IN THE SUPREME COURT OF FLORIDA

No. SC03-1326

DONALD W. DUFOUR,
Appellant

versus,

STATE OF FLORIDA,
Appellee.

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

REPLY BRIEF OF APPELLANT

LESLIE ANNE SCALLEY
FLORIDA BAR NO. 0174981
ASSISTANT CCC

MARIE-LOUISE SAMUELS PARMER
FLORIDA BAR NO. 0005584
ASSISTANT CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544
813-740-3554 (Facsimile)

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER

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.

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

The Appellee argues that "the record below demonstrates that neither juror expressed a view of the death penalty which would have prevented them from serving as an impartial juror" (Answer at 30), however, a review of the portion of the record the Appellee cited to support that proposition proves that argument is false. Juror Frazier stated, in response to the state's question what would make her "want to recommend the death sentence?": "Where someone has killed someone, and he only received 25 years instead of life in prison, and where someone has killed a child, I think they should receive a death penalty." (TR247-48). Further questioning revealed Frazier clearly had problems with the fact that in Florida, parole was possible after only 25 years:

Q . . . .Given that knowledge now, are there any other kinds of cases that where you think death would be more appropriate penalty than 25 years to life?

A It's 25 years?

(TR249). In sum, Frazier told the court that: "I don't think anyone should live if they kill somebody else.", especially if the defendant committed more than one murder, the murder was premeditated, or if the victim was a child, unless the defendant was "sort of like retarded", or the murder was an accident (TR247-51). Given the facts of Mr. Dufour's case: a premeditated murder supported by a prior murder conviction, that "25 years to life" was the only possible penalty other than death, and defense counsel presented no evidence that the crime was an accident or Mr. Dufour was "sort of like retarded", Frazier clearly stated that death was the only possible sentence she could consider (TR247-51).

Had counsel moved to have this clearly biased juror stricken for cause, the circuit court would have been obligated to grant that strike because the record clearly supported a finding of reasonable doubt as to whether Juror Frazier could render an impartial verdict in the penalty phase. Singer v. State, 109 So.2d 4, 23-24 (Fla.1959). The prejudice caused by counsel's failure to move to strike, exhaust his peremptory challenges, and request additional peremptory challenges is apparent from the record: two biased jurors actually served on Mr. Dufour's jury.

This was, in the most basic sense, a"'structural defect[ ] in the constitution of the trial mechanism,'" Sullivan v. Louisiana, 508 U.S. 275, 281 (1993).

The Appellee's tortured analogy to Jenkins v. State, 824 So.2d 977 (Fla.4th DCA 2002), is not a basis to deny relief. In Jenkins, a seated juror stated that he would tend to give police testimony "a little more weight" and that the word "every" bothered him in the instruction that the state had the burden to prove each element of the crime "beyond every reasonable doubt. Jenkins, at 980. However, the juror also stated that he could be fair and impartial. The court held that trial counsel's failure to strike this juror was not ineffective assistance because "the record did not demonstrate that a biased juror served on the jury"; there was no prejudice. Jenkins, at 983. The court was careful to distinguish Thompson v. State, 796 So.2d 511, 517 (Fla.2001), "this was not a juror who had "extreme difficulty" with a crucial legal concept". Id. The record below unambiguously establishes that jurors Frazier and Sullen were biased jurors who had ""extreme difficulty" with a crucial legal concept". Id. Both had "already formed an opinion on the merits, and the presence or absence of aggravating or mitigating circumstances [was] entirely irrelevant"; Mr. Dufour was prejudiced by counsel's failure to attempt to strike them and preserve the issue for appellate review. Morgan v. Illinois, 504 U.S. 719, 728-29 (1992).

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

The Appellee argues this issue has no merit because: "[t]his argument ignores the fact that no evidence suggested that Appellant was intoxicated at the time of the offense. This claim further ignores the fact that Appellant was responsible for numerous robberies of homosexuals which resulted in at least three other homicides." (Answer at 42). That argument ignores the fact that counsel did not investigate the residual effects of years of drug and alcohol abuse on Mr. Dufour's brain.[1] Thus, a voluntary intoxication defense would have strengthened the defense counsel did present, by establishing Robert Taylor's influence over Mr. Dufour and negating specific intent in the plan to rob the victim as well as specific intent in the murder.

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

---

[1]It also ignores the fact that the evidence below revealed that at least half of the "numerous robberies of homosexuals which resulted in at least three other homicides" occurred when Mr. Dufour was intoxicated and acting under Robert Taylor's direction.

RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION. THE LOWER COURT ERRED IN DENYING POSTCONVICTION RELIEF.

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

The Appellee's argument does not address the issue raised in Mr. Dufour's postconviction proceedings (Answer at 43-46). The Appellee redundantly argues that counsel "made an informed, strategic decision not to present a mental health expert to testify" at the penalty phase because counsel hired Dr. Gutman to look at competency issues, and Gutman found that Mr. Dufour was competent and wrote an extremely negative and hostile report(Answer at 43-46). However, the issue raised in Mr. Dufour's postconviction pleadings, proved by the Appellee's argument, is that counsel failed to conduct a reasonable mental health investigation *for the penalty phase*.

The claim raised in Mr. Dufour's postconviction pleadings is that counsel's decision to abandon mental health mitigation without a reasonable investigation was deficient performance which prejudiced Mr. Dufour. Dr. Gutman conducted only a competency evaluation and not a mitigation evaluation (PCR V7 255). Dr. Gutman's report lacked mitigating information of which counsel was aware or had

reason to be aware: history of childhood drug and alcohol abuse, physical abuse, sexual abuse, learning disabilities, and borderline mental retardation I.Q.(PCR V9 644). Counsel also experienced symptoms of Donald Dufour's mental illnesses during the course of his representation of Mr. Dufour (PCR V7 261, 272). Therefore, counsel's decision not to seek a second opinion or hire a mental health expert ***for the penalty phase*** was made without a reasonable investigation and was unreasonable because it was not based on an informed judgment. Thus, it was deficient performance.

The Appellee also argues that counsel's deficient performance did not prejudice Mr. Dufour because "given that all three psychologists that evaluated the Appellant concluded that he was antisocial, Appellant cannot show that a second opinion would have resulted in a more favorable expert opinion for him at the time of trial" (Answer at 46). That argument flatly ignores the uncontroverted evidence established at the hearing below. All three psychologists testified that Mr. Dufour had antisocial features or traits ***in addition to*** other features of his mental illnesses. Not one psychologist limited his or her diagnosis to an "antisocial lifestyle choice, as opposed to a biological malfunction in the brain" (Answer at 45). Dr. Berland found evidence of psychosis, brain injury, antisocial personality disorder, delusional paranoid thinking, hallucinations, and mood disturbance (PCR V8 469-

70, 478-83). 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 Mr. Dufour was under the influence of extreme mental or emotional disturbance and concluded that Mr. Dufour's capacity to conform his conduct to the requirements of the law was substantially impaired (PCR V8 485-86). 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). Dr. Bourg-Carter opined that the crime was connected to the homosexual abuse Mr. Dufour suffered as a child, and he suffered an extreme mental or emotional disturbance at the time of the crime(PCR V8 431). Moreover, each psychologist connected Mr. Dufour's "antisocial lifestyle choice[s]", such as using drugs and alcohol and lack of employment, to the abuse Donald Dufour suffered as a child and to his low I.Q. and learning disabilities(PCR V8 425, 431, 456-57; V9 643-44). Clearly, all three psychologists that evaluated Mr. Dufour **did not** merely conclude that he was antisocial.

B. Family and childhood mitigation

The Appellee faults this argument because "Appellant failed to identify any

specific deficiencies or specific witnesses or evidence relating to his childhood that should have been discovered" (Answer at 47). So the record is clear, the specific deficiencies were: 1) not speaking to George Dufour about Donald Dufour's childhood before accusing George Dufour[2] of pimping his teenage brother (PCR V7 235, 237-38); 2) not contacting the other background witnesses including John Dufour and Vance Powell, who provided mitigating background material that was used at the evidentiary hearing (PCR V8 420, 447, 491); and 3) not providing a competent mental health expert access to those witnesses so that a competent mental health mitigation could be discovered.

The "specific evidence that should have been discovered" is all of that which surpasses, in quality and quantity, Gary Dufour's penalty phase testimony.

In addition to Gary Dufour's penalty phase testimony 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

---

[2]The Appellee argues that counsel's failure to find background mitigation was not deficient performance because of the unfounded assertion "Another member of the defense team also tried to contact George Dufour and did not succeed." (Answer at 47). The Appellee provides no citation for this assertion. The only possible basis for the assertion is Mr. Dvorak's testimony: "As I recall, I *think* Jay [Cohen] tried to contact him, but I believe he didn't have contact. I *believe* Jay followed up contact, **but I did not, no**." (PCR V7 235). Notably, when the state called Mr. Cohen as a rebuttal witness, the state did not ask him whether he ever attempted to contact George Dufour.

was around him"; "particularly on Don" (TR 1584-85), counsel should have presented evidence available from other family members and friends of the family that Mr. Dufour's father: "would almost always be drunk. I seldom would remember him not being drunk." (PCR V7 176); "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); "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).

In addition to Gary Dufour's penalty phase testimony that Donald started drinking alcohol when he was young, had a drug and alcohol problem, and once sought treatment (TR 1587-88), counsel should have presented evidence that Donald began abusing drugs at "[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." (PCR V7 182-83). When Donald was sixteen years old, "[h]e certainly knew about speed and downers and quaaludes, all the stuff you could do" (PCR V7 184-85). Rather than simply having Gary testify at the penalty phase that George Dufour is gay, counsel could and should have presented evidence that, at the age of sixteen, Donald had been sexually abused and was sexually involved with several of George's male friends (PCR V7 184-85, 188-89).

Rather than having Gary merely testify that Donald did poorly in school, counsel should have presented available evidence that:

> 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).

Additionally, counsel should have presented mitigating evidence, consistent with their theory of defense that Robert Taylor committed the murder and Donald Dufour was a minor participant.

> 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).

Counsel should have presented available and compelling evidence of Donald Dufour's mental state at the time of the crime.

> 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 seen 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).

To the extent that the Appellee argues that Donald Dufour's unwillingness to involve his family excuses counsel's failure to conduct a reasonable background investigation, the record conclusively establishes that there is no such excuse. 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). Moreover, counsel did involve Gary Dufour.

Conclusion

Counsel's deficient investigation prejudiced Mr. Dufour's ability to receive an individualized sentence. Indeed, Mr. Dufour's case is materially indistinguishable from cases in which both the federal courts and this Court have found violations of the Sixth and Fourteenth Amendment rights to the effective assistance of penalty phase counsel.

In Hildwin v. Dugger, 654 So.2d 107, 110 (Fla.1995), this Court found that Hildwin was prejudiced by ineffective assistance of penalty phase counsel where counsel presented limited testimony from five lay witnesses and post conviction proceedings revealed that two mental health experts found both statutory mental health mitigators and four nonstatutory mitigators: childhood abuse and neglect, history of substance abuse, signs of organic brain damage, and Hildwin performs well in a structured environment such as prison. Id. Similarly, Mr. Dufour's counsel presented limited testimony from three lay witnesses in mitigation. During postconviction proceedings, three mental health experts testified that at least one of

the statutory mental health mitigators existed as well as non-statutory mitigators of physical abuse, sexual abuse, poverty, history of substance abuse, learning disability, low I.Q., mental illness, and brain impairment.

In Ragsdale v. State, 798 So.2d 713 (Fla.2001), this Court held that counsel's failure to investigate and present available mitigating evidence was ineffective assistance where "counsel's entire investigation consisted of a few calls made by his wife to Ragsdale's family members". Ragsdale, 798 So.2d at 719. As in Mr. Dufour's case, "counsel did not conduct a reasonable investigation, [so] he was not informed as to the extent of the child abuse suffered, and thus he could not have made an informed decision not to present mitigation witnesses." Ragsdale, 798 So.2d at 720.

In Collier v. Turpin, 177 F.3d 1184 (11th Cir. 1999), the Eleventh Circuit Court of Appeals held counsel was ineffective for failing to adequately prepare and present mitigation evidence. Trial counsel presented 10 mitigation witnesses, but essentially elicited only one or two word answers from them that established that the defendant was a good worker, supported his family, and had a good reputation for truth and veracity (which was irrelevant since he did not testify). The Court held that, rather than that "hollow shell" of mitigation, trial counsel could have established the defendant had a gentle disposition, his record of helping his family

in times of need, specific instances of heroism and compassion, and evidence of his circumstances at the time of the crimes, including his recent loss of his job, his poverty, and his diabetic condition. "The jury was called upon to determine whether a man whom they did not know would live or die; they were not presented with the particularized circumstances of his past and of his actions on the day of the crime that would have allowed them fairly to balance the seriousness of his transgressions with the conditions of his life. Had they been able to do so, we believe that it is at least reasonably probable that the jury would have returned a sentence other than death." In Baxter v. Thomas, 45 F.3d 1501 (11th Cir.1995), the Court held that counsel was ineffective during the penalty phase of a capital trial for failing to adequately investigate and present mitigation evidence. Counsel did not obtain records or speak to background witnesses, even though counsel was aware of defendant's odd behavior and even requested a mental health evaluation. Because of these failures, trial counsel did not discover or present substantial mental health mitigation. See also Hardwick v. Crosby, 320 F.3d 1127 (11th Cir.2003)(“Similarly, "[w]here defense counsel is so ill prepared that he fails to understand his client's factual claims or the legal significance of those claims ..., we have held that counsel fails to provide service within the range of competency expected of members of the criminal defense bar."); Middleton v. Dugger, 849

F.2d 491, 493-95 (11th Cir.1988); Elledge v. Dugger, 823 F.2d 1439, 1447 (11th Cir.), withdrawn in part on denial of rehearing en banc, 833 F.2d 250 (11th Cir.1987) (withdrawing only unrelated Part III of the opinion); 306 F.3d at 1056, 1071, 1072.

In Frazier v. Huffman, 343 F.3d 780 (6th Cir. 2003), the Sixth Circuit Court of Appeals held that counsel's failure to investigate and present mitigating evidence of brain impairment was ineffective assistance of counsel:

> We can conceive of no rational trial strategy that would justify the failure of Frazier's counsel to investigate and present evidence of his brain impairment, and to instead rely exclusively on the hope that the jury would spare his life due to any "residual doubt" about his guilt. This failure was not due to counsel's ignorance of Frazier's brain injury. To the contrary, the Ohio Court of Appeals acknowledged that trial counsel were actually aware of Frazier's brain impairment because they saw his medical records, yet counsel failed to investigate the matter or present any evidence regarding the same.

In Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995), the Court found a Sixth Amendment violation where counsel requested a court-appointed examination and examiners reported no organic brain damage. Available mitigating evidence included mental retardation (from school records), physical abuse, and hyperactivity as a child. The postconviction neurological examination showed global brain damage. "While juries tend to distrust claims of insanity, they are more

likely to react sympathetically when their attention is drawn to organic brain problems such as mental retardation". Id. at 1211. Mr. Dufour's case is indistinguishable.

In Lewis v. Dretke, 355 F.3d. 364 (5th Cir. 2003), the Fifth Circuit Court of Appeals held that the failure to investigate and present additional background mitigation witnesses was ineffective assistance of counsel. Prejudice was found even though the defendant's grandmother testified that the defendant had been abused. "[H]er conclusional testimony contained none of the details provided by Lewis' siblings at the habeas hearing, which could have been truly beneficial. [Her] skeletal testimony concerning the abuse of her grandson was wholly inadequate to present to the jury a true picture of the tortured childhood experienced by Lewis." Id. at 368. "[H]ad this evidence [of Petitioner's abuse] been presented, it is quite likely that it would have affected the sentencing decision of at least one juror." Id. at 369. In Lockett v. Anderson, 230 F.3d 695 (5th Cir. 2000), the Fifth Circuit again found a violation of the right to the effective assistance of counsel. Counsel lacked basic "familiarity" with "psychological tests" performed on his client, but he knew client had a history of seizure problems and head injuries. Counsel was aware of recommendations for psychological testing, "black-outs, delusional stories, references to self as another name, family troubles, drug and/or alcohol addiction,"

which should have "put him on notice that pursuit of the basic leads that were before him may have led to medical evidence that Lockett had mental and psychological abnormalities that seriously affected his ability to control his behavior." Id. The court rejected the argument of a strategic decision to avoid devastating cross-examination because defense counsel never considered the strategy. The court found prejudice even though crimes were particularly aggravated and some of the mitigating evidence could have been aggravating (because it could support future dangerousness) because additional testing and investigation would have revealed significant mental mitigation and a troubled childhood with trauma. Without this evidence, counsel simply asked the jury for mercy and presented no real evidence or argument in mitigation.

In Douglas v. Woodford, 316 F.3d 1079 (9th Cir. 2003), the Ninth Circuit Court of Appeals held that the petitioner's trial counsel was ineffective in failing to adequately prepare and present mitigation evidence. The petitioner was convicted of killing two teenage girls. During sentencing, the state presented testimony concerning similar bad acts involving forcing women to pose nude and engage in sex acts with other women for photographs and plans to make movies involving torture and killing of young women–he previously pled nolo contendre to charges arising from this planning. In mitigation, the defense presented only the petitioner's

wife and son. In "very general terms," they described a difficult childhood, running away at fifteen to join the Marines, and being very poor and hungry as a child. Prior to trial, counsel retained mental health experts because the petitioner was experiencing severe claustrophobia in his cell, which was related to being locked in closets by abusive parents as a child. The experts did brief testing and interviewing and found no mental disorders, but did recommend additional mental health testing. After the claustrophobia issue was addressed, he refused to cooperate with any further mental health testing and insisted on an alibi defense during trial. He was "less than helpful" in providing background information and reported that "his parents were dead and that his past was a 'blank.'" Id. at 1087. He refused to provide names of relatives or friends to provide information on his childhood abuse. Even so, the court found counsel's conduct deficient for failing to discover and present significant mitigation evidence. He "was not forthcoming with useful information, . . . this does not excuse counsel's obligation to obtain mitigating evidence from other sources." Id. at 1088. Counsel had enough information to put him "on notice" that the petitioner had "a particularly difficult childhood," but did not attempt to contact persons who could provide the details or even to interview and prepare the witnesses that did testify so their testimony "was less than compelling." Id. Counsel's failure to prepare and present mitigation could not be

attributed to his client's lack of cooperation, because counsel had already "disregarded his client's wishes and did put on what mitigating evidence he had unearthed." Id. at 1089. Moreover, the jury already convicted the defendant and rejected his alibi evidence, so "'lingering doubt' was not a viable option." Id. at 1090. Thus, "there was nothing to lose" by presenting social history and mental health evidence. Id. at 1091. Prejudice was found, despite "the gruesome nature" of the offenses, Id., because the available "social background and mental health" evidence was "critical for a jury to consider when deciding whether to impose a death sentence," Id. at 1090. This evidence could have "invoked sympathy" from at least one juror. Id. In Caro v. Woodford, 280 F.3d 1247 (9th Cir. 2002), the Ninth Circuit again granted relief in another materially indistinguishable case. The court held that counsel was ineffective for failing to prepare and present evidence of the defendant's brain damage due to a long history of exposure to toxic pesticides and chemicals, history of severe head injuries, and significant abuse as a child. Counsel's conduct was deficient because counsel knew of the long history of exposure to toxic pesticides, but did not inform the experts that examined the defendant and did not seek out an expert to assess the damage done to the defendant's brain. Counsel conceded no strategy explained the failure. The court rejected the state's arguments that high grades, satisfactory military performance,

negative blood results for pesticides, a reasonably high IQ, rationality of actions following the murders, and normal psychiatric and neurological evaluations was inconsistent with the finding of brain damage. See also Mayfield v. Woodford, 270 F.3d 915 (9th Cir. 2001) (en banc); Bean v. Calderon, 163 F.3d 1073 (9th Cir. 1998), cert. denied, 528 U.S. 922 (1999).

C. Counsel's decision to call Stacey Sigler

As the Appellee points out "much of the information contained in Sigler's testimony, such as Appellant's bad childhood, the fact that his brother was gay, and that he used cocaine and alcohol, came out at the trial through the testimony of Gary Dufour" (Answer at 56). Thus, counsel's decision to present Sigler's testimony and open the door to damning cross-examination that Sigler's 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, was ineffective assistance. Mr. Dufour gained nothing from the presentation of her superfluous testimony, and instead presented the very evidence counsel intended to avoid: that Mr. Dufour was "this drugged out drunken maniac who is most mothers' and fathers' worse [sic] fear out there with their kids." (PCR V7 239-40).

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.

Throughout its Answer, the Appellee takes substantial liberty or flatly lies in summarizing the testimony of the expert witnesses who testified at the hearing below. Regarding the two statutory mental health mitigators, the Appellee states: "Dr. Merin testified that neither of these statutory mitigators applied" (Answer at 63). In fact, Dr. Merin testified:

> I didn't see any evidence that he did not, was not capable of conforming his behavior to the requirements of the law. He knew what he was doing and he knew it was wrong.

(PCR V9 610).

> Q. Did you see any indication that he was substantially impaired by any kind of mental infirmity at the time he committed the crime?
> A. No. There is always a question with him, of course, but, again, based on his own words, and supported by other persons who heard about it, told directly to them by someone, there was no evidence that he was substantially impaired.

(PCR V9 610-11). Dr. Merin's opinions regarding the mental health mitigators must be viewed in context, however. At the hearing, Dr. Merin testified that he did not understand the legal definition or application of any of them. Indeed, he equated the legal standards for the statutory mental health mitigators with the legal standards for a finding of insanity.

> Q Just the mental health ones.
>
> A Being influenced by someone else, experiencing severe stress, of course, under the influence of somebody else, which would be a dependancy type of thing, experiencing in psychosis, **inability to reflect on his behavior difficulty in understanding right from wrong,** psychotic thought process, in general. That's not obviously the wording.

(PCR V9 652-53). Extreme mental or emotional disturbance is "less than insanity, **but more emotion than the average man**, however inflamed". State v. Dixon, 283 So.2d 1, 10 (Fla. 1973)(emphasis added); see also Bryant v. State, 601 So.2d at 533; Stewart v. State, 558 So.2d at 420; Smith v. State, 492 So.2d 1063, 1067 (1986). Thus, Dr. Merin's opinions can be given no weight.

Regarding Dr. Berland's testimony, the Appellee writes: "he [Dr. Berland] gave the equivocal conclusion that if the Defendant had been under the influence of drugs or alcohol in conjunction with his mental illness, he " . . . would likely have

been under the influence of extreme mental or emotional disturbance" (Answer at 485). In fact, Dr. Berland's opinion was not at all equivocal:

> 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)(emphasis added). The Appellee writes: "With respect to whether the Defendant suffered some substantial impairment in his capacity to conform his conduct to the requirements of the law, Dr. Berland stated there was no evidence of such an impairment." (Answer at 63). That statement is blatantly false. Dr. Berland testified:

> [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) (emphasis added).

The Appellee does not dispute the facts established below, proved by both Dr. Merin's and Dr. Berland's testimony, that Dr. Gutman's evaluation of Donald Dufour fell far below the established standards in the mental health community. The Appellee also does not refute the facts established by all four mental health experts who testified at the hearing below, that Donald Dufour's mental health problems and the causes for them far exceed an "antisocial lifestyle choice, as opposed to a biological malfunction in the brain" (Answer at 45). The Appellee does not dispute the clear conclusion that expert testimony regarding those mitigators could have been presented, if Mr. Dufour had a competent mental health evaluation. Nor does the Appellee dispute that, from that evidence, the jury could have made an informed decision regarding the weight to be given the mitigating evidence and the appropriate sentence. Hitchcock v. Dugger, 481 U.S. 393(1987); Espinosa v. Florida, 505 U.S.1079 (1992); Jones v. Dugger, 867 F.2d 1277 (11th Cir.1989); Magill v. Dugger, 824 F.2d 879 (11th Cir.1987). There is a "reasonable probability that at least one juror would have struck a different balance." Wiggins, 123 S.Ct. at 2543. Clearly, Mr. Dufour did not receive a competent mental health evaluation for his penalty phase.

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.

The Appellee argues this claim fails factually because it "ignores Appellant's confession to the murder" (Answer at 70). This fact provides no basis to deny relief. "[M]entally retarded persons are much more vulnerable to manipulation during arrest, interrogation, and confession. Moreover, mental retardation appears not to be compatible with the principle of full criminal responsibility." Report by the Special Rapporteur, U.N. Commission on Human Rights, Extrajudicial, Summary on Arbitrary Executions, Add.3, para. 58, U.N. Doc. E/CN.4/1998/68/(1998); See also Ardy Friedberg & Jason T. Smith, Townsend Released; Judge Cites 'An Enormous Tragedy'; Attorneys Say Suspect was Easily Led to Confess, Sun- Sentinel, June 16, 2002, at 1A (stating that Townsend's IQ is

about 50); Innocence Project, Jerry Frank Townsend, < http://www.innocenceproject.org/case/display_profile.php?id=88 (noting that Townsend is mentally retarded and has the capacity of an eight-year-old); Morgan Cloud et al., Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects, 69 U. Chi. L. Rev. 495, 499-516 (2002); James W. Ellis & Ruth A. Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 445-52 (1985); Paul Hourihan, Earl Washington's Confession: Mental Retardation and the Law of Confessions, 81 Va. L. Rev 1471, 1491-4 (1995); Williamson v. Ward, 110 F.3d 1508, 1512-21 (10th Cir. 1997) (Overturning capital conviction on habeas because counsel failed to investigate a videotaped statement by another person confessing to the crime and extensive evidence of petitioner's mental illness and likely incompetence to stand trial; DNA testing subsequently established that he was innocent).

The Appellee also argues "the mere fact that the hair was tested does not change the testimony that law enforcement did not act in bad faith in destroying the evidence" (Answer at 72). This argument ignores the evidence presented at the hearing below. The hair did not come from Donald Dufour or the victim, so it tends to exculpate him, both as to guilt and sentence (PCR V10, 788-93). Diane Payne, the lead detective on the case who authorized the destruction of the

evidence, testified to the Sheriff Department's procedure in maintaining evidence: "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." (PCR V9 711-12). Payne could not testify that she followed procedure in Mr. Dufour's case (PCR V9 711-12). Dorothy Sedgwick, the division chief for the Office of the State Attorney when this case was arraigned and co-counsel on this case, testified her policy regarding evidence which was not introduced at trial was that it should be "maintained" in homicide cases (PCR V9 654, 657). "[W]hat 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). The evidence was destroyed during the pendency of Mr. Dufour's direct appeal–before his conviction and sentences were final, so it was clearly "a criminal case that could be litigated in any way".

The destruction was done in bad faith. Merriam Webster defines "good faith" as: "honesty or lawfulness of purpose". Merriam Webster Online, good faith, < http://www.m-n.com. Thus, "bad faith" is acting dishonestly or in contravention of the law. The testimony below clearly proves that either Payne or Sedgwick violated department procedures when either took the *affirmative* act to

destroy the evidence. It is also clear that the destruction of evidence violated the law: there was a court order to retain it (PCR V10, 808-9). The violation of standard procedure and a court order was a dishonest act that with an illegal purpose. Bad faith was established.[3]

The state also argues that law enforcement did not act in bad faith because: "nothing more can be said other than the hair could have been subjected to further testing with purely speculative results" (Answer at 72). This argument does not provide a basis to deny relief. In Illinois v. Fisher, 124 S.Ct. 1200, 1202 (2004), the United States Supreme court explained why they require a defendant to prove bad-faith when the state destroys potentially useful evidence under Youngblood v. Arizona 488 U.S. 51, 58 (1988).

> We have held that when the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld. See *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). In *Youngblood*, by contrast, we recognized that the Due Process Clause "requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said

[3]To hold otherwise, especially when the state actors can offer no explanations for their actions, would render the Due Process protections discussed in Youngblood meaningless. The state could always avoid a finding of bad faith by claiming no recollection of the destruction of potentially useful evidence.

> than it could have been subject to tests, the results of which might have exonerated the defendant." 488 U.S. at 57, 109 S.Ct. 333. We concluded that the failure to preserve this "potentially useful evidence" does not violate due process "*unless a criminal defendant can show bad faith on the part of the police." Id.*, at 58, 109 S.Ct. 333 (emphasis added).
>
> * * *
>
> . . . **the applicability of the bad-faith requirement in *Youngblood* depended not on the centrality of the contested evidence to the prosecution's case or the defendant's defense, but on the distinction between "material exculpatory" and "potentially useful" evidence**.

Illinois v. Fisher, 124 S.Ct. 1200, 1202 (2004)(emphasis added). Clearly, the hair found at the scene of the crime, which was neither Mr. Dufour's nor the victim's and was the type to match Robert Taylor's, was at least "potentially useful" evidence, if not material exculpatory evidence. Indeed, the "potentially useful" nature of the destroyed evidence is evidenced by the Appellee's repeated statements:

> the defense strategy was that the Appellant did not commit the murder, that Robert Taylor killed the victim and was the leader of the gang. (PCR Vol.7, 228, 258-59). Based upon that theory **which was supported by physical evidence and the testimony of other gang members**, Dvorak did not think it appropriate to present inconsistent theories to the jury.

(Answer at 9 and 41) (emphasis added). Contrary to Appellee's assertion

otherwise, the evidence established "that the police made a conscious effort to prevent the defense from securing the evidence" (Answer at 72).

By destroying evidence that was, at a minimum, potentially useful, if not material exculpatory, and in violation of state procedure and a court order, and before Mr. Dufour's conviction and sentence were final, the state acted in bad faith and violated Mr. Dufour's due process rights (PCR V10 808-14).

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.

Mr. Dufour concedes that this Court has held the subclaims have no merit, however, Mr. Dufour did not concede that these subclaims have no merit legally or under federal law.

CERTIFICATE OF SERVICE

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

_____

LESLIE SCALLEY
Assistant CCRC-M
Florida Bar No. 0174981

_____

MARIE-LOUISE SAMUELS PARMER
Assistant CCRC-M
Florida Bar No. 0005584
CAPITAL COLLATERAL REGIONAL COUNSEL-MIDDLE
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
813-740-3544
Attorneys for the Defendant
(813)740-3544
(813-740-3554 (Facsimile)

Copies furnished to:

The Honorable Lawrence R. Kirkwood
425 N. Orange Avenue
Orlando, Florida 32801

Chris A. Lerner
Office of the State Attorney
415 North Orange Avenue
Orlando, Florida 32801

Scott A. Browne
Office of the Attorney General
3507 E. Frontage Road
Suite 200
Tampa FL 33607-7013

Donald Dufour
DOC#: 061222
Union Correctional Institution
7819 NW 228th Street
Raiford, Florida 32026

CERTIFICATE OF COMPLIANCE

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

_____

Leslie Anne Scalley
Florida Bar No. 0174981
Assistant CCC

_____

_ Marie-Louise Samuels Parmer
Florida Bar No. 0005584
Assistant CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Dr., Ste. 210
Tampa, Florida 33619
813-740-3544
813-740-3554 (Facsimile)