IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1312

ROBERT L. HENRY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

CORRECTED AMENDED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal involves the denial of Mr. Henry's Rule 3.850 motion following a limited evidentiary hearing. References in the Brief shall be as follows:

(R. __). -- Record on direct appeal;

(PCR. __). -- Record on postconviction appeal.

(T. __). -- Transcript of hearings on postconviction appeal

Other citations shall be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Henry has been sentenced to death. The resolution of the issues in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Henry, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND THE FACTS

The Circuit Court of the Seventeenth Judicial Circuit, Broward County, entered the judgments of conviction and sentence under consideration. Mr. Henry was charged by indictment dated November 18, 1987, with first degree murder and related offenses (R. 556). He pled not guilty. Mr. Henry's trial began on September 15, 1988 (R. 543). Mr. Henry was tried by a jury. On September 29, 1988, the jury rendered a verdict of guilty. (R. 2531). On October 6, 1988, the jury recommended death sentences for the first degree murder convictions (R. 2669-70). On November 9, 1988, the trial court imposed sentences of death on the counts of first-degree murder. A sentencing order, was entered on November 9, 1988, (R. 2906-12). This Court affirmed Mr. Henry's convictions and sentences on direct appeal. Henry v. State, 586 So. 2d 1033 (Fla. 1991). On October 2, 1998, Mr. Henry filed with this Court his third amended motion to vacate judgment of conviction and sentence with special request for leave to amend. A limited evidentiary hearing on one claim was held on October 18, 2000 with a continuation on August 6 - 8, 2001. In October 2000, the witnesses that appeared were Bruce D. Raticoff, Mr. Henry's trial counsel, and psychologist Dr. Trudy Block Garfield, who had been retained by the defense as a confidential expert. The lower court also engaged Mr. Henry in a brief exchange about his right to testify at the hearing. At the continuation of the hearing in August 2001, additional witnesses appeared. They included a group of experts retained by postconviction counsel: psychologist Dr. Barry Crown, neurologist Dr. Thomas Hyde, psychiatrist Dr. Richard Dudley,

the defendant's brother, Joseph Henry, and neuropharmacologist Dr. Jonathan Lipman. Mr. Henry also called Carolyn Fort Cason, a former girlfriend of Mr. Henry, Martha Lucretia Gilbert, Mr. Henry's sister, Eddie Simpson, a co-worker and friend of Mr. Henry's, Elizabeth Diane Kyle Jackson, another girlfriend of Mr. Henry's, and Robert Norgard, a board certified criminal defense attorney. There was also a reappearance by trial counsel Raticoff as a State witness. The lower Court denied Mr. Henry relief on the limited claim upon which hearing was granted in an order entered on January 17, 2003. On February 3, 2003 Mr. Henry filed a timely motion for rehearing with the lower court. On April 17, 2003 Mr. Henry timely filed a supplement to the October 2, 1998 motion. On June 25, 2003 the lower court entered orders denying the motion for rehearing and the amended/successive motion for postconviction relief. Mr. Henry filed notice of appeal on July 22, 2003. Subsequently, on September 30, 2003, Mr. Henry filed a Motion for DNA testing pursuant to Fla. R. Crim. P. 3.853 in Circuit Court. On October 30, 2003 the lower court ordered the State to respond and also ordered both parties to prepare memoranda concerning jurisdiction. Mr. Henry and the State filed the memoranda on December 1, 2003. On January 5, 2004, the lower court entered an order denying DNA testing on jurisdictional grounds. Mr. Henry filed a notice of appeal on February 4, 2004. This Court thereafter denied Mr. Henry’s motion to consolidate the Rule 3.853 appeal with the Rule 3.850 appeal.

SUMMARY OF THE ARGUMENTS

1. Mr. Henry was not afforded the effective assistance of counsel at the penalty phase of his 1988 trial. He was precluded by the lower court from presenting the opinions of his mental health experts at the evidentiary hearing below, evidence that was relevant to both prongs of Strickland. The actions of the lower court denying forensic testing of evidence; barring inquiry into trial counsel's mental health and substance abuse problems; and restricting inquiry into Mr. Henry's state of mind at the time of his alleged waiver of mitigation, were a denial of due process that resulted in depriving Mr. Henry of a full and fair hearing.

2. The lower court erred in summarily denying Mr. Henry's other claims that constitutional error occurred during pre-trial, the guilt phase and the penalty phase. The lower court's failure to allow evidence to be presented on Mr. Henry's claim concerning law enforcement handling of forensic evidence was amplified by the lower court's denial of his motions in postconviction for forensic testing of relevant and material evidence.

3. The lower court failed to consider the cumulative effect of all the evidence not presented to the jury due to trial counsel's ineffectiveness and other relevant and material factors.

ARGUMENT I

MR. HENRY WAS NOT AFFORDED EFFECTIVE ASSISTANCE

OF COUNSEL AT THE PENALTY PHASE OF HIS 1988 TRIAL AND HE WAS ALSO DENIED A FULL AND FAIR EVIDENTIARY HEARING

a. The lower court erroneously precluded Mr. Henry from presenting the opinions of his mental health experts at the evidentiary hearing

In this case, the circuit court below granted a limited evidentiary hearing on the issue of whether Mr. Henry's trial counsel, Bruce Raticoff, rendered constitutionally deficient performance pursuant to Strickland v. Washington, 466 U.S. 558 (1984), in his representation of Mr. Henry at Mr.Henry's penalty phase. (PCR. 1069-1109).[1] The lower court denied the claim after what it termed "full evidentiary development" (PCR. 1645). Mr. Henry was denied full and fair evidentiary development *inter alia* because of the lower court's refusal to allow his postconviction experts to testify at the evidentiary hearing as to their findings.

The lower court's refusal to allow Mr. Henry's witnesses to testify at the evidentiary hearing as to their findings was predicated upon the lower court's stated intention of conducting the hearing only on the deficient performance prong of the Strickland (T. 273). The lower court specifically declined to grant hearing as to

[1]"As to Claim XXXVIII, the evidentiary hearing shall be limited to the following issues (a) alleged ineffective assistance of counsel for the failure to have qualified expert mental health professional(s) assist with the penalty phase defense, which includes a portion of the sub claim that Raticoff did not make adequate use of Rule 3.216 authorizing appointment of a mental health expert for the penalty phase, and (b) Raticoff's alleged failure to ask the defense expert to address the mitigating factors of Henry's organic brain problems and substance abuse." (PCR. 1108).

any resultant prejudice.

The United States Supreme Court has recently reaffirmed the right of a capital defendant to the effective assistance of counsel. In the case of Wiggins v. Smith 123 S. Ct. 2257 (2003), the Court emphasized the principles set forth in Strickland v. Washington, 466 U.S. 558 (1984), when it restated:

> We established the legal principles that govern claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984) citations omitted). An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. Id., at 687. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Id., at 688.

(Wiggins v. Smith, 123 S. Ct. 2527, 2535). The Supreme Court further held that counsel has:

> [A] duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

Strickland, 466 U.S. at 668 (citation omitted).

While an attorney is not required to investigate every conceivable avenue of potential mitigation, the Supreme Court has emphasized that:

> In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of known evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further

(Wiggins v. Smith 123 S.Ct. 2527, 2538 (2003)). Furthermore:

> Strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on investigation.

Id at 2539, citing Strickland, 466 U.S. at 690-691. In other words, counsel is required to investigate completely enough to know what the evidence is before a reasonable decision can be made whether or not to present it. And further, deficient performance cannot be determined by simply examining what counsel did do. There has to be an evaluation based on what trial counsel could and should have done but failed to do. Mr. Henry has consistently argued that the evidentiary restrictions by the lower court imposed on his presentation at evidentiary hearing was an artificial one (PCR. 1387-1392, 1402-1405). Mr. Henry argued after the conclusion of the first day of testimony that some evidence may support both prongs of Strickland:

> Mr. Henry has consistently maintained, and continues to maintain that the scope of the evidentiary hearing conceded by the State and granted by this Court was so narrow as to be tantamount to a summary denial of Mr Henry's entire Rule 3.850 motion. However, while Mr. Henry's position has remained constant, the position of the State as to the scope of the hearing continues to shift, thereby compounding the denial of a full and fair post conviction hearing to Mr. Henry.
>
> First of all, the process as apparently envisaged by the State is not one that is mandated by Strickland and its progeny. The Strickland analysis is not framed in terms of a deficient performance hurdle that has to be cleared before prejudice is encountered. Strickland neither mandates any order of proof of the two prongs that together constitute ineffective assistance of counsel, nor does it

suggest a bifurcated proceeding of the sort ordered by this court. The two pronged analysis merely states that in order for ineffectiveness to be found, both prongs must be established. The deficient performance and prejudice prongs are inextricably linked together in cases in which constitutional ineffective assistance of counsel is proved.

Second, the State's concept of what constitutes deficient performance, as opposed to prejudice, does not comport with established case law on the subject. Recently, the United States Supreme Court in Williams v. Taylor, 120 S.Ct. 1495 (2000), reemphasized the continuing vitality of the Strickland test and reiterated what the standards are with respect to capital cases and how they are to be properly applied. The Supreme Court makes it clear that Mr. Henry "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 at 1513. The language of Williams indicates that deficient performance is established not only by what trial counsel did and did not do, but also what counsel could have done. The Williams opinion unequivocally demonstrates that deficient performance evidence includes additional evidence that shows what could and should have been uncovered had trial counsel performed to a constitutionally acceptable standard:

The record establishes that counsel...failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood...

(Williams at 514). Clearly the United States Supreme Court understands that the additional evidence that could have been presented by trial counsel as supporting the deficient performance prong as well as the prejudice prong of the Strickland test. The additional evidence of what Mr. Raticoff could have done, had he prepared properly for Mr. Henry's penalty phase, clearly supports deficient performance as well as prejudice.

Finally. the attempt by the State to turn the restriction on witnesses to a bifurcated proceeding between deficient performance and

prejudice is also refuted by common sense and judicial economy. Even if the State rejects the Williams analysis, and persists in its contention that a particular datum of evidence must support either deficient performance or prejudice but not both, logic alone dictates that individual witnesses may testify as to discrete data relating to both performance and prejudice. This is particularly pertinent in a case such as Mr. Henry's in which the extent of trial counsel's contact with Mr. Henry's family members is at issue. At the evidentiary hearing, this Court required undersigned counsel to proffer testimony of the various witnesses that she would have presented, had she been permitted so to do. Undersigned counsel's proffer demonstrates that some of the available evidence supports deficient performance and some supports both deficient performance and prejudice:

> [by Ms. Day] First of all, [the family members] say Mr. Raticoff never made contact with them, that he never attempted to and they would have been delighted and very willing to come and testify on Mr. Henry's behalf. had they been so notified. That's the first issue. Furthermore, these witnesses would have been able to testify to Mr. Henry's childhood traumas, his poverty, his being taken away form his mother to go to live with extended family, including his grandmother. Being taken back to Florida, not knowing who his mother was when he came back to Florida, subsequent abuse and negligence and a spiralling down ward in to drug use, first marijuana, and then after he left the marijuana, crack cocaine use. I haven't been able to put that on.
>
> If the Court allows me to do that, I would also be able to put on the testimony of a competent Board Certified neuropsychologist who evaluated Mr. Henry and found he does indeed suffer from organic brain damage. I'd also have been able to

> put of the testimony of a competent Board Certified psychiatrist and neurologist who would confirm the diagnosis of brain damage as a result of both the childhood trauma, the drug abuse and many other factors, to testify to Mr. Henry's depression and post traumatic stress disorder. And he'd testify to the effects crack cocaine and marijuana would have had on somebody already impaired with PTSD, with depression, and with some substantial brain damage, to the fact that the statutory mitigation mental health circumstances [that] he was unable to confirm his conduct and was under extreme mental and emotional disturbance at the time. I'd present all that in terms of the mental health testimony.
>
> And finally I would be able to present a Strickland expert, that's to say a practitioner who is experienced in capital litigation the time of Mr. Henry's case was tried in 1988, and who would have been able to present the other alternatives available to Mr. Raticoff in light of Mr. Henry's waiver of mitigation. The fact he could have proffered, the fact he could have had an amicus attorney appointed. There are many many alternatives he can testify to . That is a very, very quick and dirty outline of what I would present. <u>And that goes to ineffectiveness, the first prong in Strickland, as well as prejudice</u>.

(Transcript of October 18, 2000 hearing at 140)(emphasis added).[2]

Mr. Henry has consistently reserved his right to present additional witnesses to deficient performance as well as to prejudice. Given the

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[2]This proffer can be found in the instant record at PCR. 1366. It took place at the end of the first day of what became a bifurcated evidentiary hearing.

> obvious eleventh hour change in the State's position regarding whether a full and fair hearing was available to Mr. Henry, as reflected in their current Motion to Remand for Continuation of Evidentiary Hearing, undersigned counsel is compelled to advise the Court that the State's new position advocating a reopened hearing does not go nearly far enough.

(PCR. 1388-1391).

Even assuming that it was possible to conduct a hearing on deficient performance alone, which Mr. Henry submits it is not, the lower court erred by refusing to allow substantive testimony at the bifurcated evidentiary hearing from Mr. Henry's mental health experts, psychologist Dr. Barry Crown, neurologist Dr. Thomas Hyde, psychiatrist Dr. Richard Dudley, and neuropharmacologist Dr. Jonathan Lipman, as to the results of their postconviction evaluations of Mr. Henry. Had their testimony as to their findings been admitted at the evidentiary hearing, Mr. Henry would have demonstrated the presence of significant statutory and non statutory mental health mitigation as well as other mitigation which trial counsel unreasonably failed to investigate and present to his client and the finders of fact. The very existence of these mitigating factors goes to support trial counsel's deficient performance. The weight of the mitigation and the depth of the deficient performance supports prejudice to Mr. Henry. The lower court's analysis of the Strickland test is fundamentally flawed, and as a result, Mr. Henry was denied a full and fair evidentiary hearing.

The opinions of Mr. Henry's postconviction experts are directly pertinent to the issue of trial counsel's deficient performance. The

only confidential expert appointed at trial, psychologist Dr. Trudy Block Garfield, testified at the evidentiary hearing that if she had received collateral information suggesting Mr. Henry's substance abuse, she would have recommended further testing to determine if brain damage existed (PCR. 1334-1335). Dr. Block Garfield testified that trial counsel Raticoff neither provided her with any background material nor did he follow up in any meaningful way with her. Her testimony at the evidentiary hearing revealed Mr. Raticoff did not personally retain her or any other confidential mental health expert and he failed to ever meet with her face to faced after she had been appointed on motion by prior counsel Sidney Solomon (PCR. 1328, 1337).[3]

Had neuropsychological or neurological testing subsequently been done pre-trial, there would have been overwhelming evidence of Mr. Henry's neuropsychological and neurological deficits, evidence that went undiscovered because of trial counsel's deficient

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[3]Fla. R. Crim. P. 3.216 went into effect July 1, 1980, well before Mr. Henry's trial in 1988. The rule authorizes the appointment of a mental health expert:

> to examine the defendant in order to assist his attorney in the preparation of his defense. Such expert shall report only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the lawyer-client privilege. Fla. R. Crim. P. 3.216(a).

Mr. Henry's counsel did not make adequate use of this pertinent rule, and as a result did not receive confidential, independent assistance strictly for defense purposes. Counsel's failure to use tools readily available to defense was unreasonable and prejudiced Mr. Henry in the extreme.

performance. If Dr. Block Garfield had been provided with the evidence of Mr. Henry's traumatized youth, presented at the evidentiary hearing, it would have required investigation by trial counsel into his Post Traumatic Stress Disorder and depression, diagnosed by psychiatrist Richard Dudley during a postconviction evaluation (R. 1467-1477). The existence of these psychiatric conditions is highly relevant to both trial counsel's deficient performance and prejudice, and it was error for the lower court to exclude such testimony.

As Wiggins makes clear, the solitary act of retaining a mental health expert is insufficient to constitute the requisite "reasonable investigation" and does not substitute for the investigation of the defendant's social history. See Wiggins at 2536 in which the retained psychologist "[C]onducted a number of tests on petitioner...conclud[ing] that petitioner had an IQ of 79, had difficulty coping with demanding situations and exhibited features of a personality disorder" but "revealed nothing of his life history" Id. at 2536. The situation in the instant cause, however is even more egregious than in Wiggins because in Wiggins, the psychologist conducted interviews with some of Mr. Wiggins' family members, whereas in Mr. Henry's case, the retained psychologist did no testing, reviewed no collateral information and failed to interview family members.

In State of Florida v. Lewis, 838 So. 2d 1102 (Fla. 2002), this Court agreed with a lower court that postconviction counsel had shown deficient performance by trial counsel at the evidentiary hearing

with a demonstration that "information regarding [Mr. Henry] was available if a reasonable investigation had been conducted", Lewis at 1110. The Lewis opinion then listed a number of mitigating factors that postconviction counsel demonstrated below, including testimony elicited from a mental health expert retained during postconviction proceedings. This Court's affirmation of the lower court's finding in Lewis demonstrates that such information, including mental health testimony obtained during the pendency of postconviction proceedings, can establish deficient performance.

Mr. Henry was not afforded the proper opportunity to present evidence of similar compelling mitigation through his mental health experts, who were specifically precluded from testifying as to their finding. In fact, the Court refused to qualify them as experts.

Had Dr. Barry Crown been allowed to testify as to his findings he would have been able to show that Mr. Henry has "significant neuropsychological deficits and impairments" and that this pattern "is indicative of brain damage" (T. 542)(PCR. 1488-1491). Had Dr. Thomas Hyde been allowed to testify as to his findings, he would have been able to testify as to Mr. Henry's attentional deficits, which, in his opinion relate to a "developmental dysfunction of the central nervous system particularly the frontal lobes" Report of Dr. Hyde, Defendant's Exhibit P for ID at Evidentiary Hearing.[4] Had Dr. Richard Dudley been allowed to testify as to his findings, he would

[4] Mr. Henry has consistently maintained that Dr. Hyde's findings, like those of Dr. Dudley, Dr. Crown and Dr. Lipman are pertinent to both deficient performance and prejudice.

have been able to testify to Mr. Henry's severe childhood difficulties and traumatization which resulted in Post Traumatic Stress Disorder, depression, both major psychiatric illnesses, chronic substance abuse and cocaine dependence as well as severely impaired cognitive abilities (PCR. 1467-1477). These expert findings support the presence of statutory mental health mitigation and also constitute compelling non statutory mitigation. Dr. Dudley's psychiatric opinion was that these factors would have been shown to be present at the time of the trial, had a competent psychiatric and neuropsychological examination been conducted prior to Mr. Henry's penalty phase, and that they constituted an extreme mental or emotional disturbance at the time of the offense (PCR. 1476).

The findings of Mr. Henry's mental health experts based on their evaluations together with the additional materials and interviews provided to them by postconviction counsel support mitigation, the existence of which should have been explored by trial counsel. The lower court simply failed to allow these experts to testify as to their findings. The result was that the lower court was unable to consider the experts' opinions. It was an exercise in futility for the lower court to make any decision on trial counsel's performance under these circumstances.

b. Mr. Henry's trial counsel rendered deficient performance.

Counsel in a capital case has a duty to conduct a "requisite diligent investigation" into his client's background, in order to develop and present mitigating factors. Williams v. Taylor at 1524.

See also Id. at 1515, ("trial counsel has not fulfilled their obligation to conduct a thorough investigation of the defendant's background"); State v. Riechhmann 777 So. 2d 342 (Fla. 2000). ("an attorney has a duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence....It seems apparent that there would be few cases if any where defense counsel would be justified in failing to investigate and present a case for the defendant in the penalty phase of a capital trial.")

It is abundantly clear that Mr. Raticoff failed to conduct the requisite diligent investigation into Mr. Henry's background and therefore failed to unearth available and plentiful mitigation. Raticoff's failure to investigate caused the adversarial process to collapse completely during Mr. Henry's penalty phase. Raticoff failed both to develop background material relating to, inter alia, Mr. Henry's background of abandonment, abuse and neglect, and his chronic and acute history of cocaine abuse, and then failed to communicate these factors to any mental health professional and failed to develop abundant and easily available mental health mitigation.

Wiggins specifically addresses the failure by trial counsel to investigate a capital defendant's social history for the purpose of developing potential mitigation. It clarifies the fact that applicable professional standards require such investigation. Applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice:

> Counsel's conduct . . . fell short of the

> standards for capital defense work articulated by the American Bar Association (ABA) -- standards to which we have long referred as guides to determining what is reasonable" Strickland, supra at 688; Williams v. Taylor, supra at 396. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. (ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.41©) p. 93 (1989) (emphasis added).

(Wiggins v. Smith, 123 S. Ct at 2536-2537).[5]

As the Wiggins Court further explained, the applicable ABA standards state that:

> [A]mong the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.

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[5] The Wiggins opinion refers specifically to ABA standards which were in place at the time of Wiggins' trial, and had been in place since 1980, eight years before Mr. Henry's trial. As the Sixth Circuit recently held:

> Although the instant case was tried before the 1989 ABA edition of the standards was published, the standards merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases. The ABA standards are not aspirational in the sense that they represent norms newly discovered after Strickland. They are the same type of longstanding norms referred to in Strickland in 1984 as "prevailing professional norms" as "guided" by "American Bar Association standards and the like."

Hamblin v. Mitchell, 354 F. 3d 482 (6th Cir. 2003), 2003 U.S.App. LEXIS 26291.

Id quoting 1 ABA Standards for Criminal Justice 4-4.1. (emphasis in original). Had trial counsel investigated Mr. Henry's social history, obtained any records, or interviewed the family members and friends who testified at the hearing, he would have discovered a wealth of information that would have both been compelling in its own right, as well as providing areas for any confidential expert retained by counsel to investigate.

All of this expert testimony was available from experts in the areas of psychology, psychiatry, neurology, and neuropharmacology at the time of the 1988 trial. These disciplines were available at the time of Mr. Henry's capital trial, but for no strategic reason, trial counsel failed to investigate it and present it to the jury to establish statutory and non-statutory mitigation. Trial counsel similarly failed to investigate and present lay witness testimony that supports the experts' findings, and establishes additional mitigation. Members of Mr. Henry's family gave testimony regarding the poverty, abuse, neglect, chaos and exposure to violence of Mr. Henry's early life which was compelling and easily available to trial counsel, but for no strategic reason trial counsel did not investigate it.

A criminal defendant is entitled to expert psychiatric assistance when the State makes his mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 470 U.S. 68 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical

interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1275, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background. Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991). Counsel must assure that the client is not denied a professional and professionally conducted mental health evaluation. See Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984); Fessel; Mason v. State, 489 So. 2d 734 (Fla. 1986).

The record of the proceedings itself indicates that no mental health evaluation was ever conducted for the purpose of developing mental health mitigation. Mr. Raticoff's own testimony indicates that despite having had over four (4) months from taking the case over from Sidney Solomon, no mental health mitigation was investigated by Raticoff. (PCR. 1307, 1314-1320). Prior to Raticoff's appointment to the case, Mr. Henry's original lawyer, Sidney Solomon had engaged the services of clinical psychologist, Trudy Block Garfield, who had conducted a preliminary evaluation of Mr. Henry (PCR. 1328). Mr. Solomon's motion for Dr. Block Garfield to be appointed was predicated on the development of an intoxication and/or an insanity defense for the guilt phase of the trial. (See Defendant's Exhibit 2 at Evidentiary Hearing). As Raticoff admitted, the scope of Dr. Block Garfield's report was limited to "number one, competency to stand trial, number two, to his sanity at the time of

the crime, and number three, it seemed that she went into a rather detailed description of his personality flaws" (T. October 18, 2000 at 19).[6] Nowhere, either on the motion for appointment of Dr. Block Garfield, or on the face of her report was there any indication that a mitigation evaluation was being conducted.

The limited scope of Dr. Block Garfield's examination of Mr. Henry is also borne out by Dr. Block Garfield's testimony at the hearing. As she explained, she was only asked to take the most general look at Mr. Henry:

> [by Dr. Block Garfield] [A]pparently Mr. Solomon asked me to take a look a the defendant--to look at his psychological functioning, which is what I stated in the reason for the evaluation, on the report that I rendered.

(PCR. 1329). * * *

> [by Ms. Day] I'm going back to the scope of the evaluation. If this had been an evaluation designed to evaluate a client to develop a penalty phase case, would the report reflect that?
>
> [A.] **My report would have reflected not only that issue, it would address each and every issue pertaining to mitigation. I would have listed the statutory as well as the non statutory and addressed each and every one as it pertained to the defendant.**
>
> [Q.] So, from our report, is it fair to say that it was not presented to you as a mitigation case by the attorney who hired you?
>
> [A.] I do not believe so because it would have been reflected in my report.

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[6]Pages 6-33 of this transcript were not included in the record filed by the Clerk for unknown reasons. Those pages are included as Attachment A to this Initial Brief.

(PCR. 1331-1332)(emphasis added). The record is unequivocal that Dr. Block Garfield was not asked to look at mental health mitigation for Mr. Henry. Trial counsel failed to take account of the limited scope of Dr. Block Garfield's evaluation and failed to conduct any further investigation into Mr. Henry's mental state for penalty phase purposes.

Not only was the scope of Dr. Block Garfield's evaluation constitutionally inadequate for the comprehensive development of mitigation, but the depth of the testing performed was similarly inadequate. At the evidentiary hearing, Dr. Block Garfield testified that in order to do a proper mitigation evaluation, she would expect to receive and review numerous records relating to aa defendant, in addition to the psychological examination:

> [by Ms. Day] ...could you give me some more detail as to how a mitigation work up would differ from the kind of evaluation performed on Mr. Henry?
>
> [A.] **It would differ in that I would certainly list the sources that I relied upon in coming to--in formulating an opinion. It would list each and every person that I interviewed. It would refer to each and every record that I looked at. So, in essence, before I can do anything like this, and really the initial approach is not that different in doing a sanity evaluation, because even then, I would ask to see any and all discovery. I would ask for individuals that I could speak to that would give me an idea as to the person's state of mind at the time. I would ask for an hospital records that might be available. In effect anything at all that could possible affect the individual's state of mind. I would want to see and want to know. And I would list that in my report specifically.**

> [Q.] So, let me get this clear, to do a mitigation evaluation, you would specifically expect to be provided with--you would request interviews with other people, and other records, material that's additional to the defended's self report and testing?
>
> [A.] That's correct. I would either do that verbally or I would write a preliminary report reporting the information I obtained from the defendant and thereafter ask for additional material to be provided.
>
> [Q.] Okay, Did that happen in Mr. Henry's case?
>
> [A.] Not to my recollection.

(PCR. 1332-1333)(emphasis added). Dr. Block Garfield's testimony also made it plain that she had had only the most cursory of conversations with Raticoff prior to Mr. Henry's penalty phase, and showed that he had never asked her to follow up on her very preliminary evaluation of Mr. Henry:

> [Q.] Do you recall any face to face meetings with Mr. Raticoff?
>
> [A.] I recall no face to face meetings with Mr. Raticoff. In fact I believe today is the first time I have met him.
>
> [Q.] All right. To make the record crystal clear, Mr. Raticoff did not ask you to do any supplemental tests?
>
> [A.] I was not asked to do any supplemental work.
>
> [Q.] Or to interview anyone else or to review any other materials?
>
> [A.] Not to my recollection, no.

(PCR. 1337).[7]

In fact there was abundant evidence available to Raticoff that would have provided valuable background for a mental health professional to utilize. In particular, there was a plethora of evidence of Mr. Henry's drug use, both chronic and acute at the time of the crime, which as Dr. Block Garfield testified, would have been significant. Had Raticoff taken the time to investigate Mr. Henry's background thoroughly, he would have discovered a multiplicity of factors that would have supported a diagnosis of Mr. Henry as suffering from brain damage, post-traumatic stress disorder (PTSD), chronic and acute depression, a long term polysubstance abuse disorder, and a cocaine induced psychosis at the time of the crime. However, due to Raticoff's failure to investigate these factors, his failure to present them to the mental health expert, and his failure to retain appropriate mental health experts for Mr. Henry's particular condition, no such mitigation was developed.

Not only did Dr. Block Garfield not supplement her initial review, but Raticoff had next to no communication with her and did nothing to build on the initial evaluation that was performed while Sidney Solomon was still counsel. However, it is clear that a multiplicity of documentation and other evidence was readily available at the time of Mr. Henry's trial which both directly and

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[7]Mr. Henry filed a motion to disqualify the judge prior to the evidentiary hearing when counsel learned during witness preparation of a long standing bias on the part of the court towards Dr. Block Garfield (PCR. 1176-1190). The motion was denied. Mr. Henry does not waive the claim of judicial bias articulated in the motion served October 13, 2000.

indirectly support the fact that Mr. Henry had a chronic and acute substance abuse problem.

Dr. Jonathan Lipman, a neuropharmacologist, testified at the evidentiary hearing that even Mr. Henry's statements to law enforcement indicated that he was in a state of confusion at the time of his arrest:

> In his latest transcript of interviews, he revealed that he wanted to talk to the investigators even against the advice of his public defender. Because he didn't understand what had happened. He, himself, couldn't remember, could remember only partially, and could not understand what had transpired.

(T. 710).[8] Dr. Lipman also noted that in his second statement, Mr. Henry admitted the use of crack cocaine and pot, and implied that he was addicted to crack cocaine:

> I smoke pot every now and then. And occasional, I do, I smoke crack. Okay -- maybe years ago, I tried some other drugs. But do--. But I figure if you do crack one time, it's just as probable doing it --as doing it every day. I guess you can't predict it.

(T. 712-713). Dr. Lipman noted that Mr. Henry's statements, taken individually and together were of neuropharmacological significance to him, since they revealed his state of mind at the time of the offense or shortly thereafter (T. 715). Dr. Lipman noted that Mr. Henry's statements were useful, not only for their content, but also from the manner in which he admitted his drug use:

> Indicators that there was a

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[8]Dr. Lipman's extensive preliminary report was marked for identification at the evidentiary hearing and is found at PCR. 1479-1486.

> neuropharmacological issue that certainly needed evaluating, but not perhaps the significance of it in detail, came from the manner in which he had admitted drug use and his documented history of drug abuse and even his urine analysis. The record then suggested that this is an individual that has an -- has a history of abusing drugs; and who was -- who continued to abuse drugs at the time of his defense.
>
> His denial actually is interesting during his transcripts because of the way that it changed. This is something that we, quite typically, see in drug abusers. Denial, in a sense, is part of the problem.

(T. 725).

In addition to Mr. Henry's self report and confused state of mind at the time of his arrest, Dr. Lipman noted numerous collateral information that supported a finding that Mr. Henry had a severe polysubstance abuse disorder, and hence that other psychiatric and neuropsychological avenues should have been investigated pre-trial. For example, Dr. Lipman testified that in Mr. Henry's presentence investigation, reference was made to Mr. Henry's use of marijuana and crack cocaine. See (T. 741). He further testified that the various statements of Frances Judson, Charles Judson, and Lawanna Madison all confirmed Mr. Henry's drug use and disoriented state of mind at the time of the crime (T. 746-753). Dr. Lipman also said that the deposition of Detective James Dusenbery was "illuminating" as to Mr. Henry's demeanor at the time of his arrest. In the deposition, Detective Dusenbery described Mr. Henry as looking like a "street person" (T. 763), and he further stated that Mr. Henry looked like what he termed a "rock monster" meaning "people that are heavy users

of crack" (T. 764). Lipman testified that Detective Dusenbery further explained that Mr. Henry's general appearance was that of what he described as a "rock hound or rock monster" (T. 764).

Dr. Lipman testified that he reviewed the statement of Roxanne Campbell, who was a customer at the Cloth World store shortly before the offense. She "described Robert as making no sense verbally" on the evening of the crime (T. 759). In addition, Dr. Lipman testified that he reviewed of the deposition of the Broward jail intake nurse, which described Mr. Henry as being disorganized, not understanding why he had done what he did, in a state of bewilderment, and stating that in her opinion he needed psychiatric evaluation. (T. 759-760).

Dr. Lipman testified that the information that he reviewed indicated that Mr. Henry was under the influence of drugs at the time of the crime, and that his opinion could be further bolstered by forensic evaluation of a beer can, modified for the use of crack cocaine, that was found at the crime scene. According to Dr. Lipman, the use of this can to smoke crack had been confirmed in his interview with Mr. Henry, and an evaluation of it was potentially significant in determining Mr. Henry's neuropharmacological profile at the time of the crime. (T. 756). Only unsuccessful attempts to lift fingerprints from this can were ever attempted. No other forensic evaluation of this can has ever been undertaken. Mr. Raticoff was aware of the existence and description of the can as a instrumentality for smoking drugs based on trial testimony by Detective Andrew Gianino at trial. (Trial Transcript at 2197).

Mr. Henry had a documented drug history for several years

preceding the crime. Dr. Lipman testified that his military records revealed repeated drug related infractions, which ultimately led, in Lipman's opinion, to his less than honorable discharge. As Dr. Lipman testified:

> ..his urine analysis was tested and found to be marijuana positive, these under conditions when drug use is not permitted.
>
> He had interactions with the military police that were also drug related. They seized drugs from him.
>
> He was, ultimately discharge other than honorable, largely because of his drug involvement.

(T. 709).

In addition to the numerous documentary sources that should have been made available to a mental health expert, Mr. Raticoff should have interviewed and made available certain of Mr. Henry's family members and friends, who could likewise have shed light on his drug history. Mr. Henry's brother, Joseph Henry testified at the hearing that they had used numerous drugs together, beginning in high school. He testified that he and Robert Henry had used "just the marijuana, and opium, and hash, and hash oil, and the THC and the booze" (T. 674). He then testified that, after he (Joseph) and Mr. Robert Henry had left the Army and the Marines respectively, the two brothers did more drugs together, including "more marihuana, more booze, crack cocaine" (T. 677). He also recalled doing crack cocaine with Robert Henry on at least four occasions. Joseph Henry also described the effects of crack cocaine on his brother's demeanor:

> I noticed that he was like tuning his own in on

> listening real hard, and paranoid, and that's about it.

(T. 679-680). Joseph Henry also testified that together with neighbor Eddie Simpson, he was smoking crack cocaine with his brother Robert days before Robert Henry was arrested for the murder. (T. 685). Raticoff testified that he was **unaware** that Robert Henry even had a brother named Joseph. (T. 478).

Joseph's neighbor Eddie Simpson, who worked at the Cloth World crime scene with both Robert and Joseph, also testified at the evidentiary hearing and provided confirmation of Robert Henry's drug habit. Eddie Simpson said that he had seen Robert using marijuana, and confirmed that on at least one occasion observed Robert in possession of crack cocaine. (T. 878). Despite having access to police statements by Simpson indicating that he knew Robert was doing crack and that Simpson had been with Robert Henry on the day of the offense, Raticoff testified at the evidentiary hearing that he had not bothered to interview or depose him. (T. 482).

Mr. Henry's sister, Martha Gilbert testified at the evidentiary hearing and corroborated Mr. Henry's extensive drug history. Ms. Gilbert testified that when she was at high school, she smoked marijuana with Robert and Joe (T. 837-838). She also confirmed that when Robert was in the Marines he was heavily involved in the drug culture. She recalled an occasion when Robert came home on leave with a large quantity of marijuana, which she described as "a bed full" and she estimated to be "lots of pounds" (T. 839-840). Ms. Gilbert also noted that after Mr. Henry returned to Deerfield after

being discharged form the Marines stating that "he had changed" and that she noticed "weight loss. She stated that "he is normally short- patient. He normally had to have patience. But he was short patient. And he just wasn't himself." (T. 842-843). Ms. Gilbert also recalled a conversation she had had with Carolyn Fort, Mr. Henry's girlfriend after he left the military. She recalled that Carolyn had told her that "Robert had some white powder. He picked [Carolyn] up from work. He had some white powder stuff on his nose" (T. 844).

Ms. Gilbert also testified as to Mr. Henry's state of confusion after his arrest. She testified that she had visited Mr. Henry in jail, shortly after his arrest. She described him as being "different," "like another person" and "like he was spaced out, or something. He was just spaced. He was like in another world" (T. 847).

Mr. Henry's crack cocaine history was also alluded to by two of his ex-girlfriends, Carolyn Fort Cason and Elizabeth Jackson, formerly Elizabeth Kyle. Ms. Cason testified at the hearing that she and Mr. Henry had, in fact, broken up due to her suspicion that he was using drugs (T. 821). Ms. Cason recalled that after the breakup, she confronted Mr. Henry about her suspicions and that he had admitted his drug usage to her (T. 822). She also noted that there was a change in Mr. Henry and that:

> I noticed a difference in his attitude; his appearance -- And his whereabouts was always, you know, here and there. But I-- It would never lead up to where he actually was. And he just wasn't the same to me.

(T. 821). Ms. Cason also noted that throughout the course of their relationship, Mr. Henry progressively became much more secretive with her (T. 821).

Elizabeth Kyle Jackson also testified at the hearing and described Mr. Henry's bizarre behavior during the course of their romantic relationship:

> I seen him when he was--he would either call me to pick him up. And I would bring him back to the house. And then I would drop him back off at the same vicinity that I had picked him up at.

(T. 886). Ms. Jackson noted that he was very "secretive" about where he had been and what he had been doing during these periods, and that Mr. Henry gave her very little information (T. 890). She also noted that he would be "very evasive on what he was going to do, or the reason why" when he went back to Deerfield (T. 890).

The family and friends of Mr. Henry who testified at the evidentiary hearing represent the kind of information about his background which, had it been investigated and developed with the appropriate experts, certainly would have put Raticoff on notice that there was a plethora of statutory and non statutory mental health mitigation available.

Mr. Robert Henry's brother, Joseph Henry, testified about their mother's abuse of the children:

> [Q.] Now did she discipline you and your brothers and sister when you did something wrong?
>
> [A.] She would beat us with an extension cord.
>
> [Q.] Did she leave marks?

[A.] Yeah.

* * *

[Q.] Was your mother a tough disciplinarian?

[A.] Yes. Yeah.

{q.} What happened if you didn't follow her ?

[A.] She didn't always get to beat us right immediately.

She would chastise us by not giving us allowances and not let us go out and play.

(T. 670-671). Martha Gilbert, Mr. Henry's sister also testified as to the severity of the beatings administered to the children by their mother noting that they were administered with "Stingy [extension] cord, belts" (T. 849).

Joseph Henry also vividly described the type of abuse that caused Robert Henry to leave home:

...She got in to an argument with him, and he kind of got a little angry on his behalf, and she got physical on her behalf and he ran away and stayed with his aunt.

[Q.] What did she do?

[A.] Picked him up and body slammed him.

[Q.] How large a woman is your mom?

[A.] About 6' 2"and at that time, she was more slender, about 6' 2", 170.

[Q.] And how old was Robert then?

[A.] He was -- I think he was in the 10th grade.

(T. 672).

However, trial counsel failed to discover any of the information as to Mr. Henry's history of substance abuse or family abuse and

neglect, because he failed to properly investigate or spend time eliciting the aforementioned information. As noted elsewhere, Raticoff did not even know Joe Henry existed. The family history information would not only have been mitigating in its own right, but would have been a treasure trove of background material for Dr. Block Garfield or any other experts that Raticoff should have consulted. None of the experts pre-trial had any information except self-report. Each of the above lay witnesses indicated that they would have been willing to come to court and testify, had they been asked.[9] Each of the witnesses also testified that they would have been willing to be interviewed by mental health professionals working on behalf of Mr. Henry.[10]

Trial counsel testified that his hands were tied because he was instructed by his client not to subpoena any family members and friends. He stated that:

> Well, my plans according to Mr. Henry there were no plans. Mr. Henry didn't want to put on any witnesses. Mr. Henry didn't want to put on a penalty phase. That was (sic) Mr. Henry's wishes. I was instructed not to subpoena any witnesses. I was, in fact instructed not to do anything in the penalty phase by Mr. Henry.

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[9] Admittedly Elizabeth Jackson subsequently said that she did not understand how her testimony would have helped. However, her evidentiary hearing testimony is unequivocally clear that she would have been willing to come and testify at Mr. Henry's penalty phase, had trial counsel merely told her how it would help.

[10] In fact, psychiatrist Dr. Richard Dudley did interview Martha Gilbert, Carolyn Cason and Joseph Henry prior to his testimony, and Dr. Jonathan Lipman interviewed Martha Henry and Joseph Henry prior to testifying at the evidentiary hearing. However, as noted **supra**, neither expert was allowed to discuss, except on limited proffer, their interviews with these individuals or the impact on their opinions, even though the interviewees would have been available at the time of the trial.

(PCR. 1281). At the same time, Raticoff claimed to have subpoenaed the family members over his client's wishes. However, according to their evidentiary hearing testimony, none of lay witnesses in fact received such a subpoena. The Court files does not reflect that any such subpoenas were in fact served. Raticoff did file a praecipe for the alleged subpoenas, it was not filed until October 5, 1988, one day before the penalty phase started. This delay in and of itself constitutes ineffective assistance. See Blanco v. Singletary, 943 F. 2d at 1501-02. "To save the difficult and time-consuming task of assembling mitigation witnesses until after the jury's verdict in the guilt phase almost insures that witnesses will not be available." See also Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993), in which Mr. Deaton's trial counsel was found ineffective for failing to investigate mitigation evidence until after the conclusion for the guilt phase.[11]

Trial counsel testified that he filed a motion for non-confidential expert evaluations for "a competency and insanity evaluation" under the competency rules about a month before the trial (T. 487-488).[12] He testified that it was "not a fair question" for counsel to ask if the competency evaluations of Mr. Henry by Dr.

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[11]Trial counsel testified that he did not hire an investigator to assist with the guilt phase or penalty phase preparations.

[12]Defendant's Motion for Appointment of a Psychiatrist Per Fla. R. Crim. P. 3.210 was filed on August 9, 1988. It was entered as evidence at the hearing as Defendant's Exhibit 11. Trial began on September 15, 1988.

Spencer and Dr. Ceros-Livingston that resulted from his motion were "adequate forensic mental health evaluations for the purpose of preparing a penalty phase" (T. 489). Both reports were marked for identification and entered as court exhibits at the evidentiary hearing.[13] He testified that it was unfair "because at that point in time I was not really preparing penalty phase per se, because my client prohibited me from preparing one" Id. He also testified that as to the penalty phase, "I had no strategy" (T. 439). Yet, he further testified that the day before the penalty phase, he filed a praecipe for witnesses because he "was uncomfortable with the idea that we were going through a death penalty phase mitigation without putting on any type of evidence in order to try to save Mr. Henry's life, in spite of the fact that he didn't care whether I saved it or not" (T. 447-448). He testified that "I can't recall exactly what these witnesses were going to testify to. Mr. Henry was aware of what they would say or what they could say" (T. 452).

Mr. Raticoff specifically testified that he never intended to put on any evidence of Mr. Henry's drug usage at the penalty phase:

> Because there was no evidence I could produce that he had used drugs because Mr. Henry, up until a report that I recently read, had vehemently denied that he was under the influence of anything at the time that these events occurred. He always maintained that he did not

[13]An example lifted from the August 28, 1988 report of Dr. Ceros-Livingston provides a cogent taste of the quality and depth of these drive-by evaluations based entirely on self-report and review of the probable cause affidavit. At page three, her report states, "When the psychologist had finished reading the Probable Cause Affidavit to Mr. Henry, he reported that he only said what he had been instructed to say; not the truth."

> do it. There was not mitigation because there was not a client admitting that he used drugs. That makes it rather impossible to present that type of defense or that type of mitigation.

(T. 458). In fact, Mr. Raticoff went much further. He testified that although he "had evidence in witness statements and in certain evidence that came into trial, that there was allegedly or might likely be crack cocaine involved in Mr. Henry's actions...I would not go above and beyond his wishes and subpoena him and bring out that type of evidence" (T. 460). Trial counsel filed a praecipe with potential mitigation witnesses the day before the sentencing phase, although there is no evidence that he ever subpoenaed anyone. And although he never made any effort to retain an expert for penalty phase purposes, a month before the trial he got two competency experts appointed, because, as he testified, as a trial lawyer on these first degree murder cases "it's a cover your butt" (PCR. 1279).

Mr. Raticoff also knew that the evidence was that Mr. Henry was a substance abuser and that crack cocaine was probably involved in the offense, yet he never tried to retain a substance abuse expert. Dr. Lipman testified that potential evidence of Mr. Henry's substance abuse was available in 1988 and now through forensic testing for drug metabolites of the clothing Mr. Henry was wearing, of the Miller Lite can, and of any samples of blood, hair and nails that were taken from Mr. Henry. The failure to obtain such forensic testing was deficient performance that is only magnified by the apparent disappearance of some of the evidence in the intervening years. What better leverage is available to an attorney with a recalcitrant client than objective

proof of the very facts regarding substance abuse that the client denies? Mr. Raticoff's failure to obtain forensic testing is another aspect of the deficient performance that permeates this case. The testing requested by postconviction counsel should be allowed to go forward so as to additionally support the allegations of deficient performance by trial counsel Bruce Raticoff.

When counsel is aware, or should have been aware of a client's mental health problems, reasonably effective representation requires investigation and presentation of independent expert mental health mitigation testimony at the penalty phase. See, e.g., Rose v. State, 675 So. 2d 567, 572 (Fla. 1996)(finding deficient performance for failing to investigate client's mental health background); State v. Michael, 530 So. 2d 929, 930 (Fla. 1988)(once counsel is on notice of a client's mental health problems, failure to investigate by obtaining independent experts' opinions on applicability of statutory mental health mitigating factors is "so unreasonable as to constitute substandard representation, the first prong of the Strickland test"); O'Callaghan v. State, 461 So. 2d 1354, 1355-56 (Fla. 1984)(failure to conduct proper investigation into client's mental health background when mental health is at issue is relevant to claim of ineffective assistance of counsel); Perri v. State, 441 So. 2d 606, 609 (Fla. 1983)(notice of mental problems "should be enough to trigger an investigation as to whether the mental health condition of the defendant was less than insanity but more than the emotions of an average man, whether he suffered from a mental disturbance which interfered with, but did not obviate, his knowledge of right and wrong"

such that "he may still deserve some mitigation of his sentence").

Raticoff failed spectacularly in his duty to investigate Mr. Henry's mental health problems. Faced with a confidential report from Dr. Block Garfield that he did not feel was helpful, there were several options which a reasonable attorney should have taken to develop mental health mitigation. He could have followed up with Dr. Block Garfield, supplied her with additional materials and arranged family member interviews. Or, as new counsel, he could have filed a motion requesting an additional confidential mental health expert to evaluate Mr. Henry.[14] Given the likely areas of concern arising from Mr. Henry's drug history, in any event it would have been preferable to have an evaluation performed by a specialist in the acute and chronic effects of the type of drug history that Mr. Henry experienced. The fact is that Mr. Raticoff did no further investigation but simply gave up. As a result, valuable mental health evidence went undiscovered.

Raticoff ultimately claimed that his decision not to offer mental health evidence based on Dr. Block Garfield's report was strategic.

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[14] Raticoff claimed to have requested competency evaluations of Mr. Henry to offer an alternative viewpoint as to Mr. Henry's mental condition. However, competency is entirely different from mitigation, and the scope of a competency evaluation is vastly different from that of a mitigation workup, as Dr. Block Garfield testified. Raticoff's statements as to the reasons for his requesting the competency evaluation were more truthfully, as he admitted "to cover his butt" rather than any meaningful strategy to develop mitigation. It is noteworthy that Raticoff did not even apparently know whether Dr. Ceros Livingston and Dr. Spencer were psychologists or psychiatrists, so his understanding of their reports and work was limited in the extreme. He utterly failed to provide the competency experts with any of the information in his possession concerning Mr. Henry's substance abuse history, intoxication around the time of the offense, or family history.

However, no tactical motive can be ascribed to an attorney whose omissions are based on ignorance. Strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on investigation. Wiggins at 2539, citing Strickland, 466 U.S. at 690-691.

In addition to hampering his ability to make strategic decisions, [Raticoff's] failure to investigate clearly affected his ability to competently advise [Mr. Henry] regarding the meaning of mitigation evidence and the availability of possible mitigation strategies. Id at 1228.[13] By the same token, Raticoff's failure to investigate meant that Mr. Henry's waiver of mitigation was not knowing, intelligent and voluntary. This claim is on all points controlled by the Florida Supreme Court's opinion in Deaton v. Dugger, 635 So. 2d 4 (Fla. 1994), and the Eleventh Circuit Court of Appeals' decision in Blanco v. Singletary, 943 F. 2d 1477 (11th Cir. 1991). In Deaton, the Florida Supreme Court addressed an identical situation arising out of another Broward County capital case, where Judge Moe found that trial counsel rendered prejudicially deficient performance in failing to investigate potential mitigating evidence, thereby rendering Jason Deaton's purported "waiver" invalid. The Court affirmed Judge Moe's granting of relief:

> In this case, the trial judge found that Deaton had waived the right to testify and the right to

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[13] The record is clear that Mr. Henry's alleged waiver was limited to Dr. Block Garfield's report and did not consist of a waiver of any and all mental health mitigation.

> 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.

Deaton, 635 So. 2d at 8. 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. Moreover, because "evidence presented in the rule 3.850 evidentiary hearing established that a number of mitigating circumstances existed," Id. at 8, counsel's failure to adequately investigate "was prejudicial." Id. at 9. In a case where there is a total waiver of mitigation, the focus of the legal analysis turns to the adequacy of that waiver and whether counsel fully investigated. Deaton; Blanco v. Singletary, 943 F. 2d 1477 (11th Cir. 1991). A defendant cannot waive his right to present evidence he does not know about or does not understand is mitigating.

Mr. Henry's case is also on point with Blanco v. Singletary, 943 F. 2d 1477 (11th Cir. 1991). In Blanco, counsel did nothing to investigate for the penalty phase until after the guilt phase. While the attorneys testified that "Blanco indicated he did not want any evidence offered on his behalf, . . . [c]ounsel essentially acquiesced

in Blanco's defeatism without knowing what evidence Blanco was foregoing. **Counsel could therefore not have advised Blanco fully as to the consequences of his choice not to put on any mitigation evidence**." Id. at 1501 (emphasis added). In addressing the State's argument and trial counsel's testimony that Mr. Blanco's family would allegedly not cooperate during that four day period between the guilt and penalty phase, the Eleventh Circuit wrote:

> However, counsel had approximately five months to prepare for trial. Counsel apparently did not personally seek out any witnesses specifically for sentencing prior to trial. . . .
>
> Blanco's counsel needed to talk to the witnesses suggested by Blanco, determine whether they could provide helpful testimony, and seek leads on other possible witnesses. **From what we can determine, this was not done prior to trial. Once trial started, counsel were too hurried to do an adequate job. To save the difficult and time-consuming task of assembling mitigation witnesses until after the guilt phase almost insures that witnesses will not be available. No adequate investigation was conducted in this case.**

Id. at 1501-02 (emphasis added).

The Blanco court also addressed the issue of whether an attorney faced with a client who does not want mitigation presented can simply defer to the client's wishes:

> The state further contends that Blanco instructed his attorneys not to call any family members or acquaintances to testify. However, **this court has held that a defendant's desires not to present mitigating evidence do not terminate counsels' responsibilities during the sentencing phase of a death penalty trial: "The reason lawyers may not `blindly follow' such commands is that although the decision whether to use such evidence is for the client, the lawyer**

> **must first evaluate potential avenues and advise the client of those offering potential merit."**

Id. at 1502 (emphasis added) (citing Thompson v. Wainwright, 787 F. 2d 1447, 1451 (11th Cir. 1986)). The Court further wrote that "[d]uring the precise period when Blanco's lawyers finally got around to preparing his penalty phase case, Blanco was noticeably more morose and irrational. Counsel therefore had a greater obligation to investigate and analyze available mitigating evidence." Blanco, 977 F. 2d at 1502. The Court concluded:

> The ultimate decision that was reached not to call witnesses was not a result of investigation and evaluation, but was instead primarily a result of counsels' eagerness to latch onto Blanco's statements that he did not want any witnesses called. **Indeed, this case points up the additional danger of waiting until after a guilty verdict to prepare a case in mitigation of the death penalty: Attorneys risk that both they and their client will mentally throw in the towel and lose the willpower to prepare a convincing case in favor of a life sentence.**

Id. at 1503 (emphasis added). In summary, trial counsel's performance at the penalty phase of Mr. Henry's trial was deficient. Raticoff failed to conduct constitutionally adequate investigation into potential mitigation evidence, which in turn hampered his ability to make strategic choices during the penalty phase and to competently advise his client during those proceedings. Because Mr. Henry did not receive competent advice, he was not able to make a knowing, intelligent and voluntary waiver of mitigation.

Mr. Henry can prove both deficient performance and prejudice at a full and fair evidentiary hearing. Much of Mr. Henry's claim of

ineffective assistance of trial counsel rests on the failure to investigate and present mitigation that was available. Florida law does not require that Mr. Henry establish the existence of mitigating circumstances beyond a reasonable doubt. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1991) ("when a reasonable quantum of uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved").

Counsel in a capital case has a duty to conduct a "requisite, diligent investigation" into his client's background for potential mitigation evidence. Williams v. Taylor, 120 S. Ct. 1495, 1524 (2000). See also Id. at 1515 ("trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"). Both the record of Mr. Henry's penalty phase and the evidence presented at his evidentiary hearing reveal trial counsel Raticoff made a "less than complete investigation" and that his omissions were the result of either no strategic decision at all, or by a "strategic decision" that was itself unreasonable, being based on inadequate investigation. As a result, counsel's performance was deficient, with regard to both mental health evidence and other mitigation evidence.

As could have been demonstrated at the evidentiary hearing if the experts had been allowed to testify, all of this statutory and non-statutory mitigation, including substantial mental health mitigation, was available at the time of Mr. Henry's trial had counsel chosen to investigate it. There was no strategic or tactical motive for failing to investigate this mitigation and any decision not to do so was not itself based on reasonable investigation. Despite the restrictions

placed on evidentiary development by the lower court, the first prong of the Strickland test has been conclusively established.

c. Prejudice

In order to demonstrate prejudice, Mr. Henry must show that "[T]here is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. In Mr. Henry's case, the prejudice is apparent. See Williams v. Taylor, 120 S. Ct. 1495 (2000), in which the Supreme Court granted relief based on ineffective assistance of counsel because " . . . the graphic description of [Mr. Henry's] childhood, filled with abuse and privation . . . might well have influenced the jury's appraisal of his moral culpability." Williams v. Taylor, 120 S. Ct. 1495 at 1515.

A proper analysis of prejudice entails an evaluation of the totality of available mitigation -- both that adduced at trial and the evidence presented at the evidentiary hearing. Id. at 1515. "Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990) (citing Lockett v. Ohio, 438 U.S. 586 (1978)). Moreover, "[m]itigating evidence . . . may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death eligibility case." Williams, 120 S. Ct. at 1516.

The evidence of Mr. Henry's cognitive impairments, substance abuse

and background, filled as it was with poverty, abuse, neglect and trauma, demonstrates:

> [T]he kind of troubled history [the United States Supreme Court] ha[s] declared relevant to assessing a defendant's moral culpability, Penry v. Lynaugh, 429 U.S. 302, 319106 L. Ed 2d 256, 109 S.Ct. 2034 (1989). (Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse).

Wiggins, 123 S.Ct at 2542.

Here, as in Wiggins, the nature and extent of Mr. Henry's childhood privations are such that they should have been presented to the jury. As in Wiggins, while it may have been strategically defensible to focus on the mental health issues, "the two sentencing strategies are not mutually exclusive" Id at 2542. Furthermore, as noted supra, the thorough investigation of a social history would have helped to support the testimony of any mental health expert who was retained to evaluate Mr. Henry for penalty phase purposes. In Mr. Henry's case, neither avenue was take.

Had testimony of the type that Drs. Dudley, Hyde, Crown and Lipman were prepared to present at the hearing been presented to the jury, there is a reasonable probability that the outcome would have been different. Mr. Henry was prevented from demonstrating at the evidentiary hearing the plethora of statutory and nonstatutory mitigation that was available had trial counsel only investigated it. Neither the trial court nor the jury would have been free to ignore the evidence of mitigation presented by Mr. Henry at the evidentiary

hearing, had it been presented at trial. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1991) ("when a reasonable quantum of uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved").

As demonstrated in the proffered reports of his experts at the hearing, Mr. Henry can show at a full and fair hearing the compelling and credible evidence that he suffers from neuropsychological deficits and chronic substance abuse, and that these factors support the statutory mental health mitigating factors. He can show that he suffered a lifetime of poverty, exposure to violence, abuse and neglect, as well as pervasive substance abuse. Counsel's failure to investigate and present this evidence, both to the jury and to his expert, as well as his failure to follow up Dr. Block Garfield's screening with a full workup of mental health mitigation, was the direct cause of Mr. Henry's jury recommendation of death.

In cases such as Mr. Henry's, where trial counsel failed to present available substantial mitigation, this Court has granted relief despite the presence of numerous aggravating circumstances. See Rose v. State, 675 So. 2d 567 (Fla. 1996) (prejudice established "[i]n light of the substantial mitigating evidence identified at the hearing below as compared to the sparseness of the evidence actually presented [at the penalty phase]"); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995) (prejudice established by "substantial mitigating evidence"); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992) (prejudice established by "strong mental mitigation" which was "essentially unrebutted")

In Mr. Henry's case, "counsel's error[s] had a pervasive effect,

altering the entire evidentiary picture at [the penalty phase]." Coss v. Lackwanna County District Attorney, 204 F. 3d 453, 463 (3d Cir. 2000). That the jury and judge received a wholly inaccurate portrayal of Mr. Henry's life is established by a comparison of the trial court's sentencing order with what is now known. And even without the evidence presented at the evidentiary hearing, the jury failed to return a unanimous verdict in favor of death.[14] When postconviction counsel is able to demonstrate through expert testimony "that it is likely that a jury would have been persuaded to recommend a penalty other than death," this Court should bear in mind that "it is peculiarly within the province of the jury to sift through the evidence, assess the credibility of the witnesses, and determine which evidence is the most persuasive" See Coney v. State, 845 So. 2d 120, 131-132 (Fla. 2003). Had the jury in Mr. Henry's case "been confronted with th[e] considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence." Wiggins v. Smith, 123 S. Ct. 2527, 2543 (2003).

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

[14] The jury recommended death in the two cases by votes of eight (8) to four (4) and by nine (9) to three (3). (R. 2666-2667).

to a capital defendant where the defendant presented at an evidentiary hearing evidence that, as the State conceded in that case, was "quantitatively and qualitatively superior to that presented by defense counsel at the penalty phase." Id. at 1290. Prejudice has clearly been shown.

Mr. Henry was ill-served by the representation of Bruce Raticoff during the trial. "It is not just that the defense presented on [Mr. Henry's] behalf at the sentencing phase was ineffective, rather, [Mr. Henry's] counsel did not present any meaningful mitigation evidence at the sentencing phase because he was not *prepared* due to his lack of knowledge and understanding of the sentencing phase of a capital case. This total lack of preparation, investigation and understanding of sentencing caused counsel's deficient performance and extreme prejudice to [Mr. Henry]" Hamblin at 24.

The evidence that was available to be presented at Mr. Henry's hearing is identical to that which established prejudice in these cases, and Mr. Henry is similarly entitled to relief under the standards set forth in Strickland and Williams and reiterated in Wiggins and Hamblin. This Court should return the case to circuit court for a full and fair evidentiary hearing.

Trial counsel's attempt to "cover his butt" only served to despoil the intent of Lockett. His was not a reasonable justification for utterly failing to meet the requirements of Strickland, now articulated through Wiggins, both of which Constitutionalize standards for performance of death penalty counsel that have been in place since 1980. Wiggins makes it clear that trial counsel cannot abandon a

strategy before investigating it. "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Wiggins, citing Strickland v. Washington, 466 U.S., at 690-691. As in Wiggins, trial counsel for Mr. Henry was not in a position to make a reasonable strategic choice because the investigation supporting his choice was unreasonable. In Mr. Henry's case, "counsel abandoned [his] investigation of the [defendant's] background having acquired only rudimentary knowledge of his history from a narrow set of sources." Id.

d. The lower court's denial of Mr. Henry 's motion for blood and clothing analysis was a violation of due process and deprived Mr. Henry of a full and fair hearing

The lower Court rejected Mr. Henry's contention that he was intoxicated at the time of the crime. The presence of intoxication at the time of the offense, along with the intertwined issue of defendant's chronic substance abuse, has relevance for both the guilt phase and penalty phase of a capital murder prosecution. Mr. Henry's expert neuropharmacologist, Dr. Lipman, testified on proffer at the evidentiary hearing that it would be possible to test blood and clothing and other evidence for the presence of drug residues. (T. 802-815). The lower court ultimately denied Mr. Henry's motion for forensic testing of certain items in evidence and/or retained by the Broward County Sheriff's Office (PCR. 1708-1782). This action by the lower court deprived Mr. Henry of due process and a full and fair evidentiary hearing.

On June 28, 2001 and again on July 23, 2001 Mr. Henry filed motions requesting that the lower court order forensic testing of evidence taken from Mr. Henry at the time of his capital trial (PCR. 1452, 1516, 1533).

The first motion anticipated that unless the testing was allowed, Mr. Henry's experts would not be able to give complete testimony and that Mr Henry would not be able to present evidence that would assist him in proving the allegations in his 3.850 motion related to intoxication and substance abuse. In other words, failure by the court to allow the testing would place a significant roadblock in the avenue of a full and fair evidentiary hearing:

> An underlying issue is Mr. Henry's use of crack cocaine at the time of the offense. Mr. Henry anticipates presenting evidence that Mr. Henry was under the influence of crack cocaine at the time of the crime, which, *inter alia,* would support the existence of statutory and non statutory mitigating circumstances.
>
> Mr. Henry has retained Dr. Jonathan J. Lipman, a forensic neuropharmacologist, to present testimony at the evidentiary hearing in this regard. Dr. Lipman has indicated to counsel that he needs to examine blood taken from Mr. Henry at the time of his arrest and clothing he wore at the time of the offense, in order to search for the presence of drugs and metabolites indicating drug use at the time of the offense.
>
> The testing procedures will not consume the entire sample of either blood or clothing. See Attachment A.
>
> Failure to allow such testing would deprive Mr. Henry of his rights to a full and fair hearing and his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

(PCR. 1452-1453).

The second motion was filed only after an examination of the evidence in the Clerk's office determined that pursuant to an affidavit of defense expert neuropharmacologist Dr. Jonathan Lipman filed with the June 28, 2001 motion noted supra, the **only** item available for testimony for metabolites of drugs consumed by Mr. Henry was a tee-shirt taken from Mr. Henry on the day of his arrest by the Broward Sheriff's forensic unit and tested at the time of trial for the presence of accelerants. This tee-shirt was State Exhibit #105 at the trial and was in the possession of the Clerk.[15]

Mr. Henry's pre-evidentiary hearing renewed motion for forensic testing also noted that the State had represented at a July 9, 2001 hearing in the case that all the physical evidence not in possession of the Clerk had been destroyed despite the absence of any destruction orders regarding the physical evidence in Mr. Henry's case having being provided in the prior public records litigation by either the Broward County Sheriff's Office or the Deerfield Beach Police.

One other important item of testable physical evidence that had been marked for identification at trial did still exist. A Miller Lite beer can that police reports described as having been modified to be used as a crack cocaine pipe (6H).[16] It was found by the State in the

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[15]The State's August 1, 2001 response correctly noted that the Mr. Henry's shoes were also in the possession of the Clerk.

[16] Unfortunately, based on counsel's in-person inventory on September 24, 2001, it appears that the Broward Sheriff lost or destroyed numerous other vital sources of potential forensic evidence including Mr. Henry's pants, undershorts and socks (5E); skin from his index finger (5R); and fingernail scrapings, saliva swab, head

possession of BCSO and allowed to be inventoried by Mr. Henry's counsel on September 24, 2001, some seven weeks after the conclusion of the evidentiary hearing. The only items available for forensic testing for the presence of drugs now include only Mr. Henry's T-shirt, shoes, and the Miller Lite can. Dr. Lipman testified that he would have had the can analyzed as part of the process of forming his neuropharmacological opinion. (T. 757). As noted *supra*, Dr. Lipman explained on proffer during the evidentiary hearing the basic protocol for forensic testing for the presence of metabolites of drugs. He explained to the State Attorney that the testing would be for the presence of drugs and that the age of the evidence in Mr. Henry's case would not preclude such testing.

At the evidentiary hearing, to supplement his pre-trial affidavit requesting forensic testing, Dr. Lipman testified that an analysis of the clothing and the beer can would assist him in forming and supporting an expert neuropharmacological opinion concerning intoxication at the time of the offense and mitigation (if he had been allowed to so testify). (T. 757). Trial counsel Raticoff was well aware of the can's existence during the trial because he questioned an officer about the attempted fingerprinting of the can (R. 2198). Raticoff's failure to pursue forensic testing of the clothing and can prior to the trial is additional support for a finding of deficient performance. It was impossible for him to know the results of the testing without having the tests done.

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hair samples (5U).

In the Order denying postconviction relief, the lower court found that:

> [D]uring the four days of extensive testimony at the evidentiary hearings, there was no testimony presented that Mr. Henry was intoxicated at the time of the crime. No one observed Mr. Henry ingesting drugs at the time of the crime; no one testified with any credibility about having observed Mr. Henry ingesting drugs in the days before the crime was committed.

(PCR. 1642). Trial counsel noted in his testimony that he did have information indicating possible intoxication (PCR. 1261-1265, 1305). In fact, as noted at the hearing, the motion for confidential expert that was filed by predecessor counsel Sidney Solomon was predicated in part on a allegation of intoxication at the time of the offense. Obtaining objective scientific testing of the presence of illegal drugs or their metabolites could hardly be more relevant in this context.

e. Mr. Henry did not make a knowing intelligent and voluntary waiver of the right to present mitigation

The lower court did not make findings as to whether Mr. Henry's waiver of mitigation was knowing, intelligent and voluntary. Had Mr. Henry's experts been allowed to testify as to their findings, none of which were investigated by trial counsel, the record would be clear that there was substantial and compelling mitigation, the existence of which Mr. Henry was unaware because of his counsel's deficient performance. Thus the record is incomplete - this issue needs to be revisited once full evidentiary development has been granted.

The State objected to Mr. Henry's attempts to question Raticoff as to the validity of the waiver of mitigation. The State's stated rationale was that "the Florida Supreme Court has already found a valid

waiver of mitigation in this case". This lower court sustained the objection. In fact, as the Lewis case makes plain, the issue of whether there is a valid waiver **must** be revisited, once the findings of Dr. Crown, Dr. Dudley, Dr. Hyde and Dr. Lipman are properly before the lower Court. In light of the fact that there were a number of mitigating circumstances which existed but were not presented because counsel did not properly prepare for the penalty phase proceeding, counsel's errors were serious enough 'to have deprived [Mr. Henry] of a reliable penalty phase.' Raticoff failed to inform Mr. Henry that the existence of his brain damage, psychiatric illness and cocaine psychosis at the time of the offense constituted compelling mitigation, because, unlike postconviction counsel, he did not investigate them and did not discover them. Therefore, since Mr. Henry was unaware that these mitigating circumstances existed, his waiver of mitigation was not knowing, intelligent and voluntary. "By virtue of defense counsel's failure to adequately prepare for the penalty phase, [Mr. Henry's] waiver of mitigation was not knowing, intelligent and voluntary." Lewis at 1112. This Court was completely unaware of the existence of these mitigating circumstances when it found Mr. Henry's waiver to be voluntary. Therefore, once a proper evidentiary hearing is held below, this issue must be readdressed.

f. The lower court improperly prevented Mr. Henry from enquiring into mental health and substance abuse problems of trial counsel at the time of Mr. Henry's trial.

Raticoff's blinders as to Mr. Henry's substance abuse and intoxication at the time of the offense were largely self-imposed.

Counsel for Mr. Henry attempted to introduce into the record evidence of trial counsel's own admitted problems with cocaine abuse and substance abuse which lead to his suspension from the Florida Bar for a time. The order of the Court finding that it was strategically senseless to pursue an intoxication defense when Mr. Henry did not admit to perpetrating the acts he was subsequently convicted of is an attempt by the lower court to formulate an excuse defense for Mr. Raticoff's deficient performance in investigation, use of experts and choice of defense.

The lower court's finding is an abuse of discretion propped up by the lower court's failure to allow evidence casting light on the likely personal reasons for trial counsel Raticoff's reluctance to delve into the substance abuse area during his preparation of the case. Concealment from others that one is an illegal substance abuser and addict is the very earmark of the disease. The court's finding that "Raticoff had no concrete evidence that Mr. Henry suffered from either chronic or acute drug abuse" ignores the reality that Raticoff's deficient performance was the very reason that trial counsel had such a paucity of proof.

Rule 3-7.13 of the Rules regulating the Florida Bar provide that attorneys who are incapable of practicing law because of mental illness or incapacity will be reclassified as inactive members of the Bar and thus prevented form practicing law.[17] After undersigned counsel learned

[17] This provision applies whether the attorney has been formally adjudicated insane or mentally incompetent or hospitalized under the Florida Mental Health Act

that trial counsel had been placed on the inactive list pursuant to Rule 3-7.13 on June 11, 1998, Mr. Henry incorporated the fact into his pleadings and requested a hearing based on the allegation that Mr. Raticoff had been incapable of practicing law and was incapable of offering effective representation to Mr. Henry at all stages of his capital trial.

An evidentiary hearing was not granted on this claim.

At the evidentiary hearing, the lower court sustained the State's objection to questions addressed to trial counsel about whether he had ever been diagnosed with any mental illness or suffered from any substance abuse disorder at the time of Mr. Henry's 1988 trial (PCR. 1285-1291). After the State objected to their admission, counsel for Mr. Henry proffered Defense Exhibits N and O, portions of the record from State of Florida v. Ronnie Williams, a capital trial in which Mr. Raticoff represented Mr. Williams (PCR. 1290). The record excerpts reveal that in 1996 Mr. Raticoff placed his own psychiatrist on the stand during the proceedings and the psychiatrist then testified that Mr. Raticoff suffered from a major mental disorder Id. After Mr. Raticoff testified at the evidentiary hearing that he took "a voluntary inactivity" from the Florida Bar from February 1998 until August of 1999, the Court sustained the State's objections to any questions about why Mr. Raticoff was inactive (PCR. 1288). Counsel for Mr. Henry submits that evidence and testimony concerning whether Mr. Raticoff suffered from either a major mental disorder or substance abuse disorder at the time of Mr. Henry's trial is relevant and material to his performance as counsel for Mr. Henry.

It almost goes without saying that major mental disorders are generally not like colds. They do not last a week or two and then clear up. Major mental disorders are lifetime problems that at best have to be managed with medication and intervention to be controlled. Someone who suffers from a major mental disorder that is undiagnosed or untreated or self-medicated is not a person that anyone would want representing them in a capital murder case. Denial that a problem exists is an earmark of substance abuse disorders, and counsel for Mr. Henry suggests that an attorney suffering from a major mental disorder is much less likely to explore mental disorders in a client, including substance dependency as a defense or as mitigation, than one who is not.[18] This Court should return this case to circuit court for a full and fair hearing to require Mr. Raticoff to answer for the record questions about his mental health and substance abuse at the time of Mr. Henry's trial. This was required by Judge Schapiro in the Broward County capital postconviction hearing in State of Florida v. Michael George Bruno, Case No. 86-11892, after the State granted immunity to Mr. Bruno's trial counsel, Craig Stella, following Mr. Stella's decision upon advice of counsel to invoke his Fifth Amendment rights during discovery depositions. A full and fair hearing requires that Mr. Henry be given the same opportunity.

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[18]"The essential feature of Substance abuse is a maladaptive pattern of substance use manifested by recurrent and significant adverse consequences related to the repeated use of substances. They may be repeated failure to fulfill major role obligations, repeated use in situations in which it is physically hazardous, multiple legal problems, and recurrent social and interpersonal problems." Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, American Psychiatric Association, 1994, at 182.

g. The lower court's findings of fact are erroneous and are not borne out by the record

The lower court made findings of fact against several witnesses presented by Mr. Henry, which were neither borne out by the record nor fell within the self imposed stricture of the court's attempted restriction of the hearing to matters relating to deficient performance only.[19] (PCR 1641-1642). First of all, the court found that Raticoff's performance was not deficient for failing to discover Mr. Henry's brain damage, psychiatric problems and substance abuse history. The Court states that Raticoff "spoke with Mr. Henry and also some family members and people who knew Mr. Henry" This is not borne out by the testimony of the family members and others who testified at the evidentiary hearing.

The lower court found the testimony of Martha Gilbert Henry, Joe Henry, Carolyn Fort Cason, and Elizabeth Kyle was not credible.

However, the Court's analysis of these witnesses' credibility is simply not germane to the issue of Raticoff's deficient performance. Findings of credibility as to the factual matters of Mr. Henry's childhood abuse and drug history are for the trier of fact.[20] That

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[19] As noted by Mr. Henry supra, it is logistically impossible to attempt to dissect out individual data of evidence and ascribe them as supporting either the deficient performance or the prejudice prong of the Strickland test for ineffective assistance of trial counsel.

[20]In addition the lower court found that Martha Gilbert Henry was "self serving" and "not supported by other credible evidence" These findings are irrelevant and not borne out by the record. Ms Gilbert's testimony about her brother's possession of marijuana does not help her in any way and cannot be self serving. The fact that nobody else apparently saw the marijuana is irrelevant. Frequently

means the trial court and the jury. The issue here was not so much whether Raticoff chose to put on these witnesses or not, it was whether he followed up on what they had to say. Mr. Raticoff did not testify that he had interviewed these witnesses and found that they were so incredible that they should not be put on the witness stand at Mr. Henry's trial. He did not even get that far, because he never investigated what they had to say about Mr. Henry's life and so never followed up with appropriate expert evaluation. It is the existence of these witness' testimony, not any weighing as to its credibility that should have put Raticoff on notice. The issue of whether the witnesses should have testified is separate and distinct, a fact which the lower court overlooked.[21]

The Court's credibility findings are totally irrelevant to the instant proceedings. The Second District Court of Appeals observed that while "a trial court's determinations of credibility are afforded great weight by a reviewing court "the focus of a court's determination should be "whether the nature of the evidence is such that a reasonable jury may have believed it" Light v. State, 796 So. 2d 610 (Fla. 2d DCA 2001). This Court should view with caution a trial judge's capacity to determine the credibility of a witness in a postconviction motion, especially in instances such as this, when the issue is not whether the

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family members remember occurrences that nobody else witnesses or remembered. Again the issue here is not whether the triers of fact would have believed Ms. Henry, but whether Raticoff should have been put on notice of Mr. Henry's mental health issues.

[21]The lower court did not find these witnesses testimony as to their names, ages and relationships with Mr. Henry to be incredible.

trial court believes the evidence but whether it should have prompted proper investigation by trial counsel.

The same rationale applies to the lower court's findings that statements made by Dr. Hyde and Dr. Lipman were not credible.[22] The question is not whether the judge "believes the evidence presented as opposed to contradictory evidence ...but whether the nature of the evidence is such that a reasonable jury might have believed it" Light, 706 So 2d at 610. This is especially true, given the instant circumstances in which the court precluded Dr. Hyde and Dr. Lipman from testifying as to their forensic findings resulting from their evaluations of Mr. Henry. The lower court should not have made a detailed credibility finding on any of Mr. Henry's expert witnesses given the artificial strictures it placed on their testimony.[23]

The court's finding that "[t]he inconsistencies in Mr. Henry's varied statements to the police were attributed to his being forced to

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[22]The court found that Dr. Hyde's opinion that Mr. Henry was more truthful in his description of his drug use with Dr. Hyde than any of the psychologists who evaluated him at trial was "neither credible nor helpful" (PCR. 1604). The lower court also found that Dr. Lipman was "incredible" as to his opinion concerning the "reasons for the less than honorable discharge from the military".

[23] Moreover, the lower court's credibility findings as to the testimony of Raticoff are an abuse of discretion. In fact, had counsel for Mr. Henry been allowed to put on the available evidence Mr. Raticoff's credibility would have been completely destroyed. Not only was counsel precluded from asking Raticoff about his psychiatric and substance abuse disorders, but counsel was not afforded the opportunity to show that Raticoff knew very little about, inter alia, the signs of brain damage and psychiatric illness, the relevance of the DSM III and other related mental health issues that the standard of practice in 1988 dictated any reasonable counsel involved in capital litigation should have been aware of. See Testimony of Robert Norgard at T. 389-390.

make up a story or sleep deprivation, not to the use of drugs or alcohol" is directly contradicted by the record. During the pre-trial motions hearing, Raticoff himself, addressing the Court, says that "if you take the testimony of the State as a whole that no one knows when Mr. Henry last slept, whether he was under the influence of drugs . . ." (R. 510)(emphasis added). And as State Attorney Satz pointed out during the trial, during argument about redaction of a taped police interview with Mr. Henry which Raticoff claimed included only "some discussion by Mr. Henry [of] drug use in the past, although he denies using any drugs in this instance" (R. 1758), Mr Henry actually says, "I'd like to say something else though, and it's in reference of the few questions that you asked about crack, pot, alcohol, and I was using the night of the incident, I don't drink, I smoke pot every now and then and occasionally I do -- I smoke crack" (R. 1761-62).

Even given this admission, which Raticoff fought to keep from the jury that found Mr. Henry guilty and recommended that he be sentenced to death, Raticoff failed to retain a substance abuse expert or any expert except regarding competency, and totally failed to pursue critical forensic testing of his client's clothing, the beer can, or his client's blood, hair or nail samples for positive proof of substance abuse. Neither did he pursue an investigation of drug use or anything else through Mr. Henry's family members. There is not an iota of evidence on this record that Raticoff did anything to investigate or prepare an intoxication defense, a defense which postconviction counsel proposes was the only credible defense available to Mr. Raticoff.

The Court's finding that "Raticoff had no reason to believe or to

suspect that Mr. Henry suffered from the effects of chronic or acute substance abuse, mental illness" (PCR. 1638) is clearly erroneous and is directly contradicted by evidence introduced as well as Raticoff's testimony at the evidentiary hearing. Prior counsel Solomon's motion for an expert explicitly noted "Defendant's drug addiction, state of intoxication are relevant to the behavior on the date of the charged offense" as Raticoff acknowledged by reading the motion into the record at the evidentiary hearing. Transcript of 10/18/00 at p.20.[24] Raticoff testified that his review of the case file did give him reason to believe that drug abuse was something that he needed to address in his preparation of the case. Transcript of 10/18/00 at 33.[25] His position was that he was ethically obligated to not investigate addiction and intoxication once his client denied the addiction and denied that intoxication was a defense (PCR. 1261). He further acknowledged that there was deposition testimony from at least three witnesses that indicated that Mr. Henry was using drugs including crack cocaine (PCR. 1261-1265). And Raticoff admitted on cross that he believed that Mr. Henry was involved in drugs and that was a motivation in the case (PCR. 1305).

Other than uttering the magic word of credibility, the court's conclusions are not borne out by the record. None of the evidentiary bases on which the mental health experts grounded their opinions is "inadmissible hearsay." See § 90.704, Fla. Stat.; EHRHARDT, FLORIDA

[24]See Attachment A.

[25]See Attachment A.

EVIDENCE, § 704.1 (2000 Ed.) ("Under section 90.704, an expert may rely on facts or data that have not been admitted, or are not even admissible when those underlying facts are of `a type reasonably relied on by experts in the subject to support the opinions expressed. . . Experts may rely upon hearsay in forming their opinions if that kind of hearsay is relied upon during the practice of the experts themselves when not in court").

Moreover, the lower court's analysis is not only misplaced, but also contrary to the self imposed strictures imposed by the court on holding the hearing only on the deficient performance prong of Strickland. The fact that the lower court felt the need to make credibility findings as to the factual testimony offered by the lay witnesses is a perfect example of the absurd strictures the court put around counsel for Mr. Henry.

By making credibility findings against the existence of these lay witnesses' testimony, the lower court did what it vowed not to do - to evaluate prejudice rather than deficient performance. The lower court cannot have it both ways.

ARGUMENT II

THE LOWER COURT'S SUMMARY DENIAL OF ALL OTHER CLAIMS WAS ERRONEOUS

The lower court entered an *Order Requiring An Evidentiary Hearing On Portions of Claim XXXVIII (38)* on March 13, 2000, summarily denying Mr. Henry's Rule 3.850 motion without an evidentiary hearing with the exception of a portion of one claim (PCR. 1069-1109). The lower court also entered an order denying Mr. Henry's Amended/Successive Motion for Postconviction Relief, which included a claim concerning the

applicability of Ring v. Arizona, 536 U.S. 584 (2002) (which the court denied on the merits) as well as a Eighth Amendment claim concerning lethal injection (which the court found to be procedurally barred) (PCR. 1783-1785).[26]

Mr. Henry's sentencing did not comport with the requirements of Ring and the Sixth Amendment because the findings of fact made by this Court went beyond any findings reached by the jury in determining guilt. The penalty phase commenced on October 6, 1988, at the commencement of the penalty phase, the trial court gave the following instruction to the jury:

> Ladies and gentlemen of the jury, you have found the defendant, Robert Lavern Henry, guilty of murder in the first degree as charged in Count I and II of the indictment. The punishment for this crime is either death or life imprisonment without possibility of parole for twenty five years. The final decision as to what punishment shall be imposed rests solely with the Judge of this Court. However, the law requires that you, the jury render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

(R. 2625). Following the penalty phase, during which trial counsel presented no statutory or non statutory mental health mitigation and minimal other non statutory mitigation, the trial court further instructed the jury:

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[26]The use of lethal injection as a method of execution constitutes cruel and/or unusual punishment under the United States and Florida Constitutions. See Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 OHIO ST. L.J. 63 (2002). Mr. Henry requested an evidentiary hearing on this claim, which had never before been heard in circuit court.

Ladies and gentlemen of the jury, it is now your duty to advise this Court as to what punishment should be imposed upon the defendant for his crimes of murder in the first degree. As you have been told, the final decision as to what punishment should be imposed is the responsibility of the Judge. However it is your duty to follow the law that will now be given by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant

The aggravating circumstances that you may consider are limited to any of the following that were established by the evidence and the State has the burden of proving the evidence of such circumstances and that they outweigh any mitigating factors beyond a reasonable doubt:

1. The defendant has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person; the crimes of murder in the first degree is a capital felony.

2. The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of arson.

3. The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody

4. The crime of which the defendant is to be sentenced is for financial gain.

5. The crime for which the defendant is to be sentenced was especially wicked, evil atrocious or cruel.

In order that you might better understand and be guided concerning the meaning of aggravating circumstance (5) the Court hereby

> instructs you that what is intended to be included in the category heinous, atrocious and cruel are those crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime outside the norm of capital felonies.
>
> The conscienceless or pitiless crime which is unnecessarily tortuous to the victim. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and evil. Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
>
> 6. The crime for which the defendant is about to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of legal or moral justification.
>
> In order that you might better understand and be guided concerning the manner you should consider the enumerated aggravating circumstances, this Court hereby instructs you that the aggravating circumstances specified in these instructions are exclusive.
>
> * * *
>
> Should you find sufficient aggravating circumstances do exist it would be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(R. 558-2660). The Court then stated that:

> Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.
>
> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that you feel should be imposed.

(R. 2662).

The jury returned an advisory verdict recommending a death sentence by a vote of 8-4 on Count I and 9-3 on Count II. Despite the complete absence of any evidence supporting statutory or non statutory mental health mitigating circumstances, and minimal evidence presented supporting other mitigating circumstances three jurors voted against the death sentence on Count II and four jurors on Count I. It is thus entirely plausible that the jurors who voted for life failed to find the aggravating circumstances were sufficient to merit the death sentence. Furthermore, even the jurors who voted for death may have based their conclusions upon the finding of one of the aggravating circumstances rather than both. In any event, the jury's 8-4 and 9-3 votes establish beyond reasonable doubt that no unanimous jury finding was ever made in Mr. Henry's penalty phase of the facts that rendered him eligible for a death sentence under Florida law.

The sentencing hearing was held on November 7, 1988. On that day, the trial court entered its sentencing order which reads in pertinent part:

> **The Court has carefully and conscientiously complied with the provisions of section 921.941 sub 3 and finds from the evidence of the trial and sentencing procedures that the following aggravating circumstances have been proven beyond a reasonable doubt.**

(R. 2696)(emphasis added). The Court then listed the aggravating circumstances it found, namely, during the course of a robbery; avoiding or preventing lawful arrest; pecuniary gain; heinous, atrocious, or cruel ; cold, calculated and premeditated. Only after entering its findings into the record did this Court impose the death

sentence (R. 2703).

On direct appeal this Court noted that

> . . .the trial court found as aggravating factors that the murders had been committed during the course of robbery and arson, to avoid or prevent arrest, for pecuniary gain, and in a cold, calculated and premeditated manner and that they were heinous, atrocious, or cruel

Henry v. State, 586 So. 2d 1033, 1037 (Fla. 1991). The opinion did not refer to the fact that each of the jury recommendations was less than unanimous. Thus this Court's analysis was predicated solely on the judge's finding rather than any finding by the jury.

Mr. Henry acknowledges that this Court has issued opinions in Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002) and King v. Moore, 831 So. 2d 143 (Fla. 2002), and numerous subsequent cases, which address the applicability of Ring to the Florida sentencing statute.

The law strongly favors full evidentiary hearings in capital post conviction cases, especially where a claim is grounded in factual as opposed to legal matters. "Because the trial court denied the motion without an evidentiary hearing...our review is limited to determining whether the motion conclusively shows whether [Mr. Henry] is entitled to no relief." Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988). See also LeDuc v. State, 415 So. 2d 721, 722 (Fla. 1982).

Some fact based claims in post conviction litigation can only be considered after an evidentiary hearing, Heiney v. State, 558 So. 2d 398, 400 (Fla. 1990). Holland v. State, 503 So. 2d 1250, 1252-3 (Fla. 1987). "Accepting the allegations . . .at face value, as we must for

purposes of this appeal, they are sufficient to require an evidentiary hearing", Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla 1989). Mr. Henry's case is such a case.

Under Rule 3.850 and this Court's well settled precedent, a postconviction movant is entitled to evidentiary hearing unless the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief", Fla R. Crim. P. 3.850. Fla. R. Crim. P. 3.850 (c)(6) describes the pleading requirements under the rules, namely "a brief statement of the facts (and other conditions) relied on in support of the motion." And as is described in Fla. R. Crim. P 3.850(d), "[i]f the motion, files and records in the case **conclusively show** the prisoner is entitled to no relief, the motion shall be denied without a hearing." (emphasis added).

As to the sufficiency of the pleadings of Brady violations by the state and/or ineffectiveness of trial counsel, Mr. Henry has met the burden under Fla. R. Crim. P. 3.850. As noted by this Court, "[w]hile the post conviction defendant has the burden of pleading a sufficient factual basis for relief, an evidentiary hearing is presumed necessary absent a conclusive demonstration that the defendant is entitled to no relief". Gaskin v. State, 737 So. 2d 509 (Fla. 1999). The rule was never intended to become a hindrance to obtaining a hearing or to permit the trial court to resolve disputed issues in a summary fashion. Id. All but one of Mr. Henry's claims below were denied without a hearing based on findings of alleged procedural bars, inadequate pleading, refutation by the record, or lack of merit.

Several agencies have claimed exemptions which have not been

tested through *in camera* inspection. Mr. Henry renews his objections to the lower court's ruling denying Mr. Henry's motion to compel supplemental public records materials requested by him pursuant to Fla. R. Crim. P. 3.852.

Mr. Henry's trial counsel, Bruce Raticoff never supplied undersigned counsel with Mr. Henry's trial file. The Florida Legislature recognized the importance of passing Mr. Henry's trial file to collateral counsel when it adopted Florida Statute, Chapter 27.51, the Florida Legislature stated:

> The public defender shall then forward all original files on the matter to the capital collateral representative, retaining such copies for his files as may be desired.

Florida Statutes, Chapter 27.51(5)(a).

This Court has recognized that the litigation file of a capital defendant belongs to the accused and not to his representative. Kight v. Dugger, 574 So.2d 1066 (Fla. 1990). No hearing was allowed on this issue despite affidavits filed by CCRC concerning efforts over many years to obtain the file (PCR. 1135-1158). The failure by trial counsel to preserve the file deprived Mr. Henry the effective assistance of counsel and is a violation of due process under the Eighth and Fourteenth Amendments to the United States Constitution.

Brady requires disclosure of evidence which impeaches the State's case or which may exculpate the accused "where the evidence is material to either guilt or punishment." This was a circumstantial case. The State's failure to disclose evidence concerning other suspects renders a trial fundamentally unfair. Brady v. Maryland, 373 U.S. 83 (1963).

In Mr. Henry's case, the State had material exculpatory evidence that it failed to disclose to the defense. The state had information supporting Mr. Henry's initial, exculpatory version of events suggesting that individuals other than Mr. Henry were involved in the events occurring at Cloth World. Mr. Henry maintained that others were involved. See Claim V at PCR. 617-624.

The State withheld material exculpatory material arising from a polygraph test administered to potential witness Leroyal Rowell. Rowell was listed as a state witness, but was never called to testify.

Either the State failed to disclose the contents of the polygraph interview to trial counsel, or counsel was ineffective for failing to present it.

The jury was given the following instruction regarding the pecuniary gain aggravating factor:

> The crime for which the defendant is to be sentenced was committed for financial gain.

(R. 2658). This instruction violates Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and the Eighth and Fourteenth Amendments. The jury instruction failed to give the jury meaningful guidance as to what was necessary to find this aggravating factor present. The failure of trial and appellate counsel to properly raise this issue denied Mr. Henry the effective assistance of counsel.

To waive any right guaranteed by the United States Constitution the defendant must be able to make a "knowing and intelligent" waiver

of these rights. Mr. Henry was incapable of making any such waiver. Mincey v. Arizona, 437 U.S. 385 (1978); Miranda v. Arizona, 384 U.S. 436 (1966). Mr. Henry's rights were violated when the police, in order to obtain statements statement, exploited Mr. Henry's mental disabilities stemming from organic brain damage and crack cocaine addiction and withdrawal at the time of his arrest, and his inability to make a knowing and voluntary waiver of his rights. Had this information been presented at trial, the statements would have been suppressed. Mr. Henry was not allowed to present evidence concerning this claim. See Claim IX at PCR. 632-636.

In presenting its case to the jury, the State relied heavily on gruesome, cumulative and irrelevant photographs. Nearly one third of the State's exhibits were photographs. The photographs depicted blood splatter, bloody, burnt bodies, and the clothing one of the victims had been wearing. Defense counsel objected to the majority of these being admitted into evidence (R. 116, 1132, 1191, 1202, 1212). To the extent counsel conceded admissibility of the gruesome, cumulative photographs published to the jury during the testimony of numerous witnesses, he rendered ineffective assistance. No strategic or tactical purpose can be ascribed to such a concession, and Mr. Henry was thus prejudiced.

Deerfield Beach police officers arrested Mr. Henry on November 3, 1987. His arrest was allegedly based on the statement of a victim that she saw him immediately before she was hit. However, she did not see who hit her. See Claim XI at PCR 638-640. Although a valid warrant generally is a necessary predicate to arrest, a warrant is not necessary for arrest made in a public place when properly attained

probable cause exists to believe the defendant has committed a felony. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280 (1925). Mr. Henry's warrantless arrest was not predicated upon probable cause. In Mr. Henry's case, the arresting officer had no reasonably trustworthy information of facts and circumstances that would permit a reasonable belief that Mr. Henry had committed this crime. Ms. Thermidor's statements are unreliable for purposes of establishing probable cause. She never stated that she saw Mr. Henry hit her or doused her with a liquid. Mr. Henry, until the police broke his will and coerced him, maintained that others were in the store at the time of the robbery and homicides. At an evidentiary hearing Mr. Henry would have been able to establish that the November 3, 1987 arrest affidavit submitted by Sgt. Roy Anderson and Detective David Kenny, which was unchallenged by trial counsel Raticoff pre-trial or at the trial, was brought forth with omissions that were omitted with reckless disregard for the truth, including but not limited to the identification of Mr. Henry as the assailant. See Franks v. Delaware, 438 U.S. 154 (1978).

The danger that Mr. Henry's co-sentencer mistakenly believed that mercy could not be considered is greater than in other cases. In the prosecutor's argument to the jury on sentencing, he told the jury not to consider mercy (R. 1048). The jury was also told to consider that the Bible favors the death penalty and to consider other inappropriate factors in reaching their verdict (R. 1045-49).

The trial court instructed the jury during the guilt/innocence phase, "It is the judge's job to determine what a proper sentence would be if the defendant is guilty." (R. 2517). In its penalty phase

instructions, the court repeatedly told Mr. Henry's jury that it's role was merely "advisory," and that it was only to make a "recommendation" to the court for sentencing. (See e.g. R. 647, 2517, 2627, 2620, 2657, 2666, 2649, 2650, 2878, 2878, 2881, 2882).In Florida the jury is a co-sentencer. Espinosa v. Florida, 112 S. Ct. 2926 (1992). This court has characterized the jury as a "co-sentencer." Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). This brief statement of the law was insufficient to explain the jury's actual role, and any sense of responsibility in imposing death was vitiated by the constant repetition of its role as "advisory" and returning a "recommendation" to the court. Mr. Henry's jury was never told it was a co-sentencer, and its sense of responsibility in sentencing Mr. Henry to death was thus diminished in violation of the Eighth Amendment to the United States Constitution. Caldwell v. Mississippi, 472 U.S. 320 (1985).

To the extent that defense counsel failed to object to these repeated violations, he rendered prejudicially deficient assistance. Strickland.

During voir dire, the prosecutor repeatedly asked prospective jurors if they could vote for a sentence of death, follow the law, and base their decisions on the facts (R. 668-69, 687, 690-91, 786-87, 944-45). Trial counsel asked the venire if they could decide the case without regard to sympathy, without differentiating between the guilt/innocence and penalty phase (R. 708), and asked a juror if she could suspend "any personal emotional prejudice, bias, et. cetera" in evaluating the appropriate penalty (R. 718).

During the guilt/innocence phase of Mr. Henry's trial, the jury

was properly instructed that it would be improper to consider mercy or sympathy for the defendant during their deliberations (R. 2515, 2517). Defense counsel requested, and the trial court denied, instructions that would have instructed the jury that mercy is a proper consideration during penalty phase deliberations (R. 2889, 2891). Consequently, Mr. Henry's jury was never instructed on one of the proper considerations upon which a recommendation of life may be based. See Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975). Failure to inform the jury of the change in the consideration of mercy improperly left them with the impression that mercy could not be considered in determining an appropriate sentence.

The jury in Mr. Henry's case was instructed that they could find as an aggravating factor that the murder was committed for the purpose of financial gain (R. 2879). In its sentencing order, the trial court said:

> This circumstance is applicable as it appears pecuniary gain was the predominant motive for these murders, although this goal could have apparently been easily achieved without the defendant resorting to injuring or burning either of the victims. According to the store records, the defendant was believed to have taken $1,262.92 in cash as a result of this offense.
>
> (R. 2907).

This Court has held that in order for this aggravator to be applicable, it must be shown to exist beyond a reasonable doubt. Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988). Mr. Henry's jury relied upon an improper aggravating factor in arriving at its recommendation of death. The trial court erroneously found this aggravating

circumstance to exist, and applied an erroneous standard of proof.

Trial counsel's ineffectiveness rendered invalid any purported waiver elicited from Mr. Henry. Prior to commencement of the penalty phase and without Mr. Henry's presence in court, defense counsel informed the Court that Mr. Henry did not want any witnesses called to present mitigating evidence (R. 2548-49). Trial counsel then informed the court and prosecutor that he had "subpoenaed, in spite of my client's wishes, certain witnesses that I feel might present some evidence that may work in mitigation also, although not statutorily (sic) circumstances, but other circumstances that could be considered by the jury." (R. 2548). He went on to explain, "it's not desired to seek rules to show cause and force them to come in here," and provide the prosecutor with a confidential psychological report, which he felt should not go into evidence (R. 2548-49).

Here, because of counsel's deficient performance mental evaluations of Mr. Henry's mental problems and their impact upon issues at trial were not conducted and this compelling evidence could not be presented to the Jury. Counsel could have also attacked the aggravating circumstances. Counsel also failed to present to the Jury the remorse felt by Mr. Henry, documented in the comments by police interrogators. The prejudice to Mr. Henry resulting from counsel's deficient performance is clear. The trial court found only one statutory mitigating factor and one non-statutory mitigating factor, yet myriad mitigating factors existed and could have been considered. Trial Counsel failed to challenge the presence of aggravating factors or advocate against them in light of narrowing constructions by various

courts, and specifically conceded aggravating factors (R. 2645, 2649, 2651.) Additionally, counsel stated that

> There's no doubt at all in this case that what occurred was heinous, atrocious, and cruel.

(R. 1074-6). Trial counsel for Mr. Henry repeated this statement. Concession of these elements actually bolstered the State's case. Counsel, in essence, conceded that death was appropriate without his client's consent. The duty of counsel in capital case is to neutralize the aggravating circumstances and present mitigation. Starr v. Lockhart, 23 F.3d 1280 (8th Cir. 1994). Mr. Henry's trial counsel failed to do either of these tasks.

Mr. Henry was convicted of robbery, which was aggravated by carrying a deadly weapon; arson, which was aggravated by carrying a deadly weapon; and two counts of first degree murder (R. 2531). The jury was instructed on the "prior violent felony" aggravating circumstance:

> One, the defendant has been previously convicted of another capital offense or of a felony involving the use of threat or violence to some person. The crime of murder in the first degree is a capital felony.

(R. 2658). The trial court did not find the existence of the "prior violent felony" aggravating factor. (R. 2906-12).

The jury was also instructed on the "felony murder" aggravating circumstance:

> Two, the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of arson.

(R. 2658). Counsel for Mr. Henry objected to this instruction (R.

2580). The trial court found the existence of the "felony murder" aggravating factor (R. 2907). The jury's deliberation was obviously tainted by the unconstitutional and vague instruction. See Sochor v. Florida, 112 S. Ct. 2114 (1992). The use of the underlying felonies as an aggravating factor rendered the aggravator "illusory" in violation of Stringer v. Black, 112 S. Ct. 1130 (1992). The jury was instructed regarding an automatic statutory aggravating circumstance, and Mr. Henry thus entered the penalty phase already eligible for the death penalty, whereas other similarly (or worse) situated petitioners would not.

The death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for conviction. The prosecutor, in his closing argument, even told the jury that this the aggravating circumstance must be automatically applied:

> [T]he first circumstance that I'd like you to consider, and I submit to you based on the testimony and the evidence, this aggravating circumstance has been proven beyond a reasonable doubt. . .
>
> [T]he first aggravating circumstance deals with whether there has been a previous conviction for another capital felony, and I submit to you that there is in this case because there are two counts of first degree murder. . .
>
> [Y]ou can take the murder of Janet Thermidor and consider that as a previous conviction on Count I when you're taking about the first degree murder of Phyllis Harris, and then, when you consider your recommendation for Count II which is the first degree murder of Janet Thermidor, you can take into consideration the first degree murder of Phyllis Harris in considering your recommendation as to Count II, the first degree murder of Janet Thermidor. . .
>
> [T]here's no question that that aggravating

> circumstance has been proven beyond a reasonable doubt.

(R. 2627-29).

This Court has held that all of the aggravators existed beyond a reasonable doubt. Henry v. State, 613 So. 2d 429 (Fla. 1993); and Henry v. State, 586 So. 2d 1033 (Fla. 1991). In sentencing Mr. Henry to death, the trial court found the aggravating factor of avoiding arrest (R. 2907). However, the jury instructions regarding this aggravator did not include this Court's limiting construction of this aggravating circumstance in finding this factor. See (R. 2658). As a result, this aggravating factor was broadly applied, see Espinosa v. Florida, 112 S. Ct. 2926 (1992) and failed to genuinely narrow the class of persons eligible for the death sentence. Mr. Henry's death sentence was imposed in violation of the Eighth and Fourteenth Amendments to the United States Constitution. The failure of trial or appellate counsel to raise this issue is a denial of effective assistance of counsel. Relief is warranted.

Judicial instructions at Mr. Henry's capital penalty phase required that the jury impose death unless mitigation was not only produced by Mr. Henry, but also unless Mr. Henry proved that the mitigation he provided outweighed and overcame the aggravation. The trial court then employed the same standard in sentencing Mr. Henry to death. See Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988)(trial court is presumed to apply the law in accord with manner in which jury was instructed). This standard obviously shifted the burden to Mr. Henry to establish that life was the appropriate sentence and limited

consideration of mitigating evidence to only those factors proven sufficient to outweigh the aggravation. The instructions gave the jury inaccurate and misleading information regarding who bore the burden of proof as to whether a death recommendation should be returned. Counsel's failure to object to the clearly erroneous instructions was deficient performance.

Trial counsel objected to the jury being instructed on the "cold, calculated and premeditated" aggravator (R. 2587). Counsel's objections were overruled (R. 2588). The facts in this case do not support the elements for the cold, calculating, and premeditated (CCP) aggravating factor. Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994). At the time of the crime Mr. Henry was in the middle of a four day cocaine odyssey and if he was involved in this incident his actions could not be adequately labeled as the product of "cool and calm reflection" but would more properly termed as "an act prompted by emotional frenzy, panic, or a fit of rage." Due to his extended and near incident substance abuse Mr. Henry could not and did not have the mental capacity to form the heightened premeditation required for this aggravating factor. Further, the state's theory was that Mr. Henry had used weapons of opportunity lying around the store which support neither the element of calculation nor premeditation. The lower court failed to allow evidence to be present by expert testimony to negate the elements of CCP. This Court should allow evidentiary development that counsel failed to adequately advocate these issues, resulting in Mr. Henry failing to receive effective assistance of counsel under the Sixth Amendment of the United States Constitution. Strickland.

Florida's capital sentencing scheme denies Mr. Henry his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied. Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. See Profitt v. Florida, 428 U.S. 242 (1976). The Florida death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eighth Amendment to the United States Constitution. Richmond v. Lewis, 113 S. Ct. 528 (1992).

This Court has consistently held that "doubling" of aggravating circumstances is improper. See Richardson v. State, 437 So. 2d 1091 (Fla. 1983). This Court has clearly stated that it is impermissible to find both the aggravating circumstance of in the course of a burglary and for the purpose of financial gain when the circumstances supporting the two are the same. Richardson, 437 So. 2d at 1094. This issue involves fundamental error. No contemporaneous objection rule need be applied, nor is any applicable to this sentencing-order-based claim. However, counsel for Mr. Henry objected to the trial court's instruction regarding the doubling of aggravating circumstances but the judge overruled the objection (R. 2580). No instructions were given to the Jury that prevented it from doubling the "during the commission of a felony" aggravating circumstance with the "pecuniary gain" aggravating circumstance.

The jury was instructed on the "during the commission of a felony" aggravating circumstance as it related to arson (R. 2658). The judge

in his sentencing order specifically noted that he found the circumstance based on Mr. Henry's alleged statement that he had just robbed the store (R. 2907). The jury was instructed on the "pecuniary gain" aggravating circumstance (R. 2658). The judge in his sentencing order specifically noted that he found the circumstance because "the Defendant was believed to have taken $1,262.92 in cash." (R. 2907). The judge relied upon both of these aggravating factors in reaching a sentence of death.

This type of "doubling" is unconstitutional; it renders a capital sentencing proceeding fundamentally unreliable and unfair. It also results in unconstitutionally overbroad application of aggravating circumstances, Godfrey v. Georgia, 446 U.S. 420 (1980), and fails to genuinely narrow the class of persons eligible for death. The result is an improper capital sentence.

Mr. Henry's penalty phase jury was given the following instruction regarding the "previous conviction of a violent felony" aggravating circumstance:

> One, the defendant has been previously convicted of another capital offense or of a felony involving the use of threat or violence to some person. The crime of murder in the first degree is a capital felony.

(R. 2658). The trial court did not find the existence of the "prior violent felony" aggravating factor. (R. 2906-12). Not only was there no evidence or facts to support this instruction it was also vague.

This unconstitutional instruction violates the Eighth and Fourteenth Amendment to the United States Constitution. Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130

(1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988). In Florida the Jury is a sentencer and must be properly instructed. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993).

The failure of counsel to object or propose any alternative instructions denied Mr. Henry of effective assistance of counsel. It fails to define the elements of the aggravating factor which the jury must find beyond a reasonable doubt.

Even though Juror Rosa Halfacre believed death should be an automatic penalty she remained on the jury (R. 659-60). This court should consider this fundamental error. Floyd v. State, 90 So. 2d 105 (Fla. 1956).

The jury in Mr. Henry's case was repeatedly instructed by the judge or told by the prosecution not to consider sympathy (R. 674, 707, 746-7, 814, 835, 945, 2865). Counsel for Mr. Henry failed to object. Counsel for Mr. Henry did propose that the jury be instructed on mercy but the Court refused the instruction (R. 2605). The sentencers' role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954 (1978). Mercy and/or sympathy which arises from the evidence is a proper consideration.

The accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings. Faretta v. California, 422 U.S. 806, 819, n.15, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975). A capital defendant is absolutely guaranteed the

right to be present at all critical stages of judicial proceedings. This right is guaranteed by the federal constitution, see, e.g., Drope v. Missouri, 420 U.S. 162 (1975).

At the start of the penalty proceedings, trial counsel said that he thought Mr. Henry would testify about his military record, and that he had subpoenaed some persons against his client's wishes, and then handed the prosecutor Dr. Block Garfield's confidential report which (he later explained) was "devastating as to the facts of the case as to possibly the aggravating circumstances" (R. 2548-50, 2553). Mr. Henry was absent during this abandonment of the lawyer-client privilege. When brought into the courtroom, he was not advised on the record as to what had happened, and no effort was made to have him ratify counsel's action. It was unfair for the trial judge, in a capital proceedings, to let the court-appointed attorney violate the lawyer-client privilege (which is basic to the sixth amendment right to counsel) and hand the prosecutors a privilege report containing "devastating" evidence. The judge's later remarks indicated that he was aware that the privilege was being breached (R. 2556). The failure of trial or direct appeal counsel to raise this issue denied Mr. Henry the effective assistance of counsel.

In Mr. Henry's case, the jurors' knowledge of the case and the inflamed community atmosphere deprived Mr. Henry of a fair trial under both an inherent prejudice and an actual prejudice analysis. See Heath v. Jones, 941 F.2d 1126, 1134 (11th Cir. 1991). Inherent prejudice occurs when pretrial publicity "is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the

community where the trials were held." Coleman, 778 F.2d at 1490. Actual prejudice occurs when "the prejudice actually enters the jury box and affects the jurors." Heath, 941 F.2d at 1134. In determining whether a jury was fair and impartial, the reviewing court "must examine the totality of the circumstances surrounding the petitioner's trial." Coleman, 778 F.2d at 1538. "[N]o single fact is dispositive." Id.

Due to the extensive nature of the prejudicial pretrial publicity the judge could have and should have moved for a change of venue *sua sponte* but failed to. Defense counsel, without a tactic or strategy, failed to move for a change of venue due to the extensive nature of the prejudicial pretrial publicity. These failures amounted to deficient performance. This deficient performance prejudiced Mr. Henry.

A hearing was held on the defense motion in limine regarding whether Ms. Thermidore gave a dying declaration. At the hearing Dr. George Podgorny and Dr. Richard Dellerson testified as experts for the state. Mr. Henry had no expert. Dr. Podgorny stated that Ms. Thermidore believed she would die (R. 19). Dr. Dellerson stated that Ms. Thermidore knew she was going to die regardless of what her physicians and nurses told her (R. 148-50). No Frye [27] hearing was requested by Mr. Henry's counsel. Counsel failed to investigate and as a result the Ms. Thermidor's statement was admitted as a dying declaration, to Mr. Henry's substantial prejudice.

Mr. Henry was discouraged from exercising his constitutional right

[27]Frye v. United States, 293 Fed. 1013 (D.C. Cir. 1923)

to present evidence by operation of Florida Rule of Criminal Procedure 3.250, which penalizes a defendant who presents testimony other than his own by preventing him from making the concluding argument to the jury. Mr. Henry was compelled to enter into the weighing process the procedural penalty under Rule 3.250 when deciding whether to present evidence at the guilt phase. The record shows that the operation of the rule burdened the decision whether to exercise the right. It cut down on the right to present evidence by making it costly. The waiver of the right to present testimony was coerced and invalid. Mr. Henry's court-appointed attorney did not make this argument. This failure was deficient and prejudiced Mr. Henry. The trial of this cause without defense witnesses violated Mr. Henry's constitutional right to great reliability in fact-finding in capital cases under Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir. 1982).

Proving the decedent's family status in a homicide case is immaterial, irrelevant and prejudicial. Hathaway v. State, 100 So. 2d 662, 664 (Fla. 3d DCA 1958). The fact that the deceased may have had a family is immaterial, irrelevant and impertinent. Rowe v. State, 163 So. 22, 23 (Fla. 1935); Melbourne v. State, 51 Fla. 69, 40 So. 189, 190 (1906). See also Gibson v. State, 191 So. 2d 58 (Fla. 1st DCA 1966). To present a close relative of the deceased as a witness for identification purposes should be avoided to prevent interjection of sympathy for the victim or undue prejudice against the accused. Wetly v. State, 402 So. 2d 1159, 1162 (Fla. 1981); Ashmore v. State, 214 So. 2d 67, 69 (Fla. 1st DCA 1968); Barnes v. State, 348 So. 2d 599 (Fla. 4th DCA 1977). During closing arguments the prosecuting attorney

should not attempt to elicit the jury's sympathy by referring to the victim's family. See Johnson v. State, 442 So. 2d 185, 188 (Fla. 1993), and Edwards v. State, 428 So. 2d 357 (Fla. 3d DCA 1983). Such evidence and argument in a capital case violates the fifth, sixth, eighth and fourteenth amendments to the United States Constitution and article I, sections 2, 9, 16, and 17 of the Florida Constitution. The evidence presented here had no relevance and was presented only to inflame the Jury.

The prosecutor began his theme of sympathy in his opening statement. He asserted that both of women were working two jobs (R. 1042). He continued this theme by calling Debra Cox, the sister of Janet Thermidor, as a witness (R. 1290). She testified that they had lived together (R. 1290-91). She described both of the decedents' jobs (R. 1291). She then went on to identify the clothing which her sister wore on the morning of the incident (R. 1291-92).[28]

The prosecutor highlighted the theme of sympathy for the deceased by eliciting descriptions of the scene. He questioned the paramedic, Miles McGrail:

> Q. Describe the condition when you first saw Janet Thermidor, what condition was she in?
>
> A. Janet Thermidor was laying on the ground, conscious with her arms spread out, I didn't see her arms as I opened the door because she was laying directly in front of the door feet towards the sink, her clothes were burned off her with the exception of where the bra lines and panty lines were, it didn't -- you could tell the

[28]Her testimony was clearly unnecessary as identification testimony since Robert Zimmerman, the store manager, also identified Mr. Thermidor. See Lewis v. State, 377 So. 2d 640 (Fla. 1979).

difference in where it was burning.

She was not on fire, she was not smoldering, she was out at this time. Her skin was coming off her, she was burned over the entire body as far as I could see.

(R. 1130-31).

The prosecutor brought out similar testimony from Officer Dusenberry, concerning Ms. Thermidor's condition at the hospital:

Q. Would you describe the condition and where this person was, this female was, when you spoke to her?

A. When I first -- after I was directed to this room or where the person was located, she was lying on a -- some type of table, she was in -- appeared to be pretty bad shape, very few clothes -- there were just pieces of clothing on her, there was quite a few medical personnel around the table, I'm not sure exactly what they were doing.

She was laid on her back, her right arm was hanging down from the table. Her skin was in very bad shape, there were pieces of skin falling from her arm or appeared to be, there was fluid -- some type of -- it was pink in color, fluid was all over the floor around the table.

Q. What part of her body did you see?

A. As I recall, I could see her whole body, her feet right up to her head, I remember there was portions that appeared to be stockings were -- appeared to be melted off or burned off, there seemed to be some type of girdle or pantyhose or something partially -- most of it was gone.

(R. 1365-66).

The prosecutor presented similar testimony concerning Ms. Harris, beginning with calling of her husband as a witness (R. 1409). He described his own job, (R. 1409), which had no relevance to any issue in the case, but was solely designed to elicit sympathy and increase

the jury's identification with him. He went on to identify his wife's handwriting, (R. 1409-1410), and testified that she worked two full-times jobs (R. 1410). He identified her handwriting on an exhibit (R. 1411). His identification testimony of his wife was unnecessary since Mr. Balke, former manager of Cloth World, identified Ms. Harris (R. 1548).

The issue of victim sympathy was exacerbated by use of irrelevant testimony from Mr. Balke concerning losses from the fire:

> Q. What did you have to do to reopen the store?
>
> A. We had to build a new office because we closed off the other one which was burned, and we had to refinish the bathrooms, and I also suggested that we purchase new fixtures for the store to give it a new look to the customers and we did that.
>
> Q. What did it cost, approximately, to repair the damage done by the fire?
>
> A. About fourteen thousand dollars.
>
> Q. And you indicated you reopened on what date?
>
> A. It seems -- it's January 7th. We were trying to get opened by the 1st, but I couldn't' get to that time. So, it was the next week.

(R. 1572-73).

The prosecutor continued this theme in his closing argument in the penalty phase. He explicitly argued the pain and suffering of Ms. Thermidor (R. 2449). He stated that she was "brutally violated" (R. 2449). This provocative term is normally used to refer to a sexual assault. Its use served only to arouse fury and engender speculation concerning a possible sexual assault, of which there is no evidence. He continued the theme of victim sympathy by arguing:

> For twelve hundred and sixty-nine dollars and twenty-six cents, Janet Thermidor, and Phyllis Harris were brutally murdered.

(R. 2470).

This Court has in other cases held that improper identification of the decedent by a family member has not been fundamental error. E.g. Barclay v. State, 470 So. 2d 691 (Fla. 1985). In Ray v. State, 403 So. 2d 956 (Fla. 1981), upon which this Court relied in Barclay, this Court set out the following standard for fundamental error at page 960: "for error to be so fundamental that it may be urged on appeal, though not properly presented below, the error must amount to a denial of due process."

These incidents violated Mr. Henry's rights to due process under the constitutions of the United States and the State of Florida.

Trial and appellate counsel's failure to object, amounted to deficient performance. This deficient performance prejudiced Mr. Henry. Strickland v. Washington. The evidence and argument regarding the decedents and their families were improper, went to no issue in dispute, and constituted violations of Mr. Henry's rights.

When specific intent is an element of the crime charged, as it was when Mr. Henry's trial occurred, evidence of voluntary intoxication is relevant, should be raised by counsel, and should be considered by the court. See Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994); Chestnut v. State, 538 So. 2d 820 (Fla. 1989); Gurganus v. State 451 So. 2d 817 (Fla. 1984). Counsel's performance in this regard was deficient.

During testimony by the state's medical witnesses, Dr. Dellerson and Dr. Podgorny, the issue of "relative calm" came up. Dr. Podgorny

testified this his testimony was subjective on the issue (R. 1275-6). Dr. Podgorny testified that his evaluation with regard to Ms. Thermidore's cognitive functions and the relation to her beliefs about an impending death were subjective (R. 1277-9). The state's medical witnesses testified about other areas based on their own feelings not on standards generally accepted by the medical community. Additionally, the state put on a witness regarding blood spatter.

The state's witnesses' opinions were not based on reliable scientific principles. Ramirez v. State, 542 So. 2d 352 (Fla. 1989). No Frye hearing was held. However, trial counsel for Mr. Henry failed to object. Correll v. State, 523 So. 2d 562 (Fla. 1988), cert. denied, 488 U.S. 871, 109 S.Ct. 183.

The testimony by the state's medical and blood spatter witnesses was presented without prerequisite as to the acceptability of their opinions. In fact there is debate over the opinions they offered. The opinions offered by the state's medical and blood spatter witnesses have not "'attained sufficient scientific and psychological accuracy . . . [and] general recognition as being capable of definite and certain interpretation.'" Stokes v. State, 548 So. 2d 188, 193 (Fla. 1989); quoting Frye. The principles upon which the state's medical and blood spatter witnesses testified have been neither firmly established nor widely accepted. Rogers v. State, 616 So. 2d 1098 (Fla. 1st DCA 1993).

Judges in Florida must determine that the underlying scientific principles or tests are generally accepted in the relevant scientific community. State v. Hickson, 630 So. 2d 172 (Fla. 1993). This did not

occur in Mr. Henry's case. The resulting testimony, which has not met the elements of the analyses mentioned, prejudiced Mr. Henry.

Mr Henry was denied an evidentiary hearing below on a claim that the entire body of forensic testimony presented in the case was tainted by the low standards and sloppy work which was endemic in the Broward Sheriff's Office Forensics laboratory at the time of Mr. Henry's arrest. Subsequent attempts to inventory the evidence collected in the case for potential forensic and DNA testing resulted in counsel being told at one point that much of the evidence had been destroyed. Mr. Henry pled that information he had received showed that it was common practice for laboratory personnel to lie about their work in order to protect their outside relationships. These undisclosed conflicts of interest and routine practice of laboratory personnel to lie, cast doubt upon the veracity of the entire body of forensic evidence presented by the State against Mr. Henry. An evidentiary hearing was denied despite the fact that the files and records in the case clearly did not conclusively refute the claims below.

In Florida, the state has the burden of proving aggravating circumstances beyond a reasonable doubt. Hamilton v. State, 547 So. 2d 630 (Fla. 1989). In Proffitt v. Florida, 428 U.S. 242 (1976), the Supreme Court approved this Court's limiting construction of the "heinous, atrocious, or cruel" aggravating circumstance:

> [The Florida Supreme Court] has recognized that while it is arguable "that all killings are atrocious, . . . [s]till, we believe that the Legislature intended something `especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." Tedder v. State, 322 So. 2d, at 910. As a

> consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So. 2d, at 9. See also Alford v. State, 307 So. 2d 433, 445 (1975); Halliwell v. State, [323 So. 2d 557], at 561 [Fla. 1975]. We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases.

Proffitt, 428 U.S. at 255-56 (footnote omitted)(emphasis added). This Court has held that it must be proven beyond a reasonable doubt that the victim was conscious when the acts being used to urge this aggravator occurred. Rhodes v. State, 547 So. 2d 1208 (Fla. 1989). The trial court erred in finding that the victim's consciousness was proved beyond a reasonable doubt.

Florida law states that simply because a victim is alive during an attack does not establish that he was conscious. An unconscious victim cannot suffer the "unnecessarily tortuous" trauma required for a finding of the heinous aggravating factor. The state has the burden of proof to establish beyond a reasonable doubt that a victim is in fact conscious during an attack.

Additionally, the state must prove that Mr. Henry intended to torture his victims. Porter v. State, 564 So. 2d 1060 (Fla. 1990). This did not occur in the trial below. There was no evidence that Mr. Henry intended to torture the victims. None of the elements required for the finding of the heinous, atrocious, and cruel aggravating factor are present. And none were proven beyond a reasonable doubt. Under Lewis v. Jeffers, 110 S. Ct. 3092 (1990), the question is whether a rational factfinder could have found the elements of this aggravator

proven beyond a reasonable doubt.

Mr. Henry's jury was instructed on the aggravating factor of having a prior violent felony.

> The defendant has been previously convicted of another capital offense or of a felony involving the use of threat or violence to some person.

(R. 2658). However, the judge did not find the existence of this aggravating factor (R. 2906-12). Mr. Henry was prejudiced because "...in weighing states..., the consideration of an invalid aggravating sentencing factor is fatal to the reliability of the sentence. Stringer. Use of one invalid aggravating factor is fatal to a death sentence in a 'weighing' state, even where the jury has found other valid aggravating circumstances, because the invalid factor operates as an impermissible 'thumb' on death's scale." Stringer v. Black, 112 S. Ct. 1130 (1992). To the extent that defense counsel failed to object to these repeated violations, he rendered prejudicially deficient assistance. Strickland v. Washington, 466 U.S. 668 (1984).

The State's theory of the case was that Robert Henry had acted alone in the incident at Cloth World. The State had however, taken a statement from Leroyal Rowell, who had not only stated that two other individuals, Bruce " Gro" Hargrove, and Dwayne McClendon were implicated, but had passed a polygraph on this interview. What the jury did not know during the guilt-innocence phase, but surely should have been made aware was that Leroyal Rowell had passed this polygraph examination administered by the Broward Sheriff's Office. Defense counsel did not call the BSO paleographer, who could have testified to the polygraph, nor did counsel attempt to introduce this

important information to the jury charged with deciding whether Mr. Henry would live or die. This information clearly would have made a difference, as it served to disprove the prosecutor's and the jury's misplaced reliance on the credibility and truthfulness of State witnesses. See Douglas v. State, 575 So. 2d 165, 167 (Fla. 1991) (the credibility of guilt/innocence witness' testimony concerning the circumstances surrounding the murder could have reasonably influenced the jury's recommendation).

While it is the general rule of this state - that polygraph evidence is inadmissible at a judicial proceeding, except upon stipulation by the parties - Florida statutes address the admissibility of this type of evidence when the proceeding is a capital sentencing hearing:

> In the [penalty] proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, providing the defendant is accorded a fair opportunity to rebut any hearsay statements.

Fla. Stat. 921.141 (1) (1992). The Eighth and Fourteenth Amendments to the United States Constitution also require that this type of polygraph evidence be admissible at a capital sentencing phase. See Lockett v. Ohio, 438 U.S. 586, 604 (1978).

There are constitutional grounds for modifying the exclusionary rules of evidence regarding polygraph evidence at capital sentencing hearings and capital trial. the command of the Eight Amendment that a

capital sentencer must receive and consider mitigating evidence, see Lockett, does not depend upon the technical admissibility of the evidence under state law. Skipper v. South Carolina, 476 U.S. 1 (1986). The United States Supreme Court has held that the due process clause bars rigid application of evidentiary rules to "exclude testimony [that is] ... highly relevant to a critical issue on the punishment phase of ... [a capital] trial." Green v. Georgia, 442 U.S. 95, 97 (1979). In Florida, the constitutional rule prohibiting a "mechanistic" application of evidentiary rules at a capital sentencing hearing is embodied in the aforementioned quotation from Florida statue 921.141. To the extent that trial counsel did not litigate this issue, he was ineffective. To the extent the State, did not disclose, Brady and Rule 3.220 were violated.

Mr. Henry 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. See Stewart v. Martinez-Villareal, 118 S.Ct. 1618.

ARGUMENT III - CUMULATIVE ERROR

A series of errors may accumulate a very real, prejudicial effect. The burden remains on the state to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. Chapman v. California, 386 U.S. 18 (1967). It is Mr. Henry's contention that the process itself failed him because the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive. State v.

Gunsby, 670 So. 2d 920 (Fla. 1996). This Court must consider the cumulative effect of all the evidence not presented to the jury whether due to trial counsel's ineffectiveness, the State's misconduct, or because the evidence is newly discovered. Kyles v. Whitley, 514 U.S. 419 (1995).

CONCLUSION

Mr. Henry submits that relief is warranted in the form of a remand for a full and fair evidentiary hearing on the issues upon which a hearing was granted in circuit court and a full and fair hearing on the issues that were summarily denied without a hearing, and any other relief this Court sees fit to grant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Corrected Amended Initial Brief has been furnished by United States Mail, first class postage prepaid, to Celia A. Terenzio, Office of the Attorney General, 1515 N. Flagler Dr., 9th Floor, West Palm Beach, FL 33401-3432, on November 10, 2004.

CERTIFICATE OF COMPLIANCE

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

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