IN THE SUPREME COURT OF FLORIDA

No. SC03-1326

DONALD W. DUFOUR,
Appellant

versus,

STATE OF FLORDIA,
Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from the Circuit Court of the Ninth Judicial Circuit in and for Orange County's denial of Donald Dufour's 3.851 Motion for Postconviction Relief. Citations to the postconviction record on appeal are referenced by PCR, followed by the appropriate volume and page number. Citations to the direct appeal record are referenced TR, followed by the appropriate page number.

STATEMENT OF THE CASE

On January 20, 1983, the grand jury returned an indictment charging Mr. Dufour with the first degree premeditated murder of Zack Miller, which occurred in 1981 (TR 2224). Mr. Dufour was tried May 21-31, 1984. The jury found Mr. Dufour guilty of premeditated first degree murder.

The penalty phase began on June 15, 1984, and ended the same day (TR 1473). The penalty phase defense comprises 29 pages in the record on appeal and consisted of three live witnesses, two of whom testified for the state during the guilt phase, portions of a prior sworn statement by another state guilt phase witness that defense counsel read to the jury, and an incomplete copy of Donald Dufour's school records (TR 1575-1604). Stacey Sigler testified that Donald Dufour liked kids, loved her grandmother, "didn't have a good childhood", has a brother who is gay, did not like her to work as a prostitute, and used cocaine and alcohol (TR 1575-82). Sigler also

testified that her grandmother felt Donald Dufour was a dangerous influence on her, she supported him for eight months while working as a prostitute, and he brought prostitution clients to her (TR 1575-82). Gary Dufour testified that Donald's father "wasn't working steady", "didn't get along with anybody", "didn't have any money", "drank quite a lot to solve his problems", "took it out on everybody that was around him", "particularly on Don" (TR 1584-85). He also testified that George Dufour is gay, Don did poorly in school, Donald started drinking alcohol when he was young, had a drug and alcohol problem, and once sought treatment (TR 1587-88). Sister Cathleen Spurlin testified that Donald Dufour found religion while he was incarcerated in Mississippi (TR 1594-1602). Defense counsel then read portions of Raymond Ryan's pre-trial statement:

> He drinks all the time. He is a constant drinking [sic], he drank a fifth or two every day. He would get up in the morning and first thing he did, he might kill a beer and then he is going to buy a bottle of liquor and drink the whole thing, or either [sic] wine. He drinks liebfraumilch by the gallons.
>
> [H]e started crying and told me he wished he was different. He knew what was wrong with hisself [sic]. He knew that he could find hisself [sic].

(TR 1603). The defense read the sworn statement "to establish that during this period of time he was heavily in drug usage, taking all kinds of drugs" (TR 1506). Following

arguments by counsel, the judge instructed the jury on five statutory aggravating circumstances and listed four mitigating circumstances for the jury to consider (TR 1633-35). The jury returned an advisory recommendation of death by a vote of 12 to 0 (TR 2712).

The court reconvened on July 3, 1984, for the sentencing (TR 1649). The defense presented no evidence (TR 1649). The trial court found four aggravating elements: prior violent felony, during the commission of a felony, avoiding lawful arrest, and cold, calculated and premeditated, and no mitigating circumstances (TR 1657-58). The court further noted "all of the factors presented by the Defendant at the sentencing hearing taken together are insufficient as mitigation to outweigh any single one of the aggravating circumstances set forth above" (TR 1830).

On direct appeal, this Court held that the trial court erroneously found that the avoiding arrest aggravating element existed, but that the error was harmless in light of the total absence of mitigation:

> we agree that the court erroneously found that the murder had been committed for the purpose of avoiding a lawful arrest, section 921.141(5)(e), Florida Statutes (1981), since the evidence failed to establish the requisite proof of an intent to avoid arrest or detection through the killing. No showing was made that the dominant or sole motive for the murder was the elimination of witnesses. . . . **Because the court below found three proper aggravating and no mitigating circumstances**, the result it reached, in spite of the error as to one factor, was correct and the death penalty

properly imposed.

Dufour v. State, 495 So.2d 154, 164 (1986)(emphasis added).

Thereafter, in 1992, Mr. Dufour filed a 3.850 motion for postconviction relief and amended it on October 16, 2001(PCR V11, 1135). After a Huff hearing, the lower court, which was not the original trial court, granted an evidentiary hearing on three Claims: ineffective assistance of counsel, ineffective assistance of mental health expert, and the state's bad faith in the destruction of exculpatory evidence (PCR V11, 1133). The evidentiary hearing occurred November 18-21, 2002. The lower court denied relief on May 30, 2003 (PCR V11, 1133-52). This appeal follows.

STATEMENT OF THE FACTS

At the evidentiary hearing below, Donald Dufour's older brother, George Dufour, testified about Donald Dufour's childhood. Their father, Frank Dufour, was severely disabled. He contracted polio as a teenager and was left with a permanent limp (PCR V7 172). Two to four years before Donald was born, a trucking accident crushed Frank Dufour's good foot (PCR V7 172). In 1956, when Beverly Dufour was pregnant with Donald, Frank Dufour was involved in another accident. "[H]e was changing a tire on one of those semi-tractor rigs and the rim of the tire shattered and part of the rim went through his head and he had a steel plate in his head for the rest of his life" (PCR V7 173). Frank Dufour's injuries affected his family:

He had a hard time making a living. Due to his polio and

> everything, a lot of people wouldn't hire him and when he had the injury with his foot he had a difficult time getting a job, but then it got really really bad when he had the tire blow up and had the steel plate put in his head.

(PCR V7 173).

Frank Dufour used alcohol to cope with his disabilities: "He would be drunk. He would almost always be drunk. I seldom would remember him not being drunk." (PCR V7 176). Frank Dufour was a terrifying and violent drunk.

> We never had a meal with the entire family seated at the table. He couldn't stand if you touched the plate or spilled your milk, you overlook it or you beat the hell out of the kid that spilled the milk.
>
> He couldn't handle anything that would be out of the ordinary. If something would have happened that had disturbed him he would have taken everything on the table and thrown it on the floor and glasses and plates hit the wall and if anybody said anything he would beat them choking them or something.

(PCR V7 175).

> Q. Describe how he [Frank Dufour] behaved the majority of the time while you lived in Florida?
>
> A. The closest I would say would be like walking on eggshells. You would be afraid to open your mouth. You are almost afraid to walk in a room because you don't know if it's going to cause a violent outburst of some type. Anything could trigger a rage. You never knew what was going to happen or when it was going to happen.

(PCR V7 179-80).

The family moved frequently because the Dufours could not afford to pay their rent (PCR V7 178). "I was reviewing a box of letters that I corresponded with my mother when I was away at college and I noted about 14 different addresses." (PCR V7 178-79).

> Some of the addresses I never knew. I never knew they lived in St. Petersburg, but I guess they had lived in St. Petersburg for a while. I remember coming home from school and I went to the house and the house was empty because they had moved and nobody had bothered to tell me.

(PCR V7 179).

George Dufour described Donald Dufour as a child and through the time of the crime.

> Donald was always a follower.
>
> He would do anything that anybody ever asked him to do but, of course, he had to always have a leader. He would never be able to make a decision on his own.
>
> He would come to live with me for a month or so at a time, but it would be a little stressful, because if he went out to the car to make a turn you would have to have someone tell him how to turn the car.

(PCR V7 181).

Donald began abusing drugs at a very young age, "[p]robably 10 or 12, and I'm

still not sure what it's called. I think it's a glue, toluene, or something like that, and he would have it in an Ovaltine jar and rags soaked in it and he would walk around and smell it and his eyes would be swollen, not knowing where he was." (182-83). When Donald was sixteen years old, "[h]e certainly knew about speed and downers and quaaludes, all the stuff you could do" and he was sexually involved with several of George's male friends (PCR V7 184-85, 188-89).

By the time Donald was a young adult, "he was not the same person that he was" (PCR V7 195). "His voice became raspier over time, like I think I understand from talking to other people when you are a speed freak, that that does that to your voice." (PCR V7 195). "All he did was drugs. I don't know if he ate." (PCR V7 195). "He could hardly speak sometimes. He would be so strung out and then he would try to clean up and stop. . ." (PCR V7 196).

> Q. Were you able to identify an actual change in his personality, a change in his voice, a change in his demeanor?
>
> A. Totally, direct opposite person.
>
> Q. You attribute that to his use of drugs?
>
> A. That's what I assumed it was.

(PCR V7 196).

The last time George saw Donald, shortly before the murder, Donald appeared

so mentally ill that he scared George (PCR V7 219).

> Q. As a practicing attorney, do you on occasions have to make evaluations of individuals, clients, witnesses, state of mind?
>
> A. I suppose you do in the practice, yes.
>
> Q. Would you say that Donald was in his right mind the last time you saw him?
>
> A. Oh, no; oh, Lord, no.
>
> Q. Would you have deemed him competent had you been representing him in court?
>
> A. No.
>
> Q. Would you have even gone so far as to say that he may not be perfectly sane at that point in time?
>
> A. I think I would have had a battery of psychiatrists involved and alert the judge that I had an incompetent client.

(PCR V7 221).

Raymond Dvorak testified that he and Jay Cohen were appointed to represent Mr. Dufour on the Zack Miller case. Mr. Dvorak had handled five capital murder cases prior to Mr. Dufour's, however, only one of the other five went to trial (PCR V7 225). Throughout the time he represented Mr. Dufour, Mr. Dvorak also actively worked on at least one other capital case (PCR V7 224).

Over the course of representing Mr. Dufour, counsel met with him for almost

eight hours, however, "a lot of visits were, for a lack of a better term, social. They had him in a one-man cell and had no contact with any other individuals and they would put the t.v. on the catwalk on the other side and that didn't change until I felt a jail informant was planted next to him." (PCR V7 257). Counsel described his relationship with Mr. Dufour:

> Ultimately the call was always mine and I knew it. Donald, if I said, no we're going to say it's red, ultimately he would say yes it's red. That went into my ultimate strategy a great deal because there was no question in my mind after taking deposition [sic], talking to some of the other witnesses, that the leader of the gang that this thing sort of grew out of, these killings, was Robert Taylor. There was absolutely no question about that. Taylor was far more intelligent, manipulative, he was slick, sharp and good, but he knew it and he knew how to use it and I felt like Donald and Ryan and Carl Williams who Taylor murdered in Georgia and there was a kid named Elliott, with them, I felt like all these people were controlled by Taylor, I really did –

(PCR V7 258-59). Mr. Dvorak also testified that Mr. Dufour acted mentally ill.

> There were a couple of things that happened during the course of the case that weren't normal things that happen in cases. Yeah, towards – we went through a period where Mr. Dufour believed that the jail personnel were trying to poison him and he refused to eat. . . When he came back from the hospital he was suppose [sic] to be the same old Donald. He related to me bizarre incidents, but it did not occur in my presence.

(PCR V7 261).

> Q. Did you ever see any indication that Mr. Dufour was

indicating or any indications that Mr. Dufour did not have a grasp of reality?

A. There were times related to me certainly where I knew he didn't. When I worked with him one, on one, no, but he's in a jail cell. He's been dried out from months because he came from Parchman to Orlando, so he had already been in prison for however long.

(PCR V7 260).

In preparation for trial, counsel hired Dr. Gutman to evaluate Mr. Dufour.

> I asked the doctor to examine him as to competency both for trial and competency at the time of the offense under the applicable competency rules at that time and law. . . .I wanted to know everything I could concerning Mr. Dufour's background, any influences that could help with his opinion. . .

(PCR V7 230-31).

Q. Do you recall whether you specifically asked him to consider mitigation as defined in the Florida Statute 921.141?

A. I honestly can't say yes to that. I don't have an independent recollection.

Q. What did you know about the mental health evaluation for mitigation purposes back then; did you know what that entails?

A. Frankly, at that time in my experience, what was being done was you had a psychiatrist examine the client and then you went from there. Like I said, I kind of gone to school on other cases and what I had

> seen and that's what we did then, right, wrong, that's what we did, and once I got what I considered to be an unsatisfactory opinion from Doctor Gutman, I didn't take it any further.
>
> Q. And what did you consider to be an unsatisfactory opinion?
>
> A. It didn't give me what I wanted. His conclusion was that Mr. Dufour was competent both at the time of the offense and for trial purposes and that he could not say that there was any psychiatric dynamic or reason behind the killing, behind the crime.

(PCR V7 231-32). After receiving Gutman's unsatisfactory competency report, counsel did not seek a second opinion or do anything else to investigate or find evidence of mental illness, brain damage, or Florida's statutory mental health mitigators (PCR V7 234).

Mr. Dvorak described his penalty phase theory.

> I believed at the time that the best approach I could take was to try and stay somewhat consistent with that he was a follower, to show that he adapted well in an institutional setting and was not a danger there and he would be short of being there the rest of his life as a result of the verdict, and to try to show him as a somewhat normal person within the community, and given the community that he was in at the time, that was not an easy thing to do. These were very wild people, and I wanted to get as much of the good stuff as I could to him.
>
> Having said that, I felt like why give them more ammunition that he's this drugged out drunken maniac who is most mothers' and fathers' worse [sic] fear out there with

their kids.

(PCR V7 239-40). He believed that Stacey Sigler was the best mitigation witness he could present.

> I felt that Stacey was one of the key witnesses against Donald in the guilt phase. Stacey had feelings for Don. They had been boyfriend and girlfriend, had lived together for, as I recall, quite a period of time, or been together as a couple for quite a period of time, and I felt like it would have a tremendous psychological impact on the jury to see a person who had helped convict him to get up there now and say he doesn't deserve to die, and I felt like I could blunt what she would have to say about the drug usage and the alcohol and her prostitution and things like that, easier than I could an expert, if that makes sense.

(PCR V7 241).

Mr. Dvorak was aware that Donald Dufour had been sexually abused as a child.

> [W]hen Don was in his teens he lived for a period of time at his brother, George, who testified earlier, and that during that living together, that he was introduced, that Don was introduced to a homosexual lifestyle and that, in fact, his brother – this is kind of embarrassing – but his brother basically pimped him to homosexuals. I'm not sure who the source of that information was, it could have been Stacey Ziegler [sic] and it could have been Gary, but I'm a little more doubtful of that or it could have been Donald himself, . . . and I do recall in my conversation with George Dufour that that came up and that may have been what terminated the conversation.

(PCR V7 237-38).

> A. As I recall, Don did confirm that he had certain

sexual encounters at a very young age. There seemed to be a lot of homosexual activity involved in it. I don't know if it was Don or another on the floor pimping by his brother when he went to him for safety. But someone that was very sexually active, very young in less than normal ways.

Q. And is that material that you provided to Doctor Gutman, to the best of your recollection?

A. I don't specifically recall if I would have told Doctor Gutman that.

Q. Do you recall if one of these encounters that he told you about that you provided to Gutman could have been as young as the second grade?

A. You say that and that rings a bell. I honestly don't recall, but that does ring a bell, something that young. I do have a vague recollection of something that young.

Q. That's something you would have shared with Doctor Gutman?

A. Certainly, if I would have known it I would have told him, I should have anyway.

(PCR V7 279-80).

Q. Your recollection, as you sit here now is, someone, possibly Mr. Dufour, told you of a sexual encounter or –

A. At a very young age involving homosexuality.

(PCR V7 290). Other than making one telephone call to George Dufour and speaking

with state guilt phase witnesses, counsel did nothing to investigate the sexual abuse or present it in mitigation.

Mr. Dvorak was also aware that Mr. Dufour was physically abused as a child. "He had a brutal childhood, but I liked Donald and I think Jay will tell you the same thing, we both liked Donald." (PCR V7 258).

Regarding Mr. Dufour's history of drug and alcohol abuse, counsel testified:

> Brutal. I mean I knew it was brutal. I knew he had been doing drugs and alcohol from the time he was very young, possibly through [sic] teen, that came out in Doctor Gutman's report, that it crossed the board, everything from drinking to marijuana, if you go to the mild end, to acid and heroin on the heavy end quaaludes and things like that.

(PCR V7 238). "The impression I got from these people that it would be a rare occasion if their eyes weren't open if they weren't messed up somehow, even if it was just residual." (PCR V7 272). Even so, counsel did nothing to investigate the effects of the drugs and alcohol on Mr. Dufour's actions at the time of the crime.

> Q. Did you do anything to investigate the affects [sic] of that drug and alcohol abuse, investigating the affects [sic] of that on Donald Dufour's actions at the time leading up to the crimes and through the crimes?
>
> A. No, ma'am, not beyond asking the witness [sic], Ziegler [sic], Ryan, probably Taylor, and Doctor Gutman, did any independent investigation or what did that mean, no ma'am.

(PCR V7 238).

Dr. Lipman, a forensic neuropharmacologist, testified about the effects of Mr. Dufour's drug and alcohol abuse throughout his life and at the time of the crime. Dr. Lipman described Mr. Dufour's history of drug and alcohol abuse as "shockingly severe and it began at an [sic] very early age" (PCR V7 314).

> Well, by his account and others, he began abusing alcohol in the 3rd grade, eight years of age, joined by marijuana in the 5th grade at age ten, and the same year he began inhaling solvents. . . He used these inhalants routinely for three or four years and this was contained in police reports and by his brother George's deposition and by trial testimony, and by early psychological reports. . . .He started to ingest drugs intravenously. I hate to say that this is unusual because, in fact, this is the earliest I've ever heard of a case, to my recollection. I don't think I'm wrong about that, of someone adopting an intravenous habit at an early age. . .At age thirteen he continued to inject and began to abuse angel dust, P.C.P., . . . and mescalin, often in combination . . .injected P.C.P. intravenously for six months and began to abuse L.S.D. every day it was available, talking four to five doses at a time. . . His brother, George, confirmed this L.S.D. use at this time, it was in his deposition October 22nd, 2002, and this same year Mr. Dufour, again 13 years old, began to inject cocaine in tandem with his suppressant drugs. This is the phenomination I referred to in voir dire as speedballing.

(PCR V7 315-17). At about 17, Mr. Dufour started abusing MDMA, a brain-damaging hallucinogenic stimulant (PCR V7 320). At age 18, Mr. Dufour had a $250 a day heroin habit (PCR V7 321). Later, he discovered quaaludes, as well as several other varieties of prescription drugs (PCR V7 322). He was still speed balling (PCR

V7 322). At the time of the offense, Mr. Dufour's drugs of choice were a combination of quaaludes and mass quantities of alcohol, which potentiated the effects of the quaaludes, cocaine, heroin, other prescription drugs, and barbiturates (PCR V7 323-26).

Dr. Lipman offered unrebutted evidence that Mr. Dufour's reasoning abilities were substantially impaired by his addiction to drugs and alcohol. Given the amount and kind of substances that Mr. Dufour abused throughout his life, "you could not have, but seriously produced an organic impairment in his brain, regardless of who he is, you cannot drink this much alcohol, you cannot take this much drug of different kinds and you cannot do them in combination as he was doing from all accounts, including his own, without causing an organic impairment in the brain, it is impossible." (PCR V7 330). Dr Lipman concluded that Mr. Dufour was in a psychotoxic state and in a state of chronic intoxication at the time of the crime (PCR V7 328).

> the psycho stimulant abuse produces a condition of agitation and paranoia and irrational fear and hypervigilance. . .It produces a delusional condition in which the user thinks that the people are out to get them, they misinterpret ques as threatening. They often respond inappropriately to ques that to others did not seem threatening but to the stimulant abuser are prima facie evidence for immediate action. They are on a hair trigger. They are terrified chronically. They are constantly trying to compensate.
>
> Alcohol, when abused at this sort of dose for this amount of time, produces for its organic brain syndrome a

> condition that completely outlasts the presence of the drug in the brain. . . .So the organic brain syndrome is frightening because the alcoholic in this condition is not in control of his environment and the psychostimulant abuser, his environment seems inherently threatening.

(PCR V7 337).

This organic brain syndrome creates both a mental disturbance and an emotional disturbance (PCR V7 337). Based on his determination that Mr. Dufour was suffering from an organic brain syndrome caused by the combination of drugs and alcohol, Dr. Lipman opined that Mr. Dufour's capacity to appreciate the criminality of his conduct was substantially impaired at the time of the crime (PCR V7 338-39). Mr. Dufour's condition would have been worse about a month and a week later, at the time of the Mississippi crime which was used as an aggravating circumstance in this case, because he was experiencing a withdrawal of cocaine (PCR V7 339-40). Based on information from Mr. Dufour and the co-defendant in the Mississippi offenses, Dr. Lipman opined that Mr. Dufour was intoxicated at the time of that crime (PCR V7 342-44).

Dr. Bourg-Carter testified that she evaluated Mr. Dufour to determine whether he was sexually abused as a child and if those experiences impacted his development and behavior (PCR V8 419). Mr. Dufour told her that when he was in the second grade he was raped, both anally and orally, by a man who was in his twenties (PCR V8 422). The man cut off the head of a living chicken in front of Mr. Dufour and told

him that the same thing would happen to him if he told anyone about the sexual abuse (PCR V8 423). When Mr. Dufour was in junior high school, an adult woman picked him up and brought him to her home, where she and her husband sexually abused him (PCR V8 425-26). When Mr. Dufour was a teenager and living with his brother George, he had consensual sex with several older men, but was raped by one (PCR V8 426). Dr. Bourg-Carter testified that there were no indications from her work with Mr. Dufour or from prior testing that he was malingering the sexual abuse (PCR V8 429-30). The psychological testing she reviewed was consistent with the tests of a person who had a traumatic childhood (PCR V8 430-31).

Dr. Bourg-Carter was able to connect the childhood sexual abuse to the crime:

> To me it wasn't coincidental that all of the victims were homosexual and that he was homosexually abused as a young child, and then also reportedly raped by a homosexual during his adolescence. So it didn't come to any surprise to me that all the victims that were selected were homosexual.

(PCR V8 432).

> Q. When Mr. Lerner was questioning you regarding whether or not there was any evidence that Donald Dufour may have suffered from P.T.S.D. at the time that the incident occurred, I believe that your testimony was that there was no evidence of an automatic reaction or something of that nature. Did you have an opportunity to review a report that Dr. Michael Gutman directed to trial attorney Raymond Dvorak in your evaluation of this matter?

A. Yes.

Q. I'd like to call your attention to the second page, the third full paragraph, and the final sentence of that paragraph where it indicates that Mr. Dufour states that the man tried to kiss and fondle him and a feeling of revulsion came over Mr. Dufour and that he shot the man. Is that, and that may not be enough information for you, but is that thoroughly inconsistent [sic] with an autonomic reaction to a certain stimuli?

A. That would be. If this, in fact, happened, that would be consistent with an autonomic and reexperiencing of those two clusters of Post Traumatic Stress Disorder.

(PCR V8 456-57). She opined that Mr. Dufour was suffering an extreme mental or emotional disturbance at the time of the crime because he had a chronic substance abuse disorder (PCR V8 431).

Dr. Bourg-Carter testified that the sexual abuse Donald Dufour suffered at such a young age might have lead him to abuse drugs and alcohol. "[I]t's very common when you are working with off [sic] children who have been exposed to traumatic home situations, such as a domestically violent home or when exposed to sexual abuse, that they turn to drugs and alcohol to numb them from the symptoms they are experiencing, the nightmares, the fears, the startle, that types [sic] of thing." (PCR V8 425).

By all accounts, not just Donald's account, it had to be a

> horrifying experience to live in that family. The father was verbally and physically abusive, would hit his mother, would hit him. His father was an alcoholic, would get really angry when drinking and would start being very abusive to the family.

(PCR V8 423).

Dr. Robert Berland, a forensic psychologist who was in private practice at the time of Mr. Dufour's penalty phase, testified about the 1984 standards for a forensic mental health evaluation.

> Particularly at that time the lead on developing mitigation was taken by the attorney, and my role most typically was to determine if there was evidence of mental illness, particularly psychosis was the emphasis in my case and brain injury and then whether the defendant appeared to meet any of the clinical legal criteria that applied, such as trial competency, insanity, are, of course, mitigation for penalty phase.
>
> * * *
>
> I routinely did psychological testing. I interviewed the defendant, I sought out both case related documents and any medical records that were available and then I had begun early on interviewing lay witnesses who could corroborate and elaborate on various aspects of the evaluation, people who had known the defendant at various stages of their life.

(PCR V8 467). Dr. Berland testified that, in 1984, he had been contacted by attorneys who were seeking a second opinion regarding mental health issues (PCR V8 495).

Dr. Berland performed an evaluation of Mr. Dufour, using the same standards

he would have used had he been hired in 1984. He spent between seven and ten hours reviewing documents that existed in 1984, and more than six hours interviewing and testing Mr. Dufour (PCR V8 497-98). Though Dr. Berland did not have access to all of the resources he would have had in 1984, access to all witnesses and concurrent testing for example, Dr. Berland found evidence of psychosis, brain injury, antisocial personality disorder, delusional paranoid thinking, hallucinations, and mood disturbance (PCR V8 469-70, 478-83). Dr. Berland corroborated his conclusions with psychological testing of Mr. Dufour that was done in 1979 by the Florida Department of Corrections (PCR V8 471).

> This evaluator for D.O.C. described what he believed to be persecutory delusions and he believed that the defendant exhibited what is called abundant energy that was seen in the MMPI that I administered to him 23 years later. He said the defendant, in quotes, easily vacillates to a withdrawn self-centered position and talked about these rapid and sudden changes in temperament. Said the defendant was suspicious and distrustful and his feelings become easily injured and he reacts to what he perceives as others betrayal with devious frightfulness and treachery.
>
> I would say I felt [sic] somewhat unusual for [sic] D.O.C. evaluator to perceive the defendant to be a fairly paranoid manic sort of individual.. . .
>
> . . . .Stacey Zigler [sic], talked about believing that the defendant was really messed up in his head and had very significant mood swings...
>
> . . . Raymond Ryan quoted Robert Taylor, so quote of a

> quote, concerns with how crazy and how far [sic] the Defendant was. . . .
>
> . . . There was a deposition by a gentleman who saw the Defendant periodically from 1965 on . . .who talked in his deposition about how after a certain point the Defendant showed ups and downs , extreme ups and downs and when he was in a down he wouldn't talk, he would sit for hours without uttering a word, would not work and when he was down he said he went way down. At other times he appeared to be up and then could interact and respond with people, although he still couldn't follow instructions without immediate hands on supervision.

(PCR V8 472-74).

Based upon the archival data, his testing, and the testing Dr. Merin conducted in 2002, Dr. Berland concluded that there was "substantial information that would permit a conclusion that he was under the influence of extreme mental or emotional disturbance." (PCR V8 485).

> Well, all of the data that I cited indicating that he suffered back before this offense, these offenses, from a psychotic disturbance, which would appear to meet the criteria, as I understand them as a psychologist, which goes beyond the emotions, no matter how extreme, that a normal person would experience, somebody who is psychotic that has emotions that go beyond that of a normal person, so based on that, and if he, in fact, had been substantiated as having been under the influence of alcohol or drugs, the effect of alcohol and drugs on this kind of mental illness, which is, as a result of it, brain dysfunction, is to exacerbate or – even more so, he would likely have been under the influence of extreme mental or emotional disturbance.

(PCR V8 486). Based on the same data, Dr. Berland also concluded that Mr. Dufour's capacity to conform his conduct to the requirements of the law was substantially impaired (PCR V8 486).

> [T]he nature of his biologically determined mental illness, while it does not appear to have controlled his behavior entirely, that portion of his behavior which it did not control, the affects that it did have on his behavior tend to be panoramic in terms of disrupting judgment and involuntarily because it is, of course, biological mental illness, so that while there may not be any evidence that he had a substantial impairment in his capacity to appreciate the criminality, I believe the nature of his mental illness created a substantial impairment in his capacity to conform his conduct to the requirements of the law at that time.

(PCR V8 486-87).

In 2002, the state hired Dr. Sidney Merin to evaluate Donald Dufour. Dr. Merin gave Mr. Dufour the Wechsler Adult Intelligence Scale and determined that he has a verbal I.Q. of 85 and a performance I.Q. of 64 (PCR V9 579-80). Dr. Merin also gave Mr. Dufour the Millon personality test which revealed that Mr. Dufour has depressive, dependent, antisocial, and schizotypal personality features, and anxiety and drug and alcohol dependence disorders (PCR V9 592).

Dr. Merin further concluded that Mr. Dufour had "mild neurocognitive disorder", substance abuse disorder, a personality disorder, "which is as I refer to earlier, long term maladaptive form of behavior" with borderline, antisocial, and

paranoia features (PCR V9 611). The right side of Mr. Dufour's brain is more impaired than the left side, and Mr. Dufour is not incapable of using his prefrontal lobe (PCR V9 627). Dr. Merin cited a portion of his clinical interview with Mr. Dufour as an example of Mr. Dufour's ability to use his prefrontal lobe:

> I had information about him, but I would need for him to verbalize some of these things, and one of the questions I asked him had to do with what were you convicted of, and he had some difficulty grasping what degree of murder and that ultimately he suggested that it was, quote, worse, end of quote.
>
> Then he offered that it was second or third degree. I told him that the worse [sic] murder was murder one and he instantly agreed, adding that it was capital murder, prefrontal lobe, he was able to reason that through.

(PCR V9 600). Dr. Merin also testified that the remorse Mr. Dufour admitted feeling to Sigler shortly after the crime was also an example of his ability to use his prefrontal lobe (PCR V9 610). Dr. Merin testified that Mr. Dufour's opinions and behaviors were not inconsistent with paranoid thinking, that psychosis is not mutually exclusive of personality disorders, a psychosis can occur during a planned event if an unplanned break from reality or a paranoid reaction occurs, brain injury can cause a mental illness or disorder that could result in psychosis, and that alcohol reduces inhibitions, which are prefrontal lobe functions (PCR V9 619-20, 631, 635-36). Dr. Merin further testified: "He does not see himself to be delusional. That may be a delusion in itself."

(PCR V9 641).

Regarding the facts of the crime, Dr. Merin testified:

> In general he would refer to them as beginning as robberies, which again, gives us some idea about planning capabilities and the fact that he may not have wanted to kill them, but the general direction that his behavior was focused on doing pretty much whatever he wanted to do . . .

(PCR V9 617).

Dr. Merin described Mr. Dufour's background:

> I think he had a terrible relationship with his father and I think that he started the need to cope with that particular way and that particular way in which he coped with it, he found early on that if he sipped his father's beer maybe he felt a little better, he wasn't as tensed, or whatever, and just moved along from there.

(PCR V9 643)

> he didn't perform very well in school. The I.Q. values at that time, but I'm not certain if they were individual tests or class tests, group tests, were about 75 or 80. Much of the activity in school has to do with learning how to read and he had difficulty reading and still does.

(PCR V9 644).

Dr. Merin spent approximately seven hours reviewing materials that existed in 1984 and over five hours testing and interviewing Mr. Dufour (PCR V9 641-42).

Dorothy Sedgwick testified that she was the division chief for the Office of the State Attorney when this case was arraigned, and she was co-counsel on this case

(PCR V9 654). Her policy regarding evidence which was not introduced at trial was that it should be "maintained" in homicide cases (PCR V9 657). She further testified that "[i]f Frank Tamen was still in the division he would have been the appropriate one to ask about evidence related to the case he was lead counsel on. . . After he left I would have been the appropriate one. I was division chief in the division for a while. I would have been the appropriate one even after that, because I was the person who did have some knowledge of the case." (PCR V9 662). She testified to the state attorney's general practice regarding evidence in homicide cases:

> I know very well what we did on a regular basis. What we did on a regular basis on a serious case like a homicide is that we asked for all the evidence to be kept, and that we would routinely in a somewhat, kind of casual but direct manner, receive a phone call from the detective to the attorney that would personally have knowledge, to ask whether or not something could be released or whether something could be destroyed, and we would respond to them.
>
> It was – what we did at that time was we would not okay the destruction of anything that we believed to be evidence on a criminal case that could be litigated in any way

(PCR V9 664).

Frank Tamen, the lead prosecutor on the case, testified that he would have liked to present Mr. Dufour's criminal background to the jury and would have, had the door been opened (PCR V9 694). Tamen also testified that he has never cross-examined

psychologists called by the defense in capital cases and he has never deposed an expert that the defense intended to call during the penalty phase of a capital trial (PCR V9 698).

Diane Payne, the lead detective on the case, testified about the destruction of exculpatory evidence she authorized in this case.

> Q. Okay. Have you made an attempt to determine what happened to the stick that was taken into evidence as described as defense composite two?
>
> A. Yes. It was destroyed.
>
> Q. And do you know how that came to happen?
>
> A. Well, the normal procedure is that we receive periodically reports from the evidence section of any cases that we have evidence stored with them and then we're to go through them and get rid of anything that we can get rid of, and so it would have been listed during one of those reports that was sent to us.
>
> Q. And did your search of the records indicate that you were the person that authorized the destruction?
>
> A. Yes.
>
> Q. Do you have any recollection of that after so many years?
>
> A. Not really, other than my name is on it, on the report.
>
> Q. Do you remember who you contacted about that or if you contacted anyone about it for sure?

A. I always contacted, on death cases or murder cases, I always contacted the state attorney to make sure it was all right to go ahead and get rid of this, this was not put into evidence at the trial or anything and I got the okay.

Q. Did you note that okay anyplace?

A. No. It's just a courtesy call to them and ask them.

Q. Is it possible you didn't call the state attorney's office?

A. It's always possible.

(PCR V9 711-12).

On the last day of the hearing, the state proposed calling William Vose, who was not a listed witness, to testify about a conversation he had with George Dufour. The defense objected. The state agreed to let Mr. Dufour present rebuttal testimony through an affidavit from Mr. Dufour, and the court overruled the objection.

William Vose testified that he was general counsel for the Sheriff of Orange County from 1981 through 1989 (PCR V9 720). In 1984, he became involved in Mr. Dufour's case.

> Mr. Dufour was refusing to eat or take any nourishment and in the opinion of the jail medical personnel he was close to dying or there was a potential that he could die and that they were beginning to worry that he was going to die and they didn't want him to die on their watch, I guess, is the best way to describe it, and they asked for my assistance. . .

(PCR V9 721). Vose telephoned a person who claimed to be George Dufour and told him of the situation. Vose testified that George Dufour responded that he and the rest of the family were sick of Mr. Dufour and it would be better for them if he died (PCR V9 724).

Jay Paul Cohen testified that he was co-counsel for Mr. Dufour (PCR V9 728). He felt that Dr. Gutman "was very negative towards" Mr. Dufour (PCR V9 734). Mr. Dvorak had more contact with Dr. Gutman than he (PCR V9 734). Dr. Gutman told Cohen and Dvorak "that we would not want to call him to the stand, that he would hurt our case" (PCR V9 735).

In rebuttal, George Dufour testified by affidavit that:

> 3. I have no recollection of having received a phone call from the Orange County Sheriff's Department or its agents requesting my assistance in persuading Donald to discontinue his fast.
>
> 4. In response to learning that Donald was refusing food prepared by the Orange County Jail because he believed he was being poisoned, I did intervene on Donald's behalf. To the best of my recollection I visited Donald and provided him financial support in order to allow him to purchase pre-packaged foodstuffs. Although I vaguely recall seeing Donald in his malnourished state, it is possible I merely forwarded moneys to be placed in his account.

(PCR V11 1100).

The lower court denied relief on May 30, 2003 (PCR V11, 1133-52).

SUMMARY OF ARGUMENT

Argument I: The lower court erred in finding that Mr. Dufour was not deprived of the effective assistance of counsel at the guilt phase, where counsel failed to strike two biased jurors and failed to present a voluntary intoxication defense.

Argument II: The lower court erred in finding that Mr. Dufour had the effective assistance of counsel at his penalty phase where counsel failed to investigate mental health and background mitigation, failed to ensure that Mr. Dufour received a competent mental health evaluation, presented a witness and opened the door to bad character evidence, did not effectively object to improper hearsay evidence and prosecutorial argument, and failed to object to jury instructions regarding an aggravating circumstance that did not apply as a matter of law.

Argument III: The lower court erred in holding that Mr. Dufour received a competent mental health evaluation, where the mental health evaluator neglected to find mental illness, brain impairment, and borderline I.Q.

Argument IV: Throughout Mr. Dufour's trial the jury was presented with a barrage of circumstances and testimony which prejudiced Mr. Dufour, rendering his capital trial fundamentally unfair. The lower court erred in denying Mr. Dufour the opportunity to interview the jurors and prove prejudice.

Argument V: The lower court repeatedly minimized the jury's role in the

sentencing process, inducing a death recommendation that violates the Eighth and Fourteenth Amendments to the United States Constitution.

Argument VI: The state violated Mr. Dufour's Fifth, Sixth, Eighth, and Fourteenth Amendment rights by destroying exculpatory evidence in bad faith.

Argument VII: Ring v. Arizona establishes that the capital sentencing scheme was unconstitutional as applied, violating Mr. Dufour's Sixth and Fourteenth Amendment rights.

Argument VIII: Florida Statute 921.151 was applied in a vague and overbroad manner, violating Mr. Dufour's Eighth and Fourteenth Amendment rights: two aggravating elements were unconstitutionally vague and overbroad and one unconstitutionally shifted an element of the death penalty eligible offense to Mr. Dufour.

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

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

fair trial.

ARGUMENT I

MR. DUFOUR WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PRE-TRIAL PORTIONS OF HIS CAPITAL TRIAL, VIOLATING HIS FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION. THE LOWER COURT ERRED IN DENYING POSTCONVICTION RELIEF.

Standard of Review

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

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. Strickland requires reasonable attorney performance, and reasonable attorney performance requires counsel to conduct a *reasonable*

investigation. "[C]hoices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. Prejudice is established if confidence in the outcome is undermined:

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

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

Trial counsel's representation of Mr. Dufour fell below acceptable professional standards in several respects. Each of these failures, discussed below, severely prejudiced Mr. Dufour. There is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different; Mr. Dufour would have been convicted of a lesser offense or sentenced to life.

A. The lower court erred in holding that counsel's failure to strike jurors was not ineffective assistance of counsel.

During voir dire, jurors Frazier and Sullen repeatedly stated that they would impose the death penalty in this case.

MR. DVORAK: Do you read the paper regularly?

MS. FRAZIER: Yes.

MR. DVORAK: Okay. In this case the Defendant is charged with murdering an individual back on September the 5th of 1982. The evidence that will be developed in this case may indicate that the victim was a homosexual, whose body was found in an orange grove with a gunshot wound. Do you recall reading anything about that or hearing anything about that?

MS. FRAZIER: I believe so, yes.

(TR 255-56).

* * *

MR. TAMEN: Do you think that – I don't want to go into all the different factors. Do you think there might be some other factors that if you heard them might make you think, "Well, that could justify a death sentence?"

MS. FRAZIER: For the death penalty?

MR. TAMEN: Um-hum.

MS. FRAZIER: I guess it all depends. **I don't think anyone should live if they kill somebody else.**

(TR 252)(emphasis added).

* * *

MR. DVORAK: You made a comment earlier, ma'am, that you don't think a person should live if they have killed

> another person.
>
> MS. FRAZIER: Okay.
>
> MR. DVORAK: Can you expand on that a little bit?
>
> MS. FRAZIER: I think I was saying that if it was the type of murder it was. If it was pre– **if he, you know, a premeditated murder, yes, I think he should get the death penalty. <u>He</u> thought about it. <u>He</u> knew what he was doing**.

(TR 254)(emphasis added). Frazier was a juror who found Mr. Dufour guilty of premeditated first degree murder.

* * *

> MR. DVORAK: Okay. Are you telling us, ma'am, that in any premeditated murder situation that you would vote for the death penalty regardless of what you heard concerning factors that might be in favor of the individual?
>
> MS. FRAZIER: I would have to listen closely, look at closely at what had happened, you know, why did he do it. Because there might have been a reason why he did it.
>
> MR. DVORAK: **Going into it, would your inclination be to favor the death penalty in that circumstance?**
>
> MS. FRAZIER: **After I heard what happened.**

(TR 255)(emphasis added).

Under both Florida and United States constitutional law, Juror Frazier would

have been subject to a cause challenge. She clearly stated that she was familiar with the facts of this case and that she would vote to impose the death penalty in this case. Stroud v. United States, 251 U.S. 12 (1919); Ross v. Oklahoma, 487 U.S. 81 (1988); Thomas v. State, 403 U.S. 371 (1981). Even so, counsel absolutely failed to peremptorily challenge juror Frazier or ask the court for a cause challenge. This was deficient performance which prejudiced Mr. Dufour because it violated his right to a fair penalty phase under the Eighth and Fourteenth Amendments.

Juror Sullen also unequivocally stated that she would impose the death sentence if Donald Dufour was convicted of this crime.

> MR. TAMEN: Do you have any kinds of thoughts as to what kinds of cases, and we're talking about murder cases, or what kinds of factors in a murder case might make a death penalty appropriate penalty?
>
> MS. SULLEN: **I think if it's premeditated, you know, like somebody planned to murder somebody, a case like that, I would think it would deserve the death penalty.**

(TR 411)(emphasis added).

* * *

> MR. DVORAK: **Are you saying to us that in any case, any homicide or murder case where you feel that it was premeditated that the death penalty should be the penalty?**
>
> MS. SULLEN: **If it was premeditated, you know, I felt**

> **as though it was premeditated, you know, I think that he should, he or she.**
>
> MR. DVORAK: Should what, ma'am?
>
> MS. SULLEN: **Should deserve the death penalty.**

(TR 412)(emphasis added). Counsel attempted to have the court strike juror Sullen for cause, but the court erroneously declined to grant the challenge.

> MR. DVORAK: I would move to challenge Ms. Sullen for cause despite her indication at the end she did say if it was premeditated they should go to the electric chair.
>
> THE COURT: Oh, she's just confused.
>
> MR. TAMEN: She might be confused.

(TR 417).

* * *

> MR. DVORAK: When Ms. Sullen was asked by Mr. Tamen, anybody murdered somebody is premeditated – that was just her response. I'm paraphrasing it. She said that again to me at a second point in time on my questions. At that point the confusion started. I wanted to make sure that's what in fact she was saying. She did say it.
>
> THE COURT: She's erroneous. She was asked if she was able to follow my instructions on the law and she agreed. And her idea, her thoughts were incorrect. And we could bring her back in. We'll do that.
>
> MR. TAMEN: I'm pretty sure, Your Honor, when Mr. Dvorak –

> THE COURT: (Interposing) We'll do that on the general voir dire. Right now I'm going to deny your request that she be challenged for cause.

(TR 418). Thereafter, counsel failed to challenge her peremptorily (TR 574).

At the evidentiary hearing, Mr. Dvorak testified that he did not have a strategic reason for not striking at least one of the jurors. "Having said that, if I had peremptory challenges left at that point, enough to strike both of them, in all candor, I should have used them." (PCR V7 227).

Despite the lack of any strategic reason for not striking two jurors who stated they would impose the death penalty in every first degree premeditated murder case, the lower court held that counsel was not ineffective under the Sixth and Fourteenth Amendments.

> This Court finds that a review of the entire voir dire conducted with Ms. Frazier reflects that she had no predisposition in this case, and felt she could follow the court's instructions on the law. (R248-57). . . . the Court reviewed the entire voir dire conducted with Ms. Sullen and concludes that she had no predispositions in this case, and felt she could follow the court's instructions on the law. (R.408-417). Further, Defendant's allegations focus on both Ms. Frazier's and Ms. Sullen's inclinations to impose the death penalty. However, the jury recommended a death sentence of 12-0, even though a unanimous recommendation was not required. A recommendation of death by a vote of 10-2 would have had the same result. Thus, there is no prejudice and this issue does not merit relief.

(PCR V11, 1136-37). The lower court erred.

The United States Supreme Court has held that jurors like Frazier and Sullen, who will impose the death penalty in every first degree premeditated murder case, violate the Due Process Clause of the Fourteenth Amendment because the juror has already formed an opinion on the merits, and the presence or absence of aggravating or mitigating circumstances is entirely irrelevant to the juror. Morgan v. Illinois, 504 U.S. 719, 728-29 (1992). Such a juror's general statements that they can follow the court's instructions or the law do not cure this constitutional infirmity because such jurors are, by definition, those who cannot perform their duties in accordance with the law. Id. at 734-35.

To preserve the court's error in failing to grant the cause challenge of juror Sullen, counsel was obligated to use a peremptory challenge to remove juror Sullen. Had counsel done so, and requested additional peremptory challenges, Mr. Dufour's unconstitutional death sentence would have been vacated and his case remanded for a new penalty phase that complied with the Eighth and Fourteenth Amendments ("If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.") Id. at 729.

The lower court's conclusion regarding prejudice is misdirected in its analysis. The issue was not whether a majority of the advisory jury would have recommended

death had counsel struck the two jurors; the issue is whether, as a result of counsel's performance, the panel which made that ultimate determination was composed of jurors who denied Mr. Dufour his rights to due process and an impartial jury. Counsel's failure to strike jurors Frazier and Sullen denied him those rights, and was clearly deficient performance which prejudiced Mr. Dufour.

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

Though counsel knew that Mr. Dufour had a lethal and longstanding addiction to drugs and alcohol, counsel failed to investigate and present a voluntary intoxication defense. "Voluntary intoxication is a defense to the specific intent crimes of first-degree murder and robbery." Gardner v. State, 480 So.2d 91, 92-93 (Fla. 1985) (citations omitted). See Bell v. State, 394 So.2d 979 (Fla. 1981); State ex rel. Goepel v. Kelly, 68 So.2d 351 (Fla. 1953). See also Occhicone v. State, 570 So.2d 902 (Fla. 1990); Gurganus v. State, 451 So.2d 817 (Fla. 1984). Instead, counsel's sole defense was an attempt to inculpate Robert Taylor through cross examination and argument.

The lower court held that counsel's failure to investigate and present an voluntary intoxication defense was not ineffective assistance of counsel.

> The State also points out that the defense at trial was that Defendant did not commit the crime but was "framed" (R.1363-1383, 1414-1430). That defense was clearly inconsistent with a voluntary intoxication defense, and thus, denial of this claim is appropriate. *State v. Williams*, 707

> So.2d 1235 (Fla.2001)(where the Supreme Court held that counsel cannot be deemed ineffective for failing to pursue the voluntary intoxication defense when such a defense would have been inconsistent with defendant's theory of the case).

(PCR V11, 1139). The lower court erred.

Voluntary intoxication was a relevant and significant defense to the charge which supported, rather than conflicted with, the defense that Mr. Dufour's counsel presented. Counsel's culpability shifting argument did not refute Mr. Dufour's presence at the scene of the crime, it merely shifted blame for the actual murder. A voluntary intoxication defense would have strengthened the culpability shifting defense, by negating specific intent in the plan to rob the victim as well as specific intent in the murder. Had counsel presented a voluntary intoxication defense, there is a reasonable probability that at least one of the jurors would have voted to convict Mr. Dufour of a lesser offense or recommended a life sentence.

ARGUMENT II

MR. DUFOUR WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF HIS FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION.

THE LOWER COURT ERRED IN DENYING POSTCONVICTION RELIEF.

Standard of Review

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

A. Counsel was ineffective for failing to investigate and present mitigating evidence.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. Strickland requires a defendant to demonstrate (1) unreasonable attorney performance, and (2) prejudice. Id. In a capital case penalty phase, the United States Supreme Court has defined counsel's obligation to conduct a "reasonable" investigation as an "obligation to conduct a **thorough** investigation of the defendant's background" for penalty phase mitigation. Williams v. Taylor, 529 U.S. 362, 376-78 (2000)(emphasis added). Prejudice is a cumulative analysis, and the test is whether "the entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raise[es] a reasonable probability that the result of the sentencing

proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence." Williams, 529 U.S. at 399.

1. Deficient Performance

The lower court erred in holding that counsel's failure to conduct a reasonable investigation was not deficient performance. The primary thrust of the lower court's order is that because a reasonable investigation could have uncovered "negative" information, counsel was not obligated to conduct a reasonable investigation. The lower court erred as a matter of law. Strickland and its progeny have never stood for the proposition that a failure to investigate mitigating evidence is excused by the possibility that the investigation *may* uncover negative facts about a client. "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." Wiggins v. Smith, 123 S.Ct. 2527, 2538 (2003). As discussed below, the lower court's order is filled with factual inaccuracies and misapplication of capital penalty phase law.

a. Mental Health Mitigation

The evidence presented below established that counsel failed to conduct a reasonable mental health investigation. Though counsel had a reason to believe that Mr. Dufour had serious mental health issues and that he was acting under the influence

of drugs and alcohol, counsel did not consult a second mental health expert after receiving an unfavorable and unprofessional *competency* report from Dr. Gutman.

> Q. To the best of your recollection, what do you recall discussing with Doctor Gutman?
>
> A. Well, the competency issues both for trial and at the time of the offense, just me looking for whatever I felt like I could glean out of it that could help.

(PCR V7 255). Mr. Dvorak testified that his decision not to seek a second opinion was based on ignorance of Florida law, not that it was an informed strategic decision. Mr. Dvorak explained that he did not seek a second opinion or a mitigation evaluation after receiving Gutman's unprofessional competency report because he did not want to give the state access to Gutman or his report, even though Gutman was hired as a confidential expert (PCR V7 241, 245).

> Q. If Gutman was a confidential defense expert, the state couldn't have hired him?
>
> A. I don't know if the government's report would have always stayed confidential.
>
> Q. How would it have been disclosed to the state?
>
> A. Maybe I'm announcing my only – my feeling was if there were two psychiatric opinions or psychological opinions and one was ultimately presented, I felt like under the applicable rules of discovery, et cetera, the state would be entitled to know that, to know that

there was another examination.

Q. To know that there was another examination, but would they be entitled to the results of that examination?

A. I would have fought it tooth and nail, but the risk is, yes that it could come in, and I worried about that.

Q. Can you recall, giving [sic] the state of the law at the time, would they have been allowed to present – first, if they would have been able to get ahold of that confidential expert, and number two, would they have been able to use that in the penalty phase?

A. I believe they could rebut it, because I had a case prior to that, this was when I was with the state, where the defense produced a doctor's opinion, the court then ordered a second examination to report back to the court, and then from there it led to a third expert, and by the time we were done as the state attorney in that case, I had two definitely, if not three, doctors lined up to attack the defense's doctor.

Q. This wasn't a penalty phase though was it?

A. Well, to me it doesn't make any difference if it's penalty phase or guilt phase, if the jury is hearing it, they are hearing it.

Q. You testified earlier that as a state attorney you never prosecuted a penalty phase?

A. Right.

Q. So this situation is not at penalty phase in the capital case that you are describing?

A. No, because I had made a decision as a prosecutor not to seek the death penalty. I may not have made it by that point, but I didn't. This was a woman who was crazy, she was in Chatahoochee for a long period of time before being brought back to be prosecuted.

Q. Okay, it was more of competency?

A. Yes.

(PCR V7 240-45).

In Pouncy v. State, 353 So.2d 640, 641 (Fla.3d DCA 1977), the Third District Court of Appeals held that "the doctrine of attorney-client privilege bars the state from deposing and calling as witnesses psychiatrists hired by an accused or his counsel for the sole purpose of aiding the accused" unless the expert is actually called as a witness for the defense. The attorney-client privilege is properly asserted because:

> A psychiatrist will of necessity make inquiry about the facts surrounding the alleged crime, just as the attorney will. Disclosures made to the attorney cannot be used to furnish proof in the government's case. Disclosures made to the attorney's expert should be equally unavailable, at least until he is placed on the witness stand. The attorney must be free to make an informed judgment with respect to the best course of the defense without the inhibition of creating a potential government witness.
>
> Thus, the assertion of the privilege in the psychiatric witness cases is based on the confidential communications which may be made to the psychiatrist. *See also Tucker v. State*, 484 So.2d 1299 (Fla. 4th DCA 1986); *Ursry v. State*, 428

So.2d 713 (Fla. 4th DCA 1983).

Id. citing United States v. Alvarez, 519 F.2d 1036, 1047 (3d Cir.1975). In 1980, this rule was codified as Florida Rule of Criminal Procedure 3.216(a). Clearly, had counsel decided to seek a second opinion, the state could not have used Dr. Gutman or his report. Accordingly, counsel's "strategic" decision was not reasonable; "a tactical or strategic decision is unreasonable if it is based on a failure to understand the law". Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir.1991).

Additionally, even if counsel's decision not to seek a second opinion had been a valid and informed strategy, the decision was unreasonable. Counsel knew that Mr. Dufour had severe mental problems:

> There were a couple of things that happened during the course of the case that weren't normal things that happen in cases. Yeah, towards – we went through a period where Mr. Dufour believed that the jail personnel were trying to poison him and he refused to eat. . . When he came back from the hospital he was suppose [sic] to be the same old Donald. He related to me bizarre incidents, but it did not occur in my presence.

(PCR V7 261).

> the impression I got from these people that it would be a rare occasion if their eyes weren't open if they weren't messed up somehow, even if it was just residual.

(PCR V7 272). When faced with Dr. Gutman's "very negative" opinion of Mr. Dufour and his opinion "that we would not want to call him to the stand, that he would hurt our case", and the fact that Gutman offered no diagnosis beyond that of being competent and "polymorphous perverse", reasonable counsel would have consulted a second expert to investigate further. (PCR V9 735). "In light of what information counsel had, "counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." Wiggins v. Smith, 123 S.Ct. 2527, 2538 (2003).

b. Family and childhood mitigation

The lower court held that counsel's failure to investigate and present evidence of Mr. Dufour's traumatic childhood was not deficient performance.

> At the hearing, counsel testified that the only member of Defendant's family that was willing to cooperate was Defendant's brother Gary. In fact, the record reflects that counsel brought out several facts about Defendant's background through his brother Gary, including that Defendant had been exposed to homosexuality by his brother George, (R.1587), and that Defendant started drug and alcohol abuse at a very young age. (R.1588). Counsel stated that he had contacted Defendant's brother George, but he had adamantly refused to get involved. In addition, Defendant himself did not want to get his family involved.

(PCR V11, 1140). The lower court erred.

A number of the court's justifications for not finding deficient performance are refuted or enfeebled by a complete reading of the record. Mr. Dvorak testified that George Dufour was uncooperative, but only after Mr. Dvorak accused him of pimping Donald to his friends. "[H]is brother basically pimped him to homosexuals. . . . and I do recall in my conversation with George Dufour that that came up and that may have been what terminated the conversation." (PCR V7 235, 237-38). Mr. Dvorak did testify that Donald Dufour did not want his family involved, however, Mr. Dvorak also testified that "ultimately the call was always mine and I knew it. Donald, if I said, no we're going to say it's red, ultimately he would say yes it's red." (PCR V7 258-59). This was evidenced by the fact that counsel called Gary Dufour to testify at the penalty phase.

Counsel never testified that they made a strategic decision not to present Mr. Dufour's childhood background of sexual abuse, physical abuse, drug and alcohol abuse, and poverty. Rather, the evidence below established that the mitigation was not presented because counsel never made a reasonable effort to investigate it. Other than an accusatory telephone call to George Dufour, meeting a nun who met Mr. Dufour after he had been sentenced to death in Mississippi, and hiring Dr. Gutman, counsel's penalty phase investigation consisted of speaking to state guilt phase witnesses. "I can tell you my sources, but who told me what is going to be tough. I got some from

Gary [Dufour]. Some from Stacey [Sigler], [Raymond] Ryan may have given me some, but not a lot." (PCR V7 279). This was not the "thorough" investigation mandated by the Sixth, Eighth, and Fourteenth Amendments. Williams, 529 U.S. at 376-78 "[C]ounsel were not in a position to make a reasonable strategic choice . . . because the investigation supporting their choice was unreasonable." Wiggins, at 2543.

c. Drug and alcohol abuse

The lower court held that counsel's failure to conduct a reasonable investigation of Mr. Dufour's history of drug and alcohol abuse was not deficient performance:

> As the State argues, presenting additional evidence of Defendant's drug and alcohol abuse "does not create any sympathy for him. The use of drugs and alcohol was simply an expression of his problematic personality disorder." Moreover, none of the experts could confirm that this history deprived Defendant of the ability and rationality to plan the robbery and murder in the instant case. Thus, this claim does not warrant relief.

(PCR V11, 1140-41).

The lower court's order ignores case law from this Court and the courts of the United States, that evidence of alcoholism and chronic substance abuse is valid mitigation. Heiney v. State, 620 So.2d 171 (Fla. 1993); Demps v. Dugger, 874 F.2d 1385 (11th Cir.1989); Hall v. State, 541 So.2d 1125 (1989); Boyett v. State, 688 So.2d 308 (Fal.1996). For example, this Court has held that unrebutted evidence that the

defendant's "reasoning abilities were substantially impaired by his addiction to hard drugs" is "significantly compelling" mitigation. Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989).

The lower court dismissed this mitigating evidence, stating, "[t]he use of drugs and alcohol was simply an expression of his problematic personality disorder". This problematic personality disorder stemmed from years of physical and sexual abuse and, as all three psychologists who testified at the evidentiary hearing found, lead Donald Dufour to drugs and alcohol as a way of coping with the abuse. Clearly, the drug and alcohol abuse was critical component of a compelling background mitigation.

Additionally, all four experts at the hearing below testified that Mr. Dufour's drug and alcohol abuse injured his brain. Three experts testified that the drug and alcohol abuse **did** affect Mr. Dufour's actions at the time of this crime and at the time of the crime which was used as a prior violent felony aggravating element, finding one or both of the statutory mental health mitigators (PCR V7 338-39; V8 485-86, 431).

The court's finding that Mr. Dufour's history of drug and alcohol abuse was not mitigating because "none of the experts could confirm that this history deprived Defendant of the ability and rationality to plan the robbery and murder in the instant case" was also an error of law. In requiring the evidence to establish that drugs and alcohol "deprived Defendant of the ability and rationality to plan the robbery and

murder in the instant case" to establish mitigation, the lower court in essence required Mr. Dufour to meet the much greater burden of proving he was legally insane.

> Under the M'Naughten Rule an accused is not criminally responsible if, at the time of the alleged crime, the defendant was by reason of mental infirmity, disease, or defect **unable to understand the nature and quality of his act or its consequences** or was incapable of distinguishing right from wrong. *(Citations omitted)*.

Hall v. State, 568 So.2d 882 (Fla. 1990)(emphasis added). The court's dismissal of this mitigating evidence, based on an erroneous standard, is similar to the sentencing order this Court reversed in Mines v. State, 390 So.2d 332 (Fla. 1980). In Mines, this Court remanded Mr. Mines' case for a resentencing, holding:

> From the record it is clear that the trial court properly concluded that the appellant was sane, and the defense of not guilty by reason of insanity was inappropriate. The finding of sanity, however does not eliminate consideration of the statutory mitigating factors concerning mental condition.

Mines v. State, 390 So.2d at 337. Similarly, in Ferguson v. State, the trial court refused to find the statutory mental mitigators because, "[t]his defendant's conduct from the crime through the trial is indicative of an individual who has an absolute understanding of the events and the consequences thereof." Ferguson v. State, 417 So.2d 631, 637 (1982). This Court vacated Mr. Ferguson's death sentence, noting:

> Apparently, the judge applied the wrong standard in

> determining the presence or absence of the two mitigating circumstances related to emotional disturbance, so we have no alternative but to return this case to the trial judge for resentencing.

Ferguson, 417 So.2d at 638. See also Campbell v. State, 571 So.2d 415, 428 (Fla. 1990).

The failure to present a nonexistant insanity defense is not deficient performance, but the failure to present compelling statutory and nonstatutory mitigation is deficient performance. In light of what information counsel had, "counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible. Wiggins v. Smith, 123 S.Ct. 2527, 2538 (2003).

d. Counsel's failure to present evidence of Mr. Dufour's excellent prison record at Lantana Correctional Institute was deficient performance.

The lower court held that counsel's failure to present evidence of Mr. Dufour's excellent prison record at Lantana Correctional Institute was not deficient performance because it conflicted with other evidence presented at the hearing below.

> As the State correctly, points out, this is in direct contradiction to the picture of the brain damaged out of control drug addict that counsel was trying to present as mitigation. Defendant has argued previously that counsel was ineffective for failing to present further evidence of the effect his drug use had on his ability to control his behavior.

> It would have been unreasonable and incredible for counsel to present contradicting arguments. The State could have used this "excellent prison record" evidence to impeach the evidence of the long term effects of Defendant's alcohol and drug use. Accordingly, this Court finds that counsel reasonably chose not to put this evidence before the jury.

(PCR V11, 1143). The lower court erred.

Evidence of the ability to act appropriately when not using drugs and alcohol and while living in a structured setting does not contradict evidence of brain damage, mental illness, and the effects of drugs and alcohol at the time of the crime. A good prison record is evidence of potential for rehabilitation and is mitigation. Hitchcock v. Dugger, 481 U.S. 393 (1987); Lockett v. Ohio, 438 U.S. 586 (1978); Delap v. Dugger, 890 F.2d 285 (11th Cir.1989); Skipper v. South Carolina, 476 So.2d 1 (1986); Demps v. Dugger, 874 F.2d 1385 (11th Cir.1989). Good prison behavior, in an environment away from drugs and alcohol, would not contradict mitigating evidence of mental illness, brain damage, and impaired capacity at the time of the crime. The good prison record merely establishes the potential for rehabilitation and the fact that Mr. Dufour could be contributing member in prison society, if sentenced to life. Additionally, it was consistent with defense counsel's penalty phase theory. " I believed at the time that the best approach I could take was to try and stay somewhat consistent with that he was a follower, to show that he adapted well in an institutional

setting and was not a danger there and he would be short of being there the rest of his life as a result of the verdict" (PCR V7 239-40).

Throughout Mr. Dufour's trial, the state bombarded the jury with testimony that Mr. Dufour behaved criminally while in jail awaiting his trial. This left the jury with the dangerous impression, as argued by the state in its closing argument, that Mr. Dufour could not behave appropriately in a structured environment and the only possible solution was death. With minimal investigation, counsel could presented compelling evidence to refute that argument.

e. Counsel did not conduct a reasonable investigation.

"In assessing the reasonableness of an attorneys investigation, . . . , a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." The evidence known to Mr. Dufour's counsel clearly would have lead a reasonable attorney to investigate further. Counsel knew or had reason to know that Mr. Dufour was mentally ill, had brain damage, borderline or retarded intelligence levels, had been sexually abused by both men and women and "pimped"by his brother, that the sexual abuse was connected to this crime, had been physically abused, raised in poverty, had a lethal addiction to drugs and alcohol, and was under the effects of drugs and alcohol at the time of this crime. "[A]ny reasonably competent attorney would have realized

that pursuing these leads was necessary to making an informed choice among possible defenses." Wiggins v. Smith, 123 S.Ct. 2527, 2537 (2003). Mr. Dufour's case is indistinguishable from cases in which the federal courts have found violations of the Sixth and Fourteenth Amendments. "At the 3.850 proceeding, [Mr. Dvorak] admitted that he did not understand the difference in mitigating and aggravating factors, particularly in relation to drug use or intoxication and [Mr. Dufour's] family background. This misunderstanding clearly influenced [Mr. Dvorak's] decision to present [essentially] no mitigating evidence in [Mr. Dufour's] defense at sentencing. The reasons given for not presenting this evidence and witness testimony reveal [Mr. Dvorak's] misapprehension of mitigating evidence or a misrepresentation of the record, either of which could have been compelling to the jury and resulted in a vote for life imprisonment instead of death." Hardwick v. Crosby, 320 F.3d 1127, 1188-89 (11th Cir.2003). The lower court erred in holding otherwise. [T]he "strategic decision"the state court[] invoked to justify counsel's limited pursuit of mitigation "resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." Wiggins v. Smith, 123 S.Ct. 2527, 2538 (2003).

2. Counsel's deficient performance prejudiced Mr. Dufour.

Mitigation was Mr. Dufour's only defense. "[T]he sentencing jury knew much

about the crime, having just convicted [Mr. Dufour] of a brutal murder, but little about the circumstances of the defendant." Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989). As a result of the mitigation counsel did investigate and present, the sentencing court found no mitigation. Dufour, 495 So.2d at 164. Therefore, the addition of any mitigating evidence, let alone the compelling mitigation proven at the hearing below, would change the outcome of the penalty phase. The lower court's decision otherwise was error.

The lower court held that counsel's deficient performance did not prejudice Mr. Dufour because an adequate mental health evaluation and presentation may have revealed "negative" information, namely the facts that Mr. Dufour had "traits of a person with anti-social personality disorder, had pulled a knife on a playmate as a child, and at one point, associated with devil worshipers who used exhumed bodies in their rites" (PCR V11 1140). This decision was erroneous for two reasons. First, the "negative"facts were cumulative to those presented during the guilt and penalty phases. The jury heard that Mr. Dufour routinely engaged in antisocial-type behaviors: drug and alcohol abuse, pimping, and a prior murder conviction, and that he associated with unsavory people. Second, the United States Supreme Court has specifically held that prejudice occurs when compelling mitigation exists, even though some negative information might be revealed in the mitigation presentation. In Williams

v. Taylor, Williams was convicted of first degree murder and received a unanimous death recommendation during his penalty phase. Id. at 368-70. Williams had been convicted of several prior violent felonies, including an assault that left a woman in a "vegetative state" with no prognosis of recovery. Id. at 368. During the penalty phase, counsel presented "Williams' mother, two neighbors and a taped statement by a psychiatrist". Id. Habeas proceedings revealed that substantial background and mental health mitigation was available but Williams' counsel did not investigate it. The United States Supreme Court found prejudice, noting that, "not all of the additional evidence was favorable to Williams" but "the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession". Id.

Additionally, the lower court did not apply the prejudice analysis mandated by the United States Supreme Court. The proper analysis is whether there is "a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel *had presented and explained the significance of all the available evidence*." Williams v. Taylor, 529 U.S. 362, 398-399 (2000)(emphasis added). In this case, penalty phase counsel presented mitigation evidence which established *nothing* in mitigation. Dufour, 495 So.2d at 164. Had counsel ensured that Mr. Dufour received an adequate mental health evaluation, counsel could have

presented an overwhelming amount of mental mitigation:

1. brain injury;
2. psychosis;
3. delusional paranoid thinking;
4. hallucinations;
5. mood disturbance;
6. Mr. Dufour's I.Q. scores are primarily in the mentally retarded and borderline range of intelligence;
7. substance abuse disorder;
8. personality disorder with borderline, antisocial, and paranoia features;
9. the crime was connected to the homosexual abuse Mr. Dufour suffered as a child;
10. Mr. Dufour was physically abused as a child, and the physical abuse caused him to abuse drugs and alcohol as a means of coping;
11. he was suffering an extreme mental or emotional disturbance at the time of the crime;
12. he had organic brain syndrome which substantially impaired his capacity to appreciate the criminality of his conduct at the time of the crime

(PCR V7 338-39, V8 469-70, 478-83, 431). There is a reasonable probability that this mitigating evidence would have changed the outcome of the sentencing proceeding. "Had the jury been able to place [Mr. Dufour's] excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." Wiggins, 123 S.Ct. at 2543.

B. Counsel's decision to call Stacey Sigler as a mitigation witness was deficient performance because it permitted the state to admit and argue bad character evidence and nonstatutory aggravation. Mr. Dufour' death sentence is the prejudice.

Stacey Sigler testified against Mr. Dufour during the guilt phase of the trial. During the penalty phase, defense counsel called Sigler as a mitigation witness. In response to defense counsel's questions, Stacey Sigler testified that Donald Dufour liked kids, loved her grandmother, "didn't have a good childhood", has a brother who is gay, did not like her to work as a prostitute, and used cocaine and alcohol (TR 1575-82). On cross examination, the prosecution vitiated what little mitigation Sigler established by eliciting testimony from the teenage Sigler that her grandmother felt Donald Dufour was a dangerous influence on her, she supported him for eight months while working as a prostitute, and he brought prostitution clients to her (TR 1575-82). Had counsel not unreasonably opened the door to this evidence by calling Sigler, the jury would not have heard argument that Mr. Dufour prostituted his teenage girlfriend.

At the hearing below, counsel testified that his penalty phase strategy was to "try to show him as a somewhat normal person within the community" and not "that he's this drugged out drunken maniac who is most mothers' and fathers' worse [sic] fear out there with their kids." (PCR V7 239-40). Regardless of that strategy, and likely because counsel did not conduct a reasonable mitigation investigation, counsel called Sigler as the primary mitigation witness because he felt he could "could blunt what she would have to say about the drug usage and the alcohol and her prostitution and things

like that, easier than I could an expert, if that makes sense." (PCR V7 241). In calling Sigler, counsel presented the exact mitigation he testified he tried to avoid. The record reveals that counsel did not "blunt" the prejudicial impact of "the drug usage and the alcohol and her prostitution and things like that".

The lower court held that it was not ineffective assistance.

> The Court concludes that there is no reasonable probability that the jury would have recommended a life sentence, had they not heard Ms. Sigler's concessions on cross-examination. Accordingly, relief is not warranted.

(PCR V11, 1142). The lower court erred.

Because counsel did not reasonably investigate or present any mental health mitigation, counsel had only character evidence to convince the jury that Donald Dufour should live. Character evidence that Mr. Dufour was a "dangerous individual" who acted as his teenage girlfriend's pimp was not the kind of evidence that would convince a jury that Mr. Dufour was a person worth saving. There is a reasonable probability that had counsel investigated and presented the compelling evidence discussed above and not presented evidence that Mr. Dufour was a "dangerous individual" who acted as his teenage girlfriend's pimp, the outcome would have differed. The lower court erred.

C. Counsel was ineffective for failing to effectively object to improper hearsay testimony.

During the penalty phase, the state presented Thomas Mayfield, who prosecuted Mr. Dufour for the Mississippi murder of Earl Wayne Peeples. During the course of his testimony, the prosecution asked Mr. Mayfield to summarize the testimony of the pathologist who testified at Mr. Dufour's Mississippi trial (TR 1561). Counsel objected to it as hearsay (TR 1561). The prosecutor responded that hearsay is admissible in penalty phase proceedings, and the court overruled the objection (TR 1561). Mr. Mayfield was allowed to summarize the pathologist's testimony while displaying pictures. This prejudiced Mr. Dufour because he was not able to rebut the summarized testimony.

Hearsay testimony is permitted in penalty phase proceedings, *provided the defendant is accorded a fair opportunity to rebut any hearsay statements*. §921.141 (1) Fla. Stat. (1983). In this case Mr. Dufour had absolutely no opportunity to rebut the pathologist's conclusions as Mayfield paraphrased them, so the summarized testimony was not admissible.

The lower court denied this claim:

> Counsel objected to this testimony as hearsay, and the court overruled the objection. (R.1561). Therefore, counsel sufficiently preserved this issue for appellate review, and thus, it is not proper in this postconviction proceeding.

(PCR V11, 1142). The lower court's analysis is error.

The prejudice analysis should not focus on whether or not counsel preserved this issue for appellate review, the appropriate analysis should focus on the jury's reaction to the improper presentation of this prejudicial hearsay testimony. Had counsel pointed out the limitation on the state's ability to present hearsay testimony, that hearsay testimony is permitted in penalty phase proceedings, *provided the defendant is accorded a fair opportunity to rebut any hearsay statements*, there is a reasonable probability that the devastating summary and accompanying pictures would not have been admitted. They jury would not have been swayed by the prejudicial testimony, and the penalty phase outcome would have differed.

D. Counsel was ineffective for failing to object to the prosecutor's improper penalty phase closing argument.

The prosecution urged the jury to recommend a death sentence:

> Do the aggravating factors outweigh any mitigating factors the defense can tell you? That is where you have to weigh the significance of a human life in our society versus a pretty piece of jewelry. It is custom made and unique.
>
> I don't think too many people in the state of Florida think that having a piece of jewelry is worth taking a human life.
>
> * * *
>
> If you are going to return a recommendation that makes a legal or moral judgement about Donald Dufour's actions, the only verdict, the only recommendation would be that the sentence of death should be applied to him because society

> cannot tolerate this type of behavior that Donald Dufour has indulged in. He has killed not once, but twice.
>
> When you return a recommendation, the verdict has to make a statement about the seriousness of the crime and about the value of human life, the value of innocent human life.

(TR 1615).

This argument was improper because, under Florida law, the jury was required to weigh the aggravating circumstances against the unique mitigating circumstances of Donald Dufour's life. When the prosecutor told they jury they had to "weigh the significance of a human life in our society versus a pretty piece of jewelry", the prosecutor mislead the jury, which could only result in the standardless sentencing forbidden by the Eighth Amendment (TR 1615). Moreover, the prosecution made an improper argument to the jury to act as the conscience of the community. Counsel performed deficiently in failing to object to this improper argument which likely resulted in a standardless and unconstitutional death sentence.

The lower court denied this claim, holding: "Having reviewed the record, this Court concludes that the prosecutor's comments were not objectionable." (PCR V11, 1142). The lower court erred. The comments violate Florida law as well as the Eighth and Fourteenth Amendments. Therefore, counsel's failure to object to them was ineffective assistance of counsel.

E. Counsel was ineffective for failing to object to the improper penalty phase instruction that the crime was committed for the purpose of avoiding a lawful arrest.

The jury was improperly instructed and the trial court improperly found that Donald Dufour committed this crime for the purpose of avoiding a lawful arrest. § 921.141 Fla. Stat. (1981). The state failed to establish that this murder was committed for the sole or dominant purpose of eliminating a witness as well as the requisite proof required for the jury to receive this instruction. Dufour v. State, 495 So.2d 154, 163 (Fla.1986). However, because counsel failed to make the appropriate argument, the jury heard the instruction and probably found this aggravating circumstance. The weighing process was unconstitutionally weighted in the state's favor. Had counsel effectively argued against this instruction, the jury would have considered the balance of aggravating and mitigating circumstances differently, and at least one juror probably would have recommended a life sentence.

The lower court denied this claim:

> First, Defendant's allegation is merely speculation. Second, even if one juror had recommended a life sentence, the trial court could have properly imposed the death penalty relying on the analysis and result which the Supreme Court found to be correct.

(PCR V11, 1143). The lower court erred.

The prejudice analysis should not hinge on the number of jurors voting for

death: " if there is a reasonable probability that one juror would change his or her vote, there is a reasonable probability that the jury would change its recommendation." Bertoletti V. Dugger, 883 F.2d 1503, 1519 n.12 (11th Cir. 1989). "The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decision maker, such as unusual propensities toward harshness or leniency." Strickland v. Washington, 466 U.S. 668 at 695, 104 S.Ct. 2052 at 2068(1984). Because the jury recommendation did not list which, if any, of the aggravating circumstances it found, speculation is the only possible kind of analysis. There is a reasonable probability that a reasonable juror considered this aggravator as the one which tipped the balance in death's favor. With research, counsel could have prevented the jury from being instructed on this aggravating element. Confidence in the outcome is undermined.

F. Cumulatively, counsel's ineffective assistance deprived Mr. Dufour of his rights to a fair trial and penalty phase.

Counsel's deficient performance throughout the penalty phase, cumulatively, deprived Donald Dufour of the fundamentally fair sentencing to which he was entitled under the Eighth and Fourteenth Amendments. See State v. Gunsby, 670 So. 2d 920 (Fla. 1996); Darden v. McNeel, 938 F.2d 605 (5th Cir. 1991). Confidence in the

outcome is undermined.

ARGUMENT III

MR. DUFOUR WAS DEPRIVED OF HIS DUE PROCESS RIGHTS TO DEVELOP FACTORS IN MITIGATION BECAUSE THE COURT APPOINTED PSYCHIATRIST FAILED TO CONDUCT THE APPROPRIATE TESTS FOR BRAIN DAMAGE AND MENTAL ILLNESS. THIS VIOLATED MR. DUFOUR'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION.

Standard of Review

This is a mixed question of facts and law, so the appropriate standard of review is de novo, with deference given to the lower court's findings of fact. See e.g. Stephens v. State, 748 So.2d 1028, 1032-33 (Fla.2000).

Due process requires competent mental health assistance to ensure fundamental fairness and reliability in the adversarial process. Mason v. State, 489 So.2d 734 (Fla.1986); Sireci v. State, 536 So.2d 231 (Fla. 1988); Ake v. Oklahoma, 470 U.S. 68 (1985). Donald Dufour did not receive a professionally adequate mental health evaluation and hence, a fundamentally fair sentencing, in light of the mitigation which

should have been presented. Dr. Gutman, the psychiatrist hired to assist Mr. Dufour, did not give Mr. Dufour competent mental health assistance because he did not perform a competent evaluation which would have revealed mitigating factors of brain injury, mental illness, borderline to mentally retarded I.Q., and sexual abuse.

Dr. Gutman's evaluation of Mr. Dufour was patently inadequate to evaluate mitigation for Mr. Dufour's case. Dr. Gutman's report reveals that he spent only one and a half hours with Mr. Dufour, that he conducted no tests, and that he spoke to no independent witnesses. The report reveals an appalling prejudice and disrespect for the victims, referring to them only as homosexuals, and the murders as "homocides", as well as to Mr. Dufour. The most persuasive evidence of inadequacy in Dr. Gutman's report is the absolute absence of information regarding Donald Dufour's history of childhood drug and alcohol abuse and the physical and sexual abuse he suffered throughout his formative years. Without giving any tests, Dr. Gutman concluded that Donald Dufour was of "average intelligence", even though school reports revealed "he didn't perform very well in school. The I.Q. values at that time, but I'm not certain if they were individual tests or class tests, group tests, were about 75 or 80. Much of the activity in school has to do with learning how to read and he had difficulty reading and still does." (PCR V9 644).

The evidence presented at the evidentiary hearing below established that

Gutman's evaluation fell far below the standards for a mitigation evaluation that prevailed in 1984. Dr. Berland testified about the 1984 standards for a forensic evaluation.

> Particularly at that time the lead on developing mitigation was taken by the attorney, and my role most typically was to determine if there was evidence of mental illness, particularly psychosis was the emphasis in my case and brain injury and then whether the defendant appeared to meet any of the clinical legal criteria that applied, such as trial competency, insanity, are, of course, mitigation for penalty phase.
>
> * * *
>
> I routinely did psychological testing. I interviewed the defendant, I sought out both case related documents and any medical records that were available and then I had begun early on interviewing lay witnesses who could corroborate and elaborate on various aspects of the evaluation, people who had known the defendant at various stages of their life.

(PCR V7 467). Dr. Berland conducted an evaluation using the 1984 standards and spent between seven and ten hours reviewing documents that existed in 1984, and more than six hours interviewing and testing Mr. Dufour (PCR V7 497-98). Dr. Merin, the state's expert, spent approximately seven hours reviewing materials that existed in 1984 and over five hours testing and interviewing Mr. Dufour (PCR V9 641-42).

The evidence also established that substantial mitigating evidence was available, had Gutman conducted a proper evaluation. Dr. Berland found evidence of psychosis,

brain injury, delusional paranoid thinking, hallucinations, and mood disturbance (PCR V8 469-70, 478-83). He further concluded that there was "substantial information that would permit a conclusion that he was under the influence of extreme mental or emotional disturbance" and that Mr. Dufour's capacity to conform his conduct to the requirements of the law was substantially impaired at the time of the crime (PCR V8 485-86). Dr. Bourg-Carter opined that the crime was connected to the homosexual abuse he suffered as a child and that Mr. Dufour was suffering an extreme mental or emotional disturbance at the time of the crime because he had a chronic substance abuse disorder (PCR V8 431). Dr. Lipman opined that, based on his determination that Mr. Dufour was suffering from an organic brain syndrome caused by the combination of drugs and alcohol, the organic brain syndrome was a mental and emotional disturbance, and it substantially impaired Mr. Dufour's capacity to appreciate the criminality of his conduct at the time of the crime (PCR V7 338-39). Dr. Merin concluded that Mr. Dufour's I.Q. scores are primarily in the mentally retarded and borderline range of intelligence, he has a "neurocognitive disorder", a substance abuse disorder, and a personality disorder with borderline, antisocial, and paranoia features (PCR V9 579-80, 611).

The lower court denied this claim, holding:

> Ultimately, Dr. Merin made essentially the same conclusions

> of Defendant's mental capabilities as Dr. Gutman had prior to Defendant's trial. . . This Court concludes that Dr. Gutman's evaluation of Defendant was adequate and that there is no reasonable probability that the outcome of Defendant's trial would have different [sic] had another expert been consulted.

(PCR V11, 1144-45). The lower court's order reveals a patent mischaracterization of the unrefuted evidence presented below.

Though Dr. Merin did testify that Dr. Gutman's finding of a "polymorphous perverse" personality was not inconsistent with his diagnosis of a personality disorder, Dr. Merin's mitigation diagnosis went far beyond a mere personality disorder (PCR V9 613-14).

Dr. Merin determined that the majority of Mr. Dufour's I.Q. test scores are in the mentally retarded or borderline level of intelligence: he has a verbal I.Q. of 85 and a performance I.Q. of 64 (PCR V9 579-80). Dr. Merin opined that Mr. Dufour has depressive, dependent, and schizotypal personality features, in addition to the "polymorphous perverse", as well as anxiety and drug and alcohol dependence disorders (PCR V9 592). Dr. Merin further concluded that Mr. Dufour had brain impairment or injury on both sides of his brain (PCR V9 611, 627). Mr. Dufour felt remorse (PCR V9 610). Dr. Merin testified that Mr. Dufour "does not see himself to be delusional. That may be a delusion in itself." (PCR V9 641).

Dr. Merin offered a mitigating explanation for Mr. Dufour's addiction to drugs and alcohol:

> I think he had a terrible relationship with his father and I think that he started the need to cope with that particular way and that particular way in which he coped with it, he found early on that if he sipped his father's beer maybe he felt a little better, he wasn't as tensed, or whatever, and just moved along from there.

(PCR V9 643). He explained that Mr. Dufour's scholastic failures were a result of his deficient intelligence:

> he didn't perform very well in school. The I.Q. values at that time, but I'm not certain if they were individual tests or class tests, group tests, were about 75 or 80. Much of the activity in school has to do with learning how to read and he had difficulty reading and still does.

(PCR V9 644).

Dr. Merin was the state's rebuttal witness, and his proper mental health evaluation went far beyond Dr. Gutman's to reveal that substantial and compelling mitigation existed and was available for presentation to the jury, had a proper evaluation been done. Clearly, Mr. Dufour did not receive the proper mental health evaluation to which he was entitled and, as a result, did not receive the individualized sentencing mandated by the Eighth and Fourteenth Amendments. The lower court's decision otherwise is error.

ARGUMENT IV

THROUGHOUT MR. DUFOUR'S TRIAL AND PENALTY PHASE, THE JURY WAS PRESENTED WITH PREJUDICIAL AND IRRELEVANT EVIDENCE. THE CUMULATIVE IMPACT OF THIS PREJUDICIALLY IMPROPER EVIDENCE DENIED MR. DUFOUR HIS RIGHTS TO A FAIR TRIAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION. THE LOWER COURT DENIED MR. DUFOUR A FULL AND FAIR EVIDENTIARY HEARING BY DENYING HIM THE OPPORTUNITY TO INTERVIEW HIS JURORS SO THAT HE COULD PROVE THE PREJUDICIAL EFFECT OF THE IMPROPER EVIDENCE.

Standard of Review

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

Throughout Mr. Dufour's trial the jury was presented with a barrage of circumstances and testimony which prejudiced him:

The trial court forced Mr. Dufour to appear in court shackled (TR 3, 5, 333, 334, 1505-06). To reduce the prejudice and assault on Mr. Dufour's right to the presumption of innocence inherent in the shackling, the court created a makeshift modesty panel to hide the shackles. Defense counsel observed that the slapdash

modesty panel stuck "out like a sore thumb", accentuating the shackles (TR 3). There is a reasonable probability this improperly influenced the jury's decision both in the guilt and penalty phases.

The state called the victim's sister to testify about the victim's jewelry. The witness testified to her name, address, and knowledge of the victim and then began sobbing while on the witness stand (TR 717). This emotional display was unconstitutional victim impact evidence which prejudiced Mr. Dufour.

During the guilt phase, the state improperly elicited from Raymond Ryan testimony that, "Donald liked guys" (TR 828). The state again improperly placed Mr. Dufour's sexuality at issue when the prosecutor asked Stacey Sigler, "When you were the defendant's girlfriend, did he, on occasion, pick up men to have sexual relations with them?" (TR 1236). Mr. Dufour's sexuality was not relevant to this crime and the prosecution's elicitation of this fact served only to improperly degrade Mr. Dufour and present the risk that the jury's verdict was not based solely upon the evidence at issue, but upon their disapproval of Mr. Dufour's proclivity to homosexual relationships.

The jury was tainted by knowledge that juror Girdner was excused because her husband received a strange telephone call (TR 1344, 1346-47). Though the telephone call alone was not necessarily prejudicial, the remaining juror's knowledge of the

telephone call, with their knowledge that juror Girdner was excused from jury duty because of it, left the jury with the prejudicial impression that Mr. Dufour had threatened Girdner and that the other jurors had reason to fear Mr. Dufour as well. This likely improperly influenced the jury's decision to recommend the death penalty.

The improper influences and evidence, in light of the extensive pre-trial publicity regarding five murders and lack of sequestration, could only have improperly influenced the jury's decisions. An opportunity to interview the jurors was necessary to determine the extent of the prejudice and prove it denied Mr. Dufour his rights to a fair and impartial jury.

The lower court erred in denying this claim because it "should have been raised on direct appeal" (PCR V11, 1145). Juror interviews were not contained within the appellate record, so appellate counsel could not have raised the issue on direct appeal. This is a postconviction issue, and by denying Mr. Dufour the opportunity to pursue it through juror interviews, the lower court denied Mr. Dufour his rights to a fundamentally fair trial, penalty phase, and evidentiary hearing (PCR V10, 972).

ARGUMENT V

MR. DUFOUR'S SENTENCING JURY WAS MISLED BY COMMENTS, QUESTIONS, AND INSTRUCTIONS THAT UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY FOR THEIR ROLE

IN THE SENTENCING PROCESS, VIOLATING THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT PROPERLY OBJECTING.

Standard of Review

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

Throughout Mr. Dufour's trial, the trial court unconstitutionally minimized the jury's role in the sentencing process. The court began diminishing the jury's role in the sentencing process when first addressing the entire venire.

> Okay. **My, the decision that would be made in the case as far as the penalty or what penalty would be imposed is the judge's responsibility. I would be making that decision if there is a guilty verdict.**

(TR 36)(emphasis added).

* * *

> **Under Florida law the trial judge is not bound by the jury's decision on that point. It's a recommendation. The judge is not absolutely bound in any event**. The recommendation, however, does weigh heavily in the consideration that the judge ultimately makes in imposing a sentence. **Because I do want you to understand that the judge can reject the recommendation either way.**

(TR 37)(emphasis added). During individual voir dire, the trial court repeatedly diminished the seated jurors' responsibility in the sentencing process (TR 129, 140 ("If there were a recommendation of capital punishment the ultimate decision on whether or not that would be the sentence would be left to me as the trial judge. The jury's recommendation would be given serious consideration, but it would not be binding. Do you understand that?), (TR 248-49) ("The death penalty is the judge's decision after the law is made following a recommendation of the jury after a trial or a hearing. Do you understand that?"), (TR 275) ("It would be up to the Judge on what the sentence would be. Do you understand me on that?"). The court then gathered all the prospective jurors and again, diminished their role in the sentencing process.

> **Now, those recommendations either for the death penalty or for life imprisonment are not binding on the trial judge. They're not binding on me. I would be the sentencing judge also.** However, they would be given very serious consideration. They would have a substantial impact on the decision that I would ultimately have to make. **But that decision would be mine.**
>
> **So the jury is not responsible directly or would not be responsible for calling for the death penalty, if that were the case.**

(TR 370)(emphasis added).

The court again denigrated the jury's role in the sentencing process when giving the jury the penalty phase instructions:

> 4. Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for the crime of first degree murder. **As you have been told , the final decision as to what punishment shall be imposed is for the Court to decide. It is my responsibility.**

(TR 1632)(emphasis added).

In Caldwell v. Mississippi, 472 U.S. 320 (1985), the United States Supreme Court held that, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere". Id. at 328-29. If the jury's responsibility for its role in determining a death sentence has been diminished, the defendant may be biased. It may likely deprive a defendant of his constitutional rights to an individualized sentencing proceeding because the jury feels that any lack of consideration will be appropriately decided by another authority. Id. at 330-331. For example, the jury might be unconvinced that death is the appropriate punishment but, nevertheless, recommend a death sentence to express disapproval for the defendant's acts or "send a message to the community". Id. at 331. Moreover, a jury "confronted with the truly awesome responsibility of decreeing death for a

fellow human," McGautha v. California, 412 U.S. 183, 208 (1971), might find a diminution of its role and responsibility for sentencing attractive. Caldwell, 472 U.S. at 332-33. As the Caldwell Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only factual guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Id. at 332-33 (emphasis supplied).

In Mann v. Dugger, 844 F.2d 1466 (11th Cir. 1988), the Eleventh Circuit Court of Appeals held that the Caldwell principles apply to Florida juries. Noting that the Florida legislature intended that the sentencing jury play a significant role in the Florida death penalty sentencing scheme and the Florida Supreme Court's severe limitations

on a trial judge's ability to override the jury's recommendation, the Eleventh Circuit held that the jury and trial judge are essentially dual sentencers. Id. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)(The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ."). Thus, comments that mislead or confuse the jury as to the nature of its sentencing responsibility under Florida law result in an invalid death sentence which violates the Eighth Amendment. Id. at 1458.

Despite the federal authority, in Grossman v. State, 525 So.2d 833 (Fla.1988), this Court held that the rationale of Caldwell is inapplicable in Florida because the judge, not the jury renders the sentence. This Court has rejected Caldwell claims in the past because, under Florida's statutory scheme, the jury "render[s] an advisory sentence to the court" and the trial court, "notwithstanding the recommendation of a majority of the jury," enters the sentence.

Ring v. Arizona,122 S.Ct. 2428 (2002), caused members of this Court to re-examine the holding of Grossman. In Bottoson v. Moore, 833 So.2d 693 (Fla. 2002), Justice Lewis wrote:

> I write separately to express my view that in light of the dictates of Ring v. Arizona, it necessarily follows that Florida's standard penalty phase jury instructions may no longer be valid and are certainly subject to further analysis under the United States Supreme Court's Caldwell v.

> Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), holding. In Caldwell, the Supreme Court concluded "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." . . . There, the Court deemed prosecutorial statements to a jury unconstitutional because the State "sought to minimize the jury's sense of responsibility for determining the appropriateness of death." . . . Following the decision in Caldwell, this Court evaluated the constitutionality of Florida's standard jury instructions.
>
> * * *
>
> Just as the high Court stated in Caldwell, Florida's standard jury instructions "minimize the jury's sense of responsibility for determining the appropriateness of death."

Id., 833 So.2d at 731-34 (Lewis, J., concurring in result only)(citations omitted).

The lower court denied this claim, holding it "could have and should have been raised on direct appeal" and that it lacked merit (PCR V11, 1146). The lower court erred. This issue could not have been raised on direct appeal for two reasons. First, neither Caldwell nor Ring existed at the time of Mr. Dufour's trial. Second, even if the case law existed, defense counsel failed to make the appropriate objections to preserve the issue. Because the trial court's repeated comments told the jury that their recommendation was little more than a frivolous suggestion and trial counsel failed to object, Mr. Dufour did not receive the individualized sentencing to which he was

entitled under the Eighth and Fourteenth Amendments.

ARGUMENT VI

THE STATE COMMITTED FUNDAMENTAL ERROR BY DESTROYING EXCULPATORY PHYSICAL EVIDENCE WHILE THIS CASE WAS PENDING DIRECT APPEAL. THIS MISCONDUCT VIOLATES MR. DUFOUR'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION BECAUSE MR. DUFOUR CANNOT TEST THE EVIDENCE WHICH WOULD REVEAL HIS INNOCENCE OF THE DEATH PENALTY.

Standard of Review

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

The Orange County Sheriff found a number of hairs at the crime scene, including hair found on a stick, indicating that there was a struggle. The Sheriff submitted the hair to FDLE for testing. The Sheriff sought to determine: 1. whether the hair came from a person of African origin, 2. whether the hair came from the victim, and 3. whether the hair was Donald Dufour's (PCR V10, 788-93). FDLE testing revealed that the hair was not from a person of African origin and it did not come from Donald Dufour or the victim (PCR V10, 788-93).

The unknown hair was exculpatory evidence because the evidence the state presented at Mr. Dufour's trial indicated that there were three people present at the time of the murder. Ann Cole testified in Mr. Dufour's trial that she heard two or more men arguing near the scene of the crime (TR 662). The men did not sound frightened; they sounded angry (TR 622). Ms. Cole then heard a gunshot, and she might have heard voices after the shot (TR 623-24). Circumstantial evidence clearly suggests that the hairs found at the crime belonged to another person who was involved in the murder.

Pictures of the hair and the fact that the state tested it to determine whether it came from a person of African origin indicate that the hair was black. Robert Taylor's mother was Korean, and he had black hair. The state also presented evidence that Robert Taylor possessed the victim's jewelry and that he committed a murder with Mr. Dufour in Mississippi. Evidence another person, and most compellingly Robert Taylor, was present at the crime scene would have provided substantial mitigation. With this evidence, counsel could have presented evidence of the statutory mitigators that Mr. Dufour was an accomplice in the offense and his participation was relatively minor, and he acted under extreme duress or the substantial domination of another person. § 921.141(6)(d)(e) Fla. Stat. (1987). Additionally, evidence that another person was present at the crime and actually killed the victim would have provided Mr.

Dufour with the defense against the death penalty that it is an unconstitutionally disproportionate sentence. Enmund v. Florida, 458 U.S. 782 (1982).

Defense counsel filed a Motion to Compel Retention of All Evidence, Samples, and Investigator's Notes, which the court granted on January 16, 1984 (PCR V10, 808-9). Despite the court order, the Orange County Sheriff destroyed the hair evidence in March 1985, while Mr. Dufour's case was pending direct appeal.

At the hearing below, neither Diane Payne, the lead detective on the case, nor Dorothy Sedgwick, division chief for the Office of the State Attorney when this case was arraigned, could explain why they intentionally violated the court order and destroyed the exculpatory evidence (PCR V9 656, 711-12).

In Arizona v. Youngblood, 488 U.S. 51, 58 (1988), the United States Supreme Court held that a defendant's due process rights are violated when the state, in bad faith, fails to preserve useful evidence. In Youngblood, the state's neglect in properly destroying evidence was held not to be bad faith. Id. In Mr. Dufour's case, the Orange County Sheriff destroyed exculpatory physical evidence, in violation of a court order and before Mr. Dufour's conviction and sentence were final (PCR V10 808-14). These circumstances prove bad faith and a violation of Mr. Dufour's due process rights.

The lower court denied this claim, holding, "the Defendant failed to prove that

the destruction of the stick and hair by the Orange County Sheriff's Office was done in bad faith." (PCR V11, 1149). This decision was an error of law.

In Guzman v. State, 28 Fla.L.Weekly S829 (Fla. 2003), this Court held that "bad faith exists only when the police intentionally destroy evidence they believe would exonerate the defendant . . . Evidence that has not been examined or tested by government agents does not have "apparent exculpatory value" and thus cannot form a basis of a claim of bad faith destruction of evidence." Bad faith is the "breach of a known duty". Ohio v. Acosta, 2003 WL 22867986 (Ohio App. 1 Dist.). In Mr. Dufour's case, the state destroyed evidence it tested and knew to be exculpatory, in violation of a court order to preserve the evidence–a known duty. This illegal destruction of evidence violated Mr. Dufour's rights to challenge his counsel's effectiveness under the Sixth and Fourteenth Amendments, his rights to due process under the Fifth, Sixth, and Fourteenth Amendments, and his rights not to be subjected to cruel or unusual punishment under the Eighth and Fourteenth Amendments as well as his rights under the corresponding provisions of the Florida Constitution. The lower court erred.

ARGUMENT VII

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH

AMENDMENTS OF THE UNITED STATES CONSTITUTION.

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

Standard of Review

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

The United States Supreme Court decided Ring v. Arizona, 122 S.Ct. 2428, on June 24, 2002. The Court held that the Arizona statute pursuant to which, following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determines the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty, violates the Sixth Amendment right to a jury trial in capital prosecutions, receding from Walton v. Arizona, 497 U.S. 639 (1990). If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt. A defendant may not be exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. The Court noted that the "right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished" if it encompassed the fact-

finding necessary to increase a noncapital defendant's sentence by a term of years, as was the case in Apprendi, but not the fact-finding necessary to put him to death. Ring, 122 S.Ct. at 2437.

Ring overruled Walton, and the basic principle of Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam), which had upheld the capital sentencing scheme in Florida "on grounds that 'the Sixth Amendment does not require that the specific findings authorizing imposition of the sentence of death be made by the jury.'" Ring, 122 S.Ct. at 2437(quoting Walton, 497 U.S. at 648, in turn quoting Hildwin, 490 U.S. at 640-641)). Additionally, Ring invalidates the constitutionality of Florida's capital sentencing scheme by recognizing (a) that Apprendi applies to capital sentencing schemes, Ring, 122 S.Ct. at 2432 ("Capital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment"); id. at 2432, (b) that States may not avoid the Sixth Amendment requirements of Apprendi by simply "specif[ying] 'death or life imprisonment' as the only sentencing options," Ring, 122 S.Ct. at 2441-41, and (c) that the relevant and dispositive question is whether under state law death is "authorized by a guilty verdict standing alone." Ring, 122 S.Ct. at 2441.

Because the Florida death penalty statutory scheme requires fact-finding by the trial judge before a death sentence may be imposed, it is unconstitutional under the

principles announced in Ring. Like the Arizona statute, the Florida statute violates the rule enunciated in Ring and Apprendi that "[i]f a state makes an increase in a defendant's authorized punishment contingent on a finding of a fact, that fact . . . . must be found by a jury beyond a reasonable doubt." Just as the Arizona statute, the Florida statute mandates that a defendant "cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating circumstance exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." Because the judge – and not the jury – must make specific findings of fact before a death sentence under Florida law, Ring holds squarely that the statute is unconstitutional under the Sixth and Fourteenth Amendments.

Because the State did not submit to the grand jury, and the indictment did not state, the essential elements of the aggravated crime of capital murder, Mr. Dufour's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated. By omitting any reference to the aggravating circumstances that would be relied upon by the State in seeking a death sentence, the indictment prejudicially hindered Mr. Dufour "in the preparation of a defense" to a sentence of death. Because the recommendation did not list the aggravators found, it is impossible to know whether the jurors unanimously found any one aggravator proved beyond a

reasonable doubt. Accordingly, Mr. Dufour's death sentence violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as the corresponding provisions of the Florida Constitution. The lower court erred in denying this claim (PCR V11, 1149).

ARGUMENT VIII

FLORIDA STATUTE 921.141(5) IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, AND THE UNCONSTITUTIONALITY WAS NOT CURED BECAUSE THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE. MR. DUFOUR'S DEATH SENTENCE IS PREMISED ON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED. TO THE EXTENT TRIAL COUNSEL FAILED TO LITIGATE THESE ISSUES, TRIAL COUNSEL WAS INEFFECTIVE.

This Court has held that the following subclaims have no merit, however, they are raised herein to preserve the issues for future review.

Standard of Review

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

The jury was instructed on five aggravating factors in this case: 1) prior violent felony conviction, 2) during the course of a robbery, and 3) avoiding arrest, 4)

financial gain, and 5) cold calculated and premeditated (TR 1633-34). Two were unconstitutionally vague and overbroad and one unconstitutionally shifted an element of the death penalty eligible offense to Mr. Dufour. The sentencing judge was required to give "great weight" to the jury's recommendation. Thus, the trial court indirectly weighed the unconstitutional aggravating factors the jury is presumed to have found. Espinosa v. Florida, 112 S.Ct. 2926, 2928 (1992); Kearse v. State, 662 So.2d 677 (Fla. 1995). These errors were not harmless.

A. During the commission of a felony instruction.

Donald Dufour' jury was instructed, "[t]he crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery." (TR 1633). This aggravator is unconstitutional because it automatically applies to every felony murder and rendered Donald Dufour's penalty phase unconstitutionally vague and standardless. Donald Dufour entered the penalty phase automatically eligible for the death penalty while other similarly, or worse, situated people were not automatically eligible for the death penalty. A state cannot use such aggravating factors "which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black, 503 U.S. 527 (1992). This automatic aggravating circumstance did not "genuinely narrow the class of persons eligible for the death penalty," and therefore, the sentencing process was rendered unreliable. Zant v.

Stephens, 462 U.S. 862, 876 (1983). The jury's deliberation was obviously tainted by the unconstitutional and vague instruction. See Sochor v. Florida, 504 U.S. 527 (1992).

The jury's consideration of this aggravating circumstance violated Donald Dufour's Eighth and Fourteenth Amendment rights because it allowed the jury to consider an aggravating circumstance which applied automatically. Had the jury not heard this unconstitutional instruction, the balance of aggravating and mitigating circumstances would have weighed differently, and the outcome would have differed. The lower court erred in summarily denying this claim (PCR V11, 1150).

B. Cold, calculated, and premeditated jury instruction

Mr. Dufour's jury was instructed: "the crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification" (TR 1634). They received no further instruction regarding the application of this aggravator or to distinguish it from the premeditation they found when they determined that Mr. Dufour was guilty of first degree premeditated murder. Thus, this aggravating factor was overbroadly applied because the instruction failed to genuinely narrow the class of persons eligible for the death sentence. Zant v. Stephens, 462 U.S. 862, 876 (1983). As a result, Donald Dufour's death sentence was imposed in violation of the Eighth and Fourteenth

Amendments to the United States Constitution.

Cold, calculated, and premeditated applies only to "murders more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first-degree murder." Porter v. State, 564 So.2d 1060, 1064 (Fla.1990). The killing involves "calm and cool reflection". Richardson v. State, 604 So.2d 1107, 1109 (Fla.1992). "Calculated" mandates a special plan or pre-arranged design. Rogers, 511 So.2d at 533. Premeditation is a "heightened premeditation" which distinguishes the aggravating circumstance from the element of first-degree premeditated murder. Rogers, 511 So.2d at 533. Without these definitions, the aggravating circumstance violates the Eighth and Fourteenth Amendments. see Espinosa v. Florida, 112 S. Ct. 2926 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992).

Counsel's failure to request a constitutional instruction clearly prejudiced Mr. Dufour. In James v. State, 616 So. 2d 668 (Fla. 1993), this Court reversed the denial of Mr. James' postconviction claim that the heinous, atrocious and cruel aggravating factor is unconstitutionally vague. The Court held that James should have the benefit of Espinosa v. Florida because counsel objected to the instruction. The Court specifically addressed the cold, calculated and premeditated aggravator and declared that the same rule applies to it. Id. at 669, n.3. Thus, had counsel specifically

objected to the form of the instruction to preserve this claim for appellate review, Mr. Dufour likely would have received a new constitutional penalty phase proceeding.

This error was not harmless beyond a reasonable doubt. Had counsel effectively investigated and prepared for Donald Dufour's penalty phase, counsel would have thoroughly impeached the only witness who testified to Donald Dufour's actions surrounding the murder and established mitigating circumstances which probably would have resulted in a life recommendation. This erroneous instruction, combined with the other erroneous penalty phase instructions and counsel's ineffective assistance throughout Donald Dufour's penalty phase, was not harmless. The lower court erred in denying this claim.

C. Shifting the burden of proof during the penalty phase.

Under Florida law, a capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given *if the state showed the aggravating circumstances outweighed the mitigating circumstances.*

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). However, the court instructed Donald Dufour's jury, "Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine **whether mitigating**

circumstances exist that outweigh the circumstances." (TR 1634-35). The jury was later told: "You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations." (TR 1636). Defense counsel rendered prejudicially deficient assistance in failing to object to the errors.

The jury instruction violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution because it relieved the state of its burden to prove beyond a reasonable doubt the element that "sufficient aggravating circumstances" exist which outweighed mitigating circumstances by shifting the burden of proof to Mr. Dufour to prove that the mitigating circumstances outweigh sufficient aggravating circumstances. Mullaney v. Wilbur, 421 U.S. 684, 698 (1975). Additionally, the instruction violated the Eighth and Fourteenth amendments because it essentially told the jury that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Mills v. Maryland, 108 S. Ct. 1860 (1988); Hitchcock v. Dugger, 481 U.S. 393 (1987). This error was not harmless. Because Donald Dufour's sentencing jury was instructed that it could consider Florida's felony murder aggravating circumstance, and the same jury convicted him of robbery, Donald Dufour was eligible for death upon conviction. Donald Dufour

entered the penalty phase of his capital trial with the burden of proving that death was not the appropriate penalty. The lower court erred in denying this claim.

D. Conclusion

Cumulatively, counsel's failures to request constitutional instructions prejudiced Mr. Dufour. The cumulative impact of the erroneous instructions cannot be harmless in light of counsel's ineffective assistance throughout the penalty phase. The jury applied vague instructions and the court unconstitutionally shifted the burden of proof to Mr. Dufour. Mr. Dufour's death sentence violates the Eighth and Fourteenth Amendments. The lower court erred in denying this claim.

ARGUMENT IX

THE RULES PROHIBITING MR. DUFOUR'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT VIOLATES EQUAL PROTECTION PRINCIPLES, THE FIRST, SIXTH, EIGHT AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND DENIES MR. DUFOUR ADEQUATE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES.

Standard of Review

This is a legal question of constitutional magnitude so the appropriate standard

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

The Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 21, of the Florida Constitution require that Donald Dufour receive a fair trial. However, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar prevents Donald Dufour from determining whether he received a fair trial. Donald Dufour can only discover jury misconduct through juror interviews. To the extent it precludes undersigned counsel from investigating and presenting jury bias and misconduct that can only be discovered through interviews with jurors, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar is unconstitutional. Because the lower court denied Donald Dufour this opportunity to investigate and present a claim of juror misconduct, the court denied his rights to due process and access to the courts. The reliability and integrity of Donald Dufour's capital sentence is questionable. The lower court erred in denying this claim (PCR V10, 972).

ARGUMENT X

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED DONALD DUFOUR OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL FAILED TO EFFECTIVELY LITIGATE THESE ERRORS ON APPEAL.

Standard of Review

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

Donald Dufour did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. Several errors occurred during Mr. Dufour's capital trial. On direct appeal, this Court found that error occurred when the trial court improperly found the avoiding arrest aggravator as a basis for the death sentence. Dufour, 495 So.2d at 164. As well, trial counsel failed to present mitigating evidence sufficient to establish even one mitigating circumstance. "Because the court below found three proper aggravating and no mitigating circumstances, the result it reached, in spite of the error as to one factor, was correct and the death penalty properly imposed." Dufour, 495 So.2d at 164. (emphasis added). These errors clearly contributed to, if not caused, the death recommendation. State v. DiGuilio, 491 So.2d 1129, 1135 (Fla.1986).

Additional substantive errors occurred during the guilt phase as well as the penalty phase: counsel failed to strike impartial jurors and present a voluntary intoxication defense, counsel failed to investigate and present available mitigating evidence, counsel failed to request constitutional jury instructions, Mr. Dufour did not receive a competent mental health evaluation, the state presented prejudicial evidence

and improper argument, the penalty phase jury instructions were vague, overbroad, and illegally shifted the burden of proof to Mr. Dufour, and the lower court repeatedly denigrated the jury's role in the sentencing process. Additionally, the stated acted in bad faith when it violated a court order destroyed exculpatory evidence before Mr. Dufour's case was even final. Cumulatively, these errors show that Mr. Dufour did not receive the fundamentally fair capital trial and penalty phase to which he was entitled under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. See State v. Gunsby, 670 So.2d 920 (Fla.1996); Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991).

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Dufour respectfully urges this Honorable Court to vacate the lower court's order and remand the case for a new trial, penalty phase, or for such relief this Court deems appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this _____ day of February, 2004.

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CERTIFICATE OF COMPLIANCE

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

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