IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-874

ROBERT BEELER POWER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal involves a Rule 3.850 motion on which an evidentiary hearing was granted on some issues, and summarily denied on others. References in the brief shall be as follows:

(R. ___) -- Record on Direct appeal;

(PC-R. ___) -- Record in this instant appeal;

References to the exhibits introduced during the hearing and other citations shall be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Power requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

STATEMENT OF FONT

This brief is typed in Courier 12 point not proportionately spaced.

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STATEMENT OF THE CASE AND OF THE FACTS

On February 24, 1989, Robert Beeler Power was indicted in Orlando, Orange County, Florida on charges of first-degree premeditated murder, sexual battery, kidnapping, armed burglary and armed robbery (R. 2676-2678).

Mr. Power went to trial and was found guilty on all counts. After a delay of five (5) months, the penalty phase proceeded and the jury unanimously recommended a sentence of death (R. 3254). On November 8, 1990, the trial court imposed a sentence of death (R. 3254).

The trial court found four aggravating circumstances -- Mr. Power had previously been convicted of another violent felony; the capital offense was committed during an enumerated felony; the capital offense was especially heinous, atrocious and cruel and the capital offense was committed in a cold, calculated and premeditated fashion (R. 3258-3271).

The trial court found the mitigating circumstance of the comparative cost and degree of executing Mr. Power versus life in prison to be strong and heavily weighted, however, the trial court found this mitigating circumstances to be legally inappropriate for consideration or deserved little weight (R. 3258-3271). The trial court found Mr. Power's age and lack of future dangerousness not mitigating circumstances (R. 3258-

3271).[1]

On direct appeal, this Court struck the aggravating circumstances of cold, calculated and premeditated, but upheld Mr. Power's death sentence. Power v. State, 605 So. 2d 856 (Fla. 1996), cert. denied, Power v. Florida, 113 S.Ct. 1863 (1993).

Mr. Power filed his initial Rule 3.850 motion on June 27, 1994. An amended motion was filed on March 17, 1995. The third and final amended motion was filed on November 23, 1998 and raised thirty-eight (38) claims.

A hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993) was held on May 6, 1999. The trial court issued an order granting an evidentiary hearing on eight of Mr. Power's claims and set the evidentiary hearing for October 11-13, 1999(PC-R. 568-571). Among the claims to be heard at an evidentiary hearing were whether trial counsel was ineffective for failing to present mitigating evidence, and whether Mr. Power's counsel was ineffective for failing to obtain an adequate mental health and background evaluation on Mr. Power for the penalty phase of the trial (PC-R. 569).

Before Mr. Power's evidentiary hearing, the State

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[1]The trial court judge was Gary Formet. After his death, Mr. Power's case was transferred to Circuit Court Judge Alice Blackwell White (PC-R. at 149).

attempted to have Mr. Power evaluated for competency (PC-R. at 2546). The trial court appointed three experts to evaluate Mr. Power. Counsel for Mr. Power objected and filed an interlocutory appeal to this Court, arguing Mr. Power's counsel had not called into questions Mr. Power's competency to proceed in post-conviction (PC-R. at 2595). This Court stayed the lower court proceedings and ordered briefing. But on September 5, 2000, this Court dismissed the interlocutory appeal without issuing an opinion (SC96659).

Mr. Power's evidentiary hearing was held on January 29-31, 2001 and April 2-5, 2001, with closing arguments due on May 25, 2001. The trial court denied relief on January 25, 2002. Rehearing was denied on March 11, 2002. This appeal follows.

SUMMARY OF ARGUMENTS

1. No adversarial testing occurred at the penalty phase.

The evidentiary hearing court and the trial court both determined that Mr. Power made a valid and knowing waiver of mitigation. But Mr. Power did not waive mitigation. In fact, Mr. Power, who has a history of depression and brain damage, was unable to make a knowing, valid and intelligent waiver. Trial counsel failed to present the compelling and extensive mitigation found by the State at his penalty phase to the judge or jury because he mistakenly believed that Mr. Power had waived mitigation. No constitutional waiver hearing occurred. No adversarial testing occurred because Mr. Power's judge or jury did not learn of the mitigation that was ready to be presented. The hearing court correctly found that "a great deal of very compelling information which the jury should indeed have heard prior to rendering its sentencing recommendation" (PC-R. at 3731), but did not because trial counsel and the trial court were under the erroneous belief that Mr. Power waived mitigation. Mr. Power is entitled to a new penalty phase so that a jury can hear the compelling mitigation that was never presented.

2. Mr. Power was improperly shackled during his trial.

Testimony from State witnesses at the evidentiary hearing indicated that Mr. Power was shackled and may have appeared in chains before the jury. At trial, no inquiry about Mr. Power's shackling was made. Mr. Power's due process rights were violated.

3. Mr. Power sought to interview the jurors who may have

seen him shackled and who may have been influenced by what they saw. The trial court denied all efforts by Mr. Power to interview the jurors about this shackling issue. The trial court's failure to allow Mr. Power access to the jurors violates his rights and his access to the court.

4. An unsigned sentencing order was found in the files of

the State Attorney and testimony at the evidentiary hearing could not explain why. None of the witnesses could account for an unsigned sentencing order in the State Attorney files. Because the evidence is inconclusive, Mr. Power is entitled to relief.

5. Mr. Power's record on appeal is incomplete at the trial

level and in post-conviction. The trial transcript is riddled with errors, while the transcript from the evidentiary hearing

has more than 78 errors that were pointed out to the hearing judge. The hearing judge ignored these errors. Mr. Power is entitled to a complete and accurate record on appeal.

6. Relief is warranted because of counsel's failure to object to constitutional error. Counsel failed to object to overbroad jury instructions and to instructions that diluted the jury's sense of responsibility as a sentencer.

7. The State introduced non-statutory aggravating factors to Mr. Power's detriment. Trial counsel erred in failing to object to these factors.

8. The trial court erred in failing to find mitigation in the record. Trial counsel failed to object to this error.

9. Mr. Power's trial was replete with prosecutorial misconduct, at the guilt and penalty phase. Trial counsel was ineffective for failing to object to this misconduct.

10. The trial court erroneously instructed Mr. Power's jury on flight and trial counsel was ineffective for failing to object to this error.

11. The death penalty is cruel and unusual punishment.

12. Mr. Power is insane to be executed.

13. The cumulative errors in Mr. Power's guilt and penalty

phase entitle him to a new trial and penalty phase.

ARGUMENT I--NO ADVERSARIAL TESTING AT THE PENALTY PHASE.

INTRODUCTION. Mr. Power did not waive mitigation. But at the penalty phase, trial counsel failed to present mitigation, even though the State Attorney gathered it for him, because he was under the mistaken belief that his client wanted to waive mitigation. Mr. Power was not capable of waiving mitigation. He had suffered from depression for many years and was incapable of making a valid, knowing and intelligent waiver.

The Office of the State Attorney conducted its own investigation into Mr. Power's mental health background and turned the material over to the defense when it believed that Mr. Power was waiving mental health mitigation and when it believed that defense counsel was not properly preparing for penalty phase (R. 3329).

In an abundance of caution, the State Attorney handed over Mr. Power's background materials to the defense counsel. A memorandum to the files from State Investigator Amy Harmon with records from the California Department of Corrections indicated that Mr. Power was treated with Elavil for manic depression (PC-R. at 2839). Another memo to the files by Ms. Harmon referred to Mr. Power's "huffing" of petrol-hydro-carbons and his mother's ingestion of alcohol during her

pregnancy with Mr. Power (PC-R. at 3195). This information was turned over to the defense **before** Mr. Power's trial. Despite the documentation that should have alerted counsel to Mr. Power's depression and organic brain damage, counsel conducted no further investigation.[2]

Instead, trial counsel was under the mistaken belief that Mr. Power wanted to waive mitigation. Trial counsel's belief was based on conversations between Mr. Power, the court and himself. During those conversations, Mr. Power wanted to know what information defense counsel had gathered before he agreed that it should be presented. But defense counsel had gathered nothing.

Trial counsel accepted the alleged waiver without investigating whether the waiver was knowing, intelligent and voluntary, to Mr. Power's substantial prejudice.

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[2]The Office of the State Attorney did the bulk of investigation into Mr. Power's background because it was concerned that defense counsel was not properly preparing for the penalty phase. The State received no witness list and follow up on medical reports. Because of the defense attorney's lack of preparation, the State Attorney urged the trial court to conduct in-camera hearings (R. 3329).

The State Attorney obtained hospital and prison records of Mr. Power and turned them over to the defense (R. 3130-3168). See also, R. 3173, State's Motion for Order Directing Production of Hospital Records, July 23, 1990.

After it learned that Mr. Power huffed gasoline as a child and may have organic brain damage, it sought a neurological exam of Mr. Power (R. 3181-3183). The trial court granted the state motion and ordered neurological testing (R. 3179-3180).

Based on the background material given to him by the State Attorney, trial counsel should have been aware that Mr. Power was suffering from depression and organic brain damage. Although he acknowledged that he received psychiatric records on Mr. Power, trial counsel said he did not have a chance to review them (R. 2351). Mr. Power had been evaluated for competency by Dr. James Merikangas before his trial in Seminole County.[3] As a result of his examination, Dr. Merikangas reported to the Seminole County court:

> He is very depressed at present and I believe **represents a risk for suicide**. He reports having been depressed all his life/
>
> * * *
>
> I believe that he is currently in need of psychiatric assistance as he is **severely depressed** and may be better able to cooperate with counsel if given appropriate medical care.
>
> * * *
>
> **Neuropsychological testing is also**
>
> **indicated**

(report of Dr. James Merikangas, M.D. , F.A.C.P., November 7, 1987)(Defense Exhibit 20)(PC-R. at 1437-1438)(emphasis added).

Despite Dr. Merikangas' recommending the need for

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[3]Mr. Blankner began representing Mr. Power in the fall of 1987 in Osceola County (PC-R. at 1331-1332).

neuropsychological testing, trial counsel did not have Mr. Power evaluated by a neuropsychologist. Despite the available evidence of Mr. Power's depression and organic brain damage, trial counsel failed to look into Mr. Power's mental state at the time of the penalty phase for possible mitigation. Instead, he decided that Mr. Power wanted to waive mitigation, and never conducted any investigation into Mr. Power's background, and never presented any evidence to his jury.

The post-conviction hearing court conceded that "a great deal of compelling information [was available] which the jury should indeed have heard prior to rendering its sentence recommendation, and its [defense] experts were much more compelling and credible than those presented by the State." (PC-R. at 3731). Despite that view, the hearing court erroneously held that Mr. Power was "firm and unwaivering in his decision to refuse to allow counsel to present mitigation, and that he was capable of making this decision in a reasoned, well-informed manner" (PC-R. at 3731).

The hearing court's reasoning was the same flawed path relied on by trial counsel. Both believed that it was possible for Mr. Power to make a knowing and intelligent waiver, without being given any information on what mitigation existed, without any mental health evaluation or discussion

with any defense mental health expert. The trial court and the hearing court believed as trial counsel did that if a defendant is found competent to stand trial three years earlier, then he has the ability to decide trial strategy, regardless of his mental disabilities.

This mistaken belief was not based on any case law or rule of law.[4] Nevertheless, trial counsel failed to present or even proffer compelling mitigation evidence to the judge, jury or into the record. Even at sentencing, trial counsel failed to notify the judge of mitigation that it should consider before deciding whether to sentence Mr. Power to death or in conducting a valid proportionality-based analysis. Because of trial counsel's failure and inaction, no adversarial testing occurred.

Ineffective Assistance of Counsel

Trial counsel failed to recognize that Mr. Power could not

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[4]The trial court relied on her ability to "observe Mr. Power in person. At all times, he appeared to be alert and intelligent, he was engaged in the proceedings and frequently communicated with his lawyers." (PC-R. at 3731). The trial court's ability to observe Mr. Power in court proceedings ten years after the fact should have no bearing whatsoever on his depression and brain damage at the time of trial and his ability to make a knowing and intelligent waiver of mitigation at his penalty phase. The trial court confused competency with the ability to waive mitigation, which are two distinct issues.

knowing and intelligently waive his penalty phase evidence when he did not know what it was he was waiving. Because trial counsel had not done any investigation into Mr. Power's background, even though it was handed to him by the State Attorney, Mr. Power could not know what mitigating evidence existed or how it could be used. Mr. Power could not knowingly and intelligently waive what he did not know.

Mr. Power "had a right -- indeed a constitutionally protected right -- to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." Williams v. Taylor, 120 S. Ct. 1495, 1513 (2000). Accord, Strickland v. Washington, 466 U.S. 668 (1984). As with any waiver of a constitutional right, Mr. Power's waiver must be knowing, voluntary and intelligent for it to be valid. Faretta v. California, 422 U.S. 806 (1975); Deaton v. Dugger, 635 So. 2d 4 (Fla. 1994); State v. Lewis, 27 Fla. L. Weekly S 1032 (December 12, 2002).

If a defendant "waives" mitigation, but counsel fails to investigate and the client is in the dark about what he is "waiving," the Sixth Amendment is violated. Deaton; Blanco v. Singletary, 943 F. 2d 1477 (11th Cir. 1991); Emerson v. Gramley, 91 F. 3d 898 (7th Cir. 1996); Glenn v. Tate, 71 F. 3d 1204 (6th Cir. 1995).

Such was the case here. Mr. Power received ineffective assistance of counsel because his trial attorney failed to obtain an adequate mental health evaluation and background on Mr. Power for penalty phase. Mr. Power failed to make a knowing and intelligent waiver of his rights at the penalty phase. Trial counsel was ineffective for failing to investigate his client's capability to make that waiver, and for failing to, at least, proffer that evidence to the court. See, Muhammad v. State, 782 So. 2d 343, 363-364 (2001).

At the time he represented Mr. Power, trial counsel Wesley Blankner had never defended a client in a first-degree murder case that went to penalty phase (PC-R. at 1335).[5] He first represented Mr. Power on his Osceola County rape cases and during that time, said he became aware of Mr. Power's difficult life (PC-R. at 1370-1373).

By the time of Mr. Power's penalty phase in November, 1990, Mr. Blankner testified at the evidentiary hearing in 2001 that he knew much about Mr. Power's background. He knew that Mr. Power had spent time in mental hospitals in California and that Mr. Power's first suicide attempt was when he was 10 years old (PC-R. at 1330, 1422). He knew that Mr.

[5]Mr. Blankner handled five first-degree murder trials as a prosecutor, but none as a defense attorney (PC-R. at 1334).

Power had a nervous breakdown at age 13 (PC-R. at 1422); was hospitalized at age 15 (PC-R. at 1423); and that his mother had suffered three nervous breakdowns (PC-R. at 1388-1389). Mr. Blankner testified that he knew about Mr. Power's history of huffing gasoline and other inhalants (PC-R. at 1389-1390). Mr. Blankner knew that as a child, Mr. Power was beaten and that his mother was an alcoholic (PC-R. at 1496).

Trial counsel testified that he knew about his client being sexually abused by Grady Highsmith when he was a child, although he did not talk to a mental health expert on the impact of sexual abuse. He said he had talked to Mr. Power's family about the abuse (PC-R. at 1353).

Mr. Blankner testified that he learned of this mitigation through some of his own investigation and through the investigation of the State Attorney, which was supplied to him. Mr. Blankner testified that he had never previously been involved in a case in which the State Attorney did a large part of the investigation for penalty phase as was done in this case (PC-R. at 1385). When asked what he did independently from the State investigation, Mr. Blankner said "we called the doctor and I can't remember which one it was out in California and talked to them about the information to see what kind of memory they had of the event" (PC-R. at

1405). Mr. Blankner was unable to remember the name of the doctor he spoke with and he took no notes of that conversation. Mr. Blankner failed to bring the doctor to Florida, proffer what he learned from the doctor or notify the judge of the information the doctor had (PC-R. at 1381).

Mr. Blankner testified that he took over the Osceola rape cases from the Public Defender, which occurred before the instant case, and that he received all the Public Defender files (PC-R. at 1377). Among those files was a Motion to Commit Defendant to Hospital for Physical Examination and Additional Testing. That motion was filed December 30, 1987, three years before the murder case went to trial. The motion said:

> Defense Counsel has observed visible hand tremors, excessive pallor, weight loss, and other physical difficulties that has indicated possible physical and mental deterioration of the Defendant. The Defendant is currently experiencing severe migraines and other physical ailments, to include loud, piercing nonstop ringing in both ears. He has continually requested medical attention through the jail physician without relief. The Defendant's current medical condition has greatly impeded Defense Counsel's ability to communicate with the Defendant in preparing a defense to these charges. If untreated, it will surely cause Defense Counsel to be ineffective in his representation of the Defendant.

(Defense Exhibit 32).

Yet, Mr. Blankner testified at the evidentiary hearing that he had **no** indication of any mental problems suffered by Mr. Power during his representation. Mr. Blankner testified that despite having substantial mitigating evidence of Mr. Power's significant mental history, Mr. Power refused to give him permission to present testimony on his behalf (PC-R. at 1351).[6] Mr. Blankner testified that "we did not believe we were permitted to present anything that Mr. Powers didn't agree to since he was found competent to stand trial." (PC-R. at 1360). Mr. Blankner testified that Mr. Power had been found competent during the Osceola rape cases, **three years earlier**, but no competency evaluation was conducted on Mr. Power before the 1990 murder case or during the six-month break between the guilt and penalty phases (PC-R. at 1360-1361). Mr. Blankner testified that the only authority he relied on was that Mr. Power was found competent to stand trial in 1987 (PC-R. at 1369-1370).

Mr. Blankner, who conceded that he was not a mental health expert, testified that he had constant contact with Mr. Power in the three years after the rape trials, and "Nothing

[6]This is but one example of the problems associated with defense counsel's inexperience as a defense attorney. Even though Mr. Blankner had prosecuted death cases, he had never had to deal with a mentally-ill client.

about Mr. Power's demeanor ever changed" (PC-R. at 1360). Yet, Mr. Blankner acknowledged that Mr. Power "had mental problems, I never had doubt in my mind" (PC-R. at 1362); Mr. Power often changed his mind, often within minutes (PC-R. at 1366); Mr. Power "suffers emotionally," (PC-R. at 1417); and had "mental illness. He had problems. I don't think he was okay" (PC-R. at 1485).

Mr. Blankner described Mr. Power as "an angry man. I also believed he was paranoid but we could not find anyone that would say he was not legally competent to stand trial or that he was legally insane." (PC-R. at 1362). Thus, Mr. Blankner's erroneous belief that a competency to stand trial determination meant his client was competent to make all of his trial strategy decisions, despite his mental illness. Mr. Blankner failed to hire any mental health expert to evaluate Mr. Power for paranoia or any other mental health problem.

Mr. Blankner testified that he wanted to hire a mental health expert before trial, but did not hire anyone because his mentally-ill client asked him not to (PC-R. at 1356)(Defense Exhibit 2).

Mr. Blankner clearly did not understand the difference between competency to stand trial, which Mr. Power was found to be in 1987, and the ability to make a knowing and

intelligent waiver of mitigation three years later in 1990. Mr. Blankner failed to question whether Mr. Power was capable of making a valid waiver of mitigation. He believed that a competency evaluation conducted three years earlier was all that was required. In other words, if his client was found competent to stand trial, his mental illness and deficiencies were no longer an issue.

Mr. Blankner believed that two in-camera proceedings were sufficient to notify the judge of the mitigation that existed and that Mr. Power was making a valid and knowing waiver of that mitigation (PC-R. at 1410-1411). But, Mr. Blankner was unable to show where Mr. Power's waiver was located in the record of those proceedings. In reality, the in-camera hearings show that Mr. Power asked to see the mitigation that his attorneys investigated, but no where on the record is Mr. Power asked if he knew what mitigation was and if he was willing to waive that mitigation. Both the trial court and Mr. Blankner failed Mr. Power in that regard.[7]

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[7]At the evidentiary hearing, the State also confused competency to proceed at trial with competence to make a knowing and voluntary waiver (PC-R. at 1700-1710). The cases presented by the State to the hearing court failed to make that argument and did not apply to Mr. Power's case. In Koon v. Dugger, 619 So. 2d 246 (Fla. 1993), this Court held that Mr. Koon did not need to be re-evaluated for competency at retrial because "nothing in the record suggests that he lacked the ability to consult with his attorney or that he lacked a factual understanding of the proceeding against him." Id. at 250. Mr. Koon had been evaluated

The first in-camera proceeding was on July 12, 1990, one month after the guilty verdict and four months before the penalty phase took place. In that proceeding, Judge Formet explained the process to Mr. Power and told him if an aggravating factor is present, the death penalty can be imposed and if the jury recommends it, "I should accept it." (PC-R. at 3200). The judge also explained to Mr. Power the consequences of not presenting mitigating evidence.

The trial court's primary focus here was to tell Mr. Power that if the jury recommended death, the trial court would be required to give that recommendation great weight

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by three psychiatrists before his trial. In Mr. Power's case, he had **never** been evaluated for competency to proceed at his capital trial. And, his records also were replete with evidence of severe depression, a history of suicide and organic brain damage.

In Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993), the defendant was examined to determine if he was competent to plead guilty. After an examination showed he was competent, he changed his plea and refused mitigation. In Mr. Power's capital case, he was never examined by a mental health expert to determine if he was competent to waive mitigation. See, Justice Barkett dissent in which she said that when an inmate sentenced to death expresses a desire to waive legal representation in collateral proceedings, the State has an obligation to assure that the waiver is knowing, intelligent and voluntary. Id. at 485. No such assurances occurred in Mr. Power's case.

In Castro v. State, 744 So. 2d 986 (Fla. 1999), Mr. Castro moved to dismiss his counsel and his post-conviction motion. At that point, the trial court ordered a competency hearing and the trial court conducted a Faretta hearing to determine if Mr. Castro was aware of the rights he was waiving. In Mr. Power's case, neither the judge nor the defense sought to have Mr. Power evaluated for competency and no Faretta hearing occurred as to whether Mr. Power was aware of the rights he was waiving.

(PC-R. at 3201).

The trial court did not advise Mr. Power that the State and the defense may present evidence in the penalty phase to the jury relative to the nature of the crime and character of Mr. Power, and that the jury could also rely on evidence in the guilt phase of trial. The trial court did not advise Mr. Power that based on this evidence, the jury would determine first, whether sufficient aggravating factors exist that would justify the imposition of the death penalty, and second, whether there are sufficient mitigating factors sufficient to outweigh the aggravating factors. The trial court did not advise Mr. Power of the burden of proof required for the aggravating and mitigating factors.

The trial court did not advise Mr. Power that each side could make an argument to the jury. The trial court did not advise Mr. Power how the voting worked in the penalty phase. The trial court did not advise Mr. Power that the jury would be given legal instructions about the penalty phase that they must follow.

At no time did the trial court ask Mr. Power if he was freely and voluntarily waiving mitigation. The trial court never asked Mr. Power if he was promised anything, or threatened or coerced in any way to get him to waive

mitigation. The trial court did not conduct a colloquy.

After trial counsel had a discussion with Mr. Power off the record, trial counsel said, "Thank you very much. We have had a discussion on this. I feel satisfied." (PC-R. at 3204). There was no further discussion about Mr. Power and his alleged waiver of mitigation at this in-camera hearing. There was no discussion with trial counsel as to what he felt satisfied about.

At the second in-camera hearing on October 11, 1990, three weeks before the penalty phase, trial counsel told the court that he was waiting for Mr. Power's records from California. He said:

> If there is something of value, Mr. Power said that he will sign medical release forms so we can sent (sic) our investigator out to California to get those records and have them available. And if need be, use that.

(PC-R. at 3215).

At that point, trial counsel notified the court that Mr. Power did not want his family members to testify on his behalf and said that he did not supply the State with a witness list (PC-R. at 3215).[8]

After the trial court again cautioned Mr. Power about the

[8]By this time, however, the State had already deposed Robert Power, Sr. and Billy Power, the father and brother of Mr. Power, two witnesses who were extremely damaging to Mr. Power's case.

dangers of failing to present mitigation (PC-R. at 3217), Mr. Power said he would sign the medical releases. As Mr. Power told the court:

> Mr. Power: I want them to know what information is available. If he doesn't know what information is available, how can he say whether it will be mitigating or aggravating?
>
> The Court: He can't.
>
> Mr. Blankner: I can't.
>
> The Court: But he's got to have the. He's got to have the information to make that. There may be something there there's very helpful in mitigation.
>
> Mr. Power: I told him I would sign a release.
>
> The Court: All right. They should have been done long before now because we are down to the wire. We need to get that immediately.
>
> Mr. Blankner: I don't think it will delay us in any way.
>
> The Court: All right.

(PC-R. at 3218).

Later in this hearing, trial counsel said that he spoke with Mr. Power's mother "in the previous case," (PC-R. at 3220). When the trial court told Mr. Power that he needs to decide quickly about mitigation witnesses because it may be too late, Mr. Power said:

> Mr. Power: We have **never** sat down and discussed what would be said and what wouldn't be said.

The Court: You better do that real quick.

Mr. Power: Or the possibility of cross-examination and what could come out and what couldn't come out.

(PC-R. at 3221-3222)(emphasis added).

Mr. Power then asked:

Mr. Power: **Would it be prudent to evaluate all the witnesses**, Mr. Blankner and the prosecutor, get them -- when everything comes together, decide which is the best way to go? Whether this will be enough or whether, you know, other mitigating circumstances will be necessary because of lack of something in another area?

(PC-R. 3223)(emphasis added).

Despite Mr. Power's request to evaluate all the mitigation, and to sit down with his lawyer to see what evidence is available, the trial court proceeded to ask Mr. Power if he was on mediation, and if his mind was clear (PC-R. at 3225).

At no point did Mr. Power say he wanted to waive mitigation. Rather, he told the court that he wanted more information from his attorneys. His agreement to sign releases for medical records was not a waiver of mitigation. In fact, it indicated just the opposite. Even if Mr. Power had not wanted to present family members in mitigation, he agreed to sign releases for his medical records, yet none of that information from the medical records was presented to the

jury in penalty phase.[9] The only evidence presented by the defense in mitigation was from Michael Radelet, who did not know Mr. Power personally, but who testified that based on Mr. Power's prior sentences, he would never be free again. He also testified about the cost of life in prison versus the cost of execution (R. 2442-2526).

Based on those in-camera proceedings, the post-conviction hearing court determined that Mr. Power "was adequately advised of the dangers of his decision and even encouraged to abandon it in favor of allowing counsel to present mitigating evidence. In the face of such urging even by the trial judge on two separate occasions, Mr. Power steadfastly refused. He cannot now claim counsel was ineffective for following his own explicit instructions." (PC-R. at 3727). The hearing court did not address the propriety of counsel's failure to proffer

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[9]The information gleaned from those medical records showed that Mr. Power had a history of major depression and suicide attempts (PC-R. at 1636-1637). The records also showed that Mr. Power was diagnosed as a schizoid person who experienced moderate distress syndrome, consisting of depression and anxiety (PC-R. at 1639). The records also showed that he had been raped in prison, which played a significant role in Mr. Power's life (PC-R. at 1640).

On June 20,1990, five months before the penalty phase began, the State provided additional records to the defense, including probation records from Santa Cruz, California, which showed that Mr. Power's mother suffered from three nervous breakdowns and that Mr. Power himself was treated with anti-depression medication and would benefit from psychiatric hospitalization (R. 3130-3168). None of this information was presented to the jury during Mr. Power's penalty phase.

the mitigation into the court record or to the judge at sentencing.[10]

In this case, Mr. Blankner and the trial court failed to understand that a waiver requires a heightened level of understanding and cognition to effectively waive counsel or mitigation. Faretta v. California, 422 U.S. 806 (1975) requires a court to conduct a hearing to ensure that the defendant is fully aware of the dangers and disadvantages of his waiver. Here, trial counsel failed to ensure that a proper colloquy took place with the judge to determine the depth of Mr. Power's understanding.

The trial court's colloquy of Mr. Power was not a "searching interrogation" of Mr. Power. See, Arthur v. State, 374 S.E 2d 291 (S.C. 1988). Without a "searching interrogation," of Mr. Power, the record could never affirmatively show that a waiver occurred or that the waiver was "an intentional relinquishment or abandonment of a known right or privilege." See, Boykin v. Alabama, 395 U.S. 238, 243 (1969), quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

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[10]Mr. Blankner testified that the trial court would have allowed him to proffer mitigating evidence, had he requested to do so. "Judge Formet was very amenable allowing us to present whatever we could. He allowed us to put things into evidence in this case that I don't think other judges I'm aware of today would allow us to present." (PC-R. at 1392).

The questions asked of Mr. Power were all leading questions that merely required a yes or no response from Mr. Power. The trial court never asked Mr. Power any non-leading questions that affirmatively demonstrated his knowledge of the penalty phase proceedings, his knowledge of the function and role of the jury, or his understanding of the consequences of his waiver.

At no point did the trial court ask counsel what the mitigation was, nor did trial counsel ever say on the record the type of mitigation he found. No proffer of mitigation was made.

Three weeks later, on November 5, 1990 when the penalty phase began, Mr. Power was not asked if he was waiving mitigation. In fact, he was asked nothing. Instead, trial counsel announced to the court that it would not present psychiatric testimony (R. 2351). Trial counsel told the court he received records on Mr. Power, but "haven't had a chance to go through them. It was all we could do" (R. at 2351).

Mr. Blankner failed to understand how mental health impacts on a mitigation case and how it impacted on Mr. Power's choices. He testified that while he believed that depression can affect mitigation, can cloud a defendant's opinion and thwart a defense attorney's job (PC-R. at 1379),

Mr. Blankner failed to have Mr. Power evaluated by a competent mental health expert to determine if he was depressed when the records indicated he suffered from that condition. Mr. Blankner also failed to have Mr. Power's records reviewed by a competent mental health expert because, "I never saw him in a depressed state" (PC-R. at 1413). However, Mr. Blankner conceded that he failed to consult a mental health expert on depression (PC-R. at 1420). Mr. Blankner testified that "I have depressed clients. I don't know they all look the same. I've had clients that I thought were okay and turned out not to be okay. I'm not the expert and I will give you that, okay" (PC-R. at 1514).

Records show that Mr. Blankner only received the California hospital records immediately before the penalty phase began. The trial record shows that Mr. Blankner did not have time to review the records nor investigate any of the facts contained in them.

Moreover, while Mr. Blankner testified that he thought Mr. Power would have refused to see a mental health expert, Mr. Power had agreed to undergo an MRI and EEG, after the guilt phase. This exam was sought by the State and ordered by the judge. Mr. Blankner received no reports indicating that Mr. Power refused to cooperate or be tested (PC-R. at 1399).

In fact, Mr. Blankner was unable to point to any time in his representation of Mr. Power that he was not cooperative or refused to be seen by a mental health expert.[11] Mr. Blankner said Mr. Power was a trouble-free inmate at the county jail (PC-R. at 1370).

Mr. Blankner testified that he spoke to several of Mr. Power's family members, including brother Billy, Robert Power Sr., and Donna McNeil, Mr. Power's mother. Mr. Blankner testified that Robert Power Sr., "was quite negative about Robert and we felt like he was not compassionate in the way he might be" (PC-R. at 1386). Despite such feelings, the defense nevertheless put Robert Power Sr.'s name on a witness list and he was deposed by the State Attorney (PC-R. at 1364)(Defense Exhibit 17). Mr. Blankner testified that he spoke with Mr. Power's mother before the guilt phase, but did not list her as a witness because she initially was helpful, but then said she was not going to remember things (PC-R. at 1349, 1367). Mr. Blankner failed to explain why the mother was not listed, but the father, who was a harmful witness, was listed on the defense witness list and deposed.

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[11]State witness Frank Denike, one of Mr. Power's defense attorneys on the Osceola rape cases, testified that Mr. Power agreed to speak with Dr. Merikangas after it was authorized by Mr. Denike (PC-R. at 741).

Mr. Blankner conceded that he was concerned with Mr. Power's decisions, and "did not believe Mr. Power was making good decisions about how we ought to proceed on his penalty phase." Mr. Blankner said he contacted two attorneys, Robert Wesley and Joseph Durocher, to seek their advice but **they** failed to follow up and call him back. Mr. Blankner acknowledged that it was his responsibility to call them back (PC-R. at 1444).

Mr. Blankner also said he called Dr. Merikangas, but could not find any notes of his discussions with him (PC-R. at 1424). Dr. Merikangas had no such recollection of any discussion with Mr. Blankner. Mr. Blankner's telephone consultation was not reflected in his billing, which he testified he meticulously kept (PC-R. at 1440)(Defense Exhibit 25).

Trial counsel's failure in this case was his inaction and his inexperience as a defense attorney. He failed to see that Mr. Power suffered from severe depression and take action. He even failed to review the medical records and other records he received from the State Attorney on Mr. Power that would have shown Mr. Power's severe depression, history of suicide, history of substance abuse and huffing gasoline and other inhalants. Had he reviewed those records, he would have

learned that Mr. Power was incapable of making strategic tactical trial decisions and incapable of knowingly and intelligently waiving the presentation of penalty phase mitigation. Deferring trial strategy of this magnitude to a client whom he knew or should have known “suffered emotionally” and had a “mental illness” was deficient performance and fell below the community standards of 1990.

Expert Testimony: The testimony of Dr. James Merikangas, a board certified psychiatrist and neurologist, further supported Mr. Power's contention that trial counsel was ineffective for failing to investigate Mr. Power's mental health.

In preparation for the Osceola County trial, Dr. Merikangas testified in post-conviction that he had conducted a preliminary evaluation of Mr. Power at the Osceola County Jail in 1987 for competency.[12] Dr. Merikangas prepared a full report of his findings (Defense Exhibit 20). Dr. Merikangas testified that the evaluation was "a very brief, preliminary evaluation to direct the course of a further examination" (PC-R. at 1577), but that in fact, he was never asked to conduct the follow-up examination on Mr. Power.

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[12]Given that Mr. Power's Osceola County case was tried three years before his Orange County capital case, the information generated by Dr. Merikangas was clearly available to trial counsel.

Dr. Merikangas testified that at the time of his evaluation, Mr. Power appeared "quite depressed" (PC-R. at 1583). Dr. Merikangas explained that depression is a serious medical condition which:

> ...is a state of change in your thinking where you have an unrealistic view that things are hopeless, cannot get better, accompanied by your sleep, your appetite, your sexual libido, energy and your strength, lasting more than two weeks to meet the criteria for consensus diagnosis. And [Mr. Power] met all those criteria.

(PC-R. at 1584).

Dr. Merikangas explained that depression has a profound effect on a person's ability to function. In particular, he said, depression:

> ...interferes with processing, with attending, with figuring out what's going on, with making judgments, interferes with their whole cognitive electoral process.

(PC-R. at 1585).

Dr. Merikangas further noted that while depression is typically episodic (PC-R. at 1586), the more previous episodes experienced by an individual, the worse the prognosis for further depressive episodes. (PC-R. at 1587). This is further exacerbated in cases such as Mr. Power's in which the individual experienced depression during childhood:

> Well, the earlier you get depressed the

> worse it is, the more likely you are to become a drug abuser and seek your own chemical cures for the depression. And prognosis for childhood depression is bad. It is frequently the result of child abuse, of sexual abuse or physical abuse or other emotional abuse in childhood.

(PC-R. at 1588).

As a result of his evaluation, Dr. Merikangas recommended a Magnetic Resonance Image (MRI) and neuropsychological testing to be performed. He further explained that a normal MRI result would not necessarily rule out the presence of organic brain damage (PC-R. at 1591) and that neuropsychological testing was necessary to detect brain dysfunction (PC-R. at 1593).

Dr. Merikangas stressed the need for all medical, school and jail records, and deposition testimony. He also said there was a need to conduct interviews of family members, and other people who have observed Mr. Power. This was particularly so in this case, because:

> there was a lot of child abuse, sexual abuse and probably mother abuse in this family. And getting them from different members of the family, and getting their viewpoints, and having heard Russell [Power] speak today it's very important to know what were the formative things that went into the creation of the personality and what burdens of post traumatic stress and depression may have existed and might help to explain the behavior.

(PC-R. at 1595).

However, despite having laid out a detailed road map for trial counsel to follow regarding the necessary mental health investigation into Mr. Power's case, Dr. Merikangas was never contacted by trial counsel (PC-R. at 1597). Dr. Merikangas testified that he would have made himself available to testify at Mr. Power's penalty phase (PC-R. at 1596). He said that even if Mr. Power had preferred him not to have testified, he would have been able to share his data and consult with other mental health professionals.[13]

Dr. Merikangas' initial neurological evaluation of Mr. Power provided valuable information in its own right, as well as a framework for further investigation into Mr. Power's mental state as it pertained to both the existence of mental health mitigation and his waiver of mitigation. Trial counsel's failure to utilize Dr. Merikangas' report, to contact him, or to call him at penalty phase was deficient performance. The hearing court found Dr. Merikangas “more

[13]Trial counsel's contention that he did not use Dr. Merikangas because he had elicited a confession from Mr. Power was also refuted by Dr. Merikangas' testimony. Dr. Merikangas had testified that he "didn't ask Mr. Power [about the crime]" but that he did ask the attorney present "what he was charged with." This testimony also is supported by Dr. Merikangas' report (Defense Exhibit 20).

compelling and credible" than the State's expert who attempted to refute his findings.

Dr. Merikangas' testimony was buttressed by the testimony of Dr. Thomas Hyde, a behavioral neurologist. Dr. Hyde's testimony not only reinforced the deficient performance on the part of trial counsel, but also showed the substantial prejudice that trial counsel's omissions rendered Mr. Power. Dr. Hyde testified that he had conducted an extensive interview with Mr. Power and a neurological evaluation. (PC-R. at 1769).

Dr. Hyde, who reviewed background materials and an interview with Mr. Power's mother, concluded that Mr. Power suffers from significant neurological impairment. He found:

> several abnormalities on examination that suggest some degree of frontal lobe dysfunction. It's important for abstracting actions, reasoning, impulse control. Also elements of behavior, particularly his religious preoccupation and propensity towards voluminous writing is significant with telling me he has frontal lobe dysfunction on the basis of my examination and history from Robert, correlated with events in his life that frontal lobe and/or temporal lobe damage.

(PC-R. at 1772).

Dr. Hyde found numerous factors in Mr. Power's background, which were significant influences on Mr. Power's neurological condition:

> ...in utero factors, difficult pregnancy report, records of maternal alcohol ingestion, significant amount, although she denied that to me, face to face. She did admit to working in a print shop with significant exposure to organic solvents and respiratory distress at the time of Robert's birth as well as breech presentation and placental abnormalities that might present in toxic brain damage around the time of birth. He suffered from physical trauma to the head on several occasions growing up, with loss of consciousness. Also engaged in a wide variety of poly-substance abuse from using anything including inhalants of gasoline fumes which are well known to produce lasting permanent brain damage. [Mr. Power] comes from a family of people with not well diagnosed obvious behavioral abnormalities suggesting there may be a common genetic thread there.

(PC-R. at 1772-1773).

Dr. Hyde also opined that Mr. Power suffered from a "major recurrent depression" and “post traumatic stress disorder (PTSD)" (PC-R. at 1773). He explained the severity of Mr. Power's depression:

> It's characterized by impaired reasoning and judgment...He's had chronic depression throughout adolescence and adult life. He received treatment on several occasions for that disorder and he's had several, at least one major suicide attempt of hanging while incarcerated in California. He's previously been diagnosed with mood disorder, either major recurrent depression or bipolar disorder.
>
> ***
>
> In summary I would say that there is

> significant evidence of depression throughout his adolescence and adulthood including incarceration and trial that would cloud his judgment, impair reasoning ability, and have significant effect upon how he made assessments during the course of his life both before incarceration and after incarceration.

PC-R. at 1773-1774).

Dr. Hyde's testimony reflects Dr. Merikangas' view that mood disorders such as those suffered by Mr. Power often come "closer and closer together" so that the disorder gets more severe over time. (PC-R. at 1774).

The combination of Mr. Power's neurological impairment, his depression, and his PTSD[14] caused "his behavior leading up to the crimes directly influenced by his neurological psychological impairments on his relationship with his lawyers and legal proceedings after his incarceration" (PC-R. at 1778). Dr. Hyde concluded within reasonable medical probability that Mr. Power's impairments are long standing, and support both statutory mental health mitigating circumstances enumerated in Florida law.[15] (T. (PC-R. at 1782).

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[14]This disorder is caused by "severe emotional and physical trauma" earlier in life including the rape by an adult male at age twelve, according to Dr. Hyde. (PC-R. at 1777).

[15]That Mr. Power was under extreme mental or emotional disturbance at the time of the crime and that his ability to conform his conduct according to the law was substantially impaired. (PC-R. at 1781-1782).

The failure to present such mitigation to the jury was prejudicial to Mr. Power.

Dr. Hyde found that Mr. Power was severely depressed at the time of his capital trial in 1990-1991:

> ...he showed significant signs of irritability, poor judgment, reasoning, distrust in certain aspects of his case, paranoid ideation approaching delusional thinking during the time of his trial.

(PC-R. at 1783).

Mr. Power has had chronic depression, interspersed with bouts of severe depression throughout his adolescence and adult life, according to Dr. Hyde (PC-R. at 1773). Mr. Power's depression affected his decision making capacity "in a profound way" (PC-R. at 1775). In particular, the experience of being found guilty of first-degree murder would have been a "major stressor" and extremely likely to have triggered a major depressive episode. (PC-R. At 1818).

At the evidentiary hearing, the State made much of the fact that Mr. Power apparently produced voluminous writings during the course of his trial and penalty proceedings and attempted to infer that this fact demonstrated that Mr. Power's reasoning was not impaired. However, as Dr. Hyde said, the voluminous writing itself is a symptom of temporal lobe dysfunction. Furthermore, there is a difference between

having a factual understanding of a situation and being able to reach a decision. (PC-R. at 1819). Even if Mr. Power had a factual understanding of his situation, his depression affected his ability to make choices in a profound way. Mr. Power's mental condition made it impossible for him to make a rational choice vis-a-vis waiving mitigation.

Dr. Hyde stressed that Mr. Power's impairment would probably not be apparent to the untrained lay observer (PC-R. at 1776). Trial counsel's contention that Mr. Power did not seem depressed when he purportedly waived mitigation does not excuse his failure to investigate Mr. Power's mental health, either as a basis for mitigation or to determine whether Mr. Power's purported waiver of mitigation was knowing, intelligent and voluntary. This was particularly so when Mr. Power has a long and well-documented history of severe depression. Unfortunately, trial counsel did not read the documents given to him. Without input from a competent mental health professional, it was difficult for trial counsel, untrained in medical diagnoses, to accurately gauge the true extent Mr. Power's impairments, as trial counsel should have been aware. Had trial counsel investigated Mr. Power's depression, PTSD and neurological impairments properly, Mr. Power's waiver would not have been accepted. The hearing court

also found Dr. Hyde's testimony to be "compelling and credible."

Barry Crown confirmed the results of doctors Hyde and Merikangas. Dr. Crown, a psychologist who practices in clinical psychology, forensic psychology and neuropsychology, testified that after evaluating Mr. Power, he found a history of perinatal problems, poly-substance abuse that began at a young age, which included huffing gasoline, and severe incidents of brain trauma. The result was that Mr. Power had significant neuropsychological deficits and impairments, and that pattern was indicative of brain damage (PC-R. at 798-811).

Dr. Crown said that Mr. Power's brain damage resulted in him having difficulties in reasoning and judgment and that his understanding of long term consequences was impaired. Dr. Crown described it this way:

> It's like having an eight cylinder car with an eight cylinder engine. By analogy, Mr. Power's car runs but several cylinders aren't working.

(PC-R. at 814).

Dr. Crown testified that Mr. Power's brain damage existed in 1988 at the time of the crime and was present in 1997, when he completed his exam of Mr. Power (PC-R. at 816). Dr. Crown testified that he saw no indication that Mr. Power suffered

any brain injury after 1988. He testified that brain damage cannot be cured, and that the method of assessment in finding brain damage was available in 1990 during Mr. Power's guilt and penalty phases (PC-R. at 816-817). Dr. Crown's evaluation was the type recommended by Dr. Merikangas to trial counsel three years earlier. Dr. Crown's testimony was considered "compelling and credible" by the hearing court.

Dr. William Anderson, a physician and deputy medical examiner in Orlando, testified that in 1990, he was contacted by a State Attorney investigator who asked him about the toxicology and pathological findings that can result from huffing gasoline and other chemicals, as Mr. Power purportedly had. He was specifically asked what impact those chemicals would have on a person's behavior (PC-R. at 1897). Dr. Anderson testified that toxic agents can alter the workings of the brain, change behavior patterns and cause psychosis. He also talked with the State investigator about the impact of drugs and alcohol during pregnancy and referred the State investigator to a psychiatrist to discuss the effects of toxic agents on the brain (PC-R. at 1899). Presumably, the State considered Mr. Power's mother's pre-natal activities as significant and potentially mitigating.

Dr. Anderson testified that in 1990, he was in Orlando

but was not contacted by anyone from Mr. Power's defense team. He said would have talked to them had they called (PC-R. at 1900).

Dr. Faye Sultan, a clinical psychologist, testified that she spent 15-16 hours evaluating Mr. Power and reviewed his extensive background materials (PC-R. at 1631-1636). Among the records she reviewed were Mr. Power's school records, which were mostly grades of Ds and Fs. Dr. Sultan said the records were important because they showed that Mr. Power never spent more than a few months in a school at a time and showed how often the family moved from one place to another (PC-R. at 1636).

Dr. Sultan reviewed Mr. Power's California prison records,[16] which showed that he suffered from serious mental illness, including major depression. She testified that the importance of these records were that they showed consistency of Mr. Power's prison history, dating back to 1982. The records showed Mr. Power's suicide attempts and how prison officials attempted to treat Mr. Power's depression with drugs, including Elavil and Lithium (PC-R. at 1636-1637).

Mr. Power's medical records from Santa Cruz County showed

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[16]Dr. Sultan considered records on Mr. Power that trial counsel had in his possession, but did not read.

that Mr. Power was diagnosed as a schizoid person, who experienced moderate distress syndrome, consisting of depression and anxiety (PC-R. at 1639). His prison records also showed that he had been raped in prison, which affected him deeply and which played a significant role in Mr. Power's life (PC-R. at 1640).

Dr. Sultan testified that she reviewed materials on Grady Highsmith, a friend of Donna McNeil, and spoke to Mr. Power's family members, including his mother, Donna McNeil, his sister, Kim Power; his brother, Russell Power and cousin David White (PC-R. at 1640-1641).

Dr. Sultan testified that Donna McNeil told her about her own abusive and violent life; how she suffered from mental illness and major depression. Mrs. McNeil told her that she was hospitalized twice for depression and because of her illness, was unable to control or supervise her children. Mrs. McNeil said when she was pregnant with Robert, she ate only one meal a day because the family had no food (PC-R. at 1647).

Mrs. McNeil reported to Dr. Sultan that her children were abused by Robert Power Sr., but that Robert Jr. was singled out for the majority of the abuse because he was a sickly child who was born with physical ailments and Robert Power Sr. saw this as a weakness (PC-R. at 1642-1643). Dr. Sultan noted

an incident where Robert Jr. was physically abused by his father, and placed in a room without a bed or any clothing. Because of that incident, Robert Jr. contracted pneumonia (PC-R. at 1644).

Dr. Sultan also discussed the sexual abuse the Power children suffered with Robert Jr.,'s brother, Russell Power, who said all of his brothers, including himself, were raped by Grady Highsmith (PC-R. at 1645).

Dr. Sultan spoke with Kim Power, Mr. Power's sister, who witnessed many of the beatings in the Power household. She described being hungry, stealing food, and that her mother was too frightened to work. She remembered no heat in the winter and the children sleeping in snow suits because there was no electricity or heat in the house (PC-R. at 1646).

Dr. Sultan also spoke with David White, who described how needy the Power family was. "He was very distressed to learn about the sexual abuse of the boys and was aware that the boys were using substances from an early age" (PC-R. at 1648).

Based on her evaluation, interviews and review of records, Dr. Sultan concluded that Mr. Power grew up in a chaotic and disturbed home; that he was the victim of violence; had inadequate nutrition and lived in an inadequate house. The family moved often and Mr. Power had deficient

schooling. As a young child, he began to abuse illegal substances, and was exposed to toxic chemicals while his mother was pregnant with him. Dr. Sultan found that Mr. Power was singled out for physical and mental abuse by his father (PC-R. at 1650-1651).

Dr. Sultan also found that Mr. Power had no structure in his environment. His mother suffered from major mental illness and the family was disrupted by her repeated hospitalizations. Robert Power Sr. left home when Robert Jr. was 10 or 11 years old. Robert Jr.'s mental condition deteriorated significantly (PC-R. at 1650).[17] Dr. Sultan concluded that Mr. Power's mother developed attachments to other men, who were often violent and abusive. Hunger and malnutrition were a significant part of their lives. In addition to the physical and mental abuse at home, Mr. Power also suffered from severe sexual abuse as a young boy (PC-R. at 1651).

Dr. Sultan found that depression was a significant part of Mr. Power's life. She described depression as narrow thinking; unable to see the entire picture; zooming in on small details and the inability to see clearly (PC-R. at

[17]Robert Jr.'s first suicide attempt was when he was 10 years old (PC-R. at 1422).

1652). Dr. Sultan testified that depression may be difficult for people to see. "Some people like Robert conceal it. It requires a lot of time and experience" to uncover it (PC-R. at 1653).

Just as Dr. Merikangas had, Dr. Sultan testified that she saw indications that Mr. Power suffered from brain dysfunction and recommended that he be seen by a neuropsychologist. Dr. Sultan reviewed Dr. Barry Crown's report, which found brain damage, and said it was consistent with the indications she observed (PC-R. at 1653).[18]

Dr. Sultan's clinical diagnosis was that Mr. Power suffered from major depression, severe recurrent without psychotic features. That diagnosis involves two episodes of major depression that lasted at least two weeks. His symptoms significantly impaired his functioning, his reasoning his judgment, his emotional state, and his thoughts about suicide. This affected Mr. Power's ability to make choices (PC-R. at 1656-1658). Dr. Sultan testified that severely depressed people **cannot** make rational decisions (PC-R. at 1666).

Dr. Sultan said she reviewed the deposition of Mr.

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[18]Dr. Sultan testified that she initially administered an MMPI to Mr. Power, but after she saw indications of brain damage, the test results could not be validly interpreted because of Mr. Power's neurological impairments (PC-R. at 1722).

Blankner, in which he said that in 1990, Mr. Power was not rational, often changed his mind and spoke of himself in the third person. Dr. Sultan testified that those are indications of depression (PC-R. at 1651).

Dr. Sultan found the statutory mitigating factors that Mr. Power was under the influence of neurological impairment and severe depression at the time of the offense. His ability to conform his conduct to the requirements of law was substantially impaired based on his history of mental illness (PC-R. at 1667). Dr. Sultan also testified that she found non-statutory mitigating factors and would have testified to these factors in 1990 had she been given the background materials and medical records of Mr. Power.[19] She found brain damage; depression; use of solvents, illegal drugs and alcohol; chaotic family life; physical and mental abuse by

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[19]In sentencing Mr. Power to death, the trial judge found four aggravating circumstances: that Mr. Power had previously been convicted of another violent qualifying felony; that the capital offense was committed during an enumerated felony; that the capital offense was especially heinous, atrocious or cruel; and that the capital offense was committed in a cold, calculated and premeditated fashion. (R. at 3258-3271). The judge found the mitigating circumstance of the cost and degree of punishment of executing Mr. Power versus life in prison to be strong and heavily weighted, but the court found this mitigating circumstance to be legally inappropriate for consideration and deserved little weight. The trial court specifically found that Mr. Power's age and lack of future dangerousness were not mitigating circumstances (R. at 3258-3271).

father; neglect by mother; mother's exposure to toxic chemicals during pregnancy; no structure in life; scattered enrollment in school; inadequate education; placed in foster care; poverty and hunger; abandonment by father; and sexual abuse (PC-R. at 1668-1669). The hearing court found Dr. Sultan to be "compelling and credible."

Lay testimony: At the evidentiary hearing, family members testified about Mr. Power's early experiences of poverty, abuse neglect and substance abuse. Russell Power, Mr. Power's older brother, testified that their father, Robert Power Sr., did not spend a lot of time at home and failed to provide for his family. Russell Power said when his father was home, Russell was singled out for better treatment, while Robert Jr. was rejected by his father. The father beat the children and discipline "got out of hand." Russell Power said his father did not want to be around the children because they irritated him (PC-R. at 1548).

Russell described his father as a heavy drinker who drank all the time and who became more abusive as he drank. Alcohol was in the home and the children had easy access to it. Russell testified that he started drinking when he was 9. Russell recalled an incident where his brother Robert Jr. drank an entire bottle of alcohol when he was 8 years old (PC-

R. at 1549-1550).

Russell described a chaotic home life and the family moved around a lot. He recalled living in Ohio, Indiana, Kentucky, Florida and Michigan. He said he could not remember going to school for one full semester when his father was home (PC-R. at 1553). When his father wasn't home, Russell recalled having no food or clothing because his father failed to provide for them (PC-R. at 1553).

Russell testified that his mother was not allowed to work. The family had no money for food or heat. He and his siblings stole food and clothing and his mother knew about it, but had no control over the children (PC-R. at 1555, 1557). Russell said his mother had a nervous breakdown from the stress (PC-R. at 1557).

Russell testified that he started doing drugs when he was 12-13 years old and that included huffing gasoline with Robert Jr. (PC-R. at 1556). Russell said he ran away from home when he was 12. He testified that he and his brothers were molested by Grady Highsmith (PC-R. at 1559).

Russell testified that he was a witness during Mr. Power's rape trial in Osceola County, but he was not contacted by Mr. Power's defense attorneys for the murder trial. He was never told by Mr. Power not to cooperate with Mr. Power's

defense attorneys (PC-R. at 1569).

David White, a maternal cousin of Mr. Power, also testified that he had close contact with the Power family after they moved from Indiana to Florida. (PC-R. at 1748). Mr. White also moved to Florida and initially stayed with the Power family (PC-R. at 1748). After Mr. White found his own apartment, he continued to visit the Power family regularly. (PC-R. at 1748). It was at this time that he became "real close" with Robert Power Sr. (PC-R. at 1749). Mr. White testified that Robert Power Sr. and he would frequent bars and that Robert Power Sr. was a heavy drinker:

> He bragged about having drunk a pint of whiskey before he got out of bed and drink beer all day walking girders. He was a steel worker. We couldn't see how he could do that. He was always drinking beer, laying on the couch in his underwear and drinking beer.

(PC-R. at 1750).

When drunk, Robert Power Sr. sought extra-marital sex in the bars he frequented. Mr. White testified that when they went together to play pool, Robert Power Sr. would disappear and say that he really came to the bar "to go to the back and get a blow job" (PC-R. at 1750). He also recalled that Robert Power Sr. would pick up women and take them back to his hotel room when the men were together on bowling trips. (PC-R. at

1753). Robert Power Sr. made no secret of his sexual escapades. Mr. White recalled Robert Power Sr. boasting to his children that he was going down the street to get some "pussy" (PC-R. at 1752).

According to Mr. White, Robert Power Sr. "took pleasure in humiliating the kids" (PC-R. at 1751). Robert Power Sr. was "not a good husband or a good father" (PC-R. at 1751). Mr. White stated that Robert Power Sr. would regularly go off on "fishing trips" and would give Donna a thousand dollars to cover "rent, utilities, kids, school lunches" while he was away (PC-R. at 1753). Mr. White further testified that Donna would frequently run short of money during his absences and that Mr. White would "take milk and bread and some things over for the kids" to help out (PC-R. at 1753). Mr. White made it clear that Robert Power Sr.'s neglect of his wife and children was not because he was not making enough money. In fact, Robert Power Sr. "always made a lot of money," but would spend it on luxuries for himself rather than necessities for his wife and children (PC-R. at 1754). Mr. White recalled him buying "alligator shoes....a very nice camera....a Cadillac" (PC-R. at 1755). This was in marked contrast to the children who lacked "nice shoes, good clothes" (PC-R. at 1755). Mr. White also noted that Robert Power Sr. was a "compulsive

gambler" who had "won and lost two houses gambling" (PC-R. at 1756).

Mr. White said he got "frustrated when he went to the Power home because the kids would have runny noses and no money for medicine (PC-R. at 1756). Robert Jr. stood out as a "very quiet kid" who "wouldn't join in" when the other kids played (PC-R. at 1756).

Mr. White testified that he would have been available and willing to testify at Mr. Power's penalty phase, but that Mr. Power's lawyers never contacted him (PC-R. at 1758).

Kimberly Power, Mr. Power's sister, also testified at the evidentiary hearing about the abuse, neglect and poverty that she and her siblings suffered while growing up. Kimberly recalled that her father took off on trips and left the family without food. When that happened, the utilities were frequently cut off, and the children did not have clothes. (PC-R. at 1871). They did not celebrate Christmas or other holidays (PC-R. at 1877). On one occasion, some presents were bought for the children, but "two weeks later, they come and repossessed it all" (PC-R. at 1877).

Kimberly also recalled that her brother, Robert Jr., who had chronic health problems as a child, would "take a deep breath, and turn purple and pass out on the ground" (PC-R. at

1872). The periods of unconsciousness were such that he required mouth to mouth resuscitation, and that sometime an ambulance would be called. (PC-R. at 1872). Kimberly also said that Robert Jr. was not well coordinated, that he fell over a lot, and that on at least one occasion he hit his head and became unconscious as a result of a fall from a tree. (PC-R. at 1873).

Kimberly testified that her father was abusive towards the children, including beating with "the end of a pistol in your fist... or an extension cord" (PC-R. at 1875). She described the beatings as "bad" and that they would leave marks, bruises and cuts (PC-R. at 1876). Robert Jr. bore the brunt of his father's abuse because he was "mostly a sickly child and Dad couldn't stand sickness or weakness in any way" (PC-R. at 1876). She described her father as an "excessive" drinker, and that he was "constantly" drinking beer, whiskey and Scotch at home (PC-R. at 1877). She said the children hated being around their father. When their father came home, the boys would "do anything to get out of there; crawl out windows, anything they could do to get out of the house" (PC-R. at 1878).

Kimberly testified that her brother, Robert Jr., had a history of substance abuse problems including huffing

gasoline. She said he used "recreational drugs like black beauties, Marzine and speed" (PC-R. at 1882), and that he regularly drank alcohol (PC-R. at 1883). She said Robert Jr. was only about 10 years old when he started using drugs.

Her brother suffered serious injuries as a direct result of huffing gasoline. She described one incident she remembered:

> We were living in Pine Hills. I think Bobby was about ten or eleven there, and I went out back and he was in the pool garage with my little brother Bill. They were huffing gasoline and I was blown away by it. I can't imagine what they were doing. Anyways, I asked them what they were doing. They thought it was great. Well about ten minutes later I went in the house and I come back out and I heard Bobby screaming and his leg, whole entire leg was on fire on the inside of his pants, but the outside of his pants wasn't burning. And he ran out of the door a that time and jumped in the big pool, with no water in it, about this much in the bottom. He was in shock at that time. I drug him out, me and my brother, and put him in the bathtub full of ice until an ambulance could come get him.

(PC-R. at 1873-1874).

Kimberly testified that in addition to the physical abuse meted out to her brothers, they also were subjected to sexual abuse. She recalled that after her father finally left the household, her mother became friendly with Grady Highsmith. Kimberly revealed how she learned that Highsmith had sexually

abused her brothers:

> [the mother and Highsmith] were in the front of the house and...he told her he fucked all her boys. Everybody just started picking up bricks and throwing them at his van and he left and that was the last we saw of him.

(PC-R. at 1881).

Kimberly testified that she would have been willing to testify at Mr. Power's capital penalty phase if she had been asked, but that none of Mr. Power's attorneys ever contacted her (PC-R. at 1884).

Additional information about Mr. Power's early life came in through the testimony of Anna Chestnut, a cousin of Mr. Power. Ms. Chestnut testified that she is only three years younger than Donna, Mr. Power's mother, and that she was raised by Donna's parents with Donna (PC-R. at 701).

Ms. Chestnut testified that as a teenager Donna was "wild" and would "stay out all night." Ultimately, Donna was placed in a "girl's school" for delinquent girls for nearly two years (PC-R. at 702-703). Ms. Chestnut also testified that Donna would leave Mr. Power for extended periods with her while Donna was dating Robert Power Sr. (PC-R. at 704). Ms. Chestnut also would have been willing and able to testify at Mr. Power's penalty phase had she been contacted but was only told about Mr. Power’s legal difficulties in 2000 (PC-R. at

706).

Additional evidence about Donna McNeil’s fragility was provided by Joanne Flores, Mr. Power's aunt and his mother’s older sister. Ms. Flores testified that her mother (Mr. Power's grandmother) had mood swings and used a leather belt to discipline the girls, including Donna. Their mother was very strict (PC-R. at 712-713). She also noted that Donna suffered from an apparent seizure disorder and on one occasion at dinner she "would just slump over" and black out (PC-R. at 713). Ms. Flores observed such seizures "quite a few times" (PC-R. at 714). Ms. Flores testified that no one from Mr. Power's legal team had contacted her, but had she been asked, would have testified on Mr. Power's behalf (PC-R. at 716).

Michael Parton, Mr. Power's oldest brother, testified at the evidentiary hearing. He was in prison for sexual battery at the time of his testimony (PC-R. at 1906). Mr. Parton recalled that his stepfather, Robert Power Sr., would be gone from the home a lot, and that when he was away, "...a lot of times we didn't have anything to eat. A lot of times there was no lights, gas or water" (PC-R. at 1908). When he was home, his step-father was drunk, angry and constantly upset. He said there was a lot of yelling and verbal abuse and his children were beaten.(PC-R. at 1909).

Mr. Parton said Robert Power Sr. used a leather belt to administer his beatings (PC-R. at 1910) and that he and Robert Jr. received the most beatings (PC-R. at 1910). Mr. Parton also described the verbal abuse administered by Robert Power Sr. and said that he would typically call him a "worthless bastard" or "son of a bitch" (PC-R. at 1911). Mr. Parton said he often ran away from home.

Mr. Parton testified that after Robert Power Sr. and his mother finally split up:

> We was living over in Pine Hills Road and we didn't have no lights, no gas, no water. We was eating grapefruit off backyard trees and sometime we steal stuff from stores. And my mom had took some checks and wrote them out to buy clothes for us for school and I guess checks weren't no good because police came and arrested her.

(PC-R. at 1913).

Mr. Parton specifically remembered Grady Highsmith as "someone that came in while we were smoking weed, doing drugs, and he got me a job at Winter Greens Golf Course" (PC-R. at 1914). Mr. Parton said he was raped by Highsmith (PC-R. at 1915)), but did not tell his mother until "couple months later" (PC-R. at 1915).

Mr. Parton said that he did illegal drugs with Robert Jr. and Russell, starting when Robert Jr. was "about seven." He said he huffed gasoline on a regular basis for about three

years. He described it as an “everyday thing" (PC-R. at 1917). Mr. Parton also described the incident in which Robert Jr. caught fire while "huffing" gasoline, noting that when they put him in the bathtub, his “skin was all over the sides of the bathtub. Stunk pretty bad" (PC-R. at 1918). Mr. Parton testified that he would have been available and willing to testify at Robert Jr.’s capital trial had he been asked, but that none of his attorneys ever contacted him. (PC-R. at 1919).

The fact that Grady Highsmith had raped Mr. Power as well as his brothers was confirmed by Jeff Walsh, an investigator with Capital Collateral Regional Counsel, who testified that along with investigator Paul Mann, he met Highsmith at his business/residence in Fort Walton Beach (PC-R. at 1527).[20] He had two subsequent meetings with Highsmith. Mr. Walsh testified that Highsmith:

> ...explained to myself that he would provide Robert and his brother Russell in particular with drugs. He befriended Robert's mother and described her as someone who was unable to care for the children, was an alcoholic, dysfunctional type woman and he saw that as an

[20]Mr. Walsh testified that he served Mr. Highsmith with two subpoenas to testify at the evidentiary hearing, but Mr. Highsmith tolc him that he would not honor the subpoenas. Mr. Highsmith failed to show up at Mr. Power’s evidentiary hearing (PC-R. at 1530)(Defense Exhibit 26).

> opportunity to gain sexual favors from the children.

(PC-R. at 1527).

Mr. Highsmith told Mr. Walsh that he had molested the children with his hands and mouth (PC-R. at 1528) and that on a later occasion, Highsmith took Russell and Robert Jr. to the panhandle of Florida and Southern Alabama and "engaged in sexual intercourse with Robert Power." He said it was “not consensual, a struggle" and an "ugly scene" (PC-R. at 1528). Mr. Walsh also said that Highsmith told him that no attorney or investigator for Mr. Power had ever contacted him (PC-R. at 1530). Had trial counsel attempted to do so, he easily could have located and interviewed Highsmith. Trial counsel's failure so to do is undeniably prejudicial to Mr. Power.

None of this information was presented to the judge or the jury because trial counsel failed to do so. He believed that Mr.
Power had waived mitigation, despite his mental disabilities.

Community Standards in 1990: Robert Norgard, a criminal defense attorney, was qualified as an expert in criminal defense with the specialization in criminal defense litigation. He testified about community standards in 1990, at the time of Mr. Power’s capital trial (PC-R. at 850-851).

In 1990, the community standards called for a mental health expert to examine a defendant for competency; insanity, intoxication and mitigating factors. This was done as a complete work up of the guilt phase of a case (PC-R. at 855).

Mr. Norgard testified that in 1990, case law was already established that there was no limit to non-statutory mitigating factors that could be presented. At that time, mitigating specialists throughout the state were lecturing on the exhaustive approach that needed to be taken in developing mitigation in terms of obtaining records of clients and interviewing anyone who had touched the client's life. The standard in the community a that time was a minimum of 500 hours of investigation was needed to properly work up a capital case (PC-R. at 856).

In 1990, the standard in the community was to obtain a client's records, including prenatal and birth records; hospitalization records; social agency records; school records and any records that might indicate learning disabilities; mental health and counseling referrals; military records; prison records; old pre-sentence investigations; old criminal files and police reports.

The standard in the community in 1990 was to start with the client in obtaining information, but it was understood that the client had limited knowledge about his prenatal or birth information and early childhood years. A defense attorney also was limited if he

dealt with a client who had a disability such as depression, suicide or other mental health issues. “You can’t just rely on the client in terms of what they report to you” (PC-R. at 865).

The community standards in 1990 when dealing with a depressed, suicidal or mentally ill client was to determine the level of the illness and if that illness rose to the level of a mitigating factor. “...it would be something that would be a very important consideration as it related to mitigation” (PC-R. at 865). Mr. Norgard testified that a competent attorney in 1990 would have obtained a mental health evaluation (PC-R. at 866).

The Florida courts in 1990 routinely provided defense attorneys with mental health experts for penalty phases (PC-R. at 870). The 1990 community standard on death penalty cases was “you get a mental health expert period” (PC-R. at 879). At that time, even if a defense attorney did not believe his client suffered from mental illness, he was still required to obtain a mental health expert (PC-R. at 880).

> ...even if you feel your client is competent, you have an expert make that determination, you know, even if you feel insanity is not an issue, you have an expert make that determination, if you don’t feel intoxication is an issue, you have an expert make that determination. Same thing with mitigation, since mitigation can be essentially anything relevant to that person, even if you don’t see mental health issues, you let a mental health expert go through and evaluate the person based on mental health mitigator, you have a mental

> health expert look at your client in terms of the aggravating factors where mental health components play a part in that as well, particularly when you deal with nonstatutory mitigation, you know, you wouldn't want to deal with any mental health problems.
>
> But even above and beyond that, I mean, if a client came back with not a single DSM-IV diagnosis, you would still want a mental health professional that could explain family dynamics in terms of how it impacts a person's life, you know, the fact that they may have failed in school and how that had an impact on the person's personality even though it may not have resulted in a diagnosable mental illness. So mental health professional in the context of a capital case is very expansive in that respect and a very necessary component in a capital case.

(PC-R. at 880-881).

Mr. Norgard described mental health experts especially important in capital cases because not all attorneys are attuned to mental health issues (PC-R. at 931).

> ...I think any lawyer if confronted with a situation where a person says I don't want to do something that's going to save my life, that goes so against the grain of one of the most fundamental aspects of our existence being self-preservation that you've got to, I mean, it's got to raise a question.
>
> On every case I've known of where somebody has wanted to waive mitigation and wanted to be a death volunteer, the first thing that's happened is that they – the defense lawyers trot them off to mental health experts to see if they're competent to make that decision, if they're making a knowing and intelligent decision, if it's based on, you know, valid reasons as to why, you know, they want to die and not do things to save themselves.

(PC-R. at 933).

Even if an evaluation revealed no diagnosable mental illness, the expert could still testify to mitigation about the family dynamics, school performance, work history, and different aspects of the person's personality. "They still have a personality, they still have an intelligence level that could be explained to the jury" (PC-R. at 882).

If an attorney in 1990 was dealing with a difficult or resistant client, it meant there was a fundamental flaw in the attorney/client relationship. Mr. Norgard said that if that occurred, others besides the attorneys could be called in to deal with the client. These could include a secretary, an investigator or mitigation specialist, a mental health expert or other professional. It also could include a family member or religious person. The mental health expert should be used to explore the source of resistance to mitigation (PC-R. at 869).

In 1990, based on the rules of professional responsibility, a client without mental disabilities had control over whether to have a jury or non-jury trial; whether to plead or not plead guilty; and whether to testify in his own defense. All other tactical considerations were in the hands of the attorney (PC-R. at 871, 891). As Mr. Norgard testified:

> ...for example, you're dealing with a client who wants to waive mitigation, unless you can show him what the mitigation is, show him why it's important, discuss the mitigation with him, put him in a position to make a knowing and intelligent waiver, you're not doing your job.

(PC-R. at 872).

If a client in 1990 wanted to waive mitigation and was depressed and suicidal, defense attorneys were not precluded from asking the courts to appoint special counsel or a third attorney to try to break through the client's barriers; to make the judge aware of mitigation; proffer the information into the court record; or seek a Florida Bar staff ethics opinion on the attorney options (PC-R. at 885-889; 909).

> ....I feel there were requirements where the defense lawyers should have just done more than just sit and say my client doesn't want mitigation so I'm not going to do anything.

(PC-R. at 89-891).

The community standard in 1990 was not to have the defense attorney defer to a client who had mental problems (PC-R. at 891).

In 1990, there was no strategic reason for a defense attorney not to present mitigating evidence at a capital trial and no strategic reason for failing to have a capital client evaluated by a mental health expert (PC-R. at 910-911). In 1990, nothing prohibited a competent defense attorney from presenting mitigating evidence to the judge in camera; from proffering the information into the court

record; or putting mitigation into the record and notifying the court that it was available (PC-R. at 943-944).

In cases where clients were found to be competent to waive mitigation, the courts made inquiries into whether the waiver was knowing and intelligent and mental health examinations were conducted by experts (PC-R. at 933-934). There also was the duty of the defense lawyer to present the information to the court in a proffer (PC-R. at 935). Mr. Norgard said even before 1990, lawyers still had those obligations under the Sixth and Eighth Amendments to the U.S. Constitution in dealing with proportionality and the adversarial process (PC-R. at 935).

In 1990, a competent defense attorney should have known the difference between competence to stand trial and whether a defendant can make a knowing and intelligent waiver of mitigation (PC-R. at 939).

Deficient performance

Trial counsel was provided with available sources of information about Mr. Power's life and history of depression, yet failed to present that information to the jury or the judge. Trial counsel failed to obtain a mental health expert who could have explained Mr. Power's depression to the defense attorney and to the jury and judge. A mental health expert could have evaluated Mr. Power's records, talked to family

members, explained Mr. Power's disabilities and provided a context for his life.

Trial counsel had numerous indications from Mr. Power's life that he suffered from depression but these indications were ignored. Those indications were Mr. Power's California prison records from the 1980s. They included a report from Dr. Merikangas in 1987 that said Mr. Power was depressed. They included records from the Osceola rape cases that indicated that Mr. Power was in need of medical attention. And, those indications came from Mr. Power himself to his defense team -- Mr. Power's constant change of mind and his intransigence in the face of certain death. Mr. Power's defense attorneys completely ignored those indications.

Trial counsel failed to understand mental health issues as they pertained to mitigation. Trial counsel failed to question whether Mr. Power was capable of making a valid waiver of mitigation. Trial counsel believed that a competency evaluation conducted three years earlier was all that was required. This was wrong.[21] The trial court failed

[21]Mr. Power was evaluated for competency in 1987, before he went to trial on the Osceola rape cases. At that time, Mr. Power was presumed innocent. Subsequent to that evaluation, Mr. Power was sentenced to many life terms in prison from those rapes. Mr. Power was never re-evaluated for competency after his rape convictions or before his trial on first-degree murder. Mr. Power also was not evaluated for competency after his conviction of first-degree murder but before he

to properly question Mr. Power as to his understanding of mitigation and what it meant to waive it. His attorneys failed him, too. Trial counsel did not understand severe depression or brain damage. And because of that lack of understanding, trial counsel said he failed to present the mitigation evidence because his client told him not to. But his client was a severely depressed individual who had suffered from severe depression for two decades. His client was a brain-injured person who had an inability to process information and make rational decisions.

Trial counsel failed to understand that while Mr. Power may have been competent to proceed at trial in 1987, he may have become incompetent in the intervening three years, when he was facing a death sentence. Trial counsel failed to recognize that mental health is not a static condition. Trial counsel also failed to understand that competence to be tried is not the same as making a knowing and intelligent waiver of mitigation. Trial counsel failed to understand that competence to stand trial does not automatically mean that there are no mental health issues that need to be addressed in

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was facing a possible death sentence. Dr. Hyde testified that the experience of being found guilty of first-degree murder would have beer a "major stressor" and extremely likely to have triggered a major depressive episode. (PC-R. at 1818). If that was true for a death sentence, it was probably true for life sentences as well.

a penalty phase.

Trial counsel also failed to understand that he had an obligation to zealously represent his client, but failed miserably. He allowed a severely depressed client to make strategic decisions on the case. He allowed a severely depressed client to dictate the terms of the defense.

Trial counsel said that if he had to do it today, he would present the information, despite his client's wishes. He also said that today, he routinely hires a mitigation expert (PC-R. at 1397).

The State presented no evidence to dispute the facts from lay witnesses or experts regarding Mr. Power's life history or history of depression. The State's own expert, Sidney Merin, agreed that Mr. Power had brain dysfunction (PC-R. at 1050).

A defense attorney representing a defendant in a capital penalty phase "has a duty to conduct a reasonable investigation" regarding evidence of mitigation. Middleton v. Dugger, 849 F. 2d 491, 493 (11th Cir. 1988). See also Baxter v. Thomas, 45 F. 3d 1501 (11th Cir. 1995); Jackson v. Hering, 42 F. 3d 1350 (11th Cir. 1995); Blanco v. Singletary, 943 F 2d 1477 (11th Cir. 1991); Horton v. Zant, 941 F. 2d 1449 (11th Cir. 1991); Cunningham v. Zant, 928 F. 2d 1006 (11th Cir. 1991). See also, Riechmann v. State, 777 So. 2d 342 (Fla. 2000); and

Ragsdale v. State, 798 So. 2d 713 (Fla. 2001).

In State v. Lewis, 27 Fla. L. Weekly S 1032 (December 12, 2002), this Court held:

> the obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated – this is an integral part of a capital case. **Although a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision.**

Id.(emphasis added).

In Lewis, this Court reaffirmed its position in Deaton v. Dugger, 635 So. 2d 4 (Fla. 1994). In Deaton, the Circuit Court judge found that trial counsel rendered prejudicially deficient performance in failing to adequately investigate potential mitigating evidence, thereby rendering Mr. Deaton's purported "waiver" of mitigation invalid:

> While the court does not find that the evidence presented by the defendant at the evidentiary hearing would necessarily have been beneficial to his cause at the sentencing phase, the court finds that the defendant was not given the opportunity to knowingly and intelligently make the decision as to whether or not to testify or to call these witnesses. For this reason, defendant's third issue, as it alleges the ineffective assistance of counsel during the sentencing phase of the trial, is granted[.]

Deaton, 635 So. 2d at 8 (quoting from Broward County Circuit Court Judge Moe's order partially granting Rule 3.850 relief).

This Court, in addressing a cross-appeal taken by the State,

agreed with Judge Moe's conclusions:

> In this case, the trial judge found that Deaton had waived the right to testify and the right to call witnesses to present evidence in mitigation, but concluded that, because his counsel failed to adequately investigate mitigation, Deaton's waiver of those rights was not knowing, voluntary, and intelligent. The rights to testify and to call witnesses are fundamental rights under our state and federal constitutions. Although we have held that a trial court need not necessarily conduct a Faretta type inquiry in determining the validity of any waiver of those rights to present mitigating evidence, clearly, the record must support a finding that such a waiver was knowingly, voluntarily, and intelligently made.

Id. (footnotes omitted). Because "clear evidence was presented that defense counsel did not properly investigate and prepare for the penalty phase proceeding[,] . . . counsel's shortcomings were sufficiently serious to have deprived Deaton of a reliable penalty phase proceeding." Id. at 8-9. Further, "evidence presented in the rule 3.850 evidentiary hearing established that a number of mitigating circumstances existed." Id. at 8. Because of counsel's deficient performance in failing to investigate this evidence

prior to consulting with Deaton about the decision to waive or present mitigating evidence, "such ineffective assistance was prejudicial." Id. at 9. Deaton directly controls Mr. Power's case.

A defendant's wishes not to present mitigating evidence does not terminate counsel's responsibilities during the sentencing phase of a death penalty trial." Blanco v. Singletary, 943 F.2d 1477,1502 (11th Cir. 1991). Eleventh Circuit case law rejects the notion that a lawyer may "blindly follow" the commands of the client. Eutzy v. Dugger, 746 F. Supp 1492, 1499 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. 1990) (quoting Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986). As the Eutzy court explained:

> Although a client's wishes and directions may limit the scope of an attorney's investigation, they will not excuse a lawyer's failure to conduct any investigation of a defendant's background for potential mitigating evidence. Id. at 1451; Thomas v. Kemp, 796 F.2d 1322 (11th Cir.), cert. denied, 479 U.S. 996, 107 S.Ct. 602, 93 L.Ed.2d 601 (1986); Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), cert. denied, 461 U.S. 910, 103 S.Ct. 1886, 76 L.Ed.2d 815 (1983). At a minimum, a lawyer must evaluate the potential avenues of investigation and then advise the client of their merit. Trial counsel in this case neglected to perform his duty to investigate and to discuss with his client the merits of alternative courses of action. Such neglect--albeit because counsel expected a different result--fell

> below an objective standard of reasonableness, and as a result, trial counsel's representation fell outside the range of competent assistance.

Eutzy, 746 F. Supp. at 1499-1500 (emphasis added). Counsel's decision to forego an adequate investigation was unreasonable, particularly in light of the fact that Mr. Power's family was available and willing to provide information concerning mitigation. Records were handed to defense counsel by the State, proving that records were available had counsel sought them out. Powerful mental health evidence was available had counsel not waited too long. Had he investigated, counsel for Mr. Power would have learned that Mr. Power had a long psychiatric history dating back to when he was 10 years old. Mr. Power had been diagnosed as manic depressive, endured long bouts of depression including hospitalizations, tried to commit suicide, inhaled gas fumes and suffered from brain damage. Some of Mr. Power's family members also have suffered from mental illness and have been hospitalized. All of this was "very compelling information which the jury should indeed have heard prior to rendering its sentencing recommendation" (PC-R. at. 3731).

In Muhammed v. State, 782 So. 2d 343 (Fla. 2001),this Court said it expected and encouraged trial courts to consider mitigating evidence, even when the defendant refuses to

present mitigating evidence.

> We have repeatedly emphasized the duty of the trial court to consider all mitigating evidence contained anywhere in the record, to the extent it is believable and uncontroverted. (citations omitted). This requirement applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence.

Id. at 363.

In Mohammed, this Court said that pre-sentence reports should be completed to determine the existence of mitigating circumstances. This Court also said that for a PSI to be comprehensive, it should include previous mental health problems, hospitalizations, school records and family background. This Court also said the trial court could require the State to place into evidence school records, military records and medical records. Id. at 363-364. In Mr. Power's case, the State had much of the mitigating evidence in its possession, but these records were turned over to the defense attorney by the State and still not placed in evidence in the court file.

In Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986), the Eleventh Circuit found ineffective assistance of counsel when faced with a similar situation as in Eutzy and the instant case. The Thompson court explained that the reason lawyers may not "blindly follow" the commands of their client

is that "although the decision whether to use such evidence in court is for the client, . . . the lawyer first must evaluate potential avenues and advise the client of those offering possible merit." Id. at 1451 (citations omitted). In Mr. Power's case, counsel clearly "decided not to investigate . . . [Mr. Power's] background only as a matter of deference" to Mr. Power's wish. Id. "Although [Mr. Power's] directions may have limited the scope of [counsels'] duty to investigate, they did not excuse [counsels'] failure to conduct any investigation of [Mr. Power's] background for possible mitigating evidence." Id. See also, Emerson v. Gramley, 91 F. 3d 898, 906 (7th Cir. 1996)(trial counsel "failed to conduct any investigation, however, brief, into possible existence of mitigating circumstances...Without such an investigation, [counsel] could not advise Emerson whether to try to present evidence of such circumstances...Emerson's waiver of his procedural rights at the sentencing hearing cannot be considered knowing waiver to which he should be held"); and State v. Lara, 581 So. 2d 1288, 1290 (Fla. 1991)(rejecting State's contention that the defendant and his family prevented counsel from developing and presenting mitigating evidence, noting that this argument conflicted with the postconviction court's findings to properly utilize expert witnesses

regarding the defendant's mental state).

Prejudice

The testimony and the exhibits admitted at the evidentiary hearing establish numerous facts regarding Mr. Power's life and psychological dysfunction by a preponderance of the evidence.[22] The evidence established that Mr. Power was physically abused as a child and received severe beatings from his father. The evidence established that Mr. Power was psychologically and emotionally abused as a child and teenager, being repeatedly belittled and degraded by his father. He was given no emotional support or nurturing.

The evidence established that Mr. Power was raised in a dysfunctional and unstable family. His family didn't have enough food to eat and he and his siblings had to steal their food.

He was physically abused at home and sexually abused outside the home. He began huffing gasoline at an early age. His mother had no ability to control her children. Beyond the family members, relatives were available to testify to the

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[22]Under Florida law, a mitigating factor should be found if it "has been reasonably established by the greater weight of the evidence: 'A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.'" Campbell v. State, 571 So. 2d 415, 419-20 (Fla. 1990), quoting Fla. Std. Jury Inst. (Crim.) at 81.

child neglect, physical beatings and drunk parents.

The evidence established that Mr. Power suffers from neurological impairments, including frontal lobe dysfunction. The evidence also establishes that Mr. Power suffered from a major recurrent depression that began in early childhood and lasted throughout his adult life. He has a history of suicide attempts. His depression clouded his judgment and impaired his reasoning abilities.

Strickland's prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A defendant is not required to show that counsel's deficient performance "[m]ore likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. The Supreme Court specifically rejected that standard in favor of showing a reasonable probability. See Kyles v. Whitley, 115 S. Ct. 1555 (1995) (discussing identity between Strickland prejudice standard and Brady materiality standard). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id.

The issue in Mr. Power's case was whether the purported

"waiver" meets constitutional standards. If not, and there is mitigation that defense counsel failed to investigate, the prejudice is the ensuing involuntary waiver. The test for assessing Strickland prejudice under these circumstances is not whether the unpresented mitigation "would have altered the sentencing decision." That is the identical argument raised by the State in Deaton and explicitly rejected by this Court. In Deaton, the State argued and the lower court applied the wrong standard and that "under Strickland, the trial judge should have considered whether there was a reasonable probability that, absent the errors, the balance of the aggravating and mitigating circumstances did not warrant death." Deaton, 635 So. 2d at 8. This Court rejected the State's argument and correctly held that when a defendant waives mitigation, "the record must support a finding that such a waiver was knowingly, voluntarily and intelligently made." Id. Because "clear evidence was presented that defense counsel did not properly investigate and prepare for the penalty phase proceeding [,], counsel's shortcomings were sufficiently serious to have deprived Deaton of a reliable penalty phase proceeding." Id. at8-9). Moreover, because "evidence presented in the rule 3.850 evidentiary hearing established that a number of mitigating circumstances existed," counsel's failure to

adequately investigate "was prejudicial." Id. at 8-9.

Prejudice also is established under Blanco. In Blanco, counsel did nothing to investigate for the penalty phase until after the guilt phase. Mr. Blanco told the trial court that "he did not want any evidence offered on his behalf." Blanco, 943 F. 2d at 1501. The Eleventh Circuit found not only deficient performance, but also prejudice as "[c]ounsel [] could not have advised Blanco fully as to the consequences of his choice not to put on any mitigating evidence."

During his post-conviction evidentiary hearing, Mr. Blanco presented "ample mitigating evidence that could have been presented before the sentencing jury and judge." Id. As a result, "counsels' failure to protect their client's rights at the sentencing phase resulted in 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 1504. The hearing court made the same finding below. "Collateral counsel has submitted a great deal of very compelling information which the jury should indeed have heard prior to rendering its sentencing recommendation, and its experts were mush more compelling and credible than those presented by the State." (PC-R. at 3731). Mr. Power presented a wealth of unrebutted mitigation that was available and could have been presented had

counsel investigated. The compelling mitigation presented "might well have influenced the jury's appraisal of [Mr. Power's] moral culpability." Williams v. Taylor, 120 S.Ct. 1495, 1515 (2000). "[C]ounsel's error[s] had a pervasive effect, altering the entire evidentiary picture at [the penalty phase]. Coss v. Lackwanna County District Attorney, 204 F. 3d 453, 463 (3rd Cir. 2000).

Because of the lack of investigation, the sentencer had virtually nothing to weigh against the aggravation and voted 12-0 for death. As the Supreme Court observed, "[m]itigating evidence....may alter the jury's election of penalty, even if it does not undermine or rebut the prosecution's death eligibility case." Williams, 120 S. Ct. at 1516. That there were aggravators presented by the State does not establish lack of prejudice in Mr. Power's case. Four aggravating factors were presented and found by the trial court: previously convicted of another violent felony; the offense was committed during an enumerated felony; the capital offense was heinous, atrocious or cruel and committed in a cold, calculated and premeditated fashion (R. 3258-3271). This Court struck the CCP aggravating factor. The trial court found no mitigation. Under these circumstances, Mr. Power has established prejudice. See Rose v. State, 675 So. 2d 567, 572 (Fla. 1996); Hildwin v.

Dugger, 654 So. 2d 107 (Fla. 1995); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992); State v. Lara, 581 so. 2d 1288, 1289 (Fla. 1991).

ARGUMENT II - IMPROPER SHACKLING

Mr. Power was improperly shackled during his trial. At the evidentiary hearing, Wesley Blankner testified that he remembered Mr. Power being shackled during the trial and recalled an apron around the defense table to prohibit the jury from seeing Mr. Power shackled (PC-R. at 1454-1455).

The State presented the testimony of Robert Forest III, a Lee County Sheriff deputy, who served as courtroom bailiff during the trial. He testified that Mr. Power was not shackled (PC-R. at 1830). But Judge Nancy Clark, a State witness, testified that she remembered that Mr. Power was shackled on his feet (PC-R. at 1113). Another State witness Jackie Cunningham, a court reporter, admitted that she was only watching Mr. Power in the courtroom when they were not on the record (PC-R. at 763). Arlene Zayas, a legal secretary for the State Attorney's Office, recalled that Mr. Power was not shackled, but she testified that she was in and out of the courtroom and was not present throughout the entire trial (PC-R. at 1088).

The State admitted into evidence two videotapes of news shows showing that Mr. Power was not shackled during several brief instances during the trial. However, the videotapes lasted only seconds each.

One tape showed the verdict being rendered and the other involved jury selection. Mr. Power's trial lasted eight days, from May 21-25 and May 28-June 3, 1990 and his penalty phase lasted three days, from November 5-8, 1990. The State's videotapes prove only that for a few seconds, Mr. Power was not shackled.

Because of the discrepancies in the testimony, Mr. Power renewed his motion to interview the jurors on this shackling issue (PC-R. at 3651-3653). The hearing court denied the motion.

Mr. Power initially sought to interview the jurors as it related to the shackling issue on July 16, 1999 (PC-R. 617-623). The hearing court granted a hearing on the issue of shackling in 1999 and counsel sought to interview the jurors to determine if Mr. Power was shackled during his trial. The hearing court denied the defense motion but at the time, said:

> "And then it would be without prejudice to counsel for Mr. Power raising the motion if it appears at some point that interviewing jurors is appropriate, either because of ineffective assistance of counsel claim or because of something else that came up as a result."

(PC-R. at 621-622; 2496-2497).

When the issue came up at the evidentiary hearing, defense counsel sought to interview the jurors again. But again, was denied. After the evidentiary hearing, the hearing court denied the motion again (PC-R. at 680). Because of the discrepancy in the testimony, the only way to resolve this issue is to interview the jurors and

determine if the shackling influenced their decision in any way.

Shackling a defendant before the jury was expressly disapproved in Elledge v. Dugger, 823 F.2d 1439 (11th Cir.), modified on other grounds, 833 F.2d 250 (11th Cir.), cert. denied, 485 U.S. 1014 (1987):

> The Supreme Court has characterized shackling as an "inherently prejudicial practice." Holbrook v. Flynn, 475 U.S. 560, 106 S.Ct. 1340, 1345, 89 L.Ed. 525, 534 (1986). "Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." Illinois v. Allen, 397 U.S. 337, 344, 90 S.Ct. 1057, 1061, L.Ed.2d 353 (1970).

823 F.2d at 1450-51.

When shackling occurs it must be subjected to "close judicial scrutiny," Estelle v. Williams, 425 U.S. 501, 503-04 (1976), to determine if there was an essential state interest furthered and whether less restrictive, less prejudicial methods of restraint were considered. Holbrook, 475 U.S. at 568.

The trial court's use of, and failure to prohibit, this "inherently prejudicial practice" without any showing of necessity or any hearing entitles Mr. Power to a new trial before an unbiased jury. Mr. Power's due process rights were

violated. Mr. Power was shackled without any inquiry regarding its necessity.

In addition to the excessive security and shackling of Mr. Power's person, excessive security permeated the entire capital trial proceedings. There was a large uniformed police presence in the courtroom throughout the trial. The overall effect was to give the jury a highly prejudicial impression of Mr. Power's future dangerousness, to Mr. Power's substantial prejudice.

The shackling of Mr. Power in front of the jury, and the excessive police presence without a hearing or showing of necessity or the ability to question the jurors who may have been influenced by this shackling stripped Mr. Power's trial of any fairness. Mr. Power was prejudiced as a result and is entitled to relief. To the extent that trial counsel failed to object to this combination of excessive security measures, Mr. Power was afforded ineffective assistance. Mr. Power is entitled to relief.

ARGUMENT III - INTERVIEWING JURORS

Mr. Power initially sought to interview the jurors from his trial when filed his motions for post-conviction relief. In those motions, Mr. Power argued that he was unable to explore

possible misconduct and biases of the jury.

Mr. Power argued that Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, is invalid because it conflicts with the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. It unconstitutionally burdens the exercise of fundamental constitutional rights. Mr. Power should have the ability to interview the jurors in this case. Yet, the attorneys statutorily mandated to represent him are prohibited from contacting them. The failure to allow Mr. Power the ability to interview jurors is a denial of access to the courts of this state under article I, section 21 of the Florida Constitution. Rule Regulating the Florida Bar 4-3.5(d)(4) is unconstitutional on both state and federal grounds.

Mr. Power argued that his jury was beset with prejudicial influences. The prosecutor and the court violated the rules of Hitchcock v. Dugger, 481 U.S. 393 (1987) and Caldwell v. Mississippi, 472 U. S. 320 (1985) by telling the jurors they had little responsibility in determining the sentence (R. 1036, 1038, 1041, 1055-56, 1058-60).

Counsel for Mr. Power abandoned his duty of loyalty to his client by calling Mr. Power a “son of a bitch” (R. 2586) and told the jurors that he was “sickened by what” Mr. Power

did (R. 2589). Moreover, Juror Henry was told by someone in the courthouse to "give [Mr. Power] the chair" (R. 541). Also, a car parked outside the courthouse displayed a sign in the window saying "castrate baby rapers and wimpy judges" (R. 1293). Mr. Power's counsel downplayed this display because he believed it did not refer to Mr. Power's case. Whether the sign referred to Mr. Power's trial or another trial in the courthouse, the prejudicial effects on Mr. Power's jury would have been the same. Whether these or other matters improperly influenced the jury is subject to speculation because an adequate inquiry and investigation have not occurred.

At the evidentiary hearing, another issue arose as to whether Mr. Power was shackled in view of the jury. Because the testimony at the evidentiary hearing was in dispute, the only way to determine the truth is to interview the jurors on this matter.

ARGUMENT IV - **THE SENTENCING ORDER**

The trial court failed in its duty to play an independent role in sentencing Mr. Power to death. The trial court directed the State Attorney to prepare the findings that the court adopted. This allegation was made because an unsigned sentencing order was found in the files of the State Attorney, but was not found in the files of

the defense attorneys.

Trial counsel testified at the evidentiary hearing that he did not do a draft order, was not asked to do a draft an order, was unaware if the State did, and knew of no ex parte communication between the judge and the prosecution team (PC-R. at 1453).

All the State witnesses testified at the evidentiary hearing that Judge Formet had gone to his hotel room to work on the sentencing order on the evening after the jury came back with a death recommendation. These witness testified that they were not with the judge that evening while he purportedly wrote the sentencing order. None of the State witnesses could account for the whereabouts of State Attorney Lawson Lamar, who had been present at the trial and was part of the prosecution team. None of the state witnesses could account for the fact that an unsigned sentencing order was found in the State Attorney files.

Patricia Riggall testified that the State Attorneys did on occasion visit the hotel where the judge and Ms. Riggall were staying (PC-R. at 726). Jackie Cunningham (PC-R. at 764); Philip Townes (PC-R. at 775), Nancy Clark (PC-R. at 1115); and Arlene Zayas (PC-R. at 1096) testified that they did not know if the judge received any visitors. The evidence presented by the State, is at best, inconclusive and there is no other possible explanation for the State having an unsigned sentencing order than a) ex parte communication

and obtaining a copy from the judge, without defense counsel present, or b) the State wrote it. Either way, Mr. Power is entitled to relief.

In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), this Court emphasized the importance of the trial judge's independent (of the State) weighing of aggravating and mitigating circumstances. In Patterson, the trial judge failed to engage in any independent weighing process. There, as here, the responsibility was delegated to the State Attorney:

> [W]e find that the trial judge improperly delegated to the state attorney the responsibility to prepare the sentencing order, because the judge did not, before directing preparation of the order, independently determine the specific aggravating and mitigating circumstances that applied in the case. Section 921.141, Florida Statutes (1985), requires a trial judge to independently weigh the aggravating and mitigating circumstances to determine whether the death penalty or a sentence of life imprisonment should be imposed upon a defendant.

Patterson, 513 So. 2d at 1261.

The Patterson Court observed that in Nibert v. State, 508 So. 2d 1 (Fla. 1987), the judge's failure to write his own findings did not constitute reversible error "so long as the record reflects that the trial judge made the requisite findings at the sentencing hearing." Patterson, 513 So. 2d at

1262, quoting Nibert, 508 So. 2d at 4. Indeed, in Nibert, the judge made his findings orally and then directed the State to reduce his findings to writing. See, Riechmann v. State, 777 So. 2d 342 (Fla. 2000).

In Mr. Power's case, the trial judge made no findings at the sentencing hearing. There was no indication on the record that the trial court directed the State to draft a sentencing order. Here, the judge simply adopted the State's draft findings at sentencing. This violated Patterson. An unsigned sentencing order was found in the files of the State Attorney. That order was the same order that Judge Formet signed when he sentenced Mr. Power to death. The unsigned order is in the exact same typographical format and font size as all the other motions and pleadings filed by the State. The unsigned order and the signed order are word for word identical. It is obvious that the State, at the direction of Judge Formet, after some off-the-record and ex parte communication, drafted the sentencing order in this case. This sentencing order was adopted line by line and word by word by Judge Formet. Mr. Power's trial counsel was not given an opportunity to object to this procedure that was done without his knowledge. Before the sentencing hearing, Judge Formet **did not** announce his findings as to aggravating and mitigating circumstances. The

unsigned order in the State's files is the exact same order that Judge Formet eventually signed. Trial counsel was ineffective for failing to object to the State's preparation of the sentencing order. Mr. Power is entitled to relief.

ARGUMENT V - INCOMPLETE AND INACCURATE RECORD

At Mr. Power's capital trial, there were several unrecorded sidebars. (R. 2362). The trial transcript is riddled with obvious typographical errors that render the transcript nonsensical in places.

The errors are not limited to the trial. At the post-conviction hearing, the transcripts also are replete with errors and misspellings. Counsel for Mr. Power filed a motion to correct the transcript of the evidentiary hearing and outlined more than 78 errors (PC-R. at 674). The hearing court ignored these facts and failed to address the latest errors in its order denying Mr. Power relief.

Mr. Power is entitled to a complete and accurate record. Entsminger v. Iowa, 386 U.S. 748 (1967). In Evitts v. Lucey, 467 U.S. 287 (1985), the Supreme Court reiterated that effective appellate review begins with affording an appellant an advocate, and the tools necessary to perform her constitutionally-mandated task. The record here is incomplete, inaccurate and unreliable. Confidence in the record is

undermined.

ARGUMENT VI - FAILURE TO OBJECT TO CONSTITUTIONAL ERROR

A. HAC - Mr. Power's jury was given the bare-bones instruction on the heinous, atrocious or cruel aggravator (R. 3250); this instruction violates the Eighth Amendment. Espinosa v. Florida, 505 U.S. 1079 (1992); Godfrey v. Georgia, 446 U.S. 420 (1980); James v. State, 615 So. 2d 668 (1993); State v. Breedlove, 655 So. 2d 74 (1995). To the extent that trial counsel failed to object, Mr. Power was denied effective assistance of counsel. The failure to apply the Espinosa ruling to Mr. Power violates due process.

B. BURDEN SHIFTING

The State must prove that aggravating circumstances outweigh the mitigation. State v. Dixon, 283 So.3d 1(Fla. 1973), cert denied 416 U.S. 943(1974). This standard was not applied to Mr. Power's capital sentencing phase, improperly shifting to Mr. Power the burden of proving whether he should live or die, Mullaney v. Wilbur, 4211 U.S. 684 (1975). Relief is warranted.

C. AUTOMATIC AGGRAVATING CIRCUMSTANCE

The trial count found as aggravating circumstances Mr. Power's violent felony convictions and the present offense was committed during the commission of an enumerated felony (R. 3258-3271). The consideration and finding of those aggravating factors was tainted by an unconstitutional and vague law and instruction. See Sochor v. Florida, 112 S. Ct. 2114 (1992). The use of the prior

violent felonies and during the commission of an enumerated felony as aggravating factors rendered the aggravators "illusory" in violation of Stringer v. Black, 112 S.Ct. 1130 (1992). The judge considered and found automatic statutory aggravating circumstances, therefore, Mr. Power entered the penalty phase already eligible for the death penalty, whereas other similarly (or worse) situated petitioners would not (R. 3258-3271).

Trial counsel's failure to object was ineffective assistance of counsel.

ARGUMENT VII

THE STATE IMPROPERLY INTRODUCED NON-STATUTORY AGGRAVATING CIRCUMSTANCES

The prosecution in Mr. Power's case engaged in acts of misconduct by making improper comments during the guilt phase. A prosecutor may not use epithets or derogatory remarks directed toward the defendant as they impermissibly appeal to the passions and prejudices of the jury. See, Green v. State, 427 So. 2d 1036, 1038 (Fla. 3rd DCA 1983) ("It is improper in the prosecution of persons charged with a crime for the representative of the state to apply offensive epithets to defendants or their witnesses, and to engage in vituperative characterizations of them.") See also, Duque v. State, 498 So. 2d 1334, 1337 (Fla. 2nd DCA 1986); Dukes v. State, 356 So. 2d 873 (Fla. 4th DCA 1978); Campbell v. State, 679 So. 2d 720 (Fla.

1996).

The jury and the trial court were presented with and considered non-statutory aggravating circumstances. The prosecutor impermissibly argued victim impact evidence based on the testimony of victims of a prior crime allegedly committed by Mr. Power:

> Angeli didn't survive to tell us what happened, but when we listened to the stories of Ms. Wallace, when we listened to the testimony of the Warden children, we realized that he takes pleasure in inflicting pain.

(R.2575)

The sentencers' consideration of improper and unconstitutional non-statutory aggravating factors violates the Eighth Amendment to the United States Constitution, and prevents the constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S. Ct. 1130 (1992); Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). These impermissible aggravating factors resulted in a sentence that was based on an "unguided emotional response," in violation of Mr. Power's constitutional rights. Penry v. Lynaugh, 108 S. Ct. 2934 (1989).

The prosecutor's improper argument and trial counsel's failure to object rendered Mr. Power deficient assistance of counsel.

ARGUMENT VIII

THE TRIAL COURT'S FAILURE TO FIND STATUTORY AND NON-STATUTORY MITIGATION IN THE RECORD

The court erroneously failed to find statutory and non-statutory mitigation on Mr. Power's behalf. The court specifically said the comparative cost and degree of punishment of executing Mr. Power versus a life sentence was forceful, strong, and weighty; however, the court found it legally inappropriate (R. 3258-3271). The trial court's failure to give weight to these proven mitigators deprived Mr. Power of due process of law under the Eighth and Fourteenth Amendments to the United States Constitution; therefore, his sentence of death is constitutionally unreliable. Romano v. Oklahoma, 114 S. Ct. 2004 (1994); California v. Ramos, 463 U.S. 992 (1983); McCleskey v. Kemp, 481 U.S. 279 (1987).

These mitigators, along with other factors in Mr. Power's life, constitute mitigating circumstances that were found to exist but were not considered by the court. Cheshire v. State, 568 So. 2d 908 (Fla. 1990). In Campbell v. State, 571 So. 2d 415 (Fla. 1990), this Court said:

> Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight.

Campbell, 571 So. 2d at 4.

The judge was required to weigh and give effect to all of Mr. Power's mitigation against the aggravating factors. Mr. Power was deprived of the individualized sentencing required by the Eighth and Fourteenth Amendments to the United States Constitution. Zant v. Stephens, 462 U.S. 862, 879-80 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

ARGUMENT IX - PROSECUTORIAL MISCONDUCT

The prosecutor's acts of misconduct, both individually and cumulatively, deprived Mr. Power of his rights under the Sixth, Eighth, and Fourteenth Amendments.

When conduct by a prosecutor "permeates" a case, relief is proper. Campbell v. State, 679 So. 2d 720 (Fla. 1996); Garcia v. State, 622 So. 2d 1325 (Fla. 1993); Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990). Mr. Power's trial counsel was ineffective for failure to object and/or failure to fully litigate or preserve this issue.

The prosecutor repeatedly made inflammatory, improper, and prejudicial comments during his guilt/innocence and penalty phase closing arguments. During the guilt-innocence phase, he said:

> You need to look to other evidence that you speculate or imagine might be out there.
>
> Because a police officer's interest is to see justice is done. He has got no interest in seeing innocent people convicted.
>
> (In reference to defense witness, Dr. Hart) He doesn't even have a comparison microscope, ladies and gentleman, which is essential to this kind of work.
>
> The defendant's (sic) about the same size and build as Gary Bare.
>
> The defendant thought about killing Welty.

And you know, isn't that interesting? When they found the gun, there were no latent prints except Rick Welty's. Welty said he didn't see any gloves. But I think the evidence is clear that whoever did it had gloves.

And, you know, we know who did it.

You remember the defense opening statement? What was it the defense didn't say anything about? The radio.

What do these gloves tell us? Well, they tell you a lot about why there were no latents on that gun that somebody took from Welty.

(Referring to the bag and its contents found in the attic) It was a murder kit, ladies and gentleman. There are gloves to get away with it. This is the knife. Maybe not this one, but one like it, would have worked just fine to kill Angeli Bare.

This is a murder kit, ladies and gentleman. A gun, a knife. Maybe it is not the knife. Maybe it is not the gloves. But they are two tools of a man who knows how to use them.

His most precious possessions.

He threw her away like she was trash.

(Referring to whether Mr. Power's actions were premeditated) You can't find otherwise from the evidence.

Number two. He killed her in the commission of a sexual battery. And, of course, you have to find that the evidence answers yes.

Occasionally, circumstances may suggest one is guilty of something that they didn't do.

But when the person is innocent, those two or three circumstances are easily explained away.
The murder kit...

I point to the defendant and I say he is guilty as charged and the evidence shows it.

Welty came and he told you the truth.
If Welty were a liar, he would have come in and he would say well, I forgot to tell Neil McDonald there was a moustache. But what he said was I didn't notice a moustache. And that's what he said on the witness stand last week. He is not a liar and he didn't shade his story to make it better for the state.

And look around this jury, selected randomly. And even just looking at your head hairs, very few of them are so similar that you wouldn't be able to sort them out if you mixed them in.

(Referring to the hair exhibits) But we have experts to explain evidence like this to you. And what it means. And Hart's not one.

(Referring to Dr. Hart) His incompetence is so clear to everybody who was here in this courtroom when he testified.

(Referring to Bill Power, Mr. Power's brother's alibi) Prickett's got no reason to lie for him.

The defendant was the one who doesn't. And after all, no alibi is no alibi.

And the other, there were some questions I would have liked to have asked Billy Power. You probably would have been interested in his answers.

That he had a murder kit.

(R. 1943-1987; 2047-2076).

The prosecutor's argument violated Rule 4-3.4 of the Rules of Professional Conduct, which says in relevant part,

> A lawyer shall not: (e) in trial, allude to any matter the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence,...or state a personal opinion as to the justness of a cause, the credibility of a witness,...or the guilt or innocence of an accused.

The comments and argument of the prosecutor were (1) not supported by admissible evidence; (2) statements of the prosecutor's personal opinion as to the justness of a particular matter; (3) comments on the credibility of witnesses; (4) comments on Mr. Power's right to remain silent; and/or (5) comments on the guilt or innocence of Mr. Power.

In Bertolotti v. State, 476 So. 2d 130 (Fla. 1985), and reaffirmed in Campbell v. State, 679 So. 2d 720, 724 (Fla. 1996), the Florida Supreme Court expressed its disgust with "...the continuing violations of prosecutorial duty, propriety and restraint." 476 So. 2d at 133. This Court said:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical

> analysis of the evidence in light of the applicable law.

476 So. 2d at 134.

"Under our law, the prosecutor has a duty to be fair, honorable and just....[T]he prosecuting attorney 'may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.'" Boatwright v. State, 452 So. 2d 666, 667 (Fla. 4th DCA 1984), citing, Berger v. United States, 55 S. Ct. 629 (1935).

"It is elemental in our system of jurisprudence that the jury is the sole arbiter of the credibility of witnesses. Boatwright, 452 So. 2d at 668. "A prosecutor may not ridicule a defendant or his theory of defense, [citation omitted], or express a personal belief in the guilt of the accused." Riley v. State, 560 So. 2d 279 (Fla. 3rd DCA 1990).

> We are likewise aware that the ABA Standards of Criminal Justice Relating to Prosecution Function, section 3-5.8 (1980), label as 'unprofessional conduct' expression by a prosecutor of his personal belief or opinion as to the truth of falsity of any testimony or evidence of the guilt of the defendant. [footnote omitted] That error was committed by the trial court in failing to control the improper closing remarks of the prosecutor, we are of one mind.

Bass v. State, 547 So. 2d 680, 682 (Fla. 1st DCA 1989).

Improper prosecutorial remarks can constitute reversible error when such remarks may have prejudiced and influenced the jury into finding the defendant guilty. Riley v. State, 457 So. 2d 1084, 1086 (Fla. 4th DCA 1984). "These comments were not only in poor taste and unprofessional, but also highly inflammatory." Riley, 457 So. 2d at 1088. They also were cumulative.

The State made no attempt to explain or justify these comments. It was improper for the State to refer to facts outside the record during its final argument. Riley, 457 So. 2d at 1090; see also Brooks v. Kemp, 762 F.2d 1383, 1389 (11th Cir. 1985)(misconduct by a prosecuting attorney in closing argument may be grounds for reversing a conviction).

Mr. Power's right to due process and a fair trial were undermined and violated by the prosecutor's improper comments and closing argument. To the extent Mr. Power's trial counsel did not object or otherwise preserve this claim, Mr. Power received ineffective assistance of counsel.

During the penalty phase closing argument the prosecutor said:

> ...we are almost at the end of the chain of people who have done their duty....I'm asking you to do your duty...
>
> I don't think you are afraid. I think,

> well, and fear is not the reason for you to render any decision here today.
>
> I doubt that you will have forgotten the pictures.
>
> What this sentence is about is whether the people of the State of Florida are going to follow through with the laws that we have chosen for ourselves.
>
> While we're talking about these convictions, we'll look in the window at the Fearmonger Shop.
>
> What we do know about the defendant is that he enjoyed the suffering of others. Angeli didn't survive to tell us what happened, but when we listened to the stories of Ms. Wallace, when we listened to the testimony of the Warden children, we realized that he takes pleasure in inflicting pain.[23]
>
> ...he likes to hear them crying.
>
> "But sometimes experts overlook things. And you can rely on your own judgment in this. That's your job. That's your duty to make a decision.

(R. 2567-2582).

The prosecutor commented on evidence that was not introduced at trial or the penalty phase. These were expressions of the prosecutor's personal opinion or belief; and serve no useful purpose other than to play upon the prejudices and sympathies of

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[23]Notwithstanding this improper statement, the prosecutor admitted, "What happened in that house we don't know. Perhaps we know more now after we heard the other witnesses....We'll never know the details" (R. 2576).

the jury. These comments and argument were improper and violated Mr. Power's right to due process and a fair and impartial trial. To the extent Mr. Power's trial counsel did not object or otherwise preserve this claim, Mr. Power received ineffective assistance of counsel.

ARGUMENT X

THE JURY WAS IMPROPERLY INSTRUCTED ON FLIGHT.

Mr. Power's jury was told:

> Evidence of an accused's flight, escape from custody, resistance to arrest, are admissible as evidence of the accused's consciousness of guilty and thus of guilt itself.

(R. 3243).

This flight instruction was improper and it was error to give it to the jury. See, Fenelon v. State, 594 So. 2d 292 (Fla. 1992). Trial counsel was ineffective for failing to object to this improper instruction.

ARGUMENT XI

FLORIDA'S DEATH PENALTY UNCONSTITUTIONALLY PERMITS CRUEL AND UNUSUAL PUNISHMENT

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

ARGUMENT XII

MR. POWER IS INSANE TO BE EXECUTED

Mr. Power is insane to be executed. In Ford v. Wainwright, 477 U.S. 399 (1986), the United States Supreme Court held that the Eighth Amendment protects individuals from the cruel and unusual punishment of being executed while insane.

Mr. Power acknowledges that this claim is not ripe for consideration. However, it must be raised to preserve the claim for review in future proceedings and in federal court should that be necessary. See Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998). Accordingly Mr. Power must raise this issue in the instant pleading.

ARGUMENT XIII

THE CUMULATIVE ERROR ARGUMENT

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

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

CONCLUSION

Mr. Power submits that relief is warranted in the form of a new trial and/or a resentencing proceeding. To the extent that relief is not granted on issues on which the lower court did rule, Mr. Power requests that the case be remanded so that full consideration can be given to his other claims.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first-class postage prepaid, to Douglas T. Squire, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118 on January 6, 2003.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Initial brief satisfies the Fla. R. App. P. 9.100 (1) and 9.210(a)(2).

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