IN THE SUPREME COURT OF FLORIDA

CASE NO. SCO3-1553

LYNFORD BLACKWOOD,

Appellant/Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee/Cross-Appellant.

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

ANSWER BRIEF OF CROSS-APPELLEE/ REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal by Mr. Blackwood from the trial court=s denial of his Rule 3.850 motion for postconviction relief as related to the guilt phase of his capital trial, and an appeal by the State of Florida from the lower court=s granting of Rule 3.850 relief as related to the penalty phase of Mr. Blackwood=s capital trial.

Prior to moving to withdraw, previous registry counsel filed the Initial Brief on behalf of Mr. Blackwood, but, apparently misunderstanding the appropriate manner of briefing in a case involving cross-appeals, addressed, as Argument I of the Initial Brief, the correctness of the lower court order granting penalty phase relief. As noted by the Answer Brief filed by the State,[1] this argument is Aunusual@ in that it was the State, not Mr. Blackwood, who was the appealing party as to the granting of penalty phase relief (AB at 26). Mr. Blackwood=s current counsel has reviewed the argument contained in the Initial Brief as to the penalty phase issue and determined that not only was it inappropriately raised in the Initial Brief, it is not sufficient to address the

[1]The State=s brief is titled AAnswer Brief@ although, in addition to responding to Mr. Blackwood=s arguments relating to the guilt phase, it does address what it believes were errors committed by the lower court in granting penalty phase relief. Thus, the State=s brief in actuality is its Answer/Cross-Initial Brief.

correctness of the lower court=s order. Moreover, because the argument in the Initial Brief was filed before the State filed its brief raising its arguments in support of overturning the lower court=s order, Mr. Blackwood=s Answer Brief herein provides his full and complete argument on the issue of the lower court=s grant of penalty phase relief. The arguments, facts, and authorities provided for in the instant brief are intended to supplant any arguments, facts, and authorities set forth in the Initial Brief filed by prior registry counsel.

REQUEST FOR ORAL ARGUMENT

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

PROCEDURAL HISTORY

On December 5, 1996, the Appellant, Lynford Blackwood, was convicted by a Broward County jury of the first-degree murder of Carolyn Thomas-Thynes.[2] A penalty phase commenced on January 23, 1997, after which the jury returned a recommendation for the death penalty by a vote of nine to three. Following a hearing conducted pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), the trial court entered an order sentencing Mr. Blackwood to death, finding one aggravating circumstance (heinous, atrocious, or cruel),[3] one statutory mitigating circumstance (no significant history of prior criminal conduct), and various nonstatutory mitigating factors to which various weight was assigned by the lower court. On direct appeal, this Court, by a sharply divided 4-3 vote, affirmed both the conviction and the imposition of the death sentence. *Blackwood v. State*, 777 So. 2d 399 (Fla. 2000), *cert. denied*, 534 U.S. 884

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[2]The State=s brief incorrectly states that Mr. Blackwood was convicted on January 23, 1997 (SB at 2). It was the penalty phase which took place on January 23, 1997, not the guilt phase verdict.

[3]*See* ' 921.141 (5)(h), Fla. Stat. (1995).

(2001).

Mr. Blackwood filed a timely Rule 3.850 motion and an amendment thereto (PCR-1-62; 158-219). After the State filed its written response to the motion (PCR-220-284), the court entered an order granting an evidentiary hearing on Claims II and III of his amended Rule 3.850 motion,[4] and summarily denied the remaining claims (Supp. PCR-34-42). An evidentiary hearing was conducted on June 19-20, 2003. An order granting penalty phase relief was entered by the lower court on July 23, 2003 (PCR-311-321). Mr. Blackwood appealed the denial of his guilt phase issues, and the State appealed the order granting penalty phase relief (PCR-322-324; 325-327).

STATEMENT OF FACTS ADDUCED AT EVIDENTIARY HEARING

As set forth below, at the evidentiary hearing, Mr. Blackwood presented the testimony of four witnesses: Dr. Trudy Block-Garfield, Dr. Martha

[4]Claim II involved allegations of ineffective assistance of counsel regarding the preparation and presentation of mental health mitigation at the penalty phase, and counsel=s preparation of Dr. Trudy Block-Garfield for the *Spencer* hearing (Supp. PCR-29). Claim III involved allegations of the adequacy of the mental health assistance provided by Dr. Block-Garfield (*Id*.).

Jacobson, Dr. Hyman Eisenstein, and Robert Ullman. The State presented no witnesses.

Dr. Trudy Block-Garfield. Licenced as a psychologist since 1983, Dr. Block-Garfield testified that she first met Mr. Blackwood on April 28, 1995, after she was appointed by the trial judge to conduct a competency evaluation (PCT-10).[5] At that time, Mr. Blackwood was represented by attorney Robert Trachman (*Id*.). She spent about an hour with Mr. Blackwood at the time, in addition to some time spent writing her report (PCT-11). Prior to conducting this competency evaluation, Dr. Block-Garfield had only been given the arrest affidavit to review (*Id*.). She also reviewed, on her own, Mr. Blackwood=s jail medical records (PCT-45). Because Mr. Blackwood was Atoo depressed@ at the time, despite the fact he was apparently being medicated, Dr. Block-Garfield was unable at that time to render an opinion as to competency (PCT-11).

[5]Without objection from the State, Dr. Block-Garfield was admitted by the lower court as an expert in the area of clinical psychology (PCT-9).

Dr. Block-Garfield conducted a second evaluation of Mr. Blackwood on December 15, 1995, after which she reached the conclusion that Mr. Blackwood, despite the fact he was still Avery much depressed,@ was competent to stand trial (PCT-14-15,19). She spent more time with Mr. Blackwood during the second evaluation than she did in her first evaluation because she also administered some testing, including the verbal portion of the Wechsler Adult Intelligence Scale-Revised (PCT-17).[6] On this test, Mr. Blackwood scored a 70 in the verbal portion, which was the Acutoff@ between borderline and retarded range of intellectual functioning (PCT-18), although Dr. Block-Garfield believed this result may have been affected due to his own depression (PCT-17-18).[7] At this time, Dr. Block-Garfield believed that Mr. Trachman was still representing Mr. Blackwood (PCT-19-20).

[6]The Weschsler test also contains a non-verbal component, which measures areas such as hand/eye coordination, but Dr. Block-Garfield did not administer this portion of the test due to Mr. Blackwood=s continued depression (PCT-18-19).

[7]Dr. Block-Garfield explained on cross-examination that more recent testing revealed a verbal score of 77 (PCT-57).

After receiving a letter from attorney Robert Ullman dated February 25, 1997[8], Dr. Block-Garfield conducted a third evaluation of Mr. Blackwood, this time for purposes of mitigating circumstances (PCT-20). The letter, however, indicated that the penalty phase had already been conducted and the jury had returned a 9-3 recommendation for death (PCT-21-22). Ullman=s letter reflected his belief that he expected the judge to follow that recommendation Ano matter what@ information Dr. Block-Garfield could provide (PCT-22). Accompanying the letter from Ullman was a notice of the upcoming *Spencer*[9] hearing,[10] the order appointing her entered by Judge Conn, a copy of the mitigators, a copy of the medical examiner=s deposition and autopsy report, her prior reports regarding Mr. Blackwood=s competency, police reports, and a copy of Mr. Blackwood=s statement (PCT-22). In her extensive experience working on capital cases for purposes of mitigation,[11] generally she has been provided months in which to perform her investigation and evaluation, and she did not recall ever being provided with only approximately six weeks notice as she was

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[8]In June, 1996, Mr. Ullman was substituted as counsel for Mr. Blackwood after Mr. Trachman moved to withdraw.

[9]*Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

[10]The *Spencer* hearing was scheduled for April 11, 1997, less than six weeks from the date of Ullman=s letter (PCT-23).

[11]Dr. Block-Garfield has worked with a number of criminal practitioners in Broward County on capital cases, as well as with prosecutors in the homicide division of the State Attorney=s Office in Broward County (PCT-26).

in Mr. Blackwood=s case (PCT-23). She did believe at the time, however, that the six weeks she was given would be sufficient to arrive at some opinions, particularly given her prior interactions with Mr. Blackwood years earlier (PCT-60-61) In the course of her preparation, Dr. Block-Garfield had no recollection of meeting with Ullman, and her file reflected no notes of any such meetings or conversations (PCT-23, 26);[12] this was unusual in that when she has previously testified, either for the defense or the State, there is a discussion in advance of the proceedings about the issues present in the case (PCT-27). In fact, when she appeared in court for her testimony at the *Spencer* hearing, Dr. Block-Garfield=s expectation was that she would only be needed for an hour (PCT-27), and she had no idea what questions Ullman was going to ask of her at the *Spencer* hearing (PCT-42).

[12]While her practice would be to not write down a quick phone call or discussion, any Alengthy@ discussion she would have in a case would be reflected in her notes as well as in her billing (PCT-24). In Mr. Blackwood=s case, her billing reflected only the time she actually spent in court, which was from 1:00 PM to 6:30 PM on the day of the *Spencer* hearing (*Id*.).

Aside from the isolated documents provided by Ullman, Dr. Block-Garfield testified that Ullman never provided her with important information, such as transcripts of family member testimony from the penalty phase, nor did Ullman set up any meetings between herself and Mr. Blackwood=s family (PCT-28).[13] In her experience and as she explained, this would Acertainly@ have been helpful not only in terms of confirming the information that Mr. Blackwood had given her (PCT-28), but also in terms of being able to effectively respond to the prosecutor=s cross-examination of her at the *Spencer* hearing when he confronted her with the fact that her testimony was based solely on the self-report of Mr. Blackwood (PCT-29). Indeed, after reviewing the information provided to her by collateral counsel which had not been provided to her by trial counsel, Dr. Block-Garfield was able to confirm that Mr. Blackwood had in fact provided accurate and truthful information to her (PCT-28). Additionally, although she had been provided with the written statement given by Mr. Blackwood, Dr. Block-Garfield had not been provided with the audiotape of the statement, a fact which she also mentioned during her *Spencer* hearing testimony (PCT-29-30). She explained that listening to the tape, as opposed to reviewing a cold written statement, is always preferable because the tape gives Aa flavor of the person=s

[13]Indeed, Dr. Block-Garfield Aroutinely@ would ask to meet with family members prior to testifying in a capital case, and in fact, in response to the prosecutor=s cross-examination of her at the *Spencer* hearing, informed Judge Conn that she had asked for the opportunity to speak with family members (PCT-29).

emotions@ as opposed to the written words (PCT-30). As a result of the State=s cross-examination of her at the *Spencer* hearing, Dr. Block-Garfield realized that she had not been given Aa lot of things@ by Ullman in order to effectively prepare and be in a position to properly answer the prosecutor=s questions (PCT-30).

In terms of her efforts to prepare following the receipt of Ullman=s letter, Dr. Block-Garfield explained that, on March 12, 1997, she conducted a clinical interview with Mr. Blackwood for a considerable about of time (PCT-31).[14] Mr. Blackwood still presented with depression, including a continued downward gaze, difficulty in communication, sadness, contrition, and attention deficits (*Id*.). She did not administer any tests to him at that time because of his continued depression (PCT-32), and her lack of testing was used by the prosecutor during cross-examination at the *Spencer* hearing to discredit her testimony (PCT-32). Ullman, however, never elicited from her the reasons why she performed no testing, that is, due to Mr. Blackwood=s depression (PCT-32-33).

Dr. Block-Garfield authored a brief two-page report for purposes of mitigation that she sent to Ullman (PCT-33-34). Her report did not address the extreme mental

[14]Dr. Block-Garfield was compensated only $150 for her work prior to testifying at the *Spencer* hearing, although she spent Aclose@ to ten hours between February 25 and April 11 working on the case (PCT-33).

or emotional disturbance statutory mitigating circumstance, and Dr. Block-Garfield really could not say why it was not addressed; it could possibly have been an oversight or it could have been that, at the time and based on the materials provided to her by Ullman, she did not believe that the mitigator applied to him (PCT-34-35). The only thing she had been provided by Ullman regarding the statutory mitigators was a sentencing memorandum authored by Ullman, but he provided no case law which actually defined the statutory mitigating circumstances (PCT-35-36). She has no data or other information to support the fact that a defendant needed to be psychotic in order to qualify for the extreme mental or emotional disturbance aggravating factor (PCT-36). Ullman never provided her with a legal definition of extreme emotional disturbance, which is a difficult concept and one that is difficult to quantify (PCT-39). She emphasized again, however, that she had no case law defining this mitigating factor as requiring the defendant to have Asome break with reality@ (PCT-39).

As part of her pre-trial competency evaluation, Dr. Block-Garfield administered a Benton neuropsychological screening test, on which Mr. Blackwood scored in the impaired range (PCT-40). Because of his depression, she could not say with any clinical certainty that there was neurological impairment (PCT-40). She emphasized that she is not an expert in neuropsychologist and the Benton test she administered was simply a screening test (PCT-41). It would have been helpful for Mr. Blackwood to have been examined by a neuropsychologist, and had Ullman asked her if there was

a need for further testing, she would have suggested it (PCT-41).[15]

On cross-examination, Dr. Block-Garfield rejected the notion that it was her responsibility to seek out information about a defendant=s background; as she explained, Athe attorney is the one who manages the case@ and is the person who calls

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[15]In its brief, the State writes that Dr. Block-Garfield Adid not feel that there was anything neurologically wrong with Blackwood@ (SB at 14). This is an incomplete representation of Dr. Block-Garfield=s testimony, which, in its entirety, reveals the following answer:

> A I believe what I said was I had no reason to believe [that Mr. Blackwood suffers from neurological impairment]. I wasn=t aware of any brain trauma. I wasn=t aware of any birth trauma that might have occurred that could have caused it. So I essentially, I did not think that there was anything really neurologically wrong with him, although I didn=t rule out that possibility either.

(PCT-59).

her to discuss the issues in the case (PCT-62). She knew generally what she was presumably going to be asked at the *Spencer* hearing by reviewing her report and the materials provided to her by Ullman (PCT-63). If additional information existed that was either contrary to what was contained in her report or which would have served to buttress her conclusions, she would expect the attorney to provide it to her; if she had been aware of such information, she would have asked for it had she known of its existence (PCT-65). For example, had she been provided with the penalty phase testimony of the family members, she would Acertainly have needed more time@ to go through the transcripts before testifying at the *Spencer* hearing (PCT-76). The information contained in her two-page report to Ullman detailed her conclusions based on her evaluation of Mr. Blackwood and the information Ullman had provided to her (PCT-67-70). Her notes reflected a phone number given to her by Mr. Blackwood at the time of her initial competency evaluation that purportedly was a phone number for Mr. Blackwood=s mother; Dr. Block-Garfield attempted to call the number when she first evaluated Mr. Blackwood in 1995, and again in April, 1997, but was unsuccessful in reaching anyone (PCT-72). She could not recall if she told Ullman of her unsuccessful attempts to call Mr. Blackwood=s mother (PCT-73). She again explained her difficulty in comprehending the definition of Aextreme@ for purposes of the statutory mitigating factor of extreme mental or emotional disturbance, and acknowledged her opinion that Ayou cannot give that word a definition@ and thus could

not opine that the factor applied to Mr. Blackwood (PCT-80-81).

On redirect examination, Dr. Block-Garfield acknowledged that, in her report to Ullman, she indicated that Mr. Blackwood did qualify for *several* statutory and nonstatutory mitigating circumstances, including the lack of a prior criminal history (PCT-83). When she made reference to the fact that *several* statutory mitigating factors were applicable, she claimed that the word Aseveral@ was Ainaccurate@ (PCT-84). She would hope that the attorney would have read the report and phoned her to discuss it and call her attention to her use of the word Aseveral@ when referring to statutory mitigating circumstances (PCT-84). She believed, and continues to believe, that Mr. Blackwood was under Aduress@ to the point of perhaps qualifying for that statutory mitigating circumstance, but with regard to the extreme mental or emotional disturbance mitigator, she again expressed personal trouble with the word Aextreme@ although she acknowledged that Mr. Blackwood was under Asevere emotional distress@ (PCT-84-85). She did not catch her error before she testified at the *Spencer* hearing (PCT-85).

She also explained that in her report to Ullman, she did not discuss or document the events in his life leading up to the homicide because it had previously been addressed in her other reports (PCT-86). She had no recollection of asking Mr. Blackwood if she was suffering from depression at the time of the crime, although she had no doubt that he was depressed at the time of the homicide (PCT-87). It was also

Avery obvious@ that in the time leading up to the crime, Mr. Blackwood had a loss in normal activities, weight loss, inability to sleep, lack of attention to hygiene and bathing, lack of interest in work, all of which are associated with depression (PCT-87). She did not recall documenting these matters in her report, but Acertainly from what I saw . . . and looking at the situation from a clinical perspective, those factors had to be there prior to the commission of the offense@ (PCT-88). At the time, she had no other information to corroborate what Mr. Blackwood was telling her (PCT-88). As for her continued inability to find that Mr. Blackwood was under an Aextreme@ emotional disturbance, Dr. Block-Garfield was aware of the testing and reports of Drs. Eisenstein and Jacobson, both of whom have different areas of expertise than she does (PCT-89).

Dr. Martha Jacobson. Dr. Jacobson is a licenced psychologist who has testified for both the State and the defense in criminal cases; without objection from the State=s Dr. Jacobson was admitted as an expert in the field of clinical psychology (PCT-92-95). Although not an expert in the field of neuropsychology, Dr. Jacobson has training in the area and is able to discuss the structure of the brain and the tests that make up a neuropsychological testing battery (PCT-95).

In 2003, Dr. Jacobson was asked by Mr. Blackwood=s collateral counsel to perform a full psychological evaluation of Mr. Blackwood (PCT-96). She was provided with a wealth of materials, including testimony, reports, and data from other

expert witnesses, guilt and penalty phase testimony, Broward County jail records, school records, and law enforcement reports and testimony (PCT-96-98). She also personally met with Mr. Blackwood over the course of two days, conducted an extensive clinical interview and administered a battery of testing (PCT-99; 101-02).[16] Additionally, Dr. Jacobson spoke, in person, for several hours with one of Mr. Blackwood=s sisters, and on the phone with another sister (PCT-100). Based on the results of the testing she administered to Mr. Blackwood, Dr. Jacobson opined that Mr. Blackwood has what is called an Aavoidant personality@ (PCT-105), a disorder characterized by individuals who avoid social interactions, have a psychological and developmental history of problems with consistent nurturing, emotional deprivation, and lack of trust (PCT-105). The testing results were also consistent with Mr. Blackwood being depressed and anxious, as well as demonstrating difficulties in thinking clearly, lack of aggressiveness, a high degree of suggestibility and susceptibility to being easily influenced (PCT-111, 113, 115, 120). The results of the various tests were Avery consistent@ with each other (PCT-115). Testing was also

[16]Dr. Jacobson did not perform IQ testing because it had recently been performed by another mental health expert, Dr. Hyman Eisenstein (PCT-99). She did, however, explain that she had to read the questions on the MMPI test to Mr. Blackwood because of his third-grade level of reading ability (PCT-102).

conducted which definitively ruled out any malingering on Mr. Blackwood=s behalf (PCT-118).

Dr. Jacobson also conducted a clinical interview with Mr. Blackwood, and she was able to confirm what he told her during her interviews with Mr. Blackwood=s sisters (PCT-121; 124). Mr. Blackwood presented a Avery difficult early childhood@ in that he went to live with his paternal grandmother when he was about a year old because his mother had suffered from depression and she could not handle the responsibility (PCT-121). The family lived in a rural part of Jamaica bereft of educational opportunities and marked by abject poverty (PCT-121). The children had one set of clothes and shoes that they had to wear until they gave out or outgrew them (PCT-121-22). In addition to raising Mr. Blackwood, the paternal grandmother had ten of her own children in the same home and, as a result, Mr. Blackwood did not get a lot of attention, a fact which is particularly significant in this case because when he was eventually reunited with his other siblings around the age of 12, he Afelt like the outsider@ and unwanted by his mother (PCT-123-24). This feeling was only confirmed later on when Mr. Blackwood=s mother, in divorce proceedings, said that she did not want the children (PCT-124).

Once reunited with his father and siblings, Mr. Blackwood continued to suffer from deprivation in a number of important respects, even after the family moved to the United States. Because his father would work, Mr. Blackwood and his siblings

were left alone in a small apartment to fend for themselves (PCT-124-25). And because Mr. Blackwood was the oldest of the siblings, his father was Amuch harder@ on him than he was on the other siblings and would take out his anger on Mr. Blackwood if he and his siblings did not abide by the father=s directives (PCT-125). The father=s anger would take the form of physical abuse, such as beatings with sticks (PCT-125).[17]

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[17]The State claims that Dr. Jacobson Awas not sure whether Blackwood lived with his father or mother when he came to the United States@ (SB at 19). The record reveals, however, that it was the prosecutor who was not sure, not Dr. Jacobson:

> Q [by ASA Bailey] But I didn=t think the Defendant lived with his father.
>
> A [by Dr. Jacobson] Well then, I think you misunderstood. He did live with his father.
>
> Q When?
>
> A He was with his grandmother for approximately the first 10 years of his life. Now understand that the grandmother was with, was the father=s mother. So his father would come to her home and he would be there in and out.
>
> Mr. Blackwood=s father came to the United States I believe if I recall correctly in the 60's. Mr. Blackwood came after that. He was with his dad, his mom for a year or two. Mom and dad were together part of that time. And then Mr. Blackwood=s mom and dad got divorced and he was with his dad for some of that time.
>
> Q When?

A After he came to the United States.

Q How old was he?

A Approximately fourteen. I believe he came here when he was about fourteen.

Q And he lived with his father then?

A Yes.

(PCT-152-53).

Mr. Blackwood, as a child, also suffered several head injuries and also nearly drowned when he was approximately 10 years old (PCT-122-23). This incident occurred when Mr. Blackwood and his brother were washing clothes in a river, and Mr. Blackwood was carried out in the water and was rendered unconscious (PCT-123). Because there was no nearby hospital, Mr. Blackwood never received any formal medical treatment and, after this incident, the family reported that he Awasn=t quite the same after that, that he appeared to be a little slow@ (PCT-123).[18]

In terms of education, Mr. Blackwood related that he did complete high school in Ft. Lauderdale, but he was number 357 out of approximately 400 students in his

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[18]The State appears to fault Dr. Jacobson for failing to determine if Mr. Blackwood=s head injuries required hospitalization or whether CPR was Anecessary@ following Mr. Blackwood=s near-drowning experience (SB at 19). Of course, as Dr. Jacobson explained, hospitalization was out of the question as there were no doctors or hospitals located in the area where Mr. Blackwood lived (PCT-149). As for the issue of CPR, while Dr. Jacobson could not know whether formal CPR was administered to Mr. Blackwood, she did explain in response to the prosecutor=s question that his uncle Ahelped@ him Arecover@ from the incident:

> A I think, ma=am, that anybody who was unconscious after drowning probably needed some help. Whether it was CPR, what was done at that time, I can=t tell you. The description from his family members, two family members independently, was that he was unconscious and not moving. I cannot tall you exactly what the uncle did. I tried reaching the uncle. He=s very elderly and I was unable to reach him.

(PCT-150).

class (PCT-126). His poor scholastic record was confirmed by records that Dr. Jacobson was provided and had reviewed (PCT-126-27).

Dr. Jacobson also discussed with Mr. Blackwood his history of relationships with women (PCT-127). The Afirst thing@ Mr. Blackwood said to her was that women Ahurt you, they abuse you, they leave you@ (PCT-127). He related a relationship he had when he was in his late teens which, when it ended, left Mr. Blackwood nearly suicidal (PCT-127). His next major relationship was with a woman named Charlotte, who was the mother of his child and with whom he was with about 4 or 5 years (PCT-127). Mr. Blackwood also discussed his relationship with Ms. Thomas, the victim in this case (PCT-129). This Aon and off@ relationship lasted for about 12 years, and began when he was still seeing the other woman (PCT-129). The two women were jealous of one another, and eventually Mr. Blackwood began to primarily spend time with Ms. Thomas (PCT-129). Mr. Blackwood and Ms. Thomas had arguments from time to time and he felt that she would verbally Aput him down@ in front of his child (PCT-130).

In the time leading up to the murder, Mr. Blackwood and Ms. Thomas had broken up but then began to see each other again Aon and off@ (PCT-130). Dr. Jacobson explained that, for Mr. Blackwood, this was a relationship he wanted but had no control over, and in some respects it echoed the one he had with his mother, Awhere he wanted to be taken care of, but she=ll be there, not be there@ (PCT-130).

Mr. Blackwood expressed his belief that Ms. Thomas had been seeing other people in the time leading up to her death because she was not willing to go out with him in public and was not seeing him as often as she was before (PCT-130). This made Mr. Blackwood more depressed, but around Christmas-time, he became Aa little more hopeful@ because Ms. Thomas invited him to have Christmas dinner with her at her mother=s house and they spent more time together in the week or two prior to her murder (PCT-130-31). His hopefulness turned out to be short-lived, however, in that Mr. Blackwood remained depressed during this period; he would not answer to door to his house, stayed in bed, stopped attending social and sporting events, began drinking more heavily, and had trouble sleeping at night (PCT-131-32). He would also get into his car and drive around aimlessly (PCT-132). Mr. Blackwood=s depression at this time was confirmed not only by his sisters, but also by Dr. Jacobson=s testing (PCT-132-33). At the time of the incident, Dr. Jacobson opined that Mr. Blackwood suffered from Amajor depression@ (PCT-133).

Dr. Jacobson also related that Mr. Blackwood discussed what occurred with respect to the homicide. The day before (or 2 days before), Mr. Blackwood and Ms. Thomas had lunch together (PCT-134). On the morning in question, Mr. Blackwood went to Ms. Thomas=s house to bring a set of clean sheets and asked if she wanted to have breakfast together. She said she did not want to eat but rather go to bed (PCT-135). The two then went to bed and were physically intimate, but afterwards a verbal

argument occurred, with Ms. Thomas Aputting him down@ with remarks about his manhood, telling him she did not want to have his children and that she had aborted his children (PCT-135). This latter remark upset Mr. Blackwood because he had always wanted to have more children (PCT-135). After he got out of bed, he went into the bathroom to clean up and she said something else derogatory toward Mr. Blackwood, to which he responded AI should wash your mouth out with soap and water@ (PCT-136). Mr. Blackwood somehow then ended up back in the bed with Ms. Thomas, there was a physical struggle and he tried to choke her (PCT-136). After Ms. Thomas stopped moving, Mr. Blackwood got scared and believed she was unconscious, and he panicked, got scared, and drove off in her car (PCT-136). He drove into a field in a rural part of Broward County, spent the night in the field, then hitchhiked to St. Petersburg (PCT-136). Dr. Jacobson testified that she also listened to the audiotape of Mr. Blackwood=s police statement which, with the exception of minor details, was A[e]xtremely consistent@ with what he told her (PCT-137).

Dr. Jacobson opined that, at the time of the offense, Mr. Blackwood met the criteria for the statutory mitigating circumstance of no prior criminal history (PCT-138). At the time of the offense, she also testified that to a reasonable degree of psychological certainty, Mr. Blackwood was acting under an extreme mental disturbance, another statutory mitigating circumstance (PCT-139). As she testified:

Q Can you explain that opinion?

A Well, I asked you for a definition of what extreme emotional disturbance and distress was, and that=s whey you have me that manual [from the Public Defender=s Office]. I used the definition of less than insanity, but more emotion than the average man would have if they were really, really upset. I think inflamed was the language from the case that was cited in the manual.

And I used that as a freight [sic] mark, along with what I knew about Mr. Blackwood based upon the psychological tests results, and what I knew about Mr. Blackwood in terms of his background as to what kind of things would trigger him, because this is basically a man who was not generally physically aggressive.

There had been one incident of physical aggression with Ms. Thomas previously. But it was reciprocal. I believe she hit him in the face with her high heel shoe, and he required stitches. But for the most part this is not an aggressive man. So I wanted to know what happened then, what was different at this moment in time that he might have caused him to act in the way that he did.

Q And what do you see as the basis for that opinion?

A I think the basis of it was this, the deprecating remarks that were made. The comments that he wasn=t, that he wasn=t good enough for her to have children with. That he knew she was with someone else. She had asked him recently to use a condom, which he had not asked him in the past**B**

Q What was the significance of that?

A I don=t know what he made of it. But what I made of it was that there were other partners involved at some point in time, and there was a reason for it. I think that when he told me that she made fun of him, that primarily when she told him that she had aborted a number of his fetuses, that that was the trigger, the idea of rejection, especially after having been intimate with him, would have pushed the old rejection**B**

Q When you say pushed the old rejection, what was the old rejection?

A The rejection of the primary mother figure. Mr. Blackwood has, the emotional reality of his childhood was the inconsisten[cy] in nurturing and parenting, mom leaving him on several occasions, being the only one of his siblings not with the parents. I believe that was very significant for him.

Q As a result of this in formulating this opinion did you utilize the results of the psychological testing?

A Well, that fits very clearly with avoidant personality disorder. It fits very clearly with the other information, fact of the Rorschach testing, that when he is emotionally arouses can lose control. The fact that he fears rejection, and that he has a negative self image. He sees himself to be damaged to begin with.

One of the things that we look for, for example on the Rorschach, are the number of responses where something is damaged, tattered, or content response where there is some kind of damage or disforked [sic] feeling or something morbid. It is called a morbid response. And normally you might see one morbid response in the normals, maybe one. Most of the time you don=t even see that. He had three morbid responses, which indicates that he sees himself as damaged and dysfunctional.

Q So specifically when it came to this commission of the crime, how did his psychological makeup impact on what happened?

A To me the pieces of the puzzle fit pretty well together. As far as these things go, it was fairly consistent across the board in the testing. The testing fit with the collateral information, background, social history that I obtained from Mr. Blackwood and from his family members.

It fit with all of the testimony that I have read. For example, one of the things that Mr. Blackwood said was when they were having this struggle in bed his hand got caught in Ms. Thomas=s chain. And in

> Doctor Price=s testimony, I can=t recall whether it was the deposition or the Guilt Phase, she mentioned that there were marks that could be consistent with a chain. So to me it fit together. There were pieces here that didn=t, but they weren=t major pieces in my book.

(PCT-140-42).

Dr. Jacobson also explained that many factors in Mr. Blackwood=s background provided evidence of nonstatutory mitigating circumstances, such as a full scale IQ of 72, feelings of inadequacy, easily suggestible, history of neglect, and remorse over Ms. Thomas=s death (PCT-146-47).

Dr. Hyman Eisenstein. A licenced clinical psychologist with a sub-speciality in the area of clinical neuropsychology, Dr. Eisenstein was admitted, without objection, as an expert in the field of clinical psychology (PCT-179-83).

Dr. Eisenstein was asked to evaluate Mr. Blackwood by collateral counsel, and, in addition to personally meeting with Mr. Blackwood on three occasions, reviewed background materials such as school records, police reports, and a statement given by Mr. Blackwood to law enforcement (PCT-183). A battery of various tests were also administered to Mr. Blackwood, including neuropsychological and intelligence testing (PCT-184; 190-91). Mr. Blackwood=s full scale IQ was 72 (PCT-185-88).

Dr. Eisenstein opined that Mr. Blackwood suffered not only from borderline intellectual functioning, but also Asevere impairment@ with respect to the neuropsychological aspects of the testing (PCT-192-93; 195). For example, Mr.

Blackwood=s executive functioning was severely impaired; executive functioning involves the area of the brain that deals with decision-making skills, complex ability to process information, judgment, and reasoning (PCT-192-93). Due to the organic deficits, Mr. Blackwood=s thinking is also Aconcrete@ in that it lacks sophistication and an inability to weigh or consider reasonable alternatives or possibilities (PCT-197). Mr. Blackwood=s scores on the portion of the testing addressing memory were also mixed, and in the area of language and expressive skills, were Aextremely low@ (PCT-199-200-01).

Dr. Eisenstein=s evaluation also consisted of consultation with collateral sources of information. For example, he spoke with Mr. Blackwood=s former employer, Mr. Van Wych, who told him that Mr. Blackwood worked for him for approximately 15 years as a cabinet maker (PCT-197-98). While Mr. Van Wych attested to the fact that Mr. Blackwood was a Agood worker,@ his performance was limited to one or two simple repetitive steps and did not require studying new designs or analyzing different parts of a particular project (PCT-198). Mr. Van Wych referred to Mr. Blackwood as a Aone trick pony@ which, in the cabinet business, is someone who had only one skill which they could perform consistently Awith no change, no deviation@ (PCT-198).

Dr. Eisenstein also conducted a clinical interview with both Mr. Blackwood and his sister, Lorna Salmon (PCT-203-04). From these interviews Dr. Eisenstein was able to glean information about Mr. Blackwood=s history of head injuries (*Id*.). A

history of head injuries is consistent with Mr. Blackwood=s neuropsychological deficits as noted in the testing (PCT-204). Dr. Eisenstein also discussed Mr. Blackwood=s childhood with him and his sister, and details of his Avery difficult upbringing@ were discussed and corroborated (PCT-208-09). In Dr. Eisenstein=s view, Mr. Blackwood=s childhood was Ajust surviving in the bare bones necessity@ for a number of reasons including poverty and neglect (PCT-208).

Dr. Eistenstein also questioned Mr. Blackwood about his relationship with Ms. Thomas (PCT-209). Mr. Blackwood explained that the relationship was a long term one but that Ms. Thomas would be verbally abusive toward him and make him feel like Aher puppy dog@ (PCT-209-10). In the time leading up to the crime, Mr. Blackwood explained that he and Ms. Thomas had split apart and he was depressed over the breakup (PCT-211). They eventually got back together, however, and Mr. Blackwood attempted to get back in her favor (PCT-211). On the day of the incident, Mr. Blackwood and Ms. Thomas had consensual sex, after which an argument ensued and Ms. Thomas accused Mr. Blackwood of inadequate sexual performance and he felt she was putting him down (PCT-211). These remarks triggered a response in Mr. Blackwood, after which time he Alost it@ (PCT-212). Because of his organic deficits, his ability to reasonably assess and respond to the situation was impaired, as was his capacity to appreciate the nuances of what exactly was being asked of him at the time

in light of Ms. Thomas=s remarks (PCT-212).[19] As a result, in Dr. Eisenstein=s opinion, Mr. Blackwood was suffering from an extreme mental disturbance (PCT-212-13).

Robert Ullman. At present time, Mr. Ullman had no full time employment because, in 2001, his licence to practice law was suspended for three years (PCT-226). He had been convicted of a felony and was on federal probation for four years stemming from a 2001 federal conviction for using a telephone to conspire to secure an illegal drug (PCT-227). He expressed his desire to reinstate his licence upon termination of his suspension (PCT-227-28).

[19]The State writes that ADr. Eisenstien knew none of the facts or circumstances of this murder@ (SB at 20). As set forth above, however, Dr. Eisenstein discussed the murder with Mr. Blackwood. Moreover, Dr. Eisenstein reviewed the police reports as well as Mr. Blackwood=s statement to law enforcement (PCT-218).

Mr. Ullman was appointed to represent Mr. Blackwood in June, 1996, after attorney Robert Trachman withdrew (PCT-231-32).[20] Trial took place in December, 1996 (PCT-232). When he initially took over the case, he was not aware that the State was seeking the death penalty (PCT-232). At some point during the course of time, the prosecutor advised him in writing that the State was going to be seeking the death penalty (PCT-232); at that point Mr. Ullman did engage in some research with respect to death penalty issues (PCT-290). In October, 1996, about a month before trial, Mr. Ullman=s timesheets revealed that he reviewed the previous psychological reports in the case, spoke with Dr. Peter Macaluso, who had previously found Mr. Blackwood to be incompetent to stand trial[21], and A[p]ut together mitigator packet@ (PCT-269); at that time, however, he did not ask Dr. Macaluso to retain his services for the penalty phase (PCT-299-300). It was not until December 12, 1996, a week after the guilt phase verdict,[22] when Mr. Ullman contacted Dr. Macaluso with respect to seeking his help as a witness at Mr. Blackwood=s penalty phase (PCT-234; Defense Exhibit 1). On December 17, 1996, Mr. Ullman corresponded again with Dr.

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[20]The exact date of his appointment was June 19, 1996, *nunc pro tunc* to June 18 (PCT-262).

[21]Dr. Macaluso had previously evaluated Mr. Blackwood for competency issues in November, 1995 (PCT-236-37; 263). Dr. Macaluso found Mr. Blackwood incompetent to stand trial and that he suffered from depressive illness with possible psychotic features (PCR-266-67).

Macaluso giving him some information about the case, including the fact that the penalty phase was to begin on January 23, 1997 (PCT-235-36; Defense Exhibit 2).[23] From December 17 to December 22, Mr. Ullman was gone on vacation (PCT-236). Mr. Ullman never met personally with Dr. Macaluso, but Dr. Macaluso, in early January, wrote Mr. Ullman to inform him that he could not assist with the penalty phase (PCT-238; 276-77). After receiving the letter, Mr. Ullman spoke with Dr. Macaluso on the phone (PCT-277; 279). Dr. Macaluso=s letter revealed that he had not even met with Mr. Blackwood to evaluate him for purposes of mitigation, and Mr. Ullman never requested that he do so (PCT-239-40). Moreover, Dr. Macaluso indicated he would not be a witness because he was not happy with the fee arrangement and was not going to perform the needed work for $1,500 (PCT-304-05); Mr. Ullman considered the letter to be essentially a ACYA@ letter because he just did not want to be a witness (PCT-304)

Mr. Ullman agreed that his strategy at the penalty phase was to present mental health mitigation, and he A[a]bsolutely@ believed Mr. Blackwood=s case was one in

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[22]The jury returned its guilty verdict on December 5, 1996 (PCT-234).

[23]Mr. Ullman also provided Dr. Macaluso with some materials about Mr. Blackwood, such as Dr. Macaluso=s own previous competency report, Dr. Block-Garfield=s prior reports, a report from Dr. John Spencer, and police reports (PCT-237). Mr. Ullman never provided Dr. Macaluso with other materials such as school records (PCT-238). Mr. Ullman did not even know if he had obtained any school records, but if he had, they were not provided to Dr. Macaluso (PCT-238-39).

which he had a decent chance of securing a life recommendation from the jury (PCT-240-41). He did secure a court order to engage the services of an investigator, Randy McCoy, but Mr. Ullman felt Athis wasn=t a case that lent itself to private investigation@ and thus, although McCoy was reimbursed for his time, he was not called as a witness (PCT-242). Nor was McCoy even used by Mr. Ullman for purposes of penalty phase investigation (PCT-243).[24]

Mr. Ullman acknowledged that there was a period of time when Mr. Blackwood filed a motion to have him discharged as his counsel (PCT-246). He also testified that while he could have sought the services of a second chair attorney to handle the penalty phase, he did not:

> A My experience with trying cases [is] that, in fact, for my purpose, the retention andBhow should I put this. My limited experience with murder cases is, when you hire a second chair to do the penalty phase, they are never as focused on the facts of the case and that they generally do not do a good job as trial counsel. And with my experience with the second chair and juries, I believe that you=re better off with not hiring a second chair. They just don=t do as competent [a] job as first chair.

(PCT-247).

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[24]Instead, it appears that McCoy=s role was to boost Mr. Ullman=s reputation with Mr. Blackwood (PCT-244). Mr. Ullman acknowledged writing to McCoy and urged him to Ameet [Mr. Blackwood=s] acquaintance@ and Atell him what a great lawyer I am@ (PCT-244).

No mental health professionals testified at Mr. Blackwood=s penalty phase (PCT-247). By way of letter dated February 26, 1997 (over a month after the penalty phase), Mr. Ullman secured the services of Dr. Block-Garfield for purposes of the *Spencer* hearing, which was to take place on April 11, 1997 (PCT-248). Prior to Mr. Blackwood=s case, Mr. Ullman had worked with Dr. Block-Garfield in other cases, including some murder cases (PCT-248). He sent her some materials about Mr. Blackwood=s case, but did not send her the testimony from the penalty phase evidence or school records, for example (PCT-250). Nor did he send her the testimony of the medical examiner or the audiotape of Mr. Blackwood=s statement to the police (PCT-250). Indeed, in this period of time, Mr. Ullman never scheduled a formal meeting with Dr. Block-Garfield to discuss the case (PCT-250). While he believed he may have spoken with her on the phone in this period of time, his timesheets reflected no such conversations (PCT251-52).

With respect to Dr. Block-Garfield=s March, 1997, report, Mr. Ullman testified that he believed that Dr. Block-Garfield would be prepared to testify to the existence of several statutory mitigating factors, including that Mr. Blackwood was under an extreme emotional distress at the time of the crime (PCT-253-54). He believed that he knew prior to calling her to testify that she did not believe Mr. Blackwood=s distress was Aextreme@; however, it was only during the course of her testimony at the *Spencer* hearing did the topic get discussed (PCT-256). According to Mr. Ullman, Dr. Block-

Garfield Adidn=t have a clear understanding of the statutory mitigators@ (PCT-257), but that based on her report he believed she would have found the extreme emotional distress statutory mitigating factor (PCT-258). In Mr. Ullman=s view, the difference between Mr. Blackwood=s mental state constituting a statutory mitigating factor as opposed to a nonstatutory mitigating factor is a matter of Asemantics,@ although he conceded that this Court places much greater weight on statutory mitigators (PCT-258). Despite this situation, Mr. Ullman opted to put on Dr. Block-Garfield at the *Spencer* hearing because Aour back was somewhat against the wall@ insofar as Dr. Macaluso Ahad dropped out at the last moment@ and the fact that the case Awas not going to be continued@ (PCT-283-84). Mr. Ullman Acertainly didn=t want to bring in at the last minute a psychologist@ (PCT-284). He did not personally meet with Dr. Block-Garfield before putting her on the stand because A[s]he didn=t request it@ nor did he (PCT-285). If Dr. Block-Garfield wanted to meet with him, Aall she had to do was pick up the phone@ (PCT-286).

Mr. Ullman also acknowledged that Dr. Block-Garfield did recommend further neuropsychological testing of Mr. Blackwood, but he had never had a psychiatrist or psychologist tell him that further testing was not needed in a case (PCT-259). Mr. Ullman did not pursue Dr. Block-Garfield=s recommendation because Athere are time parameters, costs involved, case costs involved@ (PCT-259-60). He did not, however, list this as a reason in the motion for continuance he did file with regard to the *Spencer*

hearing (PCT-260).

SUMMARY OF THE ARGUMENTS

1. The lower court properly determined that Mr. Blackwood established both deficient performance and prejudice of his penalty phase attorney, Robert Ullman, and thus correctly determined that relief should be granted. On appeal, the State cannot meet its burden of establishing that the lower court=s factual findings are not based on competent and substantial evidence, nor can it establish that the lower court improperly applied the controlling legal standards.

The lower court made factual findings that Ullman=s performance was deficient regarding his efforts to investigate, prepare, and present available mental health mitigating circumstancesBboth statutory and nonstatutoryBat the penalty phase. Indeed, as the trial court found, Ullman essentially Adid nothing@ to ensure that Mr. Blackwood was evaluated by a mental health expert prior to the penalty phase for purposes of a penalty phase mitigation evaluation. Ullman failed to meet with the prior competency expert, Dr. Macaluso, failed to have Macaluso evaluate Mr. Blackwood for purposes of mental health mitigating circumstances, and failed to discuss with Macaluso the potential availability of nonstatutory mental health mitigating circumstances. After being informed by Macaluso that he would not testify due to a fee dispute, Ullman failed to ask for a continuance of the penalty phase and/or to seek the trial court=s assistance in providing additional resources in order to permit Macaluso to testify. Ullman also failed to contact Dr. Trudy Block-Garfield

prior to the penalty phase to have her testify at the penalty phase, particularly after being informed that Macaluso would not testify. Moreover, the lower court rejected the State=s suggestion that Ullman had made a strategic decision not to present Macaluso or any other mental health expert at the penalty phase. The lower court=s factual findings are supported by more than competent and substantial evidence, and the legal conclusion that Ullman rendered deficient performance should therefore be affirmed

The lower court also properly concluded that Mr. Blackwood had established prejudice from Ullman=s deficient performance. The court credited as Apersuasive@ the mental health testimony presented by Mr. Blackwood at the evidentiary hearing from three mental health expertsBDr. Trudy Block-Garfield, Dr. Martha Jacobson, and Dr. Hyman Eisenstein. These experts testified to extensive mental health mitigating evidence that the jury never knew about, including the existence of a statutory mental health mitigating circumstance (as testified to by Drs. Jacobson and Eisenstein). They also presented expert evidence as to Mr. Blackwood=s intellectual deficits, his lifelong struggle with extreme depression, history of head injuries, and, through Dr. Eisenstein, evidence that Mr. Blackwood suffered from organic brain damage. The State never presented any rebuttal to Mr. Blackwood=s evidence. Given this evidence, credited by the lower court, and the fact that this case involves a 9-3 jury recommendation with only one aggravating circumstance and no prior criminal

history on part of Mr. Blackwood, the lower court=s conclusion of prejudice should be affirmed.

2. The lower court=s order summarily denying Claim I of Mr. Blackwood=s amended Rule 3.850 motion should be reversed for an evidentiary hearing, as his arguments were sufficiently pled.

ARGUMENT I

THE LOWER COURT PROPERLY DETERMINED THAT MR. BLACKWOOD WAS ENTITLED TO RULE 3.850 RELIEF DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL.

A. Introduction and Standard of Review.

The lower court granted an evidentiary hearing on two claims raised in Mr. Blackwood=s Rule 3.850 motion: whether trial counsel=s failure to adequately investigate, prepare, and present mental health mitigation at the penalty phase constituted constitutionally ineffective assistance of counsel (Claim II), and whether Dr. Trudy Block-Garfield rendered competent assistance to Mr. Blackwood for purposes of the penalty phase and the *Spencer* hearing (Supp. PCR-29). Following an evidentiary hearing, the lower court granted Mr. Blackwood relief in the form of a resentencing. Applying the appropriate legal standards, the lower court granted relief after making extensive factual findings. This Court=s standard of review when assessing the propriety of the lower court=s order granting Mr. Blackwood a new penalty phase due to ineffective assistance of counsel is well-settled:

> [A] circuit court=s ruling on an ineffectiveness claim is a mixed question of law and fact, and a reviewing court must defer to the circuit court=s factual findings as long as those findings are supported by competent, substantial evidence in the record. Competent, substantial evidence is tantamount to legally sufficient evidence, and a reviewing court must assess the record evidence for its sufficiency only, not its weight. Evidence contrary to the circuit court=s ruling is outside the scope of the inquiry at this point, for a reviewing court cannot reweigh the Apros and

> cons@ of conflicting evidence. In other words, an appellate court cannot use its review powers as a mechanism for reevaluating conflicting evidence and exerting covert control over the factual findings. When evaluating an ineffectiveness claim, an appellate court may review *de novo* only the trial court=s assessment of the law, not its assessment of the facts.

State v. Coney, 845 So. 2d 120, 133 (Fla. 2003) (footnotes omitted). *Accord Stephens v. State*, 748 So. 2d 1028 (Fla. 1999). As long as the circuit court=s factual findings are supported by competent, substantial evidence in the record and the lower court=s Aultimate conclusions on the performance and prejudice prongs comport with the law,@ *Coney*, 845 So. 2d at 133, then this Court must affirm the lower court=s order.

B. The Lower Court=s Order.

In order to establish a claim of ineffective assistance of counsel under the Sixth Amendment, a defendant must meet the oft-stated two-pronged test of deficient performance and prejudice as set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny. *See Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 123 S. Ct. 2527 (2003).

1. Deficient Performance Prong.

The first prong of the *Strickland* test requires a defendant to establish deficient performance. The lower court=s order set forth extensive factual findings with regard to this prong:

Mr. Blackwood=s trial counsel, Robert Ullman, was appointed on June 19, 1996. Prior to Mr. Ullman=s appointment, Mr. Blackwood was evaluated for competency by Dr. Macaluso, Dr. Block-Garfield, and Dr. Spencer. Dr. Macaluso was the only mental health expert to find that Mr. Blackwood was not competent. Mr. Ullman hoped to rely upon Dr. Macaluso for statutory mitigators because Dr. Macaluso rendered the most favorable defense competency evaluation. On October 8, 1996, Mr. Ullman prepared a mitigation packet for Dr. Macaluso and assumed that he asked Dr. Macaluso to be a witness. Mr. Ullman followed up in a letter to Dr. Macaluso on October 28, 1996. Mr. Ullman had no independent recollection of the contents of that letter or of speaking to Dr. Macaluso on that date.

Mr. Ullman spoke to Dr. Block-Garfield on November 4, 1996, as reflected by his bill. Mr. Ullman did not recall if he asked Dr. Block-Garfield to be a mental health witness at that time; however, he did recall asking Dr. Block-Garfield in February, 1997, which was *after* the penalty phase proceeding.

The guilt phase proceeding began on December 2, 1996, and the jury returned its guilty verdict on December 5, 1996. The Court set the penalty phase proceeding for January 23, 1997, giving the parties almost seven weeks to prepare.

On December 12, 1996, Mr. Ullman wrote to Dr. Macaluso advising that he needed Macaluso=s help as an expert witness for the penalty phase proceeding. Mr. Ullman followed with a letter to Dr. Macaluso on December 17, 1996, providing him with information pertinent to the case, i.e., Dr. John Spencer=s report, materials from Dr. Block-Garfield, Mr. Blackwood=s confession, the detective=s report, and Dr. Price=s autopsy report. In addition, Mr. Ullman informed Dr. Macaluso that the penalty phase proceeding would begin on January 23, 1997.

Mr. Ullman never met with Dr. Macaluso. On January 7, 1997, sixteen days prior to the penalty phase proceeding, Dr. Macaluso wrote a letter to Mr. Ullman advising that he could not assist in the penalty phase. After receiving the letter, on January 9, 1997, Mr. Ullman contacted Dr. Macaluso by telephone. Dr. Macaluso was unhappy with

> the fee arrangement and he advised Mr. Ullman that he was not willing to work for [$1500.00]. Even though Dr. Macaluso never met with Mr. Blackwood subsequent to his competency evaluation on November 3, 1995, Dr. Macaluso stated in his letter of January 7, 1997, that he Awould not be able to testify with reasonable medical certainty that any of the statutory mitigating circumstances are present.@ This Court finds that the record reflects no evidence of any discussion with Dr. Macaluso relative to nonstatutory mental health mitigation evidence. Mr. Ullman testified that he was upset by Dr. Macaluso=s letter and thought that in reality it was a ACYA@ letter because Dr. Macaluso did not want to be a witness for what he thought would be inadequate compensation.
>
> Mr. Ullman testified that he was left in a terrible position only two weeks prior to the scheduled commencement of the penalty phase proceeding; he had no mental health mitigation witnesses. Rather than ask for a continuance of the penalty phase or contact Dr. Block-Garfield or Dr. Spencer, this Court finds that *Mr. Ullman did nothing*. He defended Mr. Blackwood at the penalty phase proceeding without further investigation and without any mental health mitigation witness to provide statutory or nonstatutory mitigators. This Court finds that *Mr. Ullman=s performance was deficient under Strickland*.

(PCR-312-15) (emphasis in original).

The lower court also rejected, as a matter of fact and law, the State=s position that Mr. Ullman made a strategic decision not to present mental health testimony at the penalty phase:

> The State argues that Mr. Ullman made a strategic decision not to present Dr. Macaluso (or any other mental health mitigation) at the penalty phase proceeding because such testimony would not have been helpful. That decision y Mr. Ullman must be given deference unless such strategy is found to be unreasonable.
>
> Less than one month ago, the Supreme Court of the United States, in *Wiggins v. Smith*, 123 S. Ct. 2527 (U.S. June 26, 2003),

> addressed the issue of standards for capital defense work. Justice O=Connor wrote that the American Bar Association (ABA) Guidelines Aprovide that investigations into mitigating evidence `should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.=@
>
> In *Wiggins*, trial counsels abandoned their investigation of mitigation after having acquired only rudimentary knowledge of the defendant=s history from a narrow set of sources. The Supreme Court found that the scope of this investigation was unreasonable, Anot reasoned strategic judgment.@
>
> This Court finds that Mr. Ullman=s decision not to investigate further by contacting Dr. Block-Garfield and/or Dr. Spencer and/or any other mental health expert *fell far short* of prevailing professional standards in capital cases. It should be noted that counsel=s Astrategic choices made after less than complete investigation are [considered] reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.@ *Strickland* at 690-91. ACounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.@ *Wiggins, supra,* and *Strickland* at 690-91. This Court finds that Mr. Ullman=s decision to do absolutely nothing regarding mental health mitigation at the penalty phase was not reasonable under the facts and circumstances of this case.

(PCR-315-16) (emphasis in original).

Finally, the lower court also concluded that Mr. Blackwood did not receive the competent assistance of a mental health expert to which he was entitled under *Ake v. Oklahoma*, 470 U.S. 68 (1985). As the court found, its Areview of the entire record establishes that Mr. Blackwood was not examined

nor evaluated by a mental health expert for mental health mitigators prior to the penalty phase@ (PCR-320).

2. Prejudice Prong.

The lower court also, in an well-reasoned order supported by the law and the facts of this case, concluded that Mr. Blackwood had established prejudice due to Mr. Ullman=s deficient performance as to the penalty phase:

> Under Florida=s capital sentencing scheme, the trial judge is required by law to give great weight to the jury=s advisory sentence. *Tedder v. State*, 322 So. 2d 908 (Fla. 1975). In weighing the single aggravating circumstance and the mitigating circumstances found in this case, this Court as the trial court, gave Agreat weight to the jury=s recommendation@ (R Vol. XIV, at 1581-1589).
>
> In assessing prejudice resulting from the ineffective assistance of counsel at the penalty phase of a capital trial, the court must reweigh evidence in aggravation against the totality of the available mitigating evidence. *Wiggins, supra*.
>
> The mitigating evidence available included the testimony of Dr. Block-Garfield who would have testified that although she did not find the statutory mitigator or extreme mental or emotional disturbance, Mr. Blackwood was extremely depressed and emotionally disturbed at the time of the offense. His verbal IQ score was 70 which placed him in the borderline-retarded range of intelligence. One of the standardized tests she administered suggested Mr. Blackwood was neurologically impaired. Dr. Block-Garfield would have testified that Mr. Blackwood had no prior criminal history and was a good candidate for rehabilitation. Had Mr. Ullman asked about the need for neuropsychological evaluation, Dr. Block-Garfield would have recommended it.

Blackwood v. State, 777 So. 2d 399 (Fla. 2000). In short, this Court finds that Dr. Block-Garfield was available to provide persuasive nonstatutory mental health mitigation at the penalty phase.

In addition to Dr. Block-Garfield, the Defense presented the testimony of two other mental health experts at the evidentiary hearing. Dr. Martha Jacobson, a clinical psychologist, testified that she administered a comprehensive series of personality tests to Mr. Blackwood, conducted extensive clinical interviews with Mr. Blackwood on April 3 and 4, 2003, and reviewed materials including Dr. Block-Garfield=s *Spencer* hearing testimony, penalty phase testimony from family members, friends and other witnesses, Detective Desaro=s testimony, Detective Abrams= report, Dr. Price=s deposition and her testimony at the guilt and penalty phases, the audio statement Mr. Blackwood made to the police in Sarasota and Mr. Blackwood=s high school records. She also asked Mr. Blackwood to write a narrative of what he could recall a couple of weeks prior to and leading up to the incident and spoke with two of Mr. Blackwood=s sisters.

Dr. Jacobson testified that she diagnoses Mr. Blackwood as having avoidant personality traits with masochistic features, and she found him to suffer from major depression. Dr. Jacobson opined that at the time of the crime, Mr. Blackwood was experiencing an extreme emotional disturbance (the statutory mitigator) (Tr. June 19, 2003, Vol. II, at 92-104, 133, 139-141).

Dr. Hyman Eisenstein, a licenced clinical psychologist who specialized in neuropsychology also testified on behalf of the Defendant (Tr. June 19, 2003, Vol. II at 179-219). He testified that Mr. Blackwood did not tell him the details of the murder. Dr. Eisenstein also testified that he did not know how the victim died, nor did he review any of the trial testimony and he did not read the autopsy report. Dr. Eisenstein reviewed a two-page summary of Mr. Blackwood=s school records, the fourteen page transcript of Mr. Blackwood=s statement to the police, and police records from

Fort Lauderdale. He met with Mr. Blackwood on three occasions. The first time was on September 25, 2002, when he administered a battery of tests to Mr. Blackwood. Dr. Eisenstein also interviewed Mr. Blackwood=s former boss and spoke with Mr. Blackwood=s sister to discuss Mr. Blackwood=s claims that he was hit in the head while a child in Jamaica. Dr. Eisenstein opined within a reasonable neuropsychological certainty that at the time of the commission of the crime, Mr. Blackwood was experiencing an extreme emotional disturbance (statutory mitigator) (id. At 212-214).

This Court finds that the instant case is strikingly similar to *State v. Coney*, 845 So. 2d 120 (2003), in which Judge Fredricka Smith considered analogous facts such as an expert who refused to testify over a fee dispute and granted Mr. Coney a new penalty phase proceeding. In affirming Judge Smith=s order, the Florida Supreme Court stated that the appropriate test for prejudice resulting from counsel=s deficient performance requires the defendant to show a reasonable probability that, but for counsel=s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome (*Id*. at 131), and *Strickland, supra*.

Applying this test, this Court finds that there is a reasonable probability that, but for Mr. Ullman=s errors of omission, the result of the penalty phase proceeding would have been different. In weighing the single aggravator against the mitigators presented, this Court gave great weight to the jury=s recommendation. Had the jury been presented with expert mental health mitigation, there is a reasonable probability that the balance of aggavating and mitigating circumstances would have changed their recommendation. At the very least, this Court finds that there is a probability sufficient to undermine confidence in the prior jury=s sentencing recommendation.

This Court also finds that Mr. Blackwood did not receive the

> competent assistance of a mental health expert to which he was entitled under *Ake v. Oklahoma*, 470 U.S. 68 (1985). This Court=s review of the entire record establishes that Mr. Blackwood was not examined or evaluated by a mental health expert for mental health mitigators prior to the penalty phase.

(PCR-316-20) (emphasis in original).

C. The Lower Court=s Order Should be Affirmed.

1. Deficient Performance.

On appeal, the State contends that, as to the deficient performance prong, the lower court order should be reversed because the evidence adduced at the hearing established that Mr. Ullman conducted a Avery thorough penalty phase investigation@ (SB at 67). The lower court, however, made a finding of fact that Mr. Ullman rendered deficient performance in that he Adid nothing@ with regard to investigating or securing available mental health mitigation to present at Mr. Blackwood=s penalty phase but rather Adefended Mr. Blackwood at the penalty phase proceeding without further investigation and without any mental health mitigation witness to provide statutory or nonstatutory mitigators@ (PCR-315). In order to overcome this factual finding, the State must demonstrate that the lower court=s findings are

devoid of competent and substantial record support.[25] This is a burden the State simply cannot meet in this case.

As evidence of the Avery thorough investigation@ it claims was conducted by Mr. Ullman, the State discusses the fact that Mr. Ullman was aware of the three competency evaluations conducted while attorney Trachman was still representing Mr. Blackwood, particularly the evaluation of Dr. Macaluso, who had found, in 1995, that Mr. Blackwood was incompetent to stand trial (SB at 67). The State also relies on Mr. Ullman=s attempts to Acontact@ Dr. Macaluso, who Ullman Ahoped@ and/or Abelieved@ would be able to be a favorable mitigation expert (SB at 67). However, other than preparing a Amitigation packet@ and writing a letter to Dr. Macaluso in October, 1996, Mr. Ullman did nothing else, prior to the beginning of the trial, to secure Dr. Macaluso=s assistance for a possible penalty phase in Mr. Blackwood=s case; he never even arranged for Dr. Macaluso (or any other expert) to evaluate Mr.

[25]While the State correctly asserts that the burden of showing ineffective assistance of counsel rests with the defendant (SB at 62), in this case, Mr. Blackwood met his burden below and, on appeal, it is now the *State=s* burden to demonstrate that the lower court=s order is devoid of competent and substantial evidence.

Blackwood for the purpose of evaluating for potential mitigating circumstances.

Mr. Ullman=s efforts once the guilt phase verdict was returned on December 2, 1996, also hardly constitute a Avery thorough penalty phase investigation@ with respect to the mental health aspects of the case (SB at 67). A week after the conclusion of the guilt phase, with the penalty phase scheduled to take place on January 23, 1997, Mr. Ullman re-contacted Dr. Macaluso by letter Aadvising that he needed Macaluso=s help as an expert witness for the penalty phase proceeding@ (PCR-313). About a week later, Mr. Ullman followed up with another letter to Dr. Macaluso, sending him some materials about the case (*Id*.). As the trial court found, Mr. Ullman never met with Dr. Macaluso, and on January 7, 1997, with little over two weeks before the penalty phase was to begin, Dr. Macaluso wrote a letter to Mr. Ullman advising that he could not assist with the penalty phase in terms of testifying to the existence of any statutory mitigating circumstances (PCR-314). The lower court also found that Mr. Ullman never discussed with Dr. Macaluso the issue of whether he could testify to nonstatutory mental health mitigating evidence (*Id*.). Mr. Ullman was upset with Dr. Macaluso=s letter, which he viewed as a

ACYA@ letter because he did not want to work for the $1500 court-appointment fee (*Id.*).[26] At this point, the penalty phase was only two weeks away, but Mr. Ullman did not attempt to contact any of the other mental health experts previously involved with the case, seek to secure the appointment of a new mental health expert, or move for a continuance of the penalty phase. Rather, as the trial court found, A*Mr. Ullman did nothing*@ (PCR-315) (emphasis added).

The lower court=s order is more than supported by competent and substantial evidence, and the State=s contention that Ullman=s efforts constituted a Avery thorough investigation@ cannot be squared with the record in this case or with the law. A[T]he obligation to investigate and prepare for the penalty portion of a capital case cannot be overstatedBthis is an integral part of a capital case.@ *State v. Lewis*, 838 So. 2d 1102, 1112 (Fla. 2002). *Accord Orme v. State*, 2005 Fla. LEXIS 360 at *8-*9 (Fla. Feb. 24, 2005). An attorney has a Astrict duty@ to investigate for potential mitigating

[26]Mr. Ullman never moved the trial court to grant Dr. Macaluso an appropriate fee in excess of $1500 due to the fact that this was a capital penalty phase.

circumstances, particularly mental health mitigation. *Ragsdale v. State*, 798 So. 2d 713, 716 (Fla. 2001). In so doing, an attorney representing a defendant facing the death penalty has an obligation to not only discover available mitigating evidence from collateral sources including medical, educational, and family and social history, *Wiggins*, 123 S. Ct. at 223 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6, at 133 (1989)), but also to ensure that his or her client is evaluated by a mental health expert for purposes of mental health mitigating circumstances when there are signs that the defendant may suffer from mental health problems. *See Arbelaez v. State*, 2005 Fla. LEXIS 89 at *16 (Fla. Jan. 27, 2005) (Awhen available information indicates that the defendant could have significant mental health problems, [a mental health evaluation for mitigation purposes] is `fundamental in defending against the death penalty=@) (*quoting Bruno v. State*, 807 So. 2d 55, 74 (Fla. 2001) (Anstead, J., concurring in part and dissenting in part); *id.* at *17 (ATo conform to the prevailing norms of the legal profession, counsel should have arranged for a mental health evaluation for mitigation purposes@). In the instant case, it is unrefuted that Mr. Ullman never had Mr. Blackwood evaluated for purposes of penalty phase mitigation prior to the penalty phase, despite having sixth months to do so prior to trial

and six weeks to do so in the time between the end of the guilt phase and the commencement of the penalty phase. Given the information that Ullman had at his disposal prior to the penalty phaseBthat Dr. Macaluso had previously found Mr. Blackwood to be incompetent to stand trial because Mr. Blackwood Asuffered from a depressive illness with possible psychotic features (PCT-267), and that Dr. Block-Garfield had evaluated Mr. Blackwood on two occasions for purposes of competency and concluded that Mr. Blackwood was extremely depressed, had a borderline-retarded level of intelligence, and scored in the impaired range on neuropsychological screening testsBUllman=s failure to secure a mental health mitigation examination of Mr. Blackwood prior to the penalty phase unquestionably constitutes deficient performance, as the lower court correctly found.

In an attempt to excuse Ullman=s failure, the State relies on his testimony on cross-examination at the evidentiary hearing that Athere was virtually no mental health mitigation here, no history of psychological problems@ (SB at 23; 69).[27] Aside from

[27]It is unclear whether the State is advancing this argument as a putative strategic reason that Ullman may have had in not presenting mental health evidence. If this is the State=s argument, it cannot hold water. Ullman never testified that he had a strategic reason for not presenting mental health mitigation due to the fact that none existed; rather, his testimony established that he Ahoped@ that Macaluso could testify to mental health mitigation at the penalty phase but that Macaluso refused to work for the $1500 that the county would pay him. Of course, the other reason Ullman never

the fact that Ullman was not in a position to know what mental health mitigation existed because no expert had evaluated Mr. Blackwood for purposes of the penalty phase, Ullman=s testimony on this point is contradicted by his attempts (as futile as they were) to contact Dr. Macaluso, who he Ahoped@ would be a favorable mental health expert at the penalty phase.[28] His testimony is also contradicted by his subsequent presentation of mental health mitigation at the *Spencer* hearing. *See Blackwood*, 777 So. 2d at 404-05 (discussing *Spencer* hearing testimony of Dr. Trudy Block-Garfield). Finally, Ullman=s testimony that there was Avirtually no mental health

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presented mental health mitigation at the penalty phase was that he never had Mr. Blackwood evaluated by an expert for the penalty phase. Moreover, the lower court rejected as a matter of fact and law that Ullman had made a reasonable strategic decision not to investigate or present mental health mitigation (PCR-315-16). Under these circumstances, the State cannot meet its burden to demonstrate that counsel had a reasonable strategic reason under the facts of this case. *See State v. Duncan*, 2004 Fla. LEXIS 2121 at *16-*17 (Fla. Nov. 24, 2004) (AOnce the moving party has made the required showing, an objective basis for counsel=s actions must be found, within the record, to justify counsel=s performance and thereby rebut the moving party=s claim. If the record itself does not provide such justification, then the court has no choice but to require the State, and the attorney whose performance is in question, to answer the moving party=s allegations@).

[28]Macaluso evaluated Mr. Blackwood in 1995 and determined him to be incompetent to stand trial because he Asuffered from a depressive illness with possible psychotic features@ (PCT-267). This finding alone should have triggered competent counsel to seek a mental health evaluation for purposes of mitigation. *Orme*, 2005 Fla. LEXIS 360 at *22 (AA diagnosis of a major mental illness would reasonably require further investigation@). All that Ullman did, however, was to write Macaluso a letter in the Ahopes@ that Macaluso would be a beneficial penalty phase mental health expert. He never met with Macaluso nor did he arrange for Macaluso to evaluate Mr. Blackwood for purposes of penalty phase mitigation.

mitigation@ in this case is contradicted by the lower court=s factual determination that abundant and credible[29] mental health mitigation, both statutory and nonstatutory, was available, and legal conclusion that Mr. Blackwood was prejudiced by Ullman=s failure to investigate and present it to the jury at the penalty phase.

The State glosses over the actual claim raised by Mr. Blackwood and instead argues that, in its view, this case is really about the fact that Ullman failed to uncover the Aextreme mental or emotional disturbance@ statutory mitigating circumstance and the fact that Mr. Blackwood has now secured Amore favorable@ testimony from mental health experts. This is not Mr. Blackwood=s claim, nor is it what the lower court found with respect to Ullman=s deficient performance as to the penalty phase. Mr. Blackwood=s case involves a wholesale failure by counsel to meaningfully investigate and present available mental health mitigationBboth statutory and nonstatutoryBto the

[29]Importantly, the State never presented any mental health expert at the evidentiary hearing to establish that there was no mental health mitigation, statutory or nonstatutory, in this case, and the lower court credited the testimony of the experts presented by Mr. Blackwood.

penalty phase jury.

This is not a case like those cited by the State where there was mental health testimony presented at a penalty phase and the defendant, in a Rule 3.850 motion, alleges that Abetter@ expert opinions could have been presented.[30] For example, in *Rose v. State*, 617 So. 2d 291 (Fla. 1993), the Court rejected the argument that trial counsel rendered deficient performance in terms of penalty phase mental health mitigation in large part because counsel Amade reasonable tactical decisions with respect to the existing mitigation.@ *Id*. at 294. Significantly, counsel in *Rose* had, prior to the penalty phase, discussed potential mitigating factors with the court-appointed psychologist who had diagnosed Rose with antisocial personality disorder and had Aruled out the possibility of organic brain damage.@ *Id*. Moreover, trial counsel did present the testimony of two mental health experts at the penalty phase, who provided the jury with nonstatutory mental health mitigating

[30]Significantly, *none* of the cases relied upon by the State involved a State appeal of the granting of relief by the lower court. The defendants in those cases failed to overcome their burden of demonstrating the lack of competent and substantial evidence underlying the lower court orders in those cases, a burden which the State here, as the appealing party, must also meet.

evidence. *Id*. In *Provenzano v. Dugger*, 561 So. 2d 541 (Fla. 1991), the Court found that counsel was not deficient with regard to penalty phase investigation of mental health mitigation because Aextensive medical testimony@ was presented at the guilt phase on the defendant=s mental condition, including two defense experts who testified that the defendant was insane at the time of the offense, and any additional testimony would have been repetitive to the guilt phase testimony. *Id*. at 546. The Court found that counsel was not deficient in *Jones v. State*, 732 So. 2d 313 (Fla. 1999), where counsel, prior to the penalty phase, secured the appointment of a mental health expert for the purpose of mitigation, and the expert testified to extensive mitigation at the penalty phase *Id*. at 315-16. In light of the fact that Athe record is clear that defense counsel did obtain a mental health evaluation and that he did present the testimony of the expert during the penalty phase,@ the fact that the expert=s evaluation Adid not yield a favorable result@ on the existence of statutory mitigation did not mean that counsel was constitutionally deficient even though postconviction counsel presented testimony that the statutory mitigating circumstances did apply. *Id*. at 318. None of these cases is remotely similar to Mr. Blackwood=s case, where trial counsel failed to secure the appointment of a penalty phase mitigation mental health

evaluation[31] prior to either the trial or the penalty phase and thus presented no mental health testimony to the jury.

The State=s reliance on *Engle v. State*, 576 So. 2d 696 (Fla. 1991), *Hodges v. State*, 885 So. 2d 338 (Fla. 2003), *Asay v. State*, 769 So. 2d 974 (Fla. 2000), *Cherry v. State*, 781 So. 2d 1040 (Fla. 2000), and *Gaskin v. State*,

[31]While it is true that Mr. Blackwood had been previously evaluated for purposes of competency to stand trial, such an evaluation cannot substitute for an evaluation specifically geared to the unique issue of mental health mitigation. *See Rutherford v. State*, 727 So. 2d 216, 222 n.3 (Fla. 1998) (AWe of course recognize that competency evaluations are different from mitigation evaluations, and in no way mean to imply here that one can necessarily take the place of the other@); *Blanco v. Singletary*, 943 F. 2d 1477, 1503 n.147 911th Cir. 1991) (AThere is a great difference between presenting evidence to establish incompetency at trial and failing to pursue mental health mitigating circumstances at all. One can be competent to stand trial and yet suffer from mental health problems that the sentencing jury and judge should have had an opportunity to consider@); *Hardwick v. Crosby*, 320 F. 3d 1127, 1163-64 (11th Cir. 2003) (same).

822 So. 2d 1243 (Fla. 2002), is likewise misplaced. In *Engle*, the Court affirmed the summary denial of a Rule 3.850 motion alleging, *inter alia*, that trial counsel rendered deficient performance in failing to properly prepare the mental health experts who testified both at the original penalty phase (where the jury returned a life recommendation) and at the subsequent resentencing before the judge only. In rejecting the claim, the Court noted that the defendant=s allegations as to the Anew@ mental health experts were insufficiently pled and, in any event, failed to demonstrate that the three experts who previously examined the defendant conducted insufficient evaluations. *Engle*, 576 So. 2d at 702. In *Hodges*, the Court, in a 4-2 decision, affirmed the lower court=s factual and legal findings that counsel was not deficient at the penalty phase regarding investigation and presentation of mental health mitigation at the penalty phase. In addition to the fact that the defendant was Auncooperative@ with counsel regarding penalty phase issuesBa concern not present in the instant caseBthis Court also noted that counsel did engage the services of two mental health experts prior to the proceedings and thus conducted a Acomprehensive investigation in an attempt to uncover mitigating evidence.@ *Hodges*, 885 So. 2d at 347. Here, in contrast, the lower court made a factual finding that Ullman conducted no

investigation prior to the penalty phase as to mental health mitigation, a finding that the State cannot overcome by citing to factually-distinguishable cases. In *Asay*, the Court affirmed the findings entered by the lower court that penalty phase counsel was not deficient where he had the defendant examined by a psychiatrist for purposes of mitigation and the expert gave an unfavorable diagnosis. *Asay*, 769 So. 2d at 985-86. Here, Macaluso never evaluated Mr. Blackwood for purposes of mitigation prior to the penalty phase. In *Cherry*, the Court affirmed findings and conclusions entered by the lower court that counsel was not deficient in failing to adequately investigate the mental health aspects of the defendant because the defendant=s evidence of mental illness amounted only to Aspeculation@ and the defendant=s lack of cooperation hampered the ability of the appointed mental health expert to conduct an adequate investigation. *Cherry*, 781 So. 2d at 1052. Here, the lower court not only made factual findings that counsel, aside from writing a letter to Macaluso and talking with him after receiving his letter, did nothing else to secure a penalty phase mitigation expert for his client, but also credited the testimony from the mental health experts presented at the evidentiary hearing. Finally, in *Gaskin*, the Court rejected the defendant=s attempt to overcome the trial court=s order denying relief in a situation where the defense simply offered

Amore favorable mental health@ testimony than that presented at the original trial and which caused the trial court to find mental health mitigation, including a statutory mental health mitigating circumstance. *Gaskin*, 822 So. 2d at 1249-50. Here, in contrast, no mental health mitigation was presented and no expert had evaluated Mr. Blackwood for the purpose of mental health mitigation. None of the cases cited by the State is remotely analogous to Mr. Blackwood=s case.

The trial court observed, and Mr. Blackwood agrees, that this Court=s decision in *State v. Coney*, 845 So. 2d 120 (Fla. 2003), is Astrikingly similar@ to the instant case (PCR-319).[32] In *Coney*, the lower court,[33] after conducting an evidentiary hearing, found that the defendant had established both deficient performance with regard to, *inter alia*, counsel=s efforts (or lack thereof) to investigate and present available mental health mitigation. In *Coney*, the court discussed the fact that, although counsel presented lay testimony at the

[32]The State=s brief takes issue with the court=s reliance on *Coney* only as to the issue of prejudice; *Coney*, however, is also similar in many respects on the issue of deficient performance.

[33]The lower court judge who granted relief in *Coney* had also presided over the original trial and sentencing, just like in the instant case.

penalty phase (just as in Mr. Blackwood=s case), Ano mental health mitigation was presented@ to the jury. *Id*. at 127. Just as in this case, the evidence adduced at the hearing in *Coney* established that one of the court-appointed defense psychiatrists never examined Coney A[d]ue to a fee dispute,@ and two additional defense mental health experts did examine Coney but never testified at the penalty phase. *Id*.[34] One of the defense mental health experts, after conducting his evaluation of Coney, recommended further neuropsychological testing, a suggestion that trial counsel failed to follow up on. *Id*. at 130. Trial counsel asked for no continuance of the penalty phase, no further examination by additional experts, and no additional resources from the court before proceeding to the penalty phase. *Id*. at 130-31. This Court affirmed the order of the lower court in *Coney* concluding that trial counsel had performed deficiently, and the lower court=s reference to *Coney* in Mr. Blackwood=s case is certainly justifiable given the general similarity of the facts in both cases regarding counsel=s efforts to investigate and prepare for the mental health aspects of the mitigation case.

[34]If *Coney* can be factually distinguished, it is in the fact that defense counsel in that case *did* at least secure mental health mitigation evaluations of his client prior to the penalty phase (although he did so at the last minute). Here, no such effort was undertaken by Ullman.

Because the lower court=s order is supported by more than competent and substantial evidence, and the State has failed in its burden to demonstrate otherwise, this Court should affirm the finding that trial counsel rendered deficient performance.

2. Prejudice.

The State also takes issue with the lower court=s conclusion on the prejudice prong, arguing that it Aimproperly applied@ the *Strickland* prejudice test to the facts of this case. As with its arguments regarding the deficiency prong, the State=s arguments are without support by either the facts of this case or by the prevailing legal standards attendant to this issue.

First and foremost, it is clear that the lower court applied the proper prejudice test, citing both *Strickland* and *Williams* (PCR-316-319).[35] The central Band indeed only Bargument that the State advances to challenge the lower court=s conclusion as to prejudice is that the court Acompletely ignored@ the fact that Ullman presented mental health mitigation from Dr. Block-Garfield at the *Spencer* hearing and that it is thus Ainexplicable@ how the court could

[35]Importantly, the State does not argue that the lower court applied an incorrect prejudice test *per se,* but simply that it failed to properly apply it Ato the facts of this case.@

have found a reasonable probability that the *jury=s* recommendation would have been different had it heard the available mental health evidence. In the State=s view, Ait is inconsequential whether Dr. Block-Garfield=s testimony would have made a difference in the jury=s recommendation@ because A[t]he trial court is the ultimate sentencer and it heard her testimony and rejected it.@

The State also complains that the trial court Ashould not have considered@ Dr. Block-Garfield=s testimony Ain determining whether the prejudice prong was met here.@ The State=s arguments are flawed on numerous levels, as set forth below.

First, the State has a cramped reading of the actual claim here and what the lower court found. Mr. Blackwood did not claim, nor did the lower court find, that it was *only* the testimony of Dr. Block-Garfield that qualified as meeting the prejudice prong of *Strickland*. Rather, the lower court found:

> The mitigating evidence available included the testimony of Dr. Block-Garfield who would have testified that although she did not find the statutory mitigator or extreme mental or emotional disturbance, Mr. Blackwood was extremely depressed and emotionally disturbed at the time of the offense. His verbal IQ score was 70 which placed him in the borderline-retarded range of intelligence. One of the standardized tests she administered suggested Mr. Blackwood was neurologically impaired. Dr. Block-Garfield would have testified that Mr. Blackwood had no prior criminal history and was a good candidate for rehabilitation. Had Mr. Ullman asked about the need for neuropsychological

evaluation, Dr. Block-Garfield would have recommended it. *Blackwood v. State*, 777 So. 2d 399 (Fla. 2000). In short, this Court finds that Dr. Block-Garfield was available to provide persuasive nonstatutory mental health mitigation at the penalty phase.

In addition to Dr. Block-Garfield, the Defense presented the testimony of two other mental health experts at the evidentiary hearing. Dr. Martha Jacobson, a clinical psychologist, testified that she administered a comprehensive series of personality tests to Mr. Blackwood, conducted extensive clinical interviews with Mr. Blackwood on April 3 and 4, 2003, and reviewed materials including Dr. Block-Garfield=s *Spencer* hearing testimony, penalty phase testimony from family members, friends and other witnesses, Detective Desaro=s testimony, Detective Abrams= report, Dr. Price=s deposition and her testimony at the guilt and penalty phases, the audio statement Mr. Blackwood made to the police in Sarasota and Mr. Blackwood=s high school records. She also asked Mr. Blackwood to write a narrative of what he could recall a couple of weeks prior to and leading up to the incident and spoke with two of Mr. Blackwood=s sisters.

Dr. Jacobson testified that she diagnoses Mr. Blackwood as having avoidant personality traits with masochistic features, and she found him to suffer from major depression. Dr. Jacobson opined that at the time of the crime, Mr. Blackwood was experiencing an extreme emotional disturbance (the statutory mitigator) (Tr. June 19, 2003, Vol. II, at 92-104, 133, 139-141).

Dr. Hyman Eisenstein, a licenced clinical psychologist who specialized in neuropsychology also testified on behalf of the Defendant (Tr. June 19, 2003, Vol. II at 179-219). He testified that Mr. Blackwood did not tell him the details of the murder. Dr. Eisenstein also testified that the did not know how the victim died, nor did he review any of the trial testimony and he did not read the autopsy report. Dr. Eisenstein reviewed a two-page summary of Mr. Blackwood=s school records, the fourteen page transcript of

> Mr. Blackwood=s statement to the police, and police records from Fort Lauderdale. He met with Mr. Blackwood on three occasions. The first time was on September 25, 2002, when he administered a battery of tests to Mr. Blackwood. Dr. Eisenstein also interviewed Mr. Blackwood=s former boss and spoke with Mr. Blackwood=s sister to discuss Mr. Blackwood=s claims that he was hit in the head while a child in Jamaica. Dr. Eisenstein opined within a reasonable neuropsychological certainty that at the time of the commission of the crime, Mr. Blackwood was experiencing an extreme emotional disturbance (statutory mitigator) (id. At 212-214).
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> Applying this [*Strickland*] test, this Court finds that there is a reasonable probability that, but for Mr. Ullman=s errors of omission, the result of the penalty phase proceeding would have been different. In weighing the single aggravator against the mitigators presented, this Court gave great weight to the jury=s recommendation. Had the jury been presented with expert mental health mitigation, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have changed their recommendation. At the very least, this Court finds that there is a probability sufficient to undermine confidence in the prior jury=s sentencing recommendation.

(PCR-316-20) (emphasis in original). The lower court=s order could therefore not be clearer that, in considering and finding prejudice, it determined that the Aavailable@ mental health mitigation evidence consisted not only of Dr. Block-Garfield=s Apersuasive@ testimony,[36] but also that of Dr. Eisenstein and Dr.

[36]The State argues that Dr. Block-Garfield=s testimony did not change between

Jacobson.

The State=s argument that the lower court should not have considered Dr. Block-Garfield=s testimony in determining whether the prejudice prong was met is mystifying and also procedurally barred. The State never objected to the testimony of Dr. Block-Garfield; indeed, without objection from the State, Dr. Block-Garfield was admitted by the lower court as an expert in the area of clinical psychology (PCT-9). The State has waived its opportunity to argue that the lower court erred in Afactoring in@ her testimony with regard to the prejudice prong. Procedural bars apply not only to defendants but also to the State. *See Cannady v. State*, 620 So. 2d 165 (Fla. 1993).[37]

The State=s argument that the lower court should not have considered Dr. Block-Garfield=s testimony in assessing the prejudice prong of *Strickland* because her testimony had been presented at the *Spencer* hearing and had not changed between that time and when she testified at the postconviction

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the *Spencer* hearing and the evidentiary hearing. This misses the point, as Mr. Blackwood=s claim was that the *jury* should have been presented with her testimony.

[37]The State also did not seek rehearing of the lower court=s order.

evidentiary hearing is also mystifying. This argument is really tied in to its overall Band flawed Bargument that what was or was not presented at the penalty phase is irrelevant because some mental health mitigation was presented to the court at the *Spencer* hearing. This argument reflects a serious and fundamental misunderstanding of Florida=s capital sentencing process.

As this Court is well-aware, the jury at a Florida penalty phase is presented with aggravating and mitigating circumstances, weighs such factors, and arrives at an advisory recommendation. In other words, a Florida capital jury Ais, in an important respect, a co-sentencer with the judge.@ *Lambrix v. Singletary*, 520 U.S. 518, 528 (1997). As the Supreme Court has explained:

> Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court=s process of weighing aggravating and mitigating circumstances.

Espinosa v. Florida, 505 U.S. 1079, 1082 (Fla. 1992). Thus, the jury=s recommendation is neither a technicality nor is it meaningless. Rather, the trial court, in evaluating the aggravation and mitigation in order to determine the appropriate sentence, also weighs the result of the jury=s weighing process, *i.e.* its advisory recommendation, and is required to give such

recommendation Agreat weight.@ *Tedder v. State*, 322 So. 2d 908 (Fla. 1975).

While it is correct, as the State argues, that the trial court is the Aultimate sentencer@ with respect to being the party responsible for entering formal findings of fact and actually imposing sentence, it is not correct that the jury=s recommendation and the evidence upon which that recommendation is based, become Ainconsequential@ simply because the trial court then has the responsibility to hold a *Spencer* hearing, engage in a weighing process, and actually Aimpose@ sentence. If this were truly the structure of Florida=s capital sentencing scheme, no defendant could ever be prejudiced by the failure to present available mitigating evidence to a penalty phase jury because the trial court always will have conducted its own weighing before imposing a death sentence. Taken to its logical conclusion, the State=s argument renders the Sixth Amendment right to effective assistance of counsel at the penalty phase

illusory in the State of Florida.[38]

Not only did the lower court properly consider the testimony of Dr. Block-Garfield in concluding that Mr. Blackwood had established prejudice under *Strickland*, it also properly considered the testimony of Drs. Eisenstein and Jacobson. While the State contends that the Aonly real difference@ between the testimony of Dr. Block-Garfield and that of Drs. Eisenstein and Garfield was that they opined that Mr. Blackwood was operating under an extreme mental disturbance at the time of the offense, a statutory mitigating circumstance, this is an inaccurate representation of their testimony.

In the first place, the State intimates (Athe only real difference@) that two mental health experts providing testimony to the existence of a statutory mitigating circumstance is not all that significant. Had the penalty phase jurors

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[38]Certainly, the procedure known as a *Spencer* hearing was never intended to supplantBor render obsoleteBthe vitally important part of the capital sentencing proceeding in Florida regarding the presentation and weighing of the aggravating and mitigating circumstances to a jury. The reasoning behind the advent of *Spencer* hearings was to prevent a trial court from imposing sentence prior to giving the defendant an opportunity to be heard. *Spencer*, 615 So. 2d at 690-91.

heard evidence that Mr. Blackwood suffered from an extreme mental disturbance at the time of the offense, in addition to the statutory mitigator of no prior criminal history, the nonstatutory mitigation that was presented, and the fact that this case involved a single aggravating circumstance, there is more than a reasonable probability that Athe balance of aggravating and mitigating circumstances would have changed their recommendation,@ as the trial court concluded below. The extreme mental or emotional disturbance statutory mental health mitigating circumstance is among the Aweightiest@ of the mitigating factors. *Santos v. State*, 629 So. 2d 838, 840 (Fla. 1994). *Accord Mills v. State*, 603 So. 2d 482, 487 (Fla. 1992) (Kogan, J., dissenting) (AMental mitigating evidence is among the most compelling that can be presented@).

Moreover, the fact that Drs. Eisenstein and Jacobson testified to the statutory mitigating factor was not the Aonly difference@ between their testimony and that of Dr. Block-Garfield. For example, while Dr. Block-Garfield was only able to conduct screening tests to determine if Mr. Blackwood suffered from any organic brain damage, Dr. Eisenstein, a neuropsychologist, opined that Mr. Blackwood suffered not only from borderline intellectual functioning, but also Asevere impairment@ with respect to the

neuropsychological aspects of the testing (PCT-192-93; 195). For example, Mr. Blackwood=s executive functioning was severely impaired; executive functioning involves the area of the brain that deals with decision-making skills, complex ability to process information, judgment, and reasoning (PCT-192-93). Due to the organic deficits, Mr. Blackwood=s thinking is also Aconcrete@ in that it lacks sophistication and an inability to weigh or consider reasonable alternatives or possibilities (PCT-197). Mr. Blackwood=s scores on the portion of the testing addressing memory were also mixed, and in the area of language and expressive skills, Aextremely low@ (PCT-199-200-01).

Dr. Eisenstein=s evaluation also consisted of consultation with collateral sources of information. For example, he spoke with Mr. Blackwood=s former employer, Mr. Van Wych, who told him that Mr. Blackwood worked for him for approximately 15 years as a cabinet maker (PCT-197-98). While Mr. Van Wych attested to the fact that Mr. Blackwood was a Agood worker,@ his performance was limited to one or two simple repetitive steps and did not require studying new designs or analyzing different parts of a particular project (PCT-198). Mr. Van Wych referred to Mr. Blackwood as a Aone trick pony@ which, in the cabinet business, is someone who had only one skill which they could perform consistently Awith no change, no deviation@ (PCT-198).

Dr. Eisenstein also conducted a clinical interview with both Mr. Blackwood and his sister, Lorna Salmon (PCT-203-04). From these interviews Dr. Eisenstein was

able to glean information about Mr. Blackwood=s history of head injuries (*Id*.). A history of head injuries is consistent with Mr. Blackwood=s neuropsychological deficits as noted in the testing (PCT-204). Dr. Eisenstein also discussed Mr. Blackwood=s childhood with him and his sister, and details of his Avery difficult upbringing@ were discussed and corroborated (PCT-208-09). In Dr. Eisenstein=s view, Mr. Blackwood=s childhood was Ajust surviving in the bare bones necessity@ for a number of reasons including poverty and neglect (PCT-208).

Dr. Eistenstein also questioned Mr. Blackwood about his relationship with Ms. Thomas (PCT-209). Mr. Blackwood explained that the relationship was a long term one but that Ms. Thomas would be verbally abusive toward him and make him feel like Aher puppy dog@ (PCT-209-10). In the time leading up to the crime, Mr. Blackwood explained that he and Ms. Thomas had split apart and he was depressed over the breakup (PCT-211). They eventually got back together, however, and Mr. Blackwood attempted to get back in her favor (PCT-211). On the day of the incident, Mr. Blackwood and Ms. Thomas had consensual sex, after which an argument ensued and Ms. Thomas accused Mr. Blackwood of inadequate sexual performance and he felt she was putting him down (PCT-211). These remarks triggered a response in Mr. Blackwood, after which time he Alost it@ (PCT-212). Because of his organic deficits, his ability to reasonably assess and respond to the situation was impaired, as was his capacity to appreciate the nuances of what exactly was being asked of him at the time

in light of Ms. Thomas=s remarks (PCT-212). As a result, in Dr. Eisenstein=s opinion, Mr. Blackwood was suffering from an extreme mental disturbance (PCT-212-13).[39]

Dr. Jacobson also provided an in-depth clinical view of Mr. Blackwood=s history and psychological make-up in far greater detail than did Dr. Block-Garfield. Dr. Jacobson was asked by Mr. Blackwood=s collateral counsel to perform a full psychological evaluation of Mr. Blackwood (PCT-96). She was provided with a wealth of materials, including testimony, reports, and data from other expert witnesses, guilt and penalty phase testimony, Broward County jail records, school records, and law enforcement reports and testimony (PCT-96-98). She also personally met with Mr. Blackwood over the course of two days, conducted an

[39]The State contends that the lower court should not have afforded any weight to Dr. Eisenstein=s testimony (SB at 83). However, the factual finding by the lower court must be honored absent a finding that it lacks competent and substantial evidentiary support in the record. Here, the lower court acknowledged that Dr. Eisenstein admitted on cross-examination that he was not aware of certain facts pointed out to him by the State but the court nonetheless credited his testimony (PCR-318-19). Mere disagreement by the State with the lower court=s factual finding does not meet the State=s high burden on appeal in order to secure a reversal.

extensive clinical interview and administered a battery of testing (PCT-99; 101-02). Additionally, Dr. Jacobson spoke, in person, for several hours with one of Mr. Blackwood=s sisters, and on the phone with another sister (PCT-100). Based on the results of the testing she administered to Mr. Blackwood, Dr. Jacobson opined that Mr. Blackwood has what is called an Aavoidant personality@ (PCT-105), a disorder characterized by individuals who avoid social interactions, have a psychological and developmental history of problems with consistent nurturing, emotional deprivation, and lack of trust (PCT-105). The testing results were also consistent with Mr. Blackwood being depressed and anxious, as well as demonstrating difficulties in thinking clearly, lack of aggressiveness, a high degree of suggestibility and susceptibility to being easily influenced (PCT-111, 113, 115, 120). The results of the various tests were Avery consistent@ with each other (PCT-115). Testing was also conducted which definitively ruled out any malingering on Mr. Blackwood=s behalf (PCT-118).

Dr. Jacobson also conducted an clinical interview with Mr. Blackwood, and she was able to confirm what he told her during her interviews with Mr. Blackwood=s sisters (PCT-121; 124). Mr. Blackwood presented a Avery difficult early childhood@ in that he went to live with his paternal grandmother when he was about a year old because his mother had suffered from depression and she could not handle the responsibility (PCT-121). The family lied in a rural part of Jamaica bereft of

educational opportunities and marked by abject poverty (PCT-121). The children had one set of clothes and shoes that they had to wear until they gave out or outgrew them (PCT-121-22). In addition to raising Mr. Blackwood, the paternal grandmother had ten of her own children in the same home and, as a result, Mr. Blackwood did not get a lot of attention, a fact which is particularly significant in this case because when he was eventually reunited with his other siblings around the age of 12, he Afelt like the outsider@ and unwanted by his mother (PCT-123-24). This feeling was only confirmed later on when Mr. Blackwood=s mother, in divorce proceedings, said that she did not want the children (PCT-124).

Once reunited with his father and siblings, Mr. Blackwood continued to suffer from deprivation in a number of important respects, even after the family moved to the United States. Because his father would work, Mr. Blackwood and his siblings were left alone in a small apartment to fend for themselves (PCT-124-25). And because Mr. Blackwood was the oldest of the siblings, his father was Amuch harder@ on him than he was on the other siblings and would take out his anger on Mr. Blackwood if he and his siblings did not abide by the father=s directives (PCT-125). The father=s anger would take the form of physical abuse, such as beatings with sticks (PCT-125).

Mr. Blackwood, as a child, also suffered several head injuries and also nearly drowned when he was approximately 10 years old (PCT-122-23). This incident

occurred when Mr. Blackwood and his brother were washing clothes in a river, and Mr. Blackwood was carried out in the water and was rendered unconscious (PCT-123). Because there was no nearby hospital, Mr. Blackwood never received any formal medical treatment and, after this incident, the family reported that he Awasn=t quite the same after that, that he appeared to be a little slow@ (PCT-123).

In terms of education, Mr. Blackwood related that he did complete high school in Ft. Lauderdale, but he was number 357 out of approximately 400 students in his class (PCT-126). His poor scholastic record was confirmed by records that Dr. Jacobson was provided and had reviewed (PCT-126-27).

Dr. Jacobson also discussed with Mr. Blackwood his history of relationships with women (PCT-127). The Afirst thing@ Mr. Blackwood said to her was that women Ahurt you, they abuse you, they leave you@ (PCT-127). He related a relationship he had when he was in his late teens which, when it ended, left Mr. Blackwood nearly suicidal (PCT-127). His next major relationship was with a woman named Charlotte, who was the mother of his child and with whom he was with about 4 or 5 years (PCT-127). Mr. Blackwood also discussed his relationship with Ms. Thomas, the victim in this case (PCT-129). This Aon and off@ relationship lasted for about 12 years, and began when he was still seeing Claudette (PCT-129). The two women were jealous of one another, and eventually Mr. Blackwood began to primarily spend time with Ms. Thomas (PCT-129). Mr. Blackwood and Ms. Thomas

had arguments from time to time and he felt that she would verbally Aput him down@ in front of his child (PCT-130).

In the time leading up to the murder, Mr. Blackwood and Ms. Thomas had broken up but then began to see each other again Aon and off@ (PCT-130). Dr. Jacobson explained that, for Mr. Blackwood, this was a relationship he wanted but had no control over, and in some respects it echoed the one he had with his mother, Awhere he wanted to be taken care of, but she=ll be there, not be there@ (PCT-130). Mr. Blackwood expressed his belief that Ms. Thomas had been seeing other people in the time leading up to her death because she was not willing to go out with him in public and was not seeing him as often as she was before (PCT-130). This made Mr. Blackwood more depressed, but around Christmas-time, he became Aa little more hopeful@ because Ms. Thomas invited him to have Christmas dinner with her at her mother=s house and they spent more time together in the week or two prior to her murder (PCT-130-31). His hopefulness turned out to be short-lived, however, in that Mr. Blackwood remained depressed during this period; he would not answer to door to his house, stayed in bed, stopped attending social and sporting events, began drinking more heavily, and had trouble sleeping at night (PCT-131-32). He would also get into his car and drive around aimlessly (PCT-132). Mr. Blackwood=s depression at this time was confirmed not only by his sisters, but also by Dr.

Jacobson=s testing (PCT-132-33). At the time of the incident, Dr. Jacobson opined that Mr. Blackwood suffered from Amajor depression@ (PCT-133).

Dr. Jacobson also related that Mr. Blackwood discussed what occurred with respect to the homicide. The day before (or 2 days before), Mr. Blackwood and Ms. Thomas had lunch together (PCT-134). On the morning in question, Mr. Blackwood went to Ms. Thomas=s house to bring a set of clean sheets and asked if she wanted to have breakfast together. She said she did not want to eat but rather go to bed (PCT-135). The two then went to bed and were physically intimate, but afterwards a verbal argument occurred, with Ms. Thomas Aputting him down@ with remarks about his manhood, telling him she did not want to have his children and that she had aborted his children (PCT-135). This latter remark upset Mr. Blackwood because he had always wanted to have more children (PCT-135). After he got out of bed, he went into the bathroom to clean up and she said something else derogatory toward Mr. Blackwood, to which he responded AI should wash your mouth out with soap and water@ (PCT-136). Mr. Blackwood somehow then ended up back in the bed with Ms. Thomas, there was a physical struggle and he tried to choke her (PCT-136). After Ms. Thomas stopped moving, Mr. Blackwood got scared and believed she was unconscious, and he panicked, got scared, and drove off in her car (PCT-136). He drove into a field in a rural part of Broward County, spent the night in the field, then hitchhiked to St. Petersburg (PCT-136). Dr. Jacobson testified that she also listened

to the audiotape of Mr. Blackwood=s police statement which, with the exception of minor details, was A[e]xtremely consistent@ with what he told her (PCT-137).

Dr. Jacobson opined that, at the time of the offense, Mr. Blackwood met the criteria for the statutory mitigating circumstance of no prior criminal history (PCT-138). At the time of the offense, she also testified that to a reasonable degree of psychological certainty, Mr. Blackwood was acting under an extreme mental disturbance, another statutory mitigating circumstance (PCT-139). As she testified:

> Q Can you explain that opinion?
>
> A Well, I asked you for a definition of what extreme emotional disturbance and distress was, and that=s whey you have me that manual [from the Public Defender=s Office]. I used the definition of less than insanity, but more emotion than the average man would have if they were really, really upset. I think inflamed was the language from the case that was cited in the manual.
>
> And I used that as a freight [sic] mark, along with what I knew about Mr. Blackwood based upon the psychological tests results, and what I knew about Mr. Blackwood in terms of his background as to what kind of things would trigger him, because this is basically a man who was not generally physically aggressive.
>
> There had been one incident of physical aggression with Ms. Thomas previously. But it was reciprocal. I believe she hit him in the face with her high heel shoe, and he required stitches. But for the most part this is not an aggressive man. So I wanted to know what happened then, what was different at this moment in time that he might have caused him to act in the way that he did.
>
> Q And what do you see as the basis for that opinion?
>
> A I think the basis of it was this, the deprecating remarks that

were made. The comments that he wasn=t, that he wasn=t good enough for her to have children with. That he knew she was with someone else. She had asked him recently to use a condom, which he had not asked him in the past**B**

Q What was the significance of that?

A I don=t know what he made of it. But what I made of it was that there were other partners involved at some point in time, and there was a reason for it. I think that when he told me that she made fun of him, that primarily when she told him that she had aborted a number of his fetuses, that that was the trigger, the idea of rejection, especially after having been intimate with him, would have pushed the old rejection**B**

Q When you say pushed the old rejection, what was the old rejection?

A The rejection of the primary mother figure. Mr. Blackwood has, the emotional reality of his childhood was the inconsisten[cy] in nurturing and parenting, mom leaving him on several occasions, being the only one of his siblings not with the parents. I believe that was very significant for him.

Q As a result of this in formulating this opinion did you utilize the results of the psychological testing?

A Well, that fits very clearly with avoidant personality disorder. It fits very clearly with the other information, fact of the Rorschach testing, that when he is emotionally arouses can lose control. The fact that he fears rejection, and that he has a negative self image. He sees himself to be damaged to begin with.

One of the things that we look for, for example on the Rorschach, are the number of responses where something is damaged, tattered, or content response where there is some kind of damage or disforked [sic] feeling or something morbid. It is called a morbid response. And normally you might see one morbid response in the normals, maybe one. Most of the time you don=t even see that. He had three morbid

responses, which indicates that he sees himself as damaged and dysfunctional.

Q So specifically when it came to this commission of the crime, how did his psychological makeup impact on what happened?

A To me the pieces of the puzzle fit pretty well together. As far as these things go, it was fairly consistent across the board in the testing. The testing fit with the collateral information, background, social history that I obtained from Mr. Blackwood and from his family members.

It fit with all of the testimony that I have read. For example, one of the things that Mr. Blackwood said was when they were having this struggle in bed his hand got caught in Ms. Thomas=s chain. And in Doctor Price=s testimony, I can=t recall whether it was the deposition or the Guilt Phase, she mentioned that there were marks that could be consistent with a chain. So to me it fit together. There were pieces here that didn=t, but they weren=t major pieces in my book.

(PCT-140-42).

Dr. Jacobson also explained that many factors in Mr. Blackwood=s background provided evidence of nonstatutory mitigating circumstances, such as a full scale IQ of 72, feelings of inadequacy, easily suggestible, history of neglect, and remorse over Ms. Thomas=s death (PCT-146-47).

It could not be clearer that the trial court properly considered the cumulative testimony of Drs. Block-Garfield, Eisenstein, and Jacobson, and properly determined that prejudice had been established under the facts of this case. The State, however, contends that no prejudice can be established because the State would have been able

to cross-examine the mental health experts at the penalty phase.[40] It goes without saying that the State could have cross-examined these witnesses. However, the State failed to present any information below, aside from some putative inconsistencies, that normally leads this Court to conclude that no ineffectiveness claim lies due to the potential introduction of truly negative information.[41] The State also failed to present

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[40]This argument typically is one that is germane to a deficient performance analysis**B**that is, whether trial counsel made a strategic decision not to present certain evidence or certain witnesses out of a reasonable fear that negative information could be elicited by the State or that the State would present its own witnesses to counter the defense evidence. For whatever reason, the State makes this argument with regard to the prejudice prong.

[41]For example, the State cites *Rogers v. Zant*, 13 F. 3d 384 (11th Cir. 1994), *Medina v. State*, 573 So. 2d 293 (Fla. 1990), *Ferguson v. State*, 593 So. 2d 508 (fla. 1992), and *Gaskin v. State*, 822 So. 2d 1243 (Fla. 2002). None of these cases is on point. In *Rogers*, the Eleventh Circuit determined that counsel was not ineffective for making a reasoned informed judgment not to introduce certain evidence because counsel had chosen another course of action and was concerned that the jury might consider the evidence as aggravating, not mitigating. *Rogers*, 13 F. 3d at 387. Here, counsel made no such informed judgment; indeed, he initially wanted to present mental health testimony through Dr. Macaluso but Macaluso backed out at the last minute and had not even evaluated Mr. Blackwood for mitigation. In *Medina*, the Court rejected the notion that counsel was deficient in not presenting mental health testimony at the penalty phase because the testimony was Aderogatory@ in nature and would have opened the door to information about Medina=s Aviolent tendencies@ including fights in jail with both inmates and guards. *Medina*, 573 So. 2d at 298. Here, no such testimony exists; and even if it did, the State failed to elicit it from Mr. Blackwood=s experts at the evidentiary hearing below. In *Ferguson*, no ineffectiveness was found in failing to present mental health experts because of an Aextremely damaging@ rebuttal case from the State, including the fact that the defendant was a sociopath, not mentally ill, and Avery dangerous.@ *Ferguson*, 593 So. 2d at 510. Here, no such record exists. Finally, in *Gaskin*, trial counsel did not present the testimony of mental health experts because of a concern that the jury

a mental health expert of its own to refute the testimony of Mr. Blackwood=s experts. Moreover, and critically, the lower court was well aware of the State=s cross-examination of Mr. Blackwood=s expert witnesses and concluded that prejudice was established. A[T]he fact that [Mr. Blackwood=s mental health mitigation evidence] may be rebutted by State evidence or argument does not change the fact that it should have been considered by the jury.@ *Phillips v. State*, 608 So. 2d 778, 783 (Fla. 1992). The State simply cannot overcome its burden to demonstrate that the lower court erred in concluding that prejudice has been established.

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would also be informed that Gaskin had a history of sexual deviancy and other prior crimes. *Gaskin*, 822 So. 2d at 1249. Again, in this case, there is no record whatsoever to substantiate such a concern on Ullman=s part.

The State next recites a litany of cases in which the Court has concluded that no prejudice was established (SB at 83-84). Again, none of these cases is on point with the facts of Mr. Blackwood=s case.[42] For example, the Court found no prejudice in *Gaskin, supra*, because the case involved two murders, four aggravating circumstances (including both CCP and HAC), and the lower court had found that the evidence presented in the evidentiary hearing was largely cumulative and indeed Amuch more negative@ than that presented at the original penalty phase. *Gaskin*, 822 So. 2d at 1249-50. In *Asay, supra*, the Court affirmed the finding of no prejudice by the lower court in light of the Aspeculative@ diagnoses rendered by the defendant=s postconviction mental health experts, the fact that the new evidence was of Aqualitatively lesser caliber@ than that in other cases where prejudice had been found, and that there were strong aggravating circumstances, including two murders, the fact that defendant was on parole at the time of the murders, and the CCP aggravator. *Asay*, 769 So. 2d at 987.

[42]Nor, importantly, did any of the cited cases involve a lower court grant of relief.

Neither the aforementioned cases, nor the others cited by the State=s brief, involve a situation where the defendant prevailed below in a well-reasoned order entered by the same judge who also presided over the original proceedings. Here, the jury returned a 9-3 recommendation, indicating that at least Asome members of [Mr. Blackwood=s jury] were inclined to mercy even without having been presented with any [mental health] mitigating evidence.@ *Blanco*, 943 F. 2d at 1505. Given that A[p]sychiatric mitigating evidence `has to potential to totally change the evidentiary picture=@ at a capital penalty phase, *Baxter v. Thomas*, 45 F. 3d 1501, 1515 (11th Cir. 1995) (citation omitted), that the jury did hear evidence of other non-mental-health related mitigation evidence as well as the strong statutory mitigating factor of no prior criminal history,[43] and that Mr. Blackwood was not charged with nor convicted of any other contemporaneous offenses, the State cannot meet its heavy burden of reversing the trial court=s order in this case. The jury did not hear compelling evidence, credited by the lower court here, of Mr. Blackwood=s longstanding mental health problems and how those problems played a role in the unfortunate and tragic death of the victim.

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[43]*See Blackwood*, 777 So. 2d at 415 (Anstead, J., concurring in part and dissenting in part) (AOf substantial significance is the fact that appellant had never committed any crimes prior the murder in this case, a fact which the trial court accorded significant weight as a statutory mitigating factor@). *Accord Wiggins*, 123 S. Ct. at 2543 (AWiggins does not have a record of violent conduct that could have been introduced by the State to offset this powerful mitigating narrative@).

This is precisely why mental health mitigation is so important for a jury to hear when making the solemn decision whether to recommend the death penalty. Here, the lower court judge, who presided over Mr. Blackwood=s trial, penalty phase, and sentencing, concluded, after hearing all of the evidence, that Mr. Blackwood had established prejudice under *Strickland*. The State has failed to meet its burden in this appeal, and therefore the lower court=s order should be affirmed in all respects.[44]

[44]Mr. Blackwood does note that because the lower court granted relief as to the allegations of ineffectiveness regarding the penalty phase, it did not address counsel=s alleged deficiencies with respect to the *Spencer* hearing (PCR-320). In the event that this Court does reverse the lower court on the claim upon which relief was granted, the Court should remand the case for the lower court to address the unresolved claim regarding the *Spencer* hearing.

ARGUMENT II

THE LOWER COURT ERRED IN SUMMARILY DENYING CLAIM I OF MR. BLACKWOOD=S AMENDED RULE 3.850 MOTION.

In Claim I of his amended Rule 3.850 motion, Mr. Blackwood raised a series of allegations relating to the reliability of the guilt phase of his capital trial. In its brief, the State contends that the lower court correctly determined that no evidentiary hearing was required on these issues. Mr. Blackwood relies on his Initial Brief and the arguments and authorities cited therein to refute the State=s argument, with the exception of the following point raised by the State as to preservation of one of Mr. Blackwood=s arguments.

With regard to Mr. Blackwood=s claim regarding trial counsel=s racist views, the State first refers to trial counsel=s views as being Aalleged@ racist views. Mr. Blackwood=s motion alleged that trial counsel, when he was arrested in 1999 for DUI, made statements to law enforcement including Aasking if he had to go to the county with all the niggers@ (PCR-125). It is troubling that the State would characterize trial counsel=s statement as reflecting a mere Aalleged@ racist view. Given that the State does not accept the allegations pled by Mr. Blackwood as true, an evidentiary hearing is warranted on this basis alone.

The State also argues that the race claim was not preserved for appellate review

Abecause the precise argument was not presented to the trial court.@ This argument is completely belied by the Rule 3.850 motion itself, which clearly stated:

> Around this time, Mr. Ullman was arrested for driving under the influence. However, as Mr. Ullman was being arrested for driving under the influence, Mr. Ullman made a very disturbing slip of the tongue. Mr. Ullman stated, AYou are not going to take me to the County Jail with all those niggers@ (See Appendix 8).
>
> Lynford Blackwood is a black Jamaican who has resided in the United States since 1974. Robert Ullman never disclosed his attitudes toward African Americans to Mr. Blackwood. . . .

(PCR-169). The State=s argument is also belied by its own response to Mr. Blackwood=s motion, in which it clearly understood that the allegations included one involving Ullman=s racial bias toward African-Americans. *See* PCR-224 (emphasis added) (ABlackwood claims that defense counsel Ullman was ineffective at trial because he suffered from a drug addiction. Blackwood *also* asserts that Mr. Ullman never informed Blackwood that he had any personal problems, *and never disclosed his attitudes towards African Americans*@). Clearly this issue was sufficiently preserved for appellate review.

CONCLUSION

For the reasons set forth above and in his other written submissions, Mr. Blackwood submits that the lower court=s order granting penalty phase relief should be affirmed and that the order denying guilt-phase relief should be reversed with directions to conduct an evidentiary hearing.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and type used in this brief is New Times Roman 14 point, a font that is not proportionately spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was sent by U.S. Mail to Debra Rescigno, Assistant Attorney General, Department of Legal Affairs, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, FL, 33401, this 4th day of April, 2005.

_____
Todd G. Scher
Counsel Appellant/Cross-Appellee