IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-636

STATE OF FLORIDA,

Appellant,

v.

DONN DUNCAN,

Appellee.

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE AND INITIAL BRIEF OF THE CROSS-APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal by the State of Florida of the circuit court's granting Rule 3.850 relief to Donn Duncan's sentence of death, as well as a cross appeal by Mr. Duncan of the denial of a new trial.[1] The following symbols will be used to designate references to the record in this appeal:

"R"-- the record on direct appeal to this Court

"PCR"-- the record on postconviction appeal to this Court

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

REQUEST FOR ORAL ARGUMENT

Donn Duncan has been sentenced to death. The resolution of issues involved in this action will 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 at issue and the stakes involved. Donn Duncan, through counsel, accordingly urges this Court to permit oral argument.

STATEMENT OF THE CASE

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[1]The cross appeal was filed to preserve the claims for any future federal review.

On January 17, 1991, the grand jury indicted Donn Duncan for first degree murder and aggravated assault (R. 1251-1253). Mr. Duncan was tried on May 20-23, 1991, with the Honorable Daniel P. Dawson, circuit judge, presiding (R. 1-828). The jury found Mr. Duncan guilty on both counts (R. 820, 1251-52). Mr. Duncan's penalty phase occurred on July 1, 1991 (R. 874-1052). The state presented evidence of one aggravator. The defense consisted of two witnesses, Mr. Duncan's sister and Mr. Duncan's friend's sister (R. 929-961). The jury unanimously recommended death (R. 1047, 1317). On August 30, 1991, the circuit court sentenced Mr. Duncan to death, finding one aggravating circumstance and considering fifteen mitigating circumstances that defense counsel submitted (R. 1060, 1340-45, 1346-48).

On direct appeal, this Court found error occurred when the circuit court allowed into evidence a gruesome picture of the victim of Mr. Duncan's prior violent felony, but affirmed the convictions and sentences. Duncan v. State, 619 So.2d 279, 282 (Fla.1993). This Court also granted the state's cross appeal, holding that the circuit court erred in its findings of mitigation.

> In its cross-appeal, the State contends that the mitigating factor of acting under the influence of alcohol and the two statutory mental mitigating circumstances were not established in this case. Although a mitigating

> circumstance need not be proved beyond a reasonable doubt, it must be "reasonably established by the greater weight of the evidence" [citations omitted] A trial court's findings concerning mitigation will not be disturbed if the findings are supported by "sufficient competent evidence in the record." [citations omitted] However, after a thorough review of the record, we agree with the state that the record is devoid of *any* evidence supporting the challenged circumstances.

Duncan, 619 So.2d at 283. The United States Supreme Court denied certiorari on November 8, 1993.

Thereafter, Mr. Duncan filed a 3.850 motion for postconviction relief and amended it several times (PCR V6 784-820; V7 823-75, 932-1007; V8 1069-1215; V10 1484-97, 1551-79). After a Huff hearing, the circuit court granted an evidentiary hearing on three Claims: ineffective assistance of counsel at the guilt phase relating to mental health issues and concession of guilt; ineffective assistance of counsel at the penalty phase; and ineffective assistance of counsel relating to mental health experts.

The evidentiary hearing occurred on December 14, 1999, and June 12-13, 2000 (PCR V1, V2, V3, V5, V6). After three days of testimony, the circuit court, the Honorable Daniel P. Dawson presiding, found that Mr. Duncan did not have the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution at his penalty phase and granted

3.850 relief (PCR V11 1784). The state appealed and, in order to preserve all of the issues for any future review, Mr. Duncan cross appealed.

STATEMENT OF FACTS

Donn Duncan was likely born with a mental illness, psychosis, but he managed to live a somewhat normal life. He was outgoing, fun, polite, and very courteous (PCR V5 525, 530). In his later teens however, Donn suffered two serious head injuries, and his personality seemed to change (PCR V5 527-33). He became paranoid, suspicious, began to have delusions and hallucinations, and started abusing drugs and alcohol (PCR V5 519-21, 530-36). Despite the severe effects of his mental illness, Donn Duncan married twice. Mr. Duncan and his second wife, Diane Goodman, had two children (PCR V5 521). The youngest child, Chad Duncan, died when he was only one month old (PCR V5 521). Chad's death devastated Mr. Duncan; he was so overwhelmed by agony that he had to be sedated and the local authorities recommended Diane Goodman have him committed (PCR V5 522). Soon after Chad's death, Donn Duncan and Diane Goodman divorced.

After the divorce, Donn Duncan drifted through life, tormented by his mental illness, his son's death, and an addiction to crack cocaine (PCR V5 537). There was a brief respite from the agony when Donn Duncan met and became engaged to

Joyce Wells (R. 953). Ms. Wells was killed in a car accident, and Donn Duncan once again turned to drugs (R. 954).

In 1990, Mr. Duncan lived as a boarder in Antoinette Blakely's one bedroom home (R. 576). He and Mrs. Blakely's daughter, Deborah Bauer, who also lived in the home, dated and became engaged. Mr. Duncan continued to abuse alcohol and crack cocaine. Over the course of Mr. Duncan's relationship with Ms. Bauer, the symptoms of his mental illness, specifically the irrational jealousy and paranoid delusions, worsened (PCR V2 298, 317-18, 353). During the month preceding the murder, Mr. Duncan and Deborah Bauer had several loud and violent fights (PCR V2 318-20). On December 28, 1990, while they were out, Deborah Bauer left Mr. Duncan to drink with other men. Mr. Duncan returned to the house very angry. The next morning, Mrs. Blakely told Mr. Duncan that she heard Deborah Bauer tell him to "pack up and leave", and she told him "there's the door" (PCR V2 300). Still intoxicated from the night before, Deborah Bauer went outside to the front porch to smoke (R. 688) Donn Duncan followed her outside and stabbed her. Right after Mr. Duncan stabbed Deborah Bauer, he spoke to Mrs. Blakely. "But he was real – he could have been under the influence of stuff ." (PCR V2 303). Mr. Duncan went to the front gate and waited for the police.

Deborah Bauer arrived at the emergency room at 7: 30 am (R. 686). She was

intoxicated but alert, orientated, and pleasant (R. 688). Her condition was stable for a period of time, then she suddenly deteriorated, lost blood pressure, and died (R. 686). Mr. Duncan was subsequently indicted on one count of first degree murder.

At trial, Mr. Duncan was represented by Robert Larr and Louis Lorincz, who worked for the Public Defender of the Ninth Judicial Circuit. Mr. Larr handled the guilt phase of the trial (PCR V5 548). His theory of defense was to negate premeditation (PCR V5 548). Mr. Larr never consulted a professional or expert regarding a voluntary intoxication defense (PCR V5 550).

Mr. Lorincz, who handled the penalty phase, retained Dr. Lipman, a neuropharmacologist, to work on the case in mid-June 1991, after Mr. Duncan had been convicted of first degree murder (PCR V6 695-96). Dr. Lipman did not complete his evaluation of the case because Mr. Lorincz did not provide the instruction and materials he needed to continue (PCR V6 696). Specifically, Dr. Lipman needed a psychological evaluation, an in depth interview with Mr. Duncan, and witnesses who observed Mr. Duncan's behavior at the time of the crime as well as throughout his drug-abusing years (PCR V6 697). Mr. Lorincz did not inform Dr. Lipman that he would not have an opportunity to complete his evaluation or that he would not testify at the penalty phase (PCR V6 706). After the penalty

phase, Mr. Lorincz wrote Dr. Lipman a letter informing him that the jury recommended a death sentence (PCR V6 706).

Mr. Lorincz hired Dr. Berland, who is a forensic psychologist, for a competency and insanity evaluation in February, 1991 (PCR V2 375). In June 1991, Dr. Berland had determined that Mr. Duncan had a biologically determined mental illness with symptoms of delusional paranoid thinking--he confirmed that diagnosis through interviews with three witnesses, post traumatic stress disorder, endogenous depression, brain injury, and an extensive history of lethal drug and alcohol abuse (PCR V1 28, 39, 48, 50, 56, 65, 66; V3, 439, 440). He did not write a report and send it to Mr. Lorincz (PCR V1 90). Dr. Berland found at least two of the witnesses on his own; Mr. Lorincz did not give Dr. Berland contact information for any lay witnesses (PCR V1 87). Dr. Berland did not complete his evaluation in 1991, did not speak with Mr. Lorincz for enough time to explain his preliminary conclusions, and was not informed that he would not testify at Mr. Duncan's penalty phase until after it was over (PCR V1 23).

Louis Lorincz was in charge of Donn Duncan's penalty phase (PCR V5 566). Throughout the evidentiary hearing, Mr. Lorincz could only state his strategy was to call the witnesses who testified at the penalty phase (PCR V5 583-88). Only he spoke to the expert witnesses he retained, and the decision not to present mental

health mitigation was his (PCR V5 566). To investigate Mr. Duncan's background for mitigating evidence, Mr. Lorincz hired Dr. Lipman and Dr. Berland and spoke to two people: Mr. Duncan's sister and a friend's sister (PCR V5 571, 576-78). Without determining whether Dr. Lipman finished his evaluation of Mr. Duncan, Mr. Lorincz decided not to present Dr. Lipman in mitigation (PCR V5 589-94). Mr. Lorincz did not consult with any other attorneys regarding his final decision (PCR V5 593-94). Mr. Lorincz chose not to present Dr. Berland during the penalty phase because "we hired him to look into competency, so that we could look into insanity at the time of the offense, and his observations and responses in our conversations concerning his findings were such that we could not use him in my estimation." (PCR V5 599). Mr. Lorincz did not ask Dr. Berland about mitigation for the penalty phase (PCR V5 606-8). Though he was asked on several occasions and he had six months while the evidentiary hearing was continued to review his file, Mr. Lorincz could not remember the reason why he decided not to present mental mitigation (PCR V5 601-3, 605-6, V2 77).

The penalty phase Mr. Lorincz presented consisted of two witnesses and is 33 pages in the record. Mr. Duncan's sister, Una Liebig, testified about their childhood, though she focused on her childhood (R. 933-61). Mr. Lorincz asked questions such as: "He [her step-father] didn't beat you, did he?" (R. 946). Mr.

Duncan's friend's sister, Sarah Martin, testified that her brother told her Mr. Duncan was a good, conscientious, and hard worker, he told her he had a drinking problem, and he was nice to her (R. 929-33). Sarah Martin described her contact with Mr. Duncan as sporadic, and Una Lliebig testified that did not see Mr. Duncan frequently and that they "more or less lived separate lives" (R. 930, 959). The jury unanimously recommended the death penalty (R. 1047).

At the sentencing hearing, Mr. Lorincz did not submit additional evidence, but argued that he established the following fifteen factors:

> 1)Duncan's childhood and upbringing saddled him with an emotional handicap; 2)Duncan's ability to conform his conduct to the requirements of the law was substantially impaired at the time of the crime; 3) Duncan was under the influence of extreme mental or emotional disturbance at the time of the crime; 4) the defendant was under the influence of alcohol at the time of the killing; 5) the killing was not for financial gain; 6) the killing did not create a great risk of death to many persons; 7) the killing did not occur while Duncan was committing another crime; 8) the victim was not a stranger; 9) the victim was not a child; 10)Duncan was a good, dependable, and capable employee, 11)Duncan was a good listener and supportive friend; 12) Duncan had satisfactorily completed his parole and was discharged from parole; 13)Duncan confessed to the killing; the killing came as a result of and subsequent to a domestic dispute; 15) Deborah Bauer chose Donn Duncan to be her husband.

Duncan, 619 So.2d 279. The circuit court followed the jury's recommendation and

sentenced Donn Duncan to death.

SUMMARY OF ARGUMENT

ANSWER BRIEF

ARGUMENT I: The circuit court used the correct law and did not abuse its discretion in holding that counsel's failure to present mental health mitigation at Donn Duncan's penalty phase was ineffective assistance of counsel.

CROSS-APPEAL

ARGUMENT I: The circuit erred in finding that Mr. Duncan was not deprived of the effective assistance of counsel at the guilt phase, where counsel began by essentially pleading Mr. Duncan guilty to second degree murder, did not pursue an available and viable voluntary intoxication defense, neglected to object to the prejudicial display of slides and introduction of pictures which caused a juror to lose consciousness and be excused from service, and ended by pleading Mr. Duncan to second or, depending on the jurors' understanding of the law and counsel's closing argument, first degree murder. The circuit court also erred in finding that counsel's failure to present mitigating evidence of and challenge the 1969 prior violent felony aggravator and present mitigating evidence of Donn Duncan's good prison record was not ineffective assistance of counsel.

ARGUMENT II: The evidence established throughout Mr. Duncan's death penalty proceedings proves that his was not one of the most aggravated and least mitigated crimes. When this Court conducted a proportionality review of Mr.Duncan's death sentence on direct appeal, there was, due to penalty phase counsel's ineffective assistance, essentially no mitigation to weigh against the sole aggravator. Postconviction proceedings, however, revealed extensive and substantial mitigation that proves death is a disproportional punishment for Mr. Duncan.

ARGUMENT III: To the extent it has and continues to preclude undersigned counsel from investigating and presenting claims that can only be discovered through interviews with jurors, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar is unconstitutional.

ARGUMENT IV: The cumulative effect of the errors that occurred during Mr. Duncan's trial violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair trial.

<u>ANSWER BRIEF</u>

ARGUMENT I

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT MENTAL MITIGATION AT MR. DUNCAN'S PENALTY PHASE WAS INEFFECTIVE ASSISTANCE OF COUNSEL WHICH VIOLATED MR. DUNCAN'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

1. Standard of Review

Appellant did not completely state the correct standard of review for ineffective assistance of counsel claims, failing to note the discretion that this Court gives to circuit court findings of fact.

> Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the <u>*Strickland*</u> test. This requires an independant review of the trial court's legal conclusions, **while giving deference to the trial court's factual findings**.

<u>Reichmann v. State</u>, 777 So.2d 342, 350 (Fla.2000)(internal citations omitted)(emphasis added).

> So long as its decisions are supported by competent

> substantial evidence, **this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given the evidence by the trial court. We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact.**

Porter v. State, 788 So.2d 917, 923 (Fla.2001)(emphasis added).

2. The Circuit Court's Findings of Fact

The circuit court made a clear finding of fact that:

> Based on Dr. Berland's testimony, the Court finds that counsel knew or should have known of the existence of various mitigating factors that could have been presented during the penalty phase.

(PCR V11 1772). This finding is supported Dr. Berland's unrebutted testimony that the murder resulted from one of Mr. Duncan's life-long paranoid delusions caused by brain injury and biological psychosis. Because Deborah Bauer left Donn Duncan to drink beer with another man the night before the killing, Mr. Duncan had a basis for his psychotic delusion that Deborah Bauer was having an affair and perhaps leaving him, and this resulted in the crime (PCR V3, 436-40). For that reason, Mr. Duncan was under an extreme emotional disturbance at the time of the crime and his ability to conform his conduct to the requirements of the law was substantially impaired (PCR V1 108, 115-17). Additionally, the toxic build up of

cocaine and alcohol in Mr. Duncan's system exacerbated his delusional paranoid psychosis at the time of the crime, Mr. Duncan suffered from post traumatic stress disorder, endogenous depression, brain injury, and an extensive history of lethal drug and alcohol abuse (PCR V1 28, 39, 48, 50, 56, 65, 66; V3 439, 440).

The circuit court's finding that "mental health mitigators which could have affected the outcome of the penalty phase were available but not introduced cannot be refuted from the record, and was not refuted at the evidentiary hearing" is further supported by the unrebutted testimony of several witnesses who testified, both for the state and the defense, at the evidentiary hearing (PCR V11 1774).

Alice Porter, Donn Duncan's ex-wife, began dating Donn Duncan when he was seventeen years old. At that time, Donn Duncan routinely drank alcohol to the point of unconsciousness or blacking out, which she described as being conscious but completely dissociated from reality. During that time, Mrs. Porter saw Donn Duncan suffer two severe head injuries and noted that his behavior changed after those injuries. Mrs. Porter testified that, after the injuries, "it was like he was Donn but he was someone different" (PCR V5 530).

> Donn and I used to get along extremely well, and it seemed like after the accidents that things started changing a little. Like it was to where he didn't trust me or trust probably anybody.

*   *   *

> I never would have described Donn as being paranoid when I met him because he seemed to be kind of outgoing, you know, but afterwards it was like – it was like he was Donn but he was someone different. He had a different look to him, a different attitude. He became very paranoid.

(PCR V5 530).

> But if there were other people around that he didn't know, he thought they were, you know, looking at him or talking about him, you know, which really didn't matter. . . .He was always very paranoid of other people in large settings.

(PCR V5 531).

> A. . . . Well, he used to think that – like sometimes he would say, well, who were you talking to, you know, or who was that, and there would be nobody –
>
> Q. And you weren't talking to anybody?
>
> A. No.
>
> Q. And there was nobody there?
>
> A. No.

(PCR V5 535).

Donn Duncan was paranoid, introverted, and thought people were talking about him and considered him crazy (PCR V5 530-31). This behavior worsened

with alcohol (PCR V5 531). Mrs. Porter testified that Donn Duncan seemed to have two different behaviors; he usually treated her very well, but once he beat her because "they told him to" (PCR V5 533-35). No one else was present, so Mrs. Porter did not know who "they" were (PCR V5 533). Donn Duncan's paranoia worsened to the extent that he would not go anyplace public, he heard voices and noises, and he would often "get a look like, I don't like saying this, but he would get a look like, you know, the lights are on but nobody's home" (PCR V5 534).

Mrs. Porter also testified that Donn Duncan supported her through her father's death, and "if it hadn't been for Donn, I wouldn't have wanted to go on" (PCR V5 538).

Though Mrs. Porter was married to Donn Duncan and knew his sister, Una, Mrs. Porter has had the same name since 1981, and has continuously lived in the same house where she was born and raised, counsel did not contact her (PCR V5 539-40, 543). Had counsel contacted her, Mrs. Porter would have provided the same information she provided to Dr. Berland and Dr. Lipman for the evidentiary hearing, and she would have testified.

Janet Felty met Donn Duncan in 1978, when he dated and married her sister, Diane Goodman. Mrs. Felty often spent time with Donn Duncan and noticed that, without reason, he feared meeting new people and going to public places . He

believed people who did not know him disliked him, talked about him, and stared at him (PCR V5 519-20).

> He could change in a split second. When we were around several people and if a couple of people were talking, he always assumed they were saying things about him. We tried to let him know that they weren't, you know, he was just paranoid. I mean, he just – he just always thought people didn't like him.

(PCR V5 519). She observed Donn Duncan talking to himself and many instances when he would stare blankly and not respond (PCR V5 520-21). She repeatedly described him as paranoid (PCR V5 519-20).

Mrs. Felty also described Donn Duncan's crazed reaction to his son's death (PCR V5 521-24).

> He didn't sleep. When I was around, he just couldn't sleep. It was just – the day of the – the night before, when we went to the funeral home, we didn't even know if Donn was going to be there. He was just so – different. He did show up about 30 minutes before, and he was just really tore up. He was – I mean, it was his son. The day of the funeral, he did go to the cemetery with us, and we were all together that afternoon. Finally that night I went home. I said, you know, you all need to rest because you haven't had any sleep and you just need to lie down. I had been home 45 minutes to an hour, and I got a phone call and they told me that I needed to get to my sister's. When I got there, Donn was busting up the windows. He had busted up just things inside the house. He had almost destroyed it. We didn't know what to do. We took him to the emergency room to see – well, first

> the law came. We called. We didn't know what to do. They said that he was in grief, so they couldn't do anything to him.
>
> We took him to the emergency room, and I asked them, I said, can you just give him something to knock him out, just to help him sleep, to get over this? So they said they did. We were on our way home and we thought that he was relaxed, you know, and calmed down; and as soon as he got out of the car, he just went and started doing it again. He just had this look in his eyes. We called the law again, and they said the only thing that we could do was have him committed, and my sister said she couldn't do that to him because of what he had been through.
>
> * * *
>
> My sister, I took my sister to a friend's house. Eventually, yes, I did leave, but we thought he had finally laid down and slept and turned up missing. We didn't know where he was. We looked and looked, and the next day we found him at the cemetery laying on his son's grave.

(PCR V5 522-24). Counsel did not contact Mrs. Felty, but if he had, she would have testified and provided this information to Donn Duncan's mental health experts (PCR V5 524).

Frank Mulcahy was Donn Duncan's life-long friend and roommate. Mr. Mulcahy met Donn when they were children and described their continuous and escalating drug abuse. Mr. Mulcahy used drugs with Donn Duncan while they were

teenagers, in prison, and used crack cocaine, marijuana, dilaudids, and alcohol daily with Mr. Duncan in the late 1980s.

> Q. Did Donn use a lot of crack?
>
> A. Well, when he got smoking it he did. He didn't realize it, but he did.
>
> Q. About how often would Donn smoke crack?
>
> A. Smoked it every day.
>
> Q. How many times a day?
>
> A. Well, how much was available? If we had 100 rocks, we would probably smoke them in one day if that was the case.

(PCR V6 635-36).

Mr. Mulcahy confirmed that Mr. Duncan hallucinated; he heard Donn Duncan "hollering at somebody and not coherent. Sometimes it would be like a dream, cursing somebody out or something." (PCR V6 681). Mr. Mulcahy saw Donn Duncan pass out and suffer head injuries. Counsel did not contact Mr. Mulcahy, but if they had, he would have testified (PCR V6 691).

Dr. Lipman testified that Donn Duncan's chronic alcohol abuse had a reversible poisoning effect on his brain, which rendered him almost always, including the morning of the crime, impaired. Because Donn Duncan was a chronic

alcoholic and drug user, he could easily mask his affected behavior so that ordinary people, such as Carianne Bauer, Antoinette Blakely, and the arresting officers, would think he was sober. This poisoning effect exacerbated Donn Duncan's underlying mental illness and affected his behavior the morning of the crime.

> I would have testified that he had a long and serious drug history; that it began with alcohol at an early age; that it involved a period of intravenous stimulant abuse of various types of stimulants including amphetamine. Later he began to use depressants which we call speed balling, the sequential or continuous use of stimulants and depressants; and that he had used these drugs to the point of experiencing psychotic episodes due to them, hallucinations of movement, of sound.
>
> I would have reported that he then went on to use cocaine which is another psychostimulant; that in the months before the offense, he deteriorated sociologically, we might say, becoming transient, losing contact with friends and his family, regularly using alcohol and cocaine; and that he was living as a semi-transient, losing contact with his friends and his family, regularly using alcohol and cocaine; and that he was living as a semi-transient at the time of the offense. He was experiencing jealousy and paranoia; and that his manner of using alcohol and cocaine over the months that he was using it consistent with what we know to produce a persistent and residual neurointoxication.
>
> I think I did opine that based on the description of how much alcohol he had drunk in the hours before the offense, that I could not be confident about his alcohol concentration in his blood at the time of the offense, but that it would be low, and probably would be zero. I've

since looked at those concentrations a little more, and I'm no more confident now than I was before, but I could describe the reasons for my uncertainty, if you would like.

Certainly, though, he was using alcohol in the weeks before the offense very severely, as well as cocaine, such that his blood alcohol concentration would have been very, very high. Not only when he went to bed but also when he woke up in the mornings. Basically he was drunk all the time. This produces persistent effects on the brain which we pharmacologists measure, and one takes considerable time to recover from them. . . . Weeks or months to recover completely. In some cases the individual doesn't recover completely. This has to do with diet and the amount of thiamine in the diet during the time of intoxication particularly. It can cause a Wernicke's or Korsakoff's, and there are some other neurological deteriorations that can be permanent also. But at the very least, it produces a neurointoxication that is measured by tests that we call physiological/psychological tests, some of which are also used by neuropsychologists.

. . . Now, let me also explain that although its generally true for anyone, the drinks and the manner that he drinks or did at the time, the exact form, the behavioral form of the deficit, of the derangement of his brain function, is going to have a great deal of dependance on his underlying psychological structure.

Now, for this I was dependant on Dr. Berland's consultation, and from what little he had done at the time that I consulted him by phone in 1991, he told me that he knew Donn Duncan to be personality disordered of an organic typology and paranoid. That comported with my own opinion at the time.

(PCR V6 703-5).

> He is very finely balanced. His state of normality is retained by his exerting enormous energy, and these cause him to anchor his behavior by restraint and inhibition. The effect of eroding restraint or inhibition will provoke him into an abnormal behavioral state.
>
> Now, a psychologist would see that as a prediliction toward the forces that cause the state, such as, for instance, Dr. Berland's conclusion to me that the man has paranoid thoughts and delusional thoughts. When you erode restraint and inhibition, that's all you have left. You have irrationality fearful paranoid delusional thinking that motivates the person's behavior. My contribution then would have been, had I testified, to an explication of how the drug and alcohol use contributed to that discontrol.

(PCR V6 716). Mr. Duncan was under an extreme mental or emotional disturbance at the time of the crime and his ability to conform his conduct to the requirements of the law was substantially impaired (PCR V6 720).

Carrieann Bauer, the victim's daughter, confirmed that Mr. Duncan's paranoid behavior continued up to the day of the crime.

> Q. Okay, well, let me ask you this about your mother. Do you know what the arguments were about?
>
> A. Um, not really. Usually probably over something stupid.
>
> He always thought she was seeing somebody or

> messing around with somebody else.

(PCR V2 317-18).

> Q. And he thought she was going out with other men?
>
> A. It wasn't going out but he always assumed – they could be out together and he would assume still that she's cheating even though they're out together, yeah.
>
> Q. Was – was she going out with other men?
>
> A. No.
>
> Q. So he really had no reason to believe that she was cheating on him?
>
> A. Except for whatever he was thinking, yes.

(PCR V2 353).

The circuit court made the finding of fact that counsel's consultation with Dr. Berland was "minimal" (PCR V 11 1772). This too, is unrebutted and supported by competent and substantial evidence. At the evidentiary hearing, Dr. Berland testified regarding his billing and contact records for this case. The records revealed that counsel and Dr. Berland conferred for only 69 minutes (PCR V1 78-88). Twenty-three minutes of consultation occurred before Dr. Berland interviewed Mr. Duncan (PCR V1 88). The forty-six remaining minutes of consultation occurred over six telephone calls, spanning 10 minutes, 2 minutes, 13

minutes, 4 minutes, 8 minutes, and 10 minutes. Dr. Berland definitively testified he could not have explained his conclusions regarding Mr. Duncan's mental mitigation during such short conversations (PCR V1 84, 86-86).

The circuit court found that counsel could "not adequately explain why Dr. Berland was not called to present the mental health mitigation which he had developed" (PCR V11 1774). This finding is likewise supported by competent and substantial evidence in the record.

> Q: Can you tell me some more about the other mental health or substance abuse issues and your thinking on whether or not to call Dr. Berland and what that was?
>
> A: I had oral communications with Dr. Berland concerning Mr. Duncan. I did not obtain a written report from him concerning his findings. I did not note in my files our conversations, just at the time I made an evaluation of what I was told and made a determination that I would not use Dr. Berland in the penalty phase.
>
> Q: Can you recall what your thinking was in that regard?
>
> A: The only thing I can recall is that in attempting to evaluate the value or detriment of that testimony was that it was more detrimental than valuable.
>
> Q: **Can you remember why?**
>
> A: **No, I can't.**

(PCR V2 372-77).

Q: And so why did you not call Dr. Berland as a witness?

A: Based on the information he had provided me in our communications, conversations, I did not feel that he could help in any respect.

Q: Now, is that for both the guilt and the penalty phase?

A: Yes, sir.

Q: What information did he provide you?

A: **At this particular time, I do not recall what he had provided to me.**

Q: **Did you make a memo to the file as you did with Dr. Lipman as to why you did not call Dr. Berland?**

A: **No, I did not.**

(PCR V5 601-2)

*   *   *

Q: Did you discuss that with anybody, whether or not you should call Dr. Berland as a witness at the penalty phase of the trial?

A: If you're talking about the conversation I had with Mr. Derocher and Ms. Cashman concerning Dr. Lipman, no. I discussed the matter with Bob Larr as to what the doctor provided to me, the information, and a decision was made that we would not use him.

Q: Why did you decide not to use him in the penalty phase.

A: Because the information that he provided I did not think would be helpful in the penalty phase.

Q: **But at this point you don’t recollect what that information was?**

A: **That’s correct.**

Q: **Do you know if he had completed all of his work that he would have relied on to testify at the penalty phase?**

A: **I assumed that he had because I do not recall.**

(PCR V5 602-3).

Q: Did you ask him that if you intended to call him as a witness at the penalty phase, was there anything further that he could develop that could be of significance that would go towards the statutory mitigators or non-statutory mitigation?

A: I certainly did not ask him that question as you phrased it. I asked him what his testimony would be, and once I was made aware of what his testimony would be, I made a determination that we would not use him.

Q: **How long a conversation was that that you had with Dr. Berland?**

A: **I don’t recall.**

(PCR V5 605).

Q: **What questions did you ask him to find out if he developed any statutory mitigators?**

> A: **I don’t recall.**
>
> Q: **What questions did you ask him to find out if he developed any non-statutory mitigators?**
>
> A: **I don’t recall.**

(PCR V5 606).

3. The Law

The circuit court found: “Based on Dr. Berland’s testimony, the Court finds that counsel knew or should have known of the existence of various mitigating factors that could have been presented during the penalty phase.” The circuit court found that penalty phase counsel could not explain why he failed to investigate and present this evidence beyond the assertion that it was his “strategy”. Appellant argues that the analysis ends there.[2] Fortunately, neither this Court nor the United

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[2]Appellant also argues “the trial judge, “by placing the onus on the State to demonstrate that counsel had a valid strategic or tactical basis for declining to present those factors” (R, 1772), improperly shifted the burden under Strickland ” (AB at 16). This argument is disingenuous. The quoted portion of the record is taken out of context, and the circuit court clearly evaluated this claim using the Strickland standard:

> The Court find that this testimony does not adequately explain why Dr. Berland was not called to present the mental health mitigation evidence which he had developed. Simply asserting that something was done for unknown strategic reasons is not sufficient. An evidentiary hearing is held so that the Court may hear what the actual

States Supreme Court have mandated such a subjective and shallow analysis.

"The noun "strategy" is not an accused lawyer's talisman that necessarily defeats a charge of constitutional ineffectiveness. The strategy, which means "a plan, method, or series of maneuvers or stratagems for obtaining a specific goal or result, Random House Dictionary 1298 (Rev.ed1975), must be reasonable." Miller v. Francis, 269 F.3d 609, 616 (6th Cir.2001)(citations omitted). In Strickland v. Washington, the United States Supreme Court held that reasonable attorney performance requires counsel to conduct a *reasonable* investigation.[3] "[C]hoices

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> reason was, and may then determine whether that reason is consistent with professional standards.

(PCR V11 1772).

[3]Appellant misstates the Strickland standard for determining whether counsel's performance was deficient: "Unless no reasonable lawyer would have made the decision not to present the witness, counsel cannot have been ineffective." (AB 16). In fact, as both this Court and the United States Supreme Court have repeatedly noted, Strickland mandates an objective standard for determining deficient performance. "[A] defendant must show that counsel's representation fell below an objective standard of reasonableness". Strickland, 466 U.S. 688. Appellant's professed standard, that "[u]nless **no** reasonable lawyer would have made the decision not to present the witness, counsel cannot have been ineffective.", makes the standard outlined in Strickland subjective. *See* Williams v. Taylor, 529 U.S. 362 376-78 (2000)("reasonable lawyers and law givers regularly disagree with one another. Congress surely did not intend that the views of one such judge who might think that relief is not warranted in a particular case should always have greater weight than the contrary, considered judgment of several other reasonable judges.") The issue is whether the *strategy* was reasonable, not whether a lawyer is reasonable.

made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. This Court too has recognized that clearly defined obligation. "[W]e have recognized that an attorney has a strict duty to conduct a *reasonable* investigation of a defendant's background for possible mitigating evidence." State v. Reichmann, 777 So.2d 342, 350 (Fla.2000)(emphasis added). In a capital case penalty phase, the United States Supreme Court has defined counsel's obligation to conduct a "reasonable" investigation as an "obligation to conduct a **thorough** investigation of the defendant's background" for penalty phase mitigation. Williams v. Taylor, 529 U.S. 362, 376-78 (2000)(emphasis added).

This was a one aggravator case, making counsel's obligation to conduct a reasonable investigation more defined that in other, multiple aggravator, cases.

> Long ago we stressed that **the death penalty was to be reserved for the least mitigated and most aggravated of murders**. To secure that goal and to protect against arbitrary imposition of the death penalty, we review each case in light of others to make sure the ultimate punishment is appropriate.
>
> . . . **We have in the past affirmed death sentences supported by only one aggravating factor, but those cases involved either nothing or very little in mitigation.**

Besarba v. State, 656 So.2d 441 (Fla.1995)(emphasis added) citing Songer v. State, 544 So.2d 1010 (Fla.1989). As this was clearly one of the least aggravated crimes, counsel's obligation was clearly defined to establish, if possible, more than "nothing or very little in mitigation". Id.

The evidentiary hearing evidence established that counsel did not conduct a reasonable investigation of Mr. Duncan's background for possible mitigation. Counsel described his penalty phase investigation and preparation:

> A. The way I operated was, I told Doug [the investigator] what we needed to look for and to obtain whatever information he could and to provide it to me, and then when he would tell me who we spoke to and what he found out that fit within the category of what I felt we needed for penalty phase purpose, then I would give him further directions with regard to that. Ultimately I ended up talking to the people who I put on in the penalty phase.
>
> Q. What information did you need and want?
>
> A. We wanted information dealing with Mr. Duncan's past history which might result in a jury having a sympathetic view towards him and his upbringing and his background.

(PCR V5 571-2).

> Q. What efforts did you make to follow up on witnesses for penalty phase mitigation as far as people that had known Mr. Duncan throughout his life?

> A. That responsibility was placed on Mr. Deprizio [the investigator]. He spoke to Una and others. We attempted to obtain the names of individuals, we went back and attempted to obtain school records from – of Mr. Duncan's.

(PCR V2 398).

> Well, you see, **we initially interviewed Mr. Duncan. We had communications with his sister Una**. Based upon what he told us and based upon whatever information we had, that directed our investigation process. **I did not plan on talking to everyone in the state of Florida about Mr. Duncan. I planned on talking to those people where [sic] there was some indication that they were significant to and maybe had relevant information to the case.**

(PCR V5 583-4). Counsel hired two mental health experts, but did not present any mental health mitigation. "I chose not to call those doctors, I am not certain that those doctors would have presented testimony which would have supported those mitigators [the two statutory mental health mitigators]" (PCR V2 385). The evidentiary hearing evidence conclusively established that counsel made this decision with regard to Dr. Berland's mental health evidence without ever hearing the mental health mitigation that existed (PCR V1 84, 86). The evidence also established that both doctors would have testified that both statutory mental health mitigators applied.

The penalty phase that defense counsel did investigate and present is 33

pages in the record and consisted of two witnesses: Mr. Duncan's sister, Una Liebig, and Mr. Duncan's friend's sister, Sarah Martin. Sarah Martin described her contact with Mr. Duncan as sporadic (R. 930). She testified that her brother told her Mr. Duncan was a good, conscientious, and hard worker, and he was nice to her (R. 931). Mr. Duncan's sister, Una Liebig, testified about her childhood.

Defense counsel submitted, and the trial court considered the following fifteen factors:

> 1)Duncan's childhood and upbringing saddled him with an emotional handicap; 2)Duncan's ability to conform his conduct to the requirements of the law was substantially impaired at the time of the crime; 3) Duncan was under the influence of extreme mental or emotional disturbance at the time of the crime; 4) the defendant was under the influence of alcohol at the time of the killing; 5) the killing was not for financial gain; 6) the killing did not create a great risk of death to many persons; 7) the killing did not occur while Duncan was committing another crime; 8) the victim was not a stranger; 9) the victim was not a child; 10)Duncan was a good, dependable, and capable employee, 11)Duncan was a good listener and supportive friend; 12) Duncan had satisfactorily completed his parole and was discharged from parole; 13)Duncan confessed to the killing; the killing came as a result of and subsequent to a domestic dispute; 15) Deborah Bauer chose Donn Duncan to be her husband.

Duncan, 619 So.2d 279. On direct appeal, this Court held that factors 2, 3, and 4 were not established.

> In its cross-appeal, the State contends that the mitigating factor of acting under the influence of alcohol and the two statutory mental mitigating circumstances were not established in this case. Although a mitigating circumstance need not be proved beyond a reasonable doubt, it must be "reasonably established by the greater weight of the evidence" [citations omitted] A trial court's findings concerning mitigation will not be disturbed if the findings are supported by "sufficient competent evidence in the record." [citations omitted] **However, after a thorough review of the record, we agree with the state that the record is devoid of *any* evidence supporting the challenged circumstances.**

Duncan, 619 So.2d at 283 (emphasis added). Factors 5, 6, 7, 8, 9, and 15 are not mitigating circumstances as a matter of law:

> Having found that only one aggravating circumstance is applicable in this case, we turn now to the mitigating evidence established by DeAngelo. **Some of the evidence DeAngelo points to as mitigating is not mitigating at all. For example, he established, and the trial court found, that his victim was not a stranger or a child, that the killing was not for financial gain, that it did not create a great risk to many persons, and that it did not occur during the commission of another crime. Yet, neither evidence of who the victim "was not" nor the fact that the crime was not more aggravated reduces the moral culpability of the defendant or the seriousness of the crime which was committed. The same is true of the finding that DeAngelo was "not a drifter." While this fact was established, we do not believe that it was mitigating in any meaningful sense.**

Deangelo v. State, 616 So.2d 440, 443 (Fla.1993)(emphasis added).[4] Accordingly, the only evidence that could mitigate against imposition of the death sentence based on defense counsel's investigation and presentation, *if considered mitigating and established by the greater weight of the evidence*, were the following factors:

> 1)Duncan's childhood and upbringing saddled him with an emotional handicap; 10)Duncan was a good, dependable, and capable employee, 11)Duncan was a good listener and supportive friend; 12) Duncan had satisfactorily completed his parole and was discharged from parole; 13)Duncan confessed to the killing; and 15)the killing came as a result of and subsequent to a domestic dispute.

Duncan, 619 So.2d 279.

Whether counsel performed deficiently is a case specific analysis. "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Strickland, 466 U.S. 688. The circuit court found, in the circumstances of this case, counsel's performance was deficient. Counsel could not offer any explanation, let alone a reasonable explanation, for why he did not investigate and

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[4]The evidence also established that counsel was ignorant of much of the law concerning mitigation. For example, counsel believed that 5,6,7,9, and, 15 were mitigating factors. "I was under the impression that we had witnesses with regard to most everything that we were able to establish, and I think we did establish some 10 or 12 nonstatutory mitigators." (PCR V6 623).

present the substantial mental mitigation that was available. Dr. Berland testified Donn Duncan suffered from chronic, long-lasting biological psychosis which was exacerbated by brain injury (PCR V1 37). Mr. Duncan's mental illnesses supported the statutory mitigating circumstances that his ability to conform his conduct to the requirements of the law was substantially impaired at the time of the crime and that he was under extreme mental or emotional disturbance at the time of the crime (PCR V1 80-83). Additionally, through testing and the few witnesses he had time to contact before Donn Duncan's penalty phase, Dr. Berland could have also testified that the following nonstatutory mitigators also existed in Mr. Duncan's case:

> 1) A chronic, long lasting psychotic disturbance which included delusional paranoia and hallucinations
>
> 2) post traumatic stress disorder
>
> 3) endogenous depression
>
> 4) brain injury
>
> 5) an extensive history of lethal drug and alcohol abuse

(PCR V1 28, 39, 48, 50, 56, 65, 66). Drug use exacerbated Donn Duncan's mental illness, though he suffered from delusions and endogenous depression with and without drug use (PCR V1 64-66). In addition, Dr. Berland testified that had

trial a counsel provided time, prison records, and guidance, he could have testified to additional non-statutory mitigators:

1) Mr. Duncan was a steady and hard worker

2) Mr. Duncan was capable of forming strong and loving relationships

3) Mr. Duncan had a good prison record with excellent work and dorm ratings

4) Mr. Duncan was intoxicated or suffering from the effects of drugs and alcohol at the time of the crime because of the kindling effect

(PCR V1 110-116). With minimal investigation, counsel could have supported each of the statutory and nonstatutory mental health mitigators with corroborating evidence.

"[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case" Strickland, 466 U.S. at 690. After three days of testimony, trial court made the determination from its "superior vantage point in assessing the credibility of witnesses and in making findings of fact" that counsel was deficient and "there is a significant likelihood that the outcome of the penalty phase would have been different had the jury heard the testimony" (PCR V11 1774). Porter v. State, 788 So.2d 917, 923 (Fla.2001). That determination is supported by this Court's case

law, and is materially indistinguishable from cases in which this Court granted relief.

In Mitchell v. State, 595 So.2d 938 (Fla.), this Court upheld a finding of ineffective assistance of penalty phase counsel where counsel had the defendant examined by two mental health experts but did not make arrangements for them to testify. In this case, counsel had Mr. Duncan examined by two mental health experts but did not make arrangements for them to testify.

In Hildwin v. Dugger, 654 So.2d 107, 110 (Fla.1995), this Court found that Hildwin was prejudiced by ineffective assistance of penalty phase counsel. "We recognize that Hildwin's trial counsel did present some evidence in mitigation at sentencing.. . .The defense called five lay witnesses. . . .The testimony of these witnesses was quite limited." Post conviction proceedings revealed that two mental health experts found both statutory mental health mitigators four nonstatutory mitigators: childhood abuse and neglect, history of substance abuse, signs of organic brain damage, and Hildwin performs well in a structured environment such as prison. Id. Similarly, Mr. Duncan's counsel presented two witnesses in mitigation, both of whom described their contact with Mr. Duncan as sporadic. Their testimony was limited. During postconviction proceedings, two mental health experts testified that both of the statutory mental health mitigators applied, as well as several non-statutory mitigators.

In Reichmann v. State, 777 So.2d at 350, this Court upheld the circuit court's finding that Reichmann's failure to investigate and present mitigating evidence at the penalty phase was ineffective assistance of counsel. This Court noted "**defense counsel was unable to provide any explanation as to why he did not conduct an investigation or contact witnesses available to him**." Id. (emphasis added). Likewise, in Mr. Duncan's case, "defense counsel was unable to provide any explanation as to why he did not conduct an investigation or contact witnesses available to him." Id. Defense counsel presented no evidence to counter the State's claims of aggravation and very little in support of mitigation.

In Ragsdale v. State, 798 So.2d 713 (Fla.2001), this Court held that counsel's failure to investigate and present available mitigating evidence was ineffective assistance. "The record establishes that counsel essentially rendered no assistance to Ragsdale during the penalty phase of trial." Ragsdale, 798 So.2d at 716. "Indeed the record reflects that counsel's entire investigation consisted of a few calls made by his wife to Ragsdale's family members. Counsel did not know who his wife contacted or the content of the conversations between his wife and the individuals contacted." Ragsdale, 798 So.2d at 719. "Furthermore, unlike the situation in *Asay*, since counsel did not conduct a reasonable investigation, he was not informed as to the extent of the child abuse suffered, and thus he could not

have made an informed decision not to present mitigation witnesses." Ragsdale, 798 So.2d at 720. "[T]he evidence establishes that these witnesses would have been available if counsel had conducted a minimal investigation." Ragsdale, 798 So.2d at 719. In Mr. Duncan's case, defense counsel's entire investigation (other than hiring but not consulting with two mental health experts) consisted of speaking to two people: "I ended up talking to the people who I put on in the penalty phase." (PCR V5 571-72). Counsel described this decision to speak with only two people: "I did not plan on talking to everyone in the state of Florida about Mr. Duncan." (PCR V2 283-84). Like the situation in Ragsdale, "since counsel did not conduct a reasonable investigation, he was not informed as to the extent of the [mental mitigation available] and thus he could not have made an informed decision not to present mitigation witnesses." Ragsdale, 798 So.2d at 720. "[T]he evidence establishe[d] that these witnesses would have been available if counsel had conducted a minimal investigation." Ragsdale, 798 So.2d at 719.

As well, the United States Supreme Court granted relief in a materially indistinguishable case. In Williams v. Taylor, Williams was convicted of first degree murder and received a unanimous death recommendation during his penalty phase. Id. at 368-70. Williams had been convicted of several prior violent felonies, including an assault that left a woman in a "vegetative state" with no prognosis of

recovery. Id. at 368. During the penalty phase, counsel presented "Williams' mother, two neighbors and a taped statement by a psychiatrist". Id. Habeas proceedings revealed that substantial background and mental health mitigation was available but Williams' counsel did not investigate it. The United States Supreme Court noted that, "not all of the additional evidence was favorable to Williams" but that "the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession". Id. at 398. The Court upheld the trial court's grant of penalty phase relief:

> After hearing additional evidence developed in the postconviction proceedings, the very judge who presided over William's trial, and who once determined that the death penalty was "just" and "appropriate," concluded that there existed "a reasonable probability that the result of the sentencing proceeding would have been different" if the jury had heard that evidence."

Id. at 396-97.

Likewise, the very judge who presided over Mr. Duncan's trial and determined that the death penalty was just and appropriate concluded that there was a "significant likelihood that the outcome of the penalty phase would have been different had the jury heard the testimony" and that counsel, therefore, was ineffective (PCR V11 1774). Mr. Duncan respectfully asks this Court to uphold

that finding.

CROSS APPEAL

ARGUMENT I

THE CIRCUIT COURT ERRED IN HOLDING THAT MR. DUNCAN WAS NOT DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

1. Standard of Review

Both prongs of the Strickland test to determine whether counsel rendered ineffective assistance of counsel are mixed questions of law and fact, which this Court considers de novo, though this Court gives discretion to the lower court's findings of fact. Stephens v. State, 748 So.2d 1028, 1033-34 (Fla.1999). Regarding the prejudice prong, this Court held:

> An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. **The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.**

Stephens, 748 So.2d at 1033-34 (emphasis added).

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. Strickland requires a defendant to demonstrate (1) unreasonable attorney performance, and (2) prejudice. Id. Counsel's strategic choices made after thorough investigation of law and facts relevant to plausible options are not usually ineffective. However, if counsel fails to investigate before adopting a strategy, and that failure results in prejudice, counsel's failure is ineffective assistance. Id. No tactical motive can be attributed to an attorney whose omissions are based on ignorance, or on the failure to properly investigate or prepare. Id.; Williams v. Taylor, 529 U.S. 362 (2000).

2. Counsel was Ineffective at the guilt/innocence phase of Mr. Duncan's trial.

A. Counsel's failure to investigate and present a voluntary intoxication defense was ineffective assistance.

To convict Donn Duncan of first degree premeditated murder, the state had to prove that Donn Duncan had a fully formed conscious purpose to kill, that the fully formed conscious purpose existed for a sufficient length of time for reflection,

and, in pursuance of which, the killing occurred. Gurganus v. State, 451 So.2d 817, 822 (Fla. 1984). Counsel did not investigate and present available evidence that Donn Duncan was not capable of forming the specific intent required for a first degree premeditated murder conviction. At the evidentiary hearing, counsel testified their theory of defense was to negate premeditation (PCR V5 548). However, though counsel knew Donn Duncan abused crack cocaine and alcohol daily before the incident and that such drug abuse most likely affected his behavior, counsel did not consult an expert regarding the effects of the drugs and alcohol on Mr. Duncan's ability to form the requisite specific intent (PCR V5 550). This prejudiced Donn Duncan because he, in fact, did not have the specific intent required for first degree premeditated murder. Counsel's failure resulted in an illegal first degree murder conviction and the resulting death sentence.

Donn Duncan abused both alcohol and crack cocaine during the months preceding the murder(PCR V 6 710). Cocaine is a psycohstimulant that produces profound adverse effects in vulnerable people like Mr. Duncan (PCR V 6 710). The longer the drug is used, the more profound the adverse effects become and the chronic use of cocaine produces a state of frank psychosis (PCR V 6 711). The adverse effects are suspiciousness, agitation, hyper vigilance, and anxiety. They intensify until they become a paranoid state (PCR V 6 712). Typically, a person

tries to mitigate the adverse effects of cocaine by taking a depressant (PCR V 6 712). Alcohol, which Mr. Duncan abused, is a depressant and will help allay some of the anxiety resulting from cocaine abuse (PCR V 6 712). Alcohol also initially has an effect on the frontal lobes of the brain causing disinhibition. As the dose increases, it effects other areas of the brain (PCR V 6 712-13). When alcohol is used at a very large dose for a persistent period of time, it poisons certain areas of the brain (PCR V 6 713). The brain continues to be injured after the intake of alcohol because it takes some length of time for the injured brain to recover (PCR V 6 713). Alcohol and cocaine are essentially opposite classes of drugs and they cause combined withdrawal symptoms (PCR V 6 714). A person in withdrawal suffers the worst of both drugs that persists after the drug has left the system. (PCR V 6 714). Kindling is the increased sensitivity to the adverse effects of drugs or alcohol. (PCR V 6 714). When a person has used psychostimulants to the point of psychosis, the affected parts of the brain remain exquisitely sensitive to later provocation. This state is called kindled and behavior in response to that state is kindled behavior (PCR V 6 714). Even after the drugs have left the system, the exquisite ability to be provoked temporarily is retained (PCR V 6 715). Donn Duncan's chronic alcohol and drug abuse caused kindling and contributed to his inability to control his impulses and his anger (PCR V 6 715).

At the evidentiary hearing, Dr. Lipman testified that had counsel hired him before the guilt/innocence phase and provided him with the information and materials he needed, he would have testified that Mr. Duncan could not and did not have the specific intent to kill Deborah Bauer:

> because he is finely balanced. His state of normality is retained by his exerting enormous energy, and these cause him to anchor his behavior by restraint and by inhibition. The effect of eroding restraint or inhibition will provoke him into an abnormal behavioral state. . . Now, a psychologist would see that as a predilection toward the forces that cause the state, such as, for instance, Dr. Berland's conclusion to me that the man has paranoid thoughts and delusional thoughts. When you erode restraint and inhibition, that's all you have left. You have irrationally fearful paranoid delusional thinking that motivates the person's behavior. My contribution then would have been, had I testified, to an explanation of how the drug and alcohol use contributed to that discontrol. . . . Dr. Berland would have explained what was unleashed, what was underneath the alcohol use and the drug use. . . **the condition that he found himself in was analogous to what in Europe we would call a crime of passion; that he was enraged, overwhelmed with insecurity, that his boundaries had vanished to the present moment.**

(PCR V 6 716-17).

At the evidentiary hearing, counsel first could not offer an explanation for their failure to investigate specific intent through people who knew how drugs affect the mind (PCR V1 48). During the later portion of the evidentiary hearing, counsel

explained they did not investigate whether Donn Duncan had the required specific intent because he felt Donn Duncan remembered the event clearly (PCR V2 368). Counsel offered no professional support for this decision, and did not discuss it with anyone who had specialized knowledge of the subject.[5] "[C]hoices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. As there was no reasonable investigation or even inquiry, that decision was not reasonable.

Counsel's failure to consult a neuropharmacologist or other professional prior to the guilt phase of the trial prejudiced Mr. Duncan because he was denied an adversarial testing and the opportunity to present evidence that, at most, he should have been convicted of a lesser included offense of manslaughter or second degree murder. The circuit court erred in denying this claim.

B. Counsel's concession of Mr. Duncan's guilt was ineffective assistance.

In opening statement, before any evidence was presented, defense counsel told the jury that Mr. Duncan was guilty of murder, denying Mr. Duncan his Fifth,

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[5]Dr. Lipman and Dr. Berland both testified that Donn Duncan's clarity of memory of the events did not affect their opinions that he did not have the specific intent required for first degree premeditated murder (PCR V2 383, 400, V3 427, 435).

Sixth, Eighth, and Fourteenth Amendment rights to due process and the effective assistance of counsel:

> One thing we'll concede at this point, Donn Duncan did, in fact, take the life of Debbie Bauer on December 29 of 1990. The question you're going to have to decide is was what degree of murder are we talking about? First degree murder or something less? That's the only real issue in this case.

(R. 515).

During initial closing argument, defense counsel pleaded Mr. Duncan to the offense of second degree murder, explaining to the jury, element by element, that Donn Duncan was guilty.

> The evidence, ladies and gentlemen, indicates that Mr. Duncan is guilty of second degree murder. Should also go through what that is so you'll have an idea when you discuss the evidence, how to apply the evidence to that.
>
> I believe that the court will instruct you that **second degree murder has the same first two elements as premeditated murder. First degree murder, however, the last element is that there was an unlawful killing of Deborah by an act imminently dangerous to another, and evincing a depraved mind, regardless of human life. And they go on to describe an act as one imminently dangerous to another and evincing a depraved mind, regardless of human life**.
>
> **If it is an act or series of acts that a person of ordinary judgment would know is reasonably certain**

> **to kill or do serious injury to another, and is, two, done from ill will, hatred, spite, or an evil intent. And, three, that it is of such a nature that the act indicates an indifference to life.**

(R. 765-66).

> **If you should find, as you should find from the evidence, Donn Duncan is guilty of murder in the second degree**, you'll not be trivializing the life of Deborah Bauer. He will not be going scot free. He will not be rejoicing that he got the lesser sentence. **What it will be is the correct verdict in this case.**

(R. 774).

> **Defense in this case does not want anything less than what the evidence shows. We want justice to be done.** But, ladies and gentlemen, justice has got to be done with what the state can prove beyond all reasonable doubt. As of this point in time, they have not proven first degree murder, because they have not proven it was premeditated. What they have done is speculated as to what might have happened when he might have had the knife and all those other things. Where all the evidence points to sudden bursts of anger, going outside and stabbing her, **it would not be a miscarriage of justice for you to come back with a second degree murder**.

(R. 794). Counsel's arguments were the functional equivalent to a guilty plea, requiring a record inquiry of whether Mr. Duncan knowingly and voluntarily consented to this strategy. No such inquiry appears on the record and, at the evidentiary hearing, counsel did not testify that Mr. Duncan affirmatively,

knowingly, and voluntarily consented to the strategy (PCR V1 5).

In Nixon v. State, 572 So.2d 1336 (Fla.1991), this Court addressed the question of whether Nixon's counsel's concession of guilt was ineffective assistance of counsel, when no such inquiry appeared on the record. In Nixon, defense counsel argued in opening statement:

> In this case, there won't be any question that my client, Joe Elton Nixon, caused Jeannie [sic] Bickner's death. Likewise, that fact will be proved to your satisfaction beyond any reasonable doubt. This case is about the death of Joe Elton Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement.

Id. at 1339. In closing, Nixon's counsel told the jury:

> I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson.

Id.

The only difference between the arguments this Court addressed in Nixon and those given in Mr. Duncan's case, is that Nixon's counsel did not confuse first and second degree murder. In Mr. Duncan's case however, counsel told the jury that Mr. Duncan was guilty of second degree murder but then explained the

elements of second degree murder *telling the jury it was first degree murder*.

> [S]econd degree murder has the same first two elements as premeditated murder. **First degree murder, however, the last element is that there was an unlawful killing of Deborah by an act imminently dangerous to another, and evincing a depraved mind, regardless of human life. And they go on to describe an act as one imminently dangerous to another and evincing a depraved mind, regardless of human life. If it is an act or series of acts that a person of ordinary judgment would know is reasonably certain to kill or do serious injury to another, and is, two, done from ill will, hatred, spite, or an evil intent. And, three, that it is of such a nature that the act indicates an indifference to life**.

(R. 765-66). Thus, the same error that forced this Court to remand Nixon's case occurred in Mr. Duncan's case.

This case is distinguishable from those decided by this Court which hold that argument amounting to a plea to a lesser crime is not per se ineffective assistance of counsel. In Atwater v. State, defense counsel's concession of guilt to second degree murder was "made only in rebuttal to the State's closing argument". Atwater v. State, 788 So.2d 223, 231-32 (Fla.2001)("At no point during the opening statement or during any of the testimony did defense counsel concede Atwater's guilt.. . . *In response, then, and in rebuttal closing argument*, defense counsel addressed premeditation and argued that the evidence *might* support the

lesser offense of second degree murder, but there was nothing to support premeditation." (emphasis added)). In Mr. Duncan's case, the argument was not "made only in rebuttal to the State's closing argument" that the evidence *might* support the lesser offense, it was made conclusively in opening statement and in the initial closing argument. In Brown v. State, "defense counsel made the tactical decision to argue during the guilt phase for a conviction of the lesser offense of armed trespass, rather than armed burglary, which would enable Brown to avoid a first degree murder conviction. As to premeditation, Chalu presented the defense that Brown did not have an intent to kill when he entered the house where the victim was sleeping and encountered her there, and thus he was guilty *at most* of second degree murder." Brown v. State, 755 So.2d 616, 629-30 (Fla.2000)(emphasis added). In Lawrence v.State , 27 Fla. L. Weekly, S877 (Fla.2002), defense counsel argued to the jury, "[a]nd we told you that you will find Lawrence guilty of something, and we never disputed that. But that something should not be first-degree premeditated murder. That something should be *either second-degree murder or manslaughter*." (emphasis added). In Mr. Duncan's case counsel did not argue that Mr. Duncan was guilty of, *at most*, second degree murder. Counsel precluded consideration of manslaughter or any crime other than first or second degree murder, essentially arguing that Mr. Duncan was guilty of both (R. 766).

There is a difference between merely attacking the element of premeditation and actively arguing, element by element, that the evidence proved the elements of second (or first) degree murder and therefore, required a conviction. It is precisely this distinction that the Eleventh Circuit noted in McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984).

> McNeal claims the attorney's statements amounted to a guilty plea entered without his consent, relying on a Sixth Circuit case, Wiley v. Sowders, 647 F.2d 642 (6th Cir.), cert. denied, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981). Wiley is distinguishable from the case at bar. There the attorney repeatedly stated that his clients were guilty of the offenses charged, that the state had proven their guilt, but requested that the jury show leniency. Id. at 644-45. In the case at bar, McNeal was being tried for first degree murder. His attorney did not state that McNeal was guilty of murder. Instead, he stated that "at best" the government had proven only manslaughter because they did not prove premeditation. The majority of his defense case centered around this proposition. During the trial, his attorney tried to establish a self-defense claim. In view of the tape recorded confession played at trial, however, such a defense did not play a central role.

McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984). There is a distinction between a conclusive argument by defense counsel that his client is guilty of a crime included within the crime charged on one hand, and an argument criticizing the state’s case as “at best” amounting to proof of a lesser included offense. The

record in this case shows that defense counsel's argument fell within the former category, and was thus proscribed by Nixon.

Counsel's concession of guilt had the same effect as the concession in Nixon. Mr. Duncan did not affirmatively, knowingly, and voluntarily consent to the strategy of admitting guilt to first and second degree murder, so there was a "complete breakdown in the adversarial process which resulted in a complete denial of his right to counsel" which is per se ineffective assistance of counsel. Nixon, 572 So.2d at 1339, citing cases, United States v. Cronic, 104 S. Ct. 2039 (1984); see e.g., Wiley v. Sowders, 647 F.2d 642 (6th Cir.), cert. denied, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981) (petitioner was deprived of effective assistance of counsel when defense counsel admitted petitioner's guilt, without first obtaining petitioner's consent to the strategy), cert. denied; People v. Hattery, 109 Ill. 2d 449, 488 N.E.2d 513 (Ill. 1985) (defense counsel is per se ineffective where counsel conceded defendant's guilt, unless the record shows that the defendant knowingly and intelligently consented to this strategy), cert. denied, 106 S. Ct. 3314 ((1986); State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (N.C. 1985) (it is per se ineffective assistance of trial counsel where counsel admits defendant's guilt without the defendant's consent), cert. denied, 106 S. Ct. 1992 (1986); see also Harvey v. Duggger, 656 So.2d 1253, 1256 (Fla. 1995); Francis v. Spraggins, 720 F.2d 1190

(11th Cir. 1983). Defense counsel's concession of guilt denied Mr. Duncan due process, a fair trial, and a right to a jury verdict under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. In addition, defense counsel's concession of guilt denied Mr. Duncan effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Strickland v. Washington, 466 U.S. 668 (1984). The circuit court erred in denying this claim.

C. Counsel was ineffective for not objecting to the introduction into evidence and display of prejudicial photographs.

The state presented Dr. William Anderson, the medical examiner who did the autopsy of the victim, and introduced into evidence through his testimony four pictures of the victim (R. 657). Defense counsel did not object (R. 657). After the pictures were introduced, the state displayed duplicate slides while the medical examiner pointed out and described each wound (R. 659-666). During the middle of the display, juror Anderson passed out (R. 666). The court had the conscious jurors exit the courtroom (R. 666). The court, defense counsel, and the state discussed the situation. Both the state and the court were concerned about Mr. Anderson’s ability to deliberate on this case.

> The Court: I’ve got a concern about it. Even if he could continue with the trial, what happens during deliberations,

> if halfway through them they come out and say he's out again after looking at the evidence? That's a concern that I have even if he was able to continue at this point.

(R. 670). Juror Anderson was dismissed, and the first alternate juror was seated and deliberated through the guilt and penalty phases (R. 677). The state moved to introduce the slides into evidence (R. 678). Rather than voicing a late objection to the prejudicial nature of the pictures and display of slides, defense counsel acquiesced (R. 678). Thereafter, the state continued to display the clearly prejudicial slides while the medical examiner continued to describe each wound (R. 679-84).

The prejudicial photographs and slides violated Mr. Duncan's Fifth, Sixth, and Fourteenth Amendment rights to a fair trial, as well as his rights under the Florida Constitution. Florida Statute 90.403 prohibits the introduction of evidence in which the prejudicial impact outweighs any probative value. The pictures and slide show prejudicially impacted any possible probative value. The state could have used less prejudicial photographs. "It is unrealistic to believe, even after a limited view, that the horror engendered by these slides could ever be erased from the minds of the jurors . . . ." Commonwealth v. Garrison, 331 A.2d 186, 188 (Pa. 1975).

> [A] trial is conducted not only to determine that an

> atrocious crime has occurred, but to determine whether the accused committed the crime. Too often the former obscures the latter.

Johnson v. State, 476 So.2d 1195, 1209 (Miss. 1985). (Emphasis supplied). The slides in this case engendered such horror.

Defense counsel did not object to the photographs and slides even after a juror lost consciousness and it was clear that any probative value was outweighed by the prejudicial impact. This failure to act and subsequent acquiescence to the prejudicial presentation denied Mr. Duncan his right to an adversarial testing. It prejudiced Mr. Duncan because the pictures went with the jury during deliberations, refreshing their memories of the enlarged and gruesome slides and juror Anderson's inability to deal with them. This violated Mr. Duncan's Sixth Amendment and Fourteenth Amendment rights to effective assistance of counsel. The circuit court erred in denying this claim.

D. Cumulatively, counsel's acts and omissions denied Mr. Duncan his Sixth and Fourteenth Amendment rights to effective assistance of counsel at the guilt phase of his capital trial.

Mr. Duncan was denied an adversarial testing of this case from opening statement. Defense counsel started the guilt/innocence phase by pleading Mr. Duncan guilty to second degree murder, did not pursue an available and viable voluntary intoxication defense, neglected to object to the prejudicial display of

slides and introduction of pictures which caused a juror to lose consciousness and be excused from service, and ended by pleading Mr. Duncan to second or, depending on the jurors' understanding of the law and counsel's closing argument, first degree murder. The cumulative effect of these errors in counsel's performance was ineffective assistance which prejudiced Mr. Duncan. State v. Gunsby, 670 So.2d 920, 924 (Fla.1996); Cf. Cherry v. State, 659 So.2d 1069 (Fla.1995). Had counsel subjected the case to an adversarial testing, forced the state to prove every element of first and second degree murder and presented a voluntary intoxication defense, there is a very real possibility that one juror would have concluded that Mr. Duncan is not guilty of first degree murder. Confidence in the outcome is undermined. Strickland, 466 U.S. at 461; Williams, 529 U.S. at 399. The circuit court erred in denying this claim.

3. Counsel was ineffective at the penalty phase of Mr. Duncan's trial

A. Counsel's failure to introduce mitigating evidence of Mr. Duncan's good prison record was ineffective assistance of counsel.

Good prison behavior is a valid nonstatutory mitigator. Williams, 529 U.S. at 399; Skipper v. South Carolina, 476 U.S. 1 (1986); Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989). Aside from the 1969 prior violent felony, which occurred while he was incarcerated, Mr. Duncan had an excellent prison record:

> The prison classification officers responsible for him wrote these lengthy reports describing not exactly a justification but basically their reasoning that he was defending himself and asked for a significant reduction to minimum custody status where he was again placed on unsupervised work assignments and said to be just an outstanding worker.

(PCR V1 117). However, counsel did not present evidence of this mitigating circumstance. Had counsel presented evidence of and offered this as a mitigating circumstance, the balance of mitigators to aggravator would have weighed differently, and there is a reasonable possibility that the outcome would have been different. Strickland, 466 U.S. at 461. The circuit court erred in denying this claim.

B. Counsel's failure to challenge the sole aggravating circumstance by presenting the circumstances of the 1969 prior violent felony was ineffective assistance of counsel.

At Mr. Duncan's penalty phase, the state presented extensive and prejudicial evidence of his 1969 conviction for second-degree murder. Captain Martin Stephens, the chief investigator of the 1969 murder who saw the victim in the emergency room soon after the attack, testified to the injuries. He explained that the victim was severely cut about the face and head, and the state introduced into evidence a photograph of the victim.

> Captain Stephens then testified in detail concerning the

> circumstances of the prior murder. Much of this testimony was offered to show the similarity between the 1969 murder and the murder of Deborah Bauer in an attempt to rebut Duncan's assertion of mental mitigation. The State then introduced, over objection, the photograph of the injuries sustained by the prior victim. The trial court allowed the photograph to be introduced to show the force required to cause the injuries described by the investigator and to show the position of the victim when the attack occurred.

Duncan, 619 So.2d at 282. The state then entered into evidence a certified copy of the judgment and sentence for second-degree murder and presented the prosecutor of the 1969 prior violent felony. He again described the incident, testified that Mr. Duncan was convicted of second degree murder, and that he never imagined that Mr. Duncan would be released from prison (R. 911-21). Though substantial evidence existed, "defense counsel presented no evidence to counter the State's claims of aggravation". Reichmann, 777 So.2d at 348.

This Court has held that a prior violent felony aggravator can be mitigated by the circumstances of the prior violent felony. Chaky v. State, 651 So.2d 1169, 1173 (Fla.1995). In Chaky, after an unsuccessful solicitation of another person, Chaky killed his wife and left her in the trunk of her car. Id. This Court scrutinized the circumstances of his prior violent felony conviction in holding that the death sentence was not proportional. "[W]e are now presented with only one valid

aggravating circumstance: Chaky's 1971 conviction for attempted murder. While the State did prove the existence of that circumstance beyond a reasonable doubt, the circumstances surrounding that conviction mitigate the significant weight that such a conviction would normally carry." This Court did the same thing in Jorgenson v. State, 714 So.2d 423, 428 (Fla.1998). "The State only presented and the trial court only found one aggravating factor in this case– Jorgenson's 1967 prior conviction for second degree murder. The facts of this prior conviction mitigate the weight that a prior violent felony normally would carry." Id. "Based on the facts surrounding the previous conviction, the time separating the previous conviction and the present crime, and the mitigating factors that Jorgenson has presented, we find that the death penalty is disproportionate in this case." Id. See also Songer v. State, 544 So.2d 1010 (Fla.1989)("Even the gravity of the one aggravating factor is somewhat diminished by the fact that Songer did not breakout of prison but merely walked away from a work release job.") .

The prior violent felony was the only aggravating circumstance in this case, so it was crucial to the state's case of death eligibility. Counsel utterly failed to investigate and present evidence of the crime that would have mitigated, if not eliminated, its prejudice. At the evidentiary hearing, Edwin Cluster, the lawyer who represented Mr. Duncan on the 1969 conviction for second degree murder,

testified: "I felt like if we could get his entire story out, that we at least had a chance of some possibility, some chance of getting an acquittal" (PCR V5 512).

> [I]t was a low security part of the men's unit at Lowell in Marion County. He was in a dormitory setting. There was another prisoner who had started harassing him sometime before the incident which resulted in the other prisoner's death occurred. The nature of the harassment is that the man would come up, had approached him for Mr. Duncan to become what the man termed his punk and told him that he wanted sexual favors from Mr. Duncan and started harassing him.
>
> Like I said, they were in a dormitory setting. **Mr. Duncan would wake up at night, and this man would be breathing in his ear. He would make up obscene gestures and comments to him. Duncan resisted him. Eventually they got into arguments. Things started generating. Mr. Duncan – he told Mr. Duncan, that unless he consented to become his punk, that he was going to kill him.** I can't remember whether he told him he was going to kill him or he was going to do great bodily harm to him. I think he did tell him he was going to kill him. Mr. Duncan then decided at that point in time that it was either he was going to be killed or the man who was harassing him, who was a very large man, I think he weighed well over 250 pounds, Mr. Duncan at that time was much younger. He was a slight fellow, as I recall, during that period. He weighed about – he maybe weighed about 145 pounds, maybe 58, something like this. This guy was like six-one, six-two, weighed over 250 pounds. According to Mr. Duncan, he had a reputation for violence in the prison itself.
>
> Mr. Duncan determined that what he was going to do was he was going to kill him before the man killed Mr.

Duncan.

(PCR V5 509-10). Mr. Cluster did not have an opportunity to present this defense because Mr. Duncan wanted to plea. "He was in a very depressed state. I had difficulty getting him to allow me to do anything. Eventually what I did was negotiated a plea to him to second degree murder." (PCR V5 512).[6]

The circumstances of the1969 conviction are corroborated by Mr. Duncan's prison records.

> The prison classification officers responsible for him wrote these lengthy reports describing not exactly a justification but basically their reasoning that he was defending himself and asked for a significant reduction to minimum custody status where he was again placed on unsupervised work assignments and said to be just an outstanding worker.

(PCR V1 117).

Moreover, the 1969 offense is also mitigated by Mr. Duncan's biologically determined psychosis, which existed at that time (PCR V1 24, 97-99). "I have some evidence that the brain injury he had at age 17 was directly linked to at least a

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[6]Additionally, Mr. Cluster's testimony would have refuted the state's evidence that the 1969 prosecutor did not believe Donn Duncan would ever get out of prison. Had counsel contacted Mr. Cluster, he could have established the state attorney knew that most people convicted of second degree murder at that time were released on parole in 10 to 15 years, and the state gave Mr. Duncan a sentence concurrent to that which he was already serving (PCR V5 513).

worsening in his mental illness." (PCR V 3 459).

Counsel should have known that the facts of the prior violent felony would be very important at all points of the penalty presentation: jury, sentencing court, and this Court's proportionality review. With very little investigation–a phone call to another member of the Florida Bar, counsel could have greatly mitigated the aggravating nature of the prior violent felony aggravator. However, counsel utterly failed to do so (PCR V5 516).

"[C]hoices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. No reasonable professional judgment supports counsel's failure to challenge the single aggravator, and it denied Mr. Duncan his right to an adversarial testing.

It prejudiced Mr. Duncan. The state described the prior violent in excruciating and prejudicial detail through two witnesses and a picture. This was a one aggravator case; counsel knew that this aggravator was crucial. Had counsel presented evidence that Mr. Duncan's 1969 conviction for second degree murder resulted from a situation of self defense, that the victim was almost twice Mr. Duncan's size and had threatened to rape and kill him, there is a reasonable possibility that the out come would have been different. Confidence in the

outcome is undermined. Strickland, 466 U.S. at 461; Williams, 529 U.S. at 399. The circuit court erred in denying this claim.

C. Cumulatively, counsel's acts and omissions denied Mr. Duncan his Sixth and Fourteenth Amendment rights to effective assistance of counsel at the penalty phase of his capital trial.

Mr. Duncan did not have an adversarial testing at his penalty phase. As explained in the cross-appeal, defense counsel did not present available mental health evidence, did not contact people who had significant contact with Mr. Duncan throughout his life and including two wives, and did nothing to challenge the one aggravating circumstance. Essentially counsel did nothing to establish that this is one of the least aggravated and most mitigated capital cases. Besarba v. State, 656 So.2d 441 (Fla.1995). The cumulative effect of these errors in counsel's performance was ineffective assistance which prejudiced Mr. Duncan. State v. Gunsby, 670 So.2d 920, 924 (Fla.1996); Cf. Cherry v. State, 659 So.2d 1069 (Fla.1995). Had counsel subjected the case to an adversarial testing, there is a very real possibility that the outcome would have been different. Confidence in the outcome is undermined. Strickland, 466 U.S. at 461; Williams, 529 U.S. at 399.

ARGUMENT II

MR. DUNCAN'S DEATH SENTENCE IS DISPROPORTIONAL, ARBITRARY, AND DISPARATE IN VIOLATION OF HIS RIGHTS UNDER FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AS WELL AS JUDICIAL AND STATUTORY LAW.

1. Standard of Review

Proportionality is a question of constitutional magnitude and implicates the need for a unified precedent. Accordingly, the appropriate standard of review is de novo. See e.g. Stephens v. State, 748 So.2d 1028, 1032-33 (Fla.2000).

This Court reviews each death sentence to ensure that the death penalty is reserved for only the most aggravated and least mitigated crimes.

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia, supra, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.

State v. Dixon, 283 So.2d 1, 10 (Fla.1973). Proportionality review "requires a discrete analysis of the facts", "of the underlying basis for each aggravator and mitigator", and "requires this Court to consider the totality of the circumstances in a case and to compare the case with other capital cases". Terry v. State, 668 So.2d 954, 965 (Fla.1996); Urbin v. State, 714 So.2d 411, 416 (Fla. 1998); Voorhees v. State, 699 So.2d 602, 614 (Fla.1997). Such a review in Mr. Duncan's case proves his death sentence is not a matter of reasoned judgment, and that is not proportional.

The evidence established throughout Mr. Duncan's death penalty proceedings proves that his was not one of the most aggravated and least mitigated crimes. See Jones v. State, 705 So.2d 1364, 1366 (Fla.1998). When this Court conducted a proportionality review of Mr.Duncan's death sentence on direct appeal, there was, due to penalty phase counsel's ineffective assistance, essentially no mitigation to weigh against the sole aggravator. Duncan, 619 So.2d at 284. Postconviction proceedings, however, revealed extensive and substantial mitigation.

During postconviction proceedings, Mr. Duncan presented uncontroverted and substantial evidence that he was psychotic at the time of the crime. At the

evidentiary hearing, Dr. Berland testified that had counsel provided him with the time, information, and materials he needed, including Deputy Hubbard's testimony that right after the crime Donn Duncan was dazed, he could have testified that the toxic build up of cocaine and alcohol in Mr. Duncan's system exacerbated his delusional paranoid psychosis (PCR V3, 439, 440). The murder resulted from one of Donn Duncan's life-long paranoid delusions caused by brain injury and biological psychosis. Because Deborah Bauer left Donn Duncan to drink beer with another man the night before the killing, Donn Duncan had a basis for his psychotic delusion that Deborah Bauer was having an affair and perhaps leaving him, and this resulted in the crime (PCR V3 436-40). For that reason, Mr. Duncan was under an extreme emotional disturbance at the time of the crime and his ability to conform his conduct to the requirements of the law was substantially impaired. Additionally, Mr. Duncan suffered from post traumatic stress disorder, endogenous depression, brain injury, an extensive history of lethal drug and alcohol abuse, and Mr. Duncan was under the effects of drugs and alcohol at the time of the crime (PCR V1 28, 39, 48, 50, 56, 65, 66).

In Chaky v. State, 651 So.2d 1169, 1173 (Fla.1995), this Court reversed a death sentence supported by the prior violent felony of attempted murder. This Court held the aggravator was outweighed by the mitigating circumstances

presented: contribution to society evidenced by exemplary work, military, and family record; Chaky and the victim, his wife, often fought; remorse; potential for rehabilitation; and good prison record.

In Jorgenson v. State, 714 So.2d 423, 428 (Fla.1998), Jorgenson was convicted of the first degree murder of his girlfriend of eight months. The girlfriend's drug use created friction in their relationship. Id. at 425. This Court reversed his death sentence which was supported by a prior second degree murder aggravator, holding it was not proportional in light of substantial mitigation: the two statutory mental health mitigators and nonstatutory mitigation that the murder occurred while Jorgenson was under the influence of drugs, the murder was "a product of disagreement stemming from a romantic relationship", and disparity of treatment between Jorgenson and another person involved. Id.

In Deangelo v. State, 616 So.2d 440, 443 (Fla.1993), DeAngelo was convicted of a first degree murder caused by both manual and ligature strangulation. Id. at 441. After upholding only one aggravator, this Court held the death sentence was not proportional in light of substantial mental mitigation including psychotic disorders caused by brain damage and bipolar disorder, paranoid thinking, episodes of depression and mania, intensified hallucinations and delusions, irritability, explosiveness, and chronic anger. Id. at 443.

In Songer v. State, 544 So.2d 1010 (Fla.1989), Songer was convicted of killing a Florida highway patrolman. This Court reversed his death sentence which was supported by one aggravating circumstance and mitigated by both statutory mental health mitigators, the statutory mitigator of age, remorse, drug dependancy and resulting mood swings, impoverished upbringing, positive influence and adaption in prison. Id.

In Besarba v. State, 656 So.2d 441 (Fla.1995), this Court reversed a death sentence supported by one aggravating circumstance: a prior murder and a prior attempted murder. Besarba killed a bus driver, a passenger on the bus, and attempted to kill another passenger by shooting him in the back three times. Id. at 442. Besarba's record established substantial mitigation: death of a close relative, a serious head injury which was connected to the onset of mental illness, alcohol abuse, sleep apnea, paranoid schizophrenia, paranoid ideas that people are after him, probable organic brain syndrome, bizarre delusions, hallucinations, and a family history of mental illness and alcoholism. Id. at 443. Holding that the death sentence was disproportionate in that case, this Court stated:

> This Court has recently addressed the issue of a single aggravating circumstance:
>
> Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of

> murders. To secure that goal and to protect against arbitrary imposition of the death penalty, we review each case in light of others to make sure the ultimate punishment is appropriate.
>
> . . . We have in the past affirmed death sentences supported by only one aggravating factor, but those cases involved either nothing or very little in mitigation.
>
> The present case involves vast mitigation. The trial court found two statutory mitigating circumstances: that the defendant has no significant history of prior criminal activity, and that the crimes were committed while the defendant was under the influence of great mental or emotional disturbance. The court found several nonstatutory mitigating circumstances: that the defendant has a history of alcohol and drug abuse and physical and emotional problems; the defendant has a record of good character and reliable employment; and that the defendant has a record of good character in prison. Additionally, as noted above, the record establishes that the defendant had a badly deprived and unstable childhood. Accordingly, under our caselaw, the death sentence is disproportionate here.

Id. at 446-47.

In Jones v. State, 705 So.2d 1364 (Fla.1998), Jones was convicted of killing a fourteen year old boy. This Court reversed the death sentence supported by only one aggravator. "[W]hile this Court has on occasion affirmed a single-aggravator death sentence, it has done so *only where there was little or noting in mitigation*." Id. at 1366. "The applicable law, however, is established, simple, and clear: Under

Florida's capital sentencing scheme, death is not indicated in a single aggravator case where there is substantial mitigation." Id. at 1367.

In Klokoc v. State, 589 So.2d 219 (Fla.1991), Klokoc was convicted of killing his nineteen year old daughter to spite his estranged wife. Id. This Court reversed the death sentence, supported by one aggravator, holding it was disproportional in light of substantial mitigation: no significant history of prior criminal activity (weight discounted because of "criminal abuse of his wife"); influence of mental or emotional disturbance at the time of the crime; Klokoc's capacity to conform his conduct to the requirements of the law was impaired by his love/revenge emotions towards his wife; good material provider; troubled family relationship; bipolar affective disorder-- manic type with paranoid features; family history of suicide, emotional disturbance and alcoholism.

In Smalley v. State, 546 So.2d 720 (Fla.1989), Smalley was convicted of the first degree murder of a twenty-eight-month-old child. The child died of a cerebral hemorrhage caused by eight hours of physical abuse. Id. at 721. This Court reversed his death sentence, which was supported by only one aggravator, because there was substantial mitigation: lack of prior significant criminal history, "Smalley's mental state was apparently the major contributing factor in the killing", circumstances of Smalley's living situation and marijuana use the day of the murder

combined to impair his ability to appreciate the criminality of his conduct, good worker, cared for the victim, normally not abusive to his children, genuine remorse. Id. at 723. "Any one or two of these factors might not, by themselves or collectively, be sufficient to result in a reversal on proportionality grounds. But we believe that the entire picture of mitigation and aggravation was that of a case which does not warrant the death penalty." Id.

In Nibert v. State, 574 So.2d 1059 (Fla.1990), this Court reversed a death sentence supported by only one aggravator. "Medical testimony showed that [the victim] had been stabbed seventeen times. The stab wounds were serious enough to be lethal, and some of the wounds were defensive in nature." Id. at 1060. This Court held that the following mitigation existed on the record and rendered the death sentence disproportional:

> Dr. Merin, an expert in the field of brain dysfunction, testified without equivocation that in his opinion, Nibert committed the murder under the influence of extreme mental or emotional disturbance, and that his capacity to control his behavior was substantially impaired. Dr. Merin supported those conclusions with a battery of psychological examinations conducted over a two-and-one-half-year period; with interviews of Nibert and his family; and with Dr. Merin's examination of the record evidence in this case. Moreover, there was proof that Nibert has suffered from chronic and extreme alcohol abuse since his preteen years; he was a nice person when sober but a completely different person when drunk; that

> he had been drinking heavily on the day of the murder; and that, consistent with the physical evidence at the scene, he was drinking when he attacked the victim.

Id. at 1062. "There is no need to have the trial court reweigh the aggravating and mitigating circumstances because on this record we find that the death penalty was disproportional punishment when compared to other cases decided by this Court." Id.

In Ross v. State, 474 So.2d 1170 (Fla.1985), Ross was convicted of beating his wife to death:

> An autopsy revealed Gladys Ross had suffered multiple scalp injuries inflicted by a blunt instrument, one of which resulted in death by embolism. The victim's face was extensively bruises, scratched, and lacerated. According to medical testimony, the bruised occurred before death and were probably caused by a fist or foot. Injuries on the victim's hands and arms indicated she had fought her attacker.

Id. at 1171. This Court reversed the death sentence, which was supported by one aggravator, because there was also substantial mitigation including Ross' drinking problem, his confession that he had been drinking when he attacked the victim, no prior history of violence, "commission of the death act was probably upon reflection of not long duration", and "the killing was the result of an angry domestic dispute in which the victim realized the defendant was having difficulty controlling

his emotions". Id. at 1174.

In Farinas v. State, 569 So.2d 425 (Fla.1990), Farinas was angry with his ex-girlfriend for reporting to the police that he harassed her and her family. Id. Farinas ran his girlfriend's car off the road and kidnapped her. Id. When the car stopped at a light, his girlfriend jumped from the car and ran away. Id. Farinas chased her, shot her once in the back, and, after unjamming his gun three times, shot her twice in the back of her head. Id. The trial court sentenced Farinas to death finding three aggravators: heinous atrocious, or cruel, cold, calculated, and premeditated, and in the course of a kidnapping. Id. The court found that the two mitigators, Farinas was under the influence of a mental or emotional disturbance that *was not extreme* and Farinas' capacity to conform his conduct to the law or appreciate the criminality of his conduct was impaired *but not substantially so*, were entitled to little weight and did not outweigh the aggravation. Id. at 428. On direct appeal, this Court vacated the cold, calculated, and premeditated aggravator, found the mitigator of extreme mental or emotional disturbance, and held the death sentence was not proportional. Id. at 431.

In Wilson v. State, 493 So.2d 1019 (Fla.1986), Wilson was sentenced to death after he killed his father and five year old cousin and attempted to kill his stepmother. Id. at 1020. Wilson became enraged when his stepmother told him to

stay out of the refrigerator. Id. at 1021. He attacked her with a hammer, and, when Wilson's father intervened, Wilson attacked his father as well. Id. During the course of the fight, Wilson stabbed his five year old cousin with a pair of scissors. Id. After Wilson's stepmother retrieved a pistol, Wilson grabbed it and shot his father in the forehead. Id. Wilson then chased his stepmother and emptied the pistol into the closet in which she hid. Id. At trial, the jury convicted Wilson of two counts of first degree murder and attempted murder. Id. The court sentenced Wilson to death, finding the heinous, atrocious, or cruel, prior violent felony, and cold, calculated, or premeditated aggravators and no mitigation. Id. at 1023. On appeal, this Court struck the cold, calculated, or premeditated aggravator and reduced one first degree murder conviction to a second degree murder conviction. Id. Finding it significant that the murder occurred as a result of a heated domestic situation and that the premeditation existed for only a short duration, this Court held Wilson's death sentence was not proportional, vacated it, and remanded the case for imposition of a life sentence. Id. at 1023-24. See White v. State, 616 So.2d 21, (Fla.1993) (This Court reversed White's death sentence, holding it was not proportional. Id. On direct appeal, this Court held that the cold, calculated, and premeditated aggravator was negated by White's mental status, which was established by questionable evidence that White was intoxicated when he killed the

victim. Id. at 25. This Court then held that the death sentence was not proportional, given the one remaining aggravator and the mitigation the trial court found questionably established. Id. at 26.) See also Robertson v. State, 699 So.2d 1343, 1347 (Fla. 1997)(This Court found the death sentence disproportional where the sentence was based on two aggravators: during the course of a burglary with an assault and heinous, atrocious, or cruel, and five nonstatutory mitigators: age of 19, impaired capacity due to drug and alcohol use, abused and deprived childhood, history of mental illness, borderline intelligence. Id.); Maulden v. State, 617 So.2d 298, 299, 302-3 (Fla. 1993)(This Court held Maulden's death sentence was disproportional due to the substantial mitigation: Maulden was under the influence of mental or emotional disturbances, his capacity to control his conduct was substantially impaired, he cooperated with the police, showed remorse, and had no disciplinary reports during 16 months in jail. Id.)

Given the substantial and extensive mitigation in this case: extreme emotional disturbance at the time of the crime, Mr. Duncan's substantially impaired capacity to conform his conduct to the requirements of the law, a chronic, long lasting, biologically determined psychotic disturbance which included delusional paranoia and hallucinations, post traumatic stress disorder, endogenous depression, brain injury, an extensive history of lethal drug and alcohol abuse, and Mr. Duncan was

intoxicated or suffering from the effects of drugs and alcohol at the time of the crime because of the kindling effect, and the prior violent felony that is made less aggravating by the circumstances revealed during postconviction proceedings (see Cross Appeal Argument I (3)(B)), Mr. Duncan's death sentence clearly is not proportional (V1, T28, 39, 48, 50, 56, 65, 66, 110-116). "We pride ourselves in a system of justice that requires equality before the law. Defendants should nor be treated different upon the same or similar facts." Slater v. State, 316 So.2d 539, 542 (Fla.1975).

The circuit court did not decide this claim because it vacated Mr. Duncan's death sentence and granted a new penalty phase. In the interests of justice and fiscal efficiency, Mr. Duncan urges this Court to remand the case to the circuit court for imposition of a life sentence.

ARGUMENT III

THE RULES PROHIBITING MR. DUNCAN'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT VIOLATES EQUAL PROTECTION PRINCIPLES, THE FIRST, SIXTH, EIGHT AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND DENIES MR. DUNCAN

ADEQUATE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES.

This Court has repeatedly held that this claim has no merit, however, it is raised herein to preserve the issue for future review.

1. Standard of Review

This is a legal question of constitutional magnitude so the appropriate standard of review is de novo. See e.g. Stephens v. State, 748 So.2d 1028, 1032-33 (Fla.2000).

Under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Mr. Duncan is entitled to a fair trial. However, Mr. Duncan's inability to fully explore possible misconduct and jury biases prevent him from showing the unfairness of his trial. Mr. Duncan can only discover jury misconduct through juror interviews. To the extent it has and continues to preclude undersigned counsel from investigating and presenting claims that can only be discovered through interviews with jurors, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar[7], is unconstitutional. Mr. Duncan should have the ability to interview

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[7]The rule expressly prohibits counsel from directly or indirectly communicating with jurors. The rule states that

> A lawyer shall not . . . after dismissal of the jury in a case with which the lawyer is connected, initiate

the jurors in this case but, because he is on death row, he must rely upon counsel provided by the State of Florida. This prevents Mr. Duncan from interviewing the jurors, because the attorneys provided to him are prohibited from contacting the jurors in his case. The state's action of providing Mr. Duncan with counsel who cannot fully investigate his well-recognized claims for relief denies Mr. Duncan due process, equal protection, and access to the courts guaranteed by the United States Constitution and the Eighth Amendment.

The process by which a jury renders a death sentence is subject to the scrutiny demanded by the Due Process Clause of the Fourteenth Amendment. The opportunity to have one's claims to postconviction relief considered fully by a fair and impartial tribunal is also the essence of a prisoner's right of access to the courts. In light of evidence that the deliberations of Florida capital juries frequently and to a shocking degree consider factors extrinsic to the verdict and engage in overt prejudicial acts, Mr. Duncan must be permitted to interview the jurors who

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> communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict is subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist.

Rule 4-3.5(d)(4), R. Regulating Fla. Bar.

contributed to his death sentence in order to assess the extent to which Mr. Duncan may have been prejudiced. While juror misconduct during the guilt phase raises serious Sixth Amendment problems, misconduct during penalty phase proceedings comes under greater scrutiny due to the Eighth and Fourteenth Amendment restrictions on capital sentencing. The interest in finality shared by the State and the jurors must give way to the opportunity of a death-sentenced person to have a claim of newly discovered evidence.

Accordingly, Mr. Duncan asks this Court to declare Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar unconstitutional, for leave to interview the jurors, and an evidentiary hearing.

ARGUMENT IV

THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. DUNCAN OF A FUNDAMENTALLY FAIR CAPITAL TRIAL AND PENALTY PHASE GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

1. Standard of Review

This is a legal question of constitutional magnitude so the appropriate

standard of review is de novo. See e.g. Stephens v. State, 748 So.2d 1028, 1032-33 (Fla.2000).

Several errors occurred during Mr. Duncan's capital trial. On direct appeal, this Court found that error occurred when the trial court admitted a gruesome photograph of the victim of the unrelated prior violent felony. Duncan, 619 So.2d at 282. Two Justices believed the admission of the photograph was harmful error:

> After viewing the challenged photograph in this case, I cannot agree that simply because no further reference was made to the photograph it did not become a focal point in the sentencing proceedings. The photograph is so inflammatory that I cannot say beyond a reasonable doubt that it did not contribute to the jury's recommendation.

Duncan, 619 So.2d at 284-85 (Kogan, J. concurring). In postconviction proceedings, the circuit court found that counsel was ineffective at the penalty phase of Mr. Duncan's trial, violating his Sixth and Fourteenth Amendment rights to counsel. These errors clearly contributed to, if not caused, the death recommendation. State v. DiGuilio, 491 So.2d 1129, 1135 (Fla.1986).

Additional substantive errors occurred during the guilt phase as well as the penalty phase: counsel plead Mr. Duncan guilty to second degree murder, did not pursue an available and viable voluntary intoxication defense, neglected to object to

the prejudicial display of slides and introduction of pictures which caused a juror to lose consciousness and be excused from service, defense counsel did not present any challenge to the state's sole aggravator, and did not contact anyone who played a significant role in Mr. Duncan's life other than his sister. Cumulatively, these errors show that Mr. Duncan did not receive the fundamentally fair capital trial and penalty phase to which he was entitled under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. See State v. Gunsby, 670 So.2d 920 (Fla.1996); Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991).

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Duncan respectfully urges this Honorable Court to affirm the lower court's order vacating his death sentence and granting a new penalty phase, remand the case with directions that the circuit court impose life sentence, or for such relief this Court deems appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellee and Initial Brief of the Cross-Appellant has been furnished by U.S. Mail to all counsel of record on this ____ day of January, 2003.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Answer Brief of Appellee and Initial Brief of the Cross-Appellant, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210**.**

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