol.9, 1398-99). The court also denied Mr. Parker's claim that the denial of these records violated significant constitutional rights (PCR. 303-05; 1497-88)

The circuit court abused its discretion in denying Mr. Parker's requests for records from the Sheriff related to witnesses in the case (App. Exh. C) and records in the form of personnel files and internal affairs files of the law enforcement officers involved in the investigation (App. Exh. A). The record does not support the circuit court's conclusion that the requests were unduly burdensome or overbroad or that the records were not reasonably likely to lead to the discovery

of admissible evidence. Records of contacts by the Sheriff with witnesses in the case are reasonably likely to lead to relevant evidence, including *Brady* evidence. Moreover, in light of the fact that a major issue both at trial and in Mr. Parker's motion for post-conviction relief is whether the law enforcement officials tampered with evidence involving the bullet that killed the victim and, also, in light of the numerous allegations of misconduct in other murder cases on the part of detectives at the Sheriff's Office, including detectives involved in the investigation in this case (as detailed in Mr. Parker's 3.852(i) requests), records of the personnel and internal affairs files of the officers involved in the investigation at the very least "relate to a colorable claim for postconviction relief" and a constitute a "'focused investigation into some legitimate area of inquiry'" *Glock v. State*, 776 So. 2d 243, 254 Fla. 2001), *quoting Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000). The circuit court's rationale for denying the request because the jury rejected Mr. Parker's theory of the switched bullet is erroneous in that the court's rationale is premised on the incorrect notion that Mr. Parker is somehow foreclosed from investigating this issue in post-conviction. On a more general level, as noted above, such records are reasonably likely to contain, or lead to the

discovery of impeachment (*Brady*) evidence applicable to the law enforcement officers who testified at trial. Moreover, in light of the gravity of the stakes involved - Mr. Parker's life - and, considering the issues raised at trial and in post-conviction (at the time the court heard argument on and ruled on the 3.852(i) and renewed (h)(2) requests for public records, the date of the *Huff* hearing, the court presumably had read the Amended Motion and was aware of the post-conviction issues), the circuit court's conclusion that the "prejudicial [e]ffect" to the State in making the records available to Mr. Parker "outweighs the possible probative value of" the records to Mr. Parker is simply untenable.

Mr. Parker's later discovery of these files could result in a procedural bar. *Cf. Glock* (denial of requested records affirmed when defendant failed to show good cause as to why he did not request public records before death warrant signed); *Porter v. State*, 653 So. 2d 375 (Fla. 1995). The lower court erroneously refused to order these materials disclosed. The circuit court's order denying the requested records should be reversed.

B. State Attorney Records

The record shows that the circuit court also abused its discretion in refusing to unseal records submitted by the State

Attorneys Office with claims that the records were exempt from public records disclosure. Therefore, Mr. Parker hereby formally moves for this Court to review the sealed records to determine if the records are in fact legally exempt from disclosure and to determine whether the records contain *Brady* material. *Cf. State v. Coney*, 2003 Fla. LEXIS 275, 28 Fla. L. Weekly S 201 (Fla. March 6, 2003)(wherein this Court refused to review sealed records when defendant did not claim, and the record did not show, that the trial court abused its discretion in refusing to disclose records submitted under seal with claims of being exempt from disclosure).

The State Attorneys Office of the Seventeenth Judicial Circuit responded to Mr. Parker's 3.852(h)(2) demand for additional public records in part by submitting a substantial amount of documents under seal with claims of exemption from disclosure under chapter 119 of the Florida Statutes. At a hearing held on March 8, 2000, the court conducted in open court an *in camera* inspection of the sealed records and concluded that all the records were validly exempt and contained no *Brady* material (PCR. 229-51). The circuit court abused its discretion in reaching this conclusion because the court conducted a cursory review of the records, openly proclaimed its belief during the inspection that the State Attorneys Office

"always" complies with *Brady* requests, indicated that the *in camera* inspection was a "waste of time", and, per the court's own admission, only reluctantly looked at the records because the court felt that reviewing the prosecutors' notes was "embarrassing."

At the hearing, the court had his bailiff bring up the records (PCR. 230). The court glanced through records and announced that he was finding that the records were exempt because the records, according to the court, "appear to be, for the most part, work product impressions of the attorneys" (*Id*.). The court then asked counsel for the State to tell him what other exemptions apply (PCR. 231-32). In response to the court's actions, counsel for Mr. Parker then stated:

> Judge, if I may, part of the issue with the notes is prosecutor's preparation for trial. I respectfully request this Court to look through them and see if there's any *Brady* material in there, because I suppose the purpose of this Court is to look through and see if there's anything in there that should be turned over exculpatory *Brady*, something of that nature. So if your honor could take a little time and look through them more.

(PCR. 231)[4]. The court then asked Mr. Parker's counsel if Mr.

[4]The transcript of this hearing repeatedly identifies certain persons as "THE BLOND". However, the context of the arguments for the most part reveal whether the particular "blond" speaking is counsel for Mr. Parker or counsel for the State.

Parker had "any predicate for a violation of *Brady*"(PCR. 231) and thereafter proclaimed its belief that

> . . . the State attorney's Office in Broward County [] **always complies with *Brady* requests**. Any they [do] so based on custom, tradition, history practice, or anything else. Maybe other circuits I don't discount. I don't know what your experience has been. But I want to tell you, **they have always complied with *Brady* requests**.

(PCR. 232)(emphasis added). The court then began a purported inspection for possible *Brady* material. The court then announced, "I looked through a pile of material that appears to be notes from depositions. Obviously, the depositions would be the best evidence of whether or not there is any *Brady* type material. There is nothing in these notes that would qualify as *Brady* material, or anything that would come out of the category of being exempt." (PCR. 236).

The court then was presented with another "stack" of records to look through (PCR. 236). At that point, the court noted that the court felt that, while it was "not too much" of a "waste of time", the court felt it was "embarrassing, pealing through private thoughts of people that are prosecuting for murder" (PCR. 236). Incredibly, counsel for Mr. Parker was compelled to respond to the court's expressed reluctance to conduct an *in camera* inspection by pointing out to the court that Mr. Parker

had been sentenced to death (PCR. 236).

The court subsequently announced that it had finished looking through these records and found no *Brady* material (PCR. 237-41). Counsel for Mr. Parker then objected that the court conducted merely a "cursory" review of the records (PCR. 247-48). Counsel argued that she had timed the court's review of the records at a mere 30 to 40 minutes (PCR. 247). Counsel for the State characterized the review as taking a "good forty-five minutes" (PCR. 247). Interestingly, the court did not respond to Mr. Parker's objection other than by simply noting the objection (PCR. 246-47). The court did not attempt to assure counsel or make a record that the court had in fact carefully and fully reviewed the entirety of the records.

The record establishes that the circuit court abused its discretion by conducting the *in camera* inspection in a cursory manner, by admittedly viewing the inspection of records as a "waste of time" (although "not too much" of one), by conducting the inspection reluctantly because the court felt "embarrass[ed], pealing through private thoughts of people that are prosecuting for murder", and by expressly harboring its blatantly non-neutral opinion that the State Attorneys Office "always" complies with *Brady* requests. Mr. Parker therefore requests this Court to conduct its own inspection of the sealed

records from the State Attorneys Office to determine both the legality of the claimed exemptions and to determine whether there exists any *Brady* material within those documents. With respect to the length of the circuit court's review of the records, this Court at the very least should make a determination of whether, given the volume of sealed records, and the issue involved in this case, a full and complete review by a single judge can be accomplished in 30 to 40 minutes. Mr. Parker asserts that it cannot.

With respect to the claims of exemption by the State Attorney, the assertion by the State, without more, that its records were trial preparation materials is insufficient to shield them from disclosure. "[I]nteroffice and intra-office memoranda may constitute public records even though encompassing trial preparation materials." *Coleman v. Austin*, 521 So. 2d 247, 248 (Fla. 1st DCA 1988); s*ee Orange County v. Florida Land Co.*, 450 So. 2d 341 (Fla. 5th DCA), *review denied*, 458 So. 2d 273 (Fla. 1984); *Hillsborough County Aviation Authority v. Azzarelli Construction Co.*, 436 So. 2d 153 (Fla. 2d DCA 1983). Additionally, notes, preliminary drafts, working drafts, or any document prepared in connection with the official business of an agency that is to perpetuate, communicate, or formalize knowledge, regardless of whether in final form or the ultimate

product of an agency, can be subject to disclosure under Chapter 119. *Johnson v. Butterworth*, 713 So. 2d 985 (Fla. 1998); *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.,* 379 So. 2d 633 (Fla. 1980); *Times Publishing Co. v. City of St. Petersburg*, 558 So. 2d 487 (Fla. 2d DCA 1990).

The circuit court could not conduct a legally sufficient *in camera* inspection of the records withheld by the State Attorney's Office without comparing the "notes" with the final product and without discussing in detail what each withheld document was and why it was not public record. In *Shevin*, the Court held that public records are "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type." *Shevin*, 379 So. 2d at 640. The Court identified materials that were not public records and those which are: "Inter-office memoranda and intra-office memoranda communicating information from one public employee to another or merely prepared for filing, even though not a part of the agency's later, formal public product would nonetheless constitute public records inasmuch as they supply the final evidence of knowledge obtained in connection with the transaction of official business." *Id.* All such materials, regardless of whether they are in final form, are open for public inspection unless specifically

exempted by the Legislature. *See Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

If the withheld notes written by the prosecutor were intended as "final evidence of the knowledge to be recorded," *State v. Kokal*, 562 So. 2d 324, 327 (Fla. 1990), then those notes are public records; if the prosecutor's notes "supply the final evidence of knowledge obtained in connection with the transaction of official business," *id.*, then those notes are public records. A record "merely prepared for filing," is nonetheless a public record because it "suppl[lies] the final evidence of knowledge obtained in connection with the transaction of official business." *Orange County v. Florida Land Co.*, 450 So. 2d 341, 343 (Fla. 5th DCA 1984)(citing *Shevin*). Even if never circulated as inter-office memoranda, the notes at issue here may fall into this category. The notes at issue were made a part of the State Attorney's file on Mr. Parker's case. The inclusion of these notes into the State Attorney's files evinces the intent of the attorney preparing them to perpetuate the existence of the knowledge contained therein. Moreover, if the information contained in the "handwritten notes" contains *Brady* material, the information must be disclosed notwithstanding that the notes may not be public records or are exempt under Chapter 119. *Walton*, 634 So. 2d at 1062.

If the notes are "mere precursors of governmental 'records' and are not, in themselves, intended as final evidence of the knowledge to be recorded," or "rough drafts," or "notes to be used in preparing some other documentary material," then the notes are not public records. *Shevin*; *Kokal*. However, the determination of whether a record is a public record is a factual determination that can be made only when the party withholding the records provides the court with the document claimed to be merely preliminary, and thus not a public record, and the document supplying the final evidence of the knowledge contained in the notes or draft, thus a public record. Only by comparing the draft/notes with the final version can the court make the determination that the draft or notes are not public record. In this case, the State did not provide the lower court with these records, and thus the *in camera* inspection was but a rubber stamping of the prosecutor's withholding of the notes from Mr. Parker.

POINT III

FAILURE TO OBJECT TO JURY MISCONDUCT DURING PENALTY PHASE DELIBERATIONS AND RULE PROHIBITING JUROR INTERVIEWS.

As alleged in Claim XIV (PCR. Vol.2, 390-94; Amended Motion pp.92-96), trial counsel failed to effectively raise and preserve for review the fact that the jury engaged in misconduct

by reaching its penalty phase recommendation to impose the death penalty in an improper manner based upon extrinsic and extra legal considerations. The misconduct denied Mr. Parker a fair sentencing and violated his rights under the Sixth, Eighth, and Fourteenth Amendments. In Claim XIV and Claim XV, Mr. Parker moved the circuit court to allow his representatives to interview the jurors for the purpose of investigating juror misconduct-related post-conviction claims, including the juror misconduct at issue in Claim XIV, and to declare as unconstitutional the ethics rule prohibiting juror interviews. (PCR.390, 395-97; Amended Motion pp.92, 97-99). The circuit court erred in denying without an evidentiary hearing Claim XIV and in denying Mr. Parker's request to interview the jurors.

The circuit erred in denying finding this claim procedurally barred, conclusively refuted by the record, and meritless (PCR. 1500). The court finds the issue procedurally barred because the court concludes that the denial of the motion to examine the jurors could have been raised on direct appeal (*Id.*). However, record clearly shows that trial counsel did not move to examine the jurors *based on the jurors' misconduct of voting for death in order to end deliberations quickly and regardless of the evidence*. Therefore, this issue could not have been raised on direct appeal because, due to trial counsel's ineffectiveness,

it was not raised at trial by trial counsel. The motion to examine the jurors was grounded on the notion that the jury disregarded the instruction to conduct a "single ballot" when the jury took a second and subsequent vote (R. 2336-44, 2972-4). Trial counsel specifically announced that the motion was grounded on the arguments in the motion and the attached newspaper article. Neither the written motion, the article or trial counsel's argument referenced to the misconduct at issue (*Id*.). Indeed, in denying the motion to examine the jurors and the motion to quash the subpoena issued to the newspaper reporter, the court ruled that the jury was entitled to take as many votes as it wanted and relied on the fact that the jury was polled (R. 2338, 2345-46). Clearly, this ruling went to the issue of whether the jury acted improperly in conducting more than a single vote. On the other hand, in presenting Mr. Moore's testimony regarding the juror's post-penalty phase statements to Mr. Moore, trial counsel specifically stated on the record that counsel was presenting this testimony "strictly for mitigation" (R. 2348). In other words, trial counsel made no motion to interview jurors or to hold new penalty phase proceedings based on the misconduct by the jury as testified to by Mr. Moore. Counsel instead simply wanted the court to consider as mitigating the fact that the jury initially voted in

favor of life by a 7 to 5 vote:

> THE COURT: All right. I want to make it clear you are proposing this [Mr. Moore's testimony] in evidence strictly for mitigation?
>
> MR. BOORAS [TRIAL COUNSEL]: Yes, sir, mitigation. That the Court based on TETTERS (phonetic), the Court is to give great weight and difference [sic] to the jury recommendation. This is our position. That the Court should also consider their original recommendation, their original vote which I intend to produce evidence, which was life, and that is for mitigation.

(R. 2348). Therefore, trial counsel failed to raise this issue below. Because the jurors' misconduct in reaching a penalty phase decision denied Mr. Parker a fair penalty phase proceeding, and in light of the fact that the jury originally voted for life, counsel's deficiency was prejudicial. The circuit court erred in denying this claim without an evidentiary hearing. The court also erred in denying post-conviction counsel's request to interview jurors and in not declaring rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar unconstitional.

POINT IV

MR. PARKER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING VOIR DIRE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The circuit court erred in denying Mr. Parker an evidentiary

hearing on Claim II (PCR. 307-10; Amended Motion pp.9-12). Potential Juror Detrich indicated improper bias toward the State when he indicated that a person charged with a crime must be guilty (R. 726). Defense counsel failed to conduct any further examination of Juror Detrich regarding this statement and Juror Detrich never indicated that he could follow the law in this regard. Defense counsel did not assert a challenge for cause to the trial court for the removal of Juror Detrich. This constituted ineffective assistance because a legal basis for such a challenge clearly existed. As a result, due to his own failure in this regard, counsel needlessly wasted one of Mr. Parker's peremptory challenges in removing this biased and prejudiced juror (R. 743). Additionally, Potential Juror Reno indicated an inability to follow the law when he stated that "I am for [capital punishment], but only because life imprisonment doesn't mean that." (R. 499), belying a clear intention to base his imposition of the death penalty upon improper considerations. After defense counsel requested that Reno be removed for cause (R. 505-506), the State falsely asserted that Reno had indicated that he could follow the law in this regard (R. 505-506). The trial court thereafter denied the challenge for cause (R. 506). Trial counsel was ineffective for failing to argue that Reno never indicated that he could follow

the law.

POINT V

SYSTEMATIC DISCRIMINATION IN THE SELECTION OF HIS JURY VENIRE.

The circuit court erred in denying Claim V as amended(PCR. 318-19; *see attached* Appendix Exh. E)without an evidentiary hearing. Mr. Parker asserts in Claim V that he was denied equal protection under the law because the State tried him before a jury from which members of his race had been purposely excluded. *Batson v. Kentucky*, 106 S.Ct. 1712 (1986; *see also Holland v. Illinois*, 110 S.Ct. 2301 (1991); *Swain v. Alabama*, 85 S.Ct. 824 (1965). Defense counsel's failure to object constituted ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). The circuit court erroneously denied the claim without a hearing on the basis that the claim "is not supported by any evidence whatsoever" (PCR. 1491). The circuit court's reasoning is circular because he purpose of an evidentiary hearing is to permit the defendant to present the evidence to establish a basis for relief. Furthermore, the court notes that "[t]his claim is at best conclusion of fact and law" (*Id*.). Mr. Parker should be allowed the opportunity to prove his "conclusion[s] of fact" acknowledged by the court.

POINT VI

INCORRECT AND IMPROPER PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. PARKER TO PROVE THAT DEATH WAS INAPPROPRIATE.

As argued in Claim X of the Amended Motion (PCR 368-70; Amended Motion pp.70-72), trial counsel failed to object to improper and incorrect penalty phase jury instructions and comments that unconstitutionally shifted to Mr. Parker the burden of proving whether he should live or die (*See* R. 2100, 2304-2305; 2317-2318; 2319). The instructions violated Mr. Parker's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and are contrary to the decisions in *Mullany v. Wilbur*, 421 U.S. 684 (1974) and *Ring v. Arizona*, 122 S.Ct. 2428 (2002). Trial counsel's failure to object to the improper burden shifting constituted prejudicially deficient performance.

POINT VII

THE CALDWELL CLAIM.

As asserted in Claim XIII (PCR.387-90; Amended Motion pp.92), the jury was misled by prosecutorial and court comments and instructions that unconstitutionally and inaccurately diluted the jury's sense of responsibility towards sentencing and trial counsel was ineffective for failing to properly object to repeated comments to the jury by the court and the State that

trivialized the role of the jury in Florida's sentencing scheme. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985); *see also Ring v. Arizona*, 122 S.Ct. 2428, 2448 (2002)(Breyer, J., concurring in the judgement)("I conclude that the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death."). While trial counsel made an objection to the "one word in [the penalty phase instructions] about advisory opinion" (R. 2096-97), counsel failed to ineffectively object to both the court's repeated comments that the jury's penalty phase verdict is but a recommendation and merely advisory (R. 407, 2292, 2317, 2318, 2320, 2321, 2322).

POINT VIII

THE DEATH PENALTY IS DISPROPORTIONATE IN MR. PARKER'S CASE.

The death penalty is disproportionate in Mr. Parker's case. The death penalty is reserved for the least mitigated and the most aggravated murders. *Besaraba v. State*, 656 So. 2d 441, 446 (Fla. 1998) *citing Songer v. State*, 544 So. 2d 1010, 1011 (Fla. 1989). Due to both the significant evidence indicating that Mr. Parker did not shoot the victim which the jury never heard due to trial counsel's ineffectiveness (*see* Claim VI and Claim VII) and the extensive mitigation that was also not presented at his

trial (*See* Claims VII and XI), and in light of a lack of evidence to support the aggravators found by the trial court, the death penalty is disproportionate. *See gen. Almeida v. State*, 748 So. 2d 922 (Fla. 1999); *Besaraba; Proffitt v. State*, 510 So. 2d 896 (Fla. 1987).

POINT IX

MR. PARKER'S SENTENCE OF DEATH IS BEING EXACTED PURSUANT TO A PATTERN AND PRACTICE TO DISCRIMINATE ON THE BASIS OF RACE IN THE ADMINISTRATION OF THE DEATH PENALTY.

As asserted in Claim XVI (PCR. Vol.2-Vol.3, 398-4-2; Amended Motion pp.100-04), the death penalty was sought by the prosecution and imposed on Mr. Parker as a direct result of the systematic racial discrimination inherent in the Florida death penalty system. The circuit court erred in denying this claim without an evidentiary hearing.

POINT X

THE JURY RECEIVED INADEQUATE GUIDANCE CONCERNING THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED.

As argued in Claim VIII of the post-conviction motion (PCR 359-65; Amended Motion pp.61-67), fundamental error occurred when, due to ineffective assistance of counsel and trial court error, Mr. Parker's jury received wholly inadequate and vague instructions regarding the aggravating circumstances in

violation of the Sixth, Eighth, and Fourteenth Amendments. Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt," *Hamilton v. State*, 547 So. 2d 630, 633 (Fla. 1989). Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." *Banda v. State*, 536 So. 2d 221, 224 (Fla. 1988). This Court held on direct appeal Mr. Parker's challenge to the instructions on the great risk and avoid arrest aggravators were not preserved for review due to trial counsel's lack of objection. *See Parker v. State*, 641 So. 2d 369, n.11 (Fla. 1994).

POINT XI

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL.

As argued in Claim XVII (PCR. Vol.3, 402-04; Amended Motion pp.104-06), Florida's capital sentencing statute deprived Mr. Parker of his right to due process of law and constitutes cruel and unusual punishment on its face and as applied. The circuit court erred in denying this claim.

POINT XII

EXECUTION BY ELECTROCUTION AND/OR LETHAL INJECTION IS CRUEL AND/OR UNUSUAL AND INHUMAN AND DEGRADING TREATMENT AND/OR PUNISHMENT.

As argued in Claim XXI (PCR. Vol.3, 409-11; Amended Motion 111-13), electrocution and lethal injection are each cruel and/or unusual punishment in violation of the Eighth and Fourteenth Amendment. Furthermore, electrocution and lethal injection violate International Law. The circuit court erred in summarily denying this claim.

POINT XIII

THE COMBINATION OF ALL ERRORS DEPRIVED MR. PARKER OF A FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Parker did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments because the sheer number and types of errors involved, when considered as a whole, virtually dictated the sentence that he would receive. *See Heath v. Jones*, 941 F.2d 1126 (11th Cir. 1991); *Derden v. McNeel*, 938 F.2d 605 (5th Cir. 1991); *Jones v. State*, 569 So. 2d 1234 (Fla. 1990); *Nowitzke v. State*, 572 So. 2d 1346 (Fla. 1990); *Jackson v. State*, 575 So. 2d 181, 189 (Fla. 1991). *See also Ellis v. State* 622 So. 2d 991 (Fla. 1993)(new trial ordered because of prejudice resulting from cumulative

error); *Taylor v. State*, 640 So. 2d 1127 (Fla. 4th DCA 1994).

POINT XIV

MR. PARKER IS INSANE TO BE EXECUTED.

As asserted in Claim XVIII (PCR. Vol.3, 405;Amended Motion pp.107), Mr. Parker is insane to be executed. *See Ford v. Wainwright*, 477 U.S. 399 (1986). Mr. Parker acknowledges that this claim is not ripe for consideration.

CONCLUSION

Mr. Parker respectfully requests this Court to reverse the lower court's order summarily denying the motion for post-conviction relief and remand for an evidentiary hearing, order that Mr. Parker be given access to the previously denied public records from the Broward Sheriff's Office, and conduct an examination of the sealed records from the State Attorneys Office to determine if the records are validly exempt from disclosure and whether the records contain *Brady* material.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Leslie T. Campbell, Office of Attorney General, 1515 N. Flagler Dr., Fl. 9, West Palm Beach, FL, 33401-3428, on June 11, 2003.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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DAN D. HALLENBERG
Florida Bar No. 940615
Assistant CCRC-South
101 N.E. 3rd Ave., Ste. 400
Fort Lauderdale, FL 33301
(954) 713-1284
Attorney for Mr. Mendoza