IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC03-1553
Lower Tribunal No.: 95-1473CF10A

LYNFORD BLACKWOOD,

Appellant.

V.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the Circuit Court's summary of denial of Mr. Blackwood's Motion for Postconviction Relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

The following symbols will be used to designate references to the record in this appeal.

"R" – Record on Direct Appeal to this Court.

"PCR" – Record on Instant 3.850 Appeal to this Court.

"PCT" - Record on Postconviction Transcript

"G.P." - Guilt Phase Trial Transcript

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 argues that the Court permit oral argument.

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SUMMARY OF THE ARGUMENT

ARGUMENT I: THE LOWER COURT PROPERLY FOUND THAT MR. BLACKWOOD WAS ENTITLED TO A NEW PENALTY PHASE PURSUANT TO STRICKLAND

ARGUMENT II: THE LOWER COURT ERRED BY SUMMARILY DENYING MR. BLACKWOOD'S CLAIM I OF HIS AMENDED MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE WITH SPECIAL REQUEST FOR LEAVE TO AMEND IN VIOLATION OF HIS RIGHTS

STATEMENT OF THE CASE AND FACTS

The Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, entered the judgments of conviction and sentences under consideration.

Mr. Blackwood was indicted by the Grand Jury with the First Degree murder of Carolyn Thomas-Tynes.

After a jury trial, Mr. Blackwood was found guilty of First-Degree Murder on December 6, 1996. The lower court scheduled a penalty phase seven weeks after the guilty verdict, and the jury recommended a death sentence for the first degree murder conviction by a vote of nine (9) to three (3) on January 23, 1997. (PCT 236, 1-3) The trial court then conducted a Spencer Hearing on April 11, 1997. On May 16, 1997, the trial court imposed a death sentence for the First Degree Murder conviction. However, the trial court found only one aggravating factor: the

murder was heinous, atrocious, or cruel (HAC), but the trial court found one statutory mitigator (no significant history of prior criminal conduct), which it gave "significant weight", and eight nonstatutory mitigators: (1) emotional disturbance at the time of the crime (moderate weight); (2) capacity for rehabilitation (very little weight); (3) cooperation with police (moderate weight); (4) murder resulted from lover's quarrel (no specific weight given but considered this factor to the extent that the killing was borne out of a prior relationship and was fueled by passion); (5) remorse (some weight); (6) appellant is good parent (some weight); (7) appellant's employment record (some weight); and (8) appellant's low intelligence level (some weight). *Blackwood v. State*, 777 So. 2d 399, 405 (Fla. 2000)

On direct appeal, the Florida Supreme Court affirmed Mr. Blackwood's conviction and his sentences, but his death sentence was affirmed by close a four-three vote in which the minority held that the death sentence was disproportionate to Mr. Blackwood's crime.

Mr. Blackwood filed an initial Motion for Post-conviction Relief on October 1, 2002. The lower court granted, on November 20, 2002, the State's Motion to Strike Defendant's Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend without Prejudice. He then filed his final

Motion for Post-Conviction Relief on December 2, 2002. On March 21, 2003 and April 11, 2003, the lower court held Case Management hearings pursuant to Florida Rule of Criminal Procedure 3.851.

Following the two Case Management hearings, the lower court entered an Order on April 11, 2003....granting a limited Evidentiary hearing on Claims II and III. An Evidentiary hearing was held on June 19-20, 2003. (PCT 1-308)

The defense put on four witnesses in the evidentiary hearing. The most critical witness was Mr. Blackwood's trial counsel, Robert Ullman.

Mr. Ullman represented Lynford Blackwood. (PCT 226-19-20) Mr. Ullman was not practicing law at the time of the evidentiary hearing. (PCT 226-10-12) His Bar license had been suspended for three years effective January, 2001. (PCT 226-13-16) Mr. Ullman had been convicted of a Federal felony for using a telephone to conspire to secure an illegal drug and was placed on four years probation on June 5, 2002. (PCT 227-3-14) Mr. Ullman, at the evidentiary hearing, expressed a desire to reinstate his license. (PCT 228-6-13)

Mr. Ullman was appointed in June, 1996, after another attorney, Robert Trachman, withdrew and the case went to trial in December of 1996. (PCT 232-1-7) Mr. Ullman waited until

December 12, 1996 to seek out an expert, Dr. Macaluso, to become a witness for the penalty phase. (PCT 233-20-234-20) This request for an expert for the penalty phase was made after a guilty verdict occurred on December 5, 1996. (PCT 234-21-235-1) Mr. Ullman sent his first letter dated December 17, 1996 advising his expert that the penalty phase was scheduled to start January 23, 1997. Dr. Macaluso had done a limited competency evaluation of Mr. Blackwood. (PCT 237-3-5)

In his letter, Mr. Ullman referenced materials that he sent Dr. Macaluso, including Dr. Macaluso's psychological report, Dr. Trudy Block-Garfield's report, John Spencer's report, Mr. Blackwood's statement, the detective's report and Dr. Price's autopsy report. (PCT 237-11-20) On January 7, 1997, Mr. Ullman received a letter from Dr. Macaluso. (PCT 239-4-6) Mr. Ullman testified that Dr. Macaluso did not meet with Mr. Blackwood after December 17 for the purposes of mitigation. (PCT 239-15-19) Mr. Ullman testified that Dr. Macaluso indicated in his letter that he could not assist with testimony. (PCT 239-20-24) Mr. Ullman testified that he learned he had no expert sixteen days before the penalty phase on January 23, 1997. (PCT 240-7-13)

Mr. Ullman's strategy for the penalty phase was to present mental health mitigation. (PCT 240-14-17) Mr. Ullman believed

that he had a decent chance of securing a life recommendation. (PCT 240-18-21) In addition, Mr. Ullman believed that he had a pretty good chance of arguing legal standards for obtaining a life sentence. (PCT 240-22-241-1)

Mr. Ullman had a telling slip of the tongue when he was asked what he did once he learned that he had no expert before the penalty phase.

> Q Did you ask for another expert to be appointed before the penalty phase once Dr. Macaluso indicated he wasn't going to be helpful?
>
> A I believe I did a motion to have Dr. Garfield involved in the case. She was already involved in the case.
>
> Q Did you do the motion before the penalty phase?
>
> A I believe so.
>
> Q Okay.
>
> A It wouldn't be any good afterwards. No. Well, I didn't want to be flipped. Let me strike that. Rephrase that.
>
> Q I don't think you can strike that.
>
> A No, I can't. I'm sorry. But to answer your question, I believe I did the motion.

(PCT 241-2-15)

The truth be told, Mr. Ullman did not secure the services of a mental health professional until one month after Mr.

Blackwood received a 9-3 death recommendation, and the jury heard no mental health professional testimony. (PCT 247-11-23) Mr. Ullman testified that he sent her a letter on February 26, and the Spencer Hearing was held on April 11, 1997. (PCT 248-3-9) Mr. Ullman detailed a number of items that he sent Dr. Block-Garfield.

> A Okay. Well, first, I outlined procedurally where we were at and the dates and brought her up to speed with regard to procedures and the jury's finding, and then I gave her a factual scenario of what happened. Documents that were in the Spencer Hearing. The Order appointing Dr. Garfield. Location of the defendant. Copy of the mitigators. A copy of the case law that was applicable. Copy of Dr. Ericston Price's deposition. Dr. Garfield's evaluation, her initial competency. Copy of the police reports from Fort Lauderdale. Copy of detective – excuse me. Detective Desaro's report. I believe he was in St. Petersburg. Let's see. Mr. Blackwood's confession. The autopsy report. And there may have been other things. Copy of the mitigators. Copy of the aggravators. That's the information that is referenced in the letter.

(PCT 249-14-250-3)

However, many critical items were missing and as a result, Mr. Loe attacked Dr. Block-Garfield. Mr. Ullman did not remember providing these items.

Q Did you ever, to the best of your memory, send her transcripts of the penalty phase testimony?

A Transcripts of the penalty phase testimony, I don't remember.

Q Did you ever sent her school records of Mr. Blackwood?

A I don't believe I did. I don't know. I don't remember.

Q Did you ever send her Dr. Price's testimony at the trial?

A The trial level? I don't know. I don't remember.

Q Did you ever send her the testimony of Mr. Blackwood's cousin, Mr. Robinson?

A I don't recall.

Q Did you ever send her an audio tape of his statement?

A No. I don't believe so.

(PCT 250-4-20)

Incredibly for a case of this magnitude, Mr. Ullman never scheduled a formal meeting with Dr. Block-Garfield. (PCT 251-1-6) Mr. Ullman initially indicated that he spoke to Dr. Block-Garfield concerning the case. (PCT 251-7-9) However, Mr. Ullman conceded after reviewing time records that were used for his bill that his bill from February 25 to April 11 reflect no conversations with Dr. Trudy Block-Garfield. (PCT 251-21-252-16)

At the time of the hearing, based on Dr. Block-Garfield's

report, Mr. Ullman testified that he believed that he would establish emotional distress as a statutory mitigator. (PCT 258-1-14) He indicated that he was surprised as a matter of semantics that she did not testify consistent with her report. (PCT 258-15-17) Mr. Ullman conceded that he was aware that the Florida Supreme Court placed greater weight on statutory mitigators than non-statutory mitigators. (PCT 258-18-21) Mr. Ullman provided the following analysis of Dr. Block-Garfield's testimony.

> Q Would you agree then that you felt she backstroked when she testified from the report that she gave you?
>
> A I felt, with all due respect, that Dr. Garfield did not have a grasp of the definition of statutory mitigators even though she previously supplied me with one. That's what I felt.
>
> Q I thought you felt that after she concluded her testimony?
>
> A During and after.

(PCT 258-25-259-8)

Although Mr. Ullman tried to shift blame to Dr. Block-Garfield for the Spencer Hearing fiasco, the following colloquy reveals that Mr. Ullman was woefully unprepared for the Spencer Hearing.

> Q Did you ever ask her if she recommended any further testing of Mr. Blackwood?

A I don’t recall. I believe she did though. I don’t recall.

Q Did she indicate what type of testing she felt would be helpful?

A No. It would be in the record. I believe there were neuro psychological exams, yes, but I never had a psychiatrist or psychologist basically say there wasn’t further testing needed.

Q Did she indicate to you that it would have been helpful to have some neuro psych testing of Mr. Blackwood?

A I believe so.

Q Did you pursue that?

A No, sir.

Q Why not?

A Well, there are time parameters, costs involved, case costs involved.

Q Did you ever ask the Court based on the information that Dr. Trudy Block-Garfield had given you for a continuance so that you could pursue a neuro psych evaluation?

A I believe there was a motion filed for a continuance but I think that – I don’t recall if I filed a motion for continuance. I don’t believe it was predicated on that basis though. I believe there was a motion for –

Q You don’t believe that in your motion you specified that as a ground?

A Correct.

Q What grounds did you give for seeking a continuance of the Spencer Hearing?

A I think it was preparation.

Q And what was the Court's response?

A Denied.

(PCT 259-11-260-18)

Trial counsel's level of preparation for Mr. Blackwood's case is exemplified by trial counsel's use of an investigator to assist in Mr. Blackwood's penalty phase.

Mr. Ullman indicated that he filed a motion to have an investigator assist him with Mr. Blackwood's case. (PCT 242-2-4) The court granted an Order permitting the use of $1,500.00 for an investigator. (PCT 242-5-7) Mr. Ullman initially told the lower court that as a matter of trial strategy that the investigator was not called as a witness. (PCT 242-11-22) Mr. Ullman conceded that Mr. McCoy was not used to locate witnesses. (PCT 242-1-5) Mr. Ullman acknowledged that Mr. McCoy was directed to visit Mr. Blackwood. (PCT 243-1-9) Mr. Ullman conceded that he was familiar with defense Exhibit "3" which is a letter that he wrote to Mr. McCoy; where "If you get a chance, what I want you to do is call Mr. Blackwood, to go meet his acquaintance and tell him what a great lawyer I am and what we will be doing to bring him up-to-date, somewhat. Enclosed is a

copy of a newspaper article in the Fort Lauderdale Supplement. Thank you for your courtesies and cooperation."

Mr. Ullman's stated reason for having Mr. McCoy tell Mr. Blackwood that he was a great lawyer:

> "That was my attempt at sarcasm or wit. Looking back at it it might not have been the brightest thing to do. I'm sure Mr. McCoy took it with the intent it was written."

Mr. Ullman could not remember what he told Mr. McCoy to tell Mr. Blackwood about Mr. Blackwood's case. (PCT 245-6-11) Mr. Ullman could not tell what else Mr. McCoy did on Mr. Blackwood's case. (PCT 246-15-19) Mr. Ullman stated that Mr. McCoy did not do a lot of work in the file. (PCT 246-13-14)

Mr. Blackwood at the Evidentiary hearing called Dr. Trudy Block-Garfield as a witness. Dr. Trudy Block-Garfield is a psychologist licensed in the State of Florida.(PCT 8-6-8) Dr. Block-Garfield first conducted an evaluation for competency of Mr. Blackwood on April 28, 1995. (PCT 10-4-9) Dr. Block-Garfield spent an hour with Mr. Blackwood in the competency evaluation and another one and a half hours writing a report. (PCT 11-2-8) Mr. Blackwood was so severely depressed that Dr. Block-Garfield did not render an opinion on competency. (PCT 11-15-22) Dr. Block-Garfield conducted a second evaluation on December 15, 1995 for approximately the same amount of time.

(PCT 14-17-21 and 15-1-3) She rendered the opinion he was competent to proceed even though he was still depressed. (PCT 15-4-12)

Dr. Block-Garfield's third evaluation of Mr. Blackwood was triggered by a Court Order by Judge Cohn signed on February 21, 1997. (PCT 20-9-13) Mr. Ullman, Mr. Blackwood's trial counsel, sent a letter to Dr. Block-Garfield dated February 25, 1997. (PCT 21-22-22-3) Most significantly, Mr. Ullman indicated that he expected Judge Cohn to follow the jury's recommendation irrespective of what Dr. Block-Garfield did on the case. (PCT 22-4-13)

Dr. Block-Garfield testified that Mr. Ullman provided her with the following:

> A He gave me the notice of the Spencer Hearing, the Order appointing me, copy of the mitigators, copy of Dr. Price's deposition, my initial evaluation regarding competency, reports taken by Fort Lauderdale Police Department, and a copy of Detective Desaro's report, as well as Doctor Price's autopsy report. He did not list it, but I believe he had given me a copy of Mr. Blackwood's statement. (PCT 22-16-23)

Dr. Block-Garfield had conducted capital mitigation evaluations before Mr. Blackwood's evaluation. (PCT 12-17-20) Her practice in a mitigation evaluation is to request as much information as there is available, including police reports and

she generally will say “give me everything you have.” (PCT 13-15-14-2) In other mitigation cases, defense attorneys arranged meetings with family members so she could get a more independent analysis of the person. (PCT 14-12-16)

Dr. Block-Garfield was informed that the Spencer Hearing was scheduled on April 11, 1997 , to be conducted within six weeks from her appointment to do a mitigation evaluation. (PCT 23-2-8) In previous mitigation evaluations, she had months to conduct an investigation. (PCT 23-9-15) Dr. Block-Garfield testified that she had never had less time to work before the hearing than on Mr. Blackwood’s case. (PCT 23-16-18)

Dr. Block-Garfield testified that she never met with Mr. Ullman before the Spencer Hearing. (PCT 23-19-24) Dr. Block-Garfield testified that she reviewed Mr. Blackwood’s file in preparing for the evidentiary hearing, and she had no notes, records of telephone calls or billing that reflected discussions with Mr. Ullman about Mr. Blackwood’s case. (PCT 23-22-25-2)

Dr. Block-Garfield had worked with a number of criminal practitioners in Broward County on capital cases, and her normal practice when called either by the State or the defense was to have a meeting to discuss her findings. (PCT 25-2-26-12) Dr. Block-Garfield testified that even if she did not discuss the actual questions with the attorney, then she would discuss the

issues that would be addressed. (PCT 26-25-27-6) Dr. Block-Garfield had no idea what questions Mr. Ullman was going to ask her at the Spencer Hearing. (PCT 27-7-13)

Mr. Ullman's deficient preparation of Dr. Block-Garfield for the Spencer Hearing was exposed in Dr. Block-Garfield's evidentiary hearing testimony. Dr. Block-Garfield testified that Mr. Ullman neither supplied her with transcripts of family members who testified at the penalty phase or set up meetings with family members to discuss the case. (PCT 28-1-9) Dr. Block-Garfield indicated that her evaluation would have been aided by discussions with family members that could have confirmed information that Mr. Blackwood gave her. (PCT 28-10-16) As a result of reading additional material about Mr. Blackwood in preparation for the evidentiary hearing, Dr. Block-Garfield's belief was confirmed in Mr. Blackwood's veracity. (PCT 28-6-13)

Dr. Block-Garfield acknowledged that Assistant State Attorney Loe attacked her in cross for basing everything on what Mr. Blackwood told her and for not speaking to family members. (PCT 28-24-29-6) It was her normal practice to ask to speak to family members which she did in Mr. Blackwood's case. (PCT 29-7-14) Although Mr. Ullman provided Dr. Block-Garfield with Mr. Blackwood's transcribed statement, he did not provide her with audiotape that she indicated at the Spencer Hearing would have

been helpful to her. (PCT 29-15-30-6)

Dr. Block-Garfield indicated that she asked for everything from Mr. Ullman. (PCT 30-7-10) She testified that she realized at the conclusion of the Spencer Hearing that she had not been given many things. (PCT 30-11-15) She addressed the impact of the missing information on her Spencer Hearing when she stated:

> A Well, certainly it impacted the testimony. There are certain things that I didn't really have a good answer to that I might have otherwise, or I may have. (PCT 30-18-21)

Dr. Block-Garfield indicated at the evidentiary hearing that she did not administer any testing for the purpose of mitigation. (PCT 31-22-24) She indicated that she did not administer the tests due to Mr. Blackwood's depression as those test results would have been invalid creating the impression that Mr. Blackwood was lying. (PCT 31-25-32-15) Dr. Block-Garfield did not explain to the Court why she did not administer the testing. (PCT 32-16-22) Dr. Block-Garfield acknowledged that Mr. Loe attacked her credibility because she did not administer Mr. Blackwood tests. (PCT 32-23-33-1) Dr. Block-Garfield acknowledged that had Mr. Ullman asked why she did not test Mr. Blackwood, she would have answered. (PCT 33-2-5)

Dr. Block-Garfield is a dedicated professional who spent ten (10) hours working on Mr. Blackwood's case for $150.00. (PCT 33-

6-21)

Dr. Block-Garfield administered the Benten Visual Retention Test that screens for neurological deficits. (PCT 40-8-14) She found that he fell in the impaired range, but she could not say with clinical certainty whether the results were neurological or due to depression. (PCT 40-20-25) She acknowledged at the time of the testing, as well as at the time of the evidentiary hearing that she did not have expertise in neuropsychology. (PCT 41-1-4) Dr. Block-Garfield testified that she would have recommended to Mr. Ullman that Mr. Blackwood have a neuropsychological evaluation if Mr. Ullman would have asked, but Mr. Ullman did not ask that question. (PCT 41-18-24)

The State attempted in cross-examination to suggest that Dr. Block-Garfield believed that six weeks was sufficient time to prepare for the Spencer Hearing. (PCT 61-13-17) However, that attempt was negated in the following colloquy:

> Q So even though on other capital one cases, you may have had longer time, when you received this letter requesting your assistance, you as a expert witness did not feel this was insufficient in which to prepare yourself for this case; correct?
>
> A Not based upon materials I had, and based upon the information I had. Now had Mr. Ullman sent me more material at that time, that may have changed my point of view.

Q Okay. More material such as what?

A Such as the documents that I was questioned about, and the issues I was questioned about during the Spencer Hearing by Mr. Loe.

Q Did you ever tell Mr. Ullman that you needed more information?

A I have no recollection of doing that. I sent him my report. And generally the attorney is the one who manages the case. The attorney calls me, then says let’s go through this, let’s discuss this.

(PCT 61-21-62-14)

Q Now you told us that when you received the letter in February asking you to reevaluate the Defendant for the purpose of mitigation, and testify in April, you would have told Robert Ullman if that was a insufficient period of time; correct?

A Given that I already had seen Mr. Ullman, I mean Mr. Blackwood previously, I felt it was a sufficient amount of time. Certainly had I been provided information like this at that time, I would have possibly requested more time.

Q You mean to read other material?

A To read. If I had been provided with trial testimony I certainly would have needed more time at that point to go through all of these things.

(PCT 75-17-76-5)

Q My final question is do you believe at the time that you were about to testify

that you had the appropriate amount of information provided to you to render an opinion as to what mitigation was applicable?

A At the time that I testified I thought I had sufficient information. In retrospect, since I have read some court transcripts, so forth, I have to revisit that and say no, I didn't. But then again, I didn't know those things existed prior to my testimony.

(PCT 90-4-14)

Dr. Hyman Eisenstein, a licensed clinical psychologist who specialized in neuropsychology also testified on behalf of the Defendant. (PCT 179-219) Dr. Eisenstein 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 (PCT 197-16-198-22), 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. (PCT 203-24-204-11)

Dr. Eisenstein addressed the unresolved issue of whether Mr. Blackwood suffered neuropsychological deficits when he testified as follows:

Q If you would, have a seat. Do you have, based on administering these tests, did you form an opinion as to whether Mr. Blackwood has certain neuropsychological deficits? Did you form an opinion within a reasonable degree of certainty within your field

as to whether he has certain neuropsychological deficits?

A Yes, I do.

Q Can you share with the Court what that opinion is?

A Well, Mr. Blackwood first of all, as I was discussing earlier, demonstrated borderline intellectual functioning in verbal, performance, the full scale IQ, all the subtests. I considered it a valid administration, and consistent with borderline intellectual functioning based on the IV administration falling within the basically the very low end of the population.

Executive functioning, as measured by the Halsted Right Hand Neuropsychological Battery, demonstrated severe impairment in several different domains.

(PCT 192-22-193-18)

Q How would you characterize as a result of your tests his strengths or weaknesses in the area of executive function?

A Well, in terms of executive functioning basically not on the, on the category tests, but there are several other tests that demonstrated a similar pattern. As a neuropsychologist one ought not to ever formulate an opinion based on any one particular test. But one is looking for a pattern of results that is consistent and corroborated data. Basically it demonstrates that his thinking is best described as being concrete.

Q What do you mean by concrete?

A Concrete means the thinking pattern is very straightforward and simple. One or two basic steps in problem solving is okay. So something that is repetitive, something that's simple, something that's straightforward, that is something that an individual like Mr. Blackwood is certainly capable of doing.

Anything that's more sophisticated or complicated or required complete decision making, or weighing alternatives, or options, or thinking about different possibilities or solutions to integrate, to synthesize data analysis, something that requires more complex judgment and reasoning, is really beyond his cognitive or his neuropsychology abilities.

(PCT 196-15-197-15)

Q What impact did his neuropsychological deficits have on this crime?

A A individual who is concrete in their thinking and impaired in their judgment, assesses, has a inability to assess the situation, and all of its ramifications and it's implications.

You are dealing with a situation that on one hand the relationship had ended, on the other hand it seems that they were still getting together, and she is still putting him down, and sort of playing with him. And I don't think that he could appreciate the nuances of what exactly was asked from him, and what the relationship, where it was going.

Q Do you have an opinion within a reasonable degree of neuropsychological certainty as to whether he was, at the time of commission of this crime, experiencing either extreme emotional or mental disturbance?

A Yes.

Q What would that opinion be?

A It is my opinion that he was experiencing an extreme mental disturbance.

Q When you use the term mental disturbance, what do you mean by that as a neuropsychologist?

A I mean organic brain behavior, cognitive, intellectual, executive functioning. Everything that really I have assessed in terms of learning disabilities, multiple head injuries, the way he was described at work, concrete, simplistic, borderline intellectual individual, who is limited in the capacity to appreciate alternative ways of dealing with a stressful situation.

The inability to extricate themselves by thinking of Plan B. There was no Plan B. And a response that was sort of a knee jerk response to a situation, with the inability to utilize any other judgment which was unavailable at the time for him to make.

(PCT 212-8-213-21)

Finally, 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. (PCT 318-19)

Unlike Dr. Block-Garfield, Dr. Jacobson conducted collateral interviews with family members. As a result, her opinions were not based on Mr. Blackwood's self-report as evidenced by Dr. Jacobson's following testimony at the evidentiary hearing:

> A Mr. Blackwood had what I would consider a very difficult early childhood, and some very basic psychological ways. He was, went to live with is paternal grandmother when he was about a year old. His mother had been depressed prior when she was pregnant with him. She couldn't, the family couldn't handle him.
>
> Q What's the source of that information? Is it Mr. Blackwood or other sources?
>
> A That was Mr. Blackwood, and it was confirmed by his family members.
>
> Q Which family members confirmed?
>
> A Both sisters that I spoke with. And primarily that's where confirmation came from. The family lived in a rural part of Jamaica. There wasn't a lot of opportunity for education. They were poor. Both sisters reported to me they had to wash their school clothes every night because they had to wear them the next day.
>
> Q Did you take that to mean they only had

one set of school clothes?

A That's what I took it to mean, yes. They had one pair of shoes they had to wear until they gave out, or they outgrew them. There was no real medical facility close by. So there were a number of reports of head injuries –

Q Head injuries suffered by whom?

A By Mr. Blackwood.

Q Who was the source of that information?

A Again the sisters. But it was confirmed by Mr. Blackwood's own statements to me.

Q Well, with respect to the sisters what do they say in terms of him having head injuries?

A Well, I was told that he was hit by a rock once. That he was, apparently they lived in a hilly area, and there was a hill that was loose gravel, so trucks would come by, the kids would jump on the back of the trucks. He once did that and fell off and hit his head. There was an incident which was related to me by both sisters in which were was a near drowning –

Q How old was Mr. Blackwood when that happened?

A Which time?

Q The drowning incident.

A I believe around ten or so.

Q And what did the sisters relate to you in terms of that?

A They related to me that he was unconscious. He and his brother were washing clothes in a river, where holding on to a log, got carried out and almost drowned. That an uncle saved him. That he was unconscious.

I asked if he had been taken to a hospital and I was told there was no hospital close by. One of the sisters, I would have to look up which one, let me know that the grandmother felt that he wasn't quite the same after that, that he appeared to be a little slow.

Mr. Blackwood told me about a couple of other experiences, but those were not confirmed by anyone else. That incident when he was hit on the head with a stick or a bit, and falling into a sink hole, but that was, I couldn't get any independent confirmation of that.

Q You indicated that he was raised by the paternal grandmother; correct?

A That's correct. And she had ten of her own children there. So he didn't get a lot of attention. I believe this is very significant because he told me that when he finally got reunited with his other siblings around the age of twelve or so he felt like the outsider.

There were other incidents when his mother, father came here to the country and two other siblings came here, some of the other children came here, and he felt like he was never wanted by his mother.

Q Did he relate any specific incidents to indicate that he wasn't wanted by his mother?

A Well, apparently when they went to Divorce Court to get divorced here in Broward County, the mother said she didn't want the children.

Q Did you get any confirmation of that from the sisters?

A Yes.

Q What did they indicate to you?

A A similar type of story. There was really very little inconsistency that I found in my collection of data.

Q With respect to being provided material, you're talking about emotional components. But with respect to material, was he raised in a deprived environment?

A Absolutely. Dad had to work. He would go, leave them, even when they came to this country, Mr. Blackwood told me that they would all, he and his siblings would hang around in the apartment. They had like a very small apartment. And that because dad would leave to go to work on the sugarcane, the oranges, Mr. Blackwood was the oldest, and his dad had been the oldest, and one of his sisters told me that dad was much harder on Mr. Blackwood than he was on any of the other siblings.

Q Did she give specific examples of how he was harder on him?

A She said that dad would kind of put things in a certain spot to see whether or not the kids did their chores, and did what they were supposed to do, and would be very angry if they didn't. That most of the time his anger was

taken out on Mr. Blackwood.

Q Was his anger taken out on Mr. Blackwood in a physical sense?

A There were some times, yes, when it was physical.

Q Which is what his sisters related?

A Yes. And Mr. Blackwood also informed me that he had been physically hurt by his dad.

(PCT 121-3-125-19)

The lower court entered an order on Mr. Blackwood's Amended Motion to Vacate Judgments of Conviction and Sentence on July 23, 2003. The Order granted relief in the form of a new penalty phase based on ineffective assistance of counsel at the penalty phase. On August 20, 2003, Mr. Blackwood filed a Notice of Appeal to review the lower court's Order rendered July 23, 2003, as well as a summary denial of claims entered on April 11, 2003. (PCR 322-324)

On August 24, 2003, the State filed a Notice of Cross-Appeal and Notice to the Court. (PCR 325-327)

ARGUMENT I

THE LOWER COURT PROPERLY FOUND THAT MR. BLACKWOOD WAS ENTITLED TO A NEW PENALTY PHASE PURSUANT TO STRICKLAND

A. DEFICIENT PERFORMANCE:

The lower court's factual findings on counsel's deficient performance support Mr. Blackwood's legal claim. In it's post-evidentiary hearing Order granting penalty phase relief, the lower court explained that Mr. Blackwood had been allowed to present evidence on two claims that had been raised in his 3.850 motion:

> "The dispositive issue presented by Claims II and III is whether Mr. Blackwood was deprived of the effective assistance of counsel as a result of his counsel's failure to investigate and present any mental health mitigation at the penalty phase proceeding." (PCR 311-312)

The Order then established its standard that the lower court's analysis of the evidence presented below to support

these claims is governed by the two-step analysis set forth in *Strickland v. Washington,* 466 U.S. 668 (1984); to establish (1) deficient performance, and (2) prejudice (PCR 312) In its Order, the lower court found that trial counsel Ullman's performance had been deficient pursuant to *Strickland* and *Wiggins:* (PCR 311-321)

The Law:

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). *Strickland* requires a defendant to plead and demonstrate 1) unreasonable attorney performance, and 2)prejudice.

Defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976)(plurality opinion). In *Gregg* and its companion cases, the Court emphasized the importance of

focusing the sentencer's attention on "particularized characteristics of the individual defendant." *Id.* at 206; *see also Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Recently, the United States Supreme Court reemphasized trial counsel's responsibility to investigate and prepare available mitigating evidence for the sentencer's consideration. The Court reversed and remanded a sentence of death after finding ineffective assistance of counsel during the penalty phase. *Williams v. Taylor*, 529 U.S. 362 (2000). Focusing on trial counsel's failure to prepare for the penalty phase, the Court found that counsel did not begin their mitigation investigation until a week before trial. *Id.* at 395. At an evidentiary hearing, postconviction counsel for Mr. Williams presented a wealth of mitigation evidence that was never considered at the penalty phase.[1] The cumulative weight of what was presented at

---

[1] The Court illustrated the background evidence never presented to the sentencer.

> They failed to conduct and investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an

the original trial and the evidentiary hearing, "raised 'a reasonable probability that the result of the sentencing proceedings would have been different' if competent counsel had presented and explained the significance of all the available evidence." *Id.* at 399 (emphasis added).

A few years later, the U.S. Supreme Court again stressed the importance of trial counsel's obligations during the penalty phase of a capital case. In *Wiggins v. Smith*, 123 S. Ct. 2527 (2003), the Court recognized set standards that trial counsel must adhere to in death penalty cases. The Supreme Court held that trial counsel was ineffective when they failed to follow up on leads in Mr. Wiggins' pre-sentence and social services report. *Id*. at 2536. These two reports indicated that Mr. Wiggins had suffered physical and sexual abuse that was never investigated by trial counsel.[2] Furthermore, trial counsel neglected to develop a social history regarding Mr. Wiggins' background after funds were provided for such a service. *Id.* at

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> abusive foster home), and then after his parents were released from prison, had been returned to his parents. Counsel failed to introduce available evidence that Williams was 'borderline mentally retarded' and did not advance beyond sixth grade in school.

Williams 529 U.S. at 395-399

[2] The Court found that these reports also included information regarding Mr. Wiggins alcoholic mother, placements in foster care, and borderline retardation. *Wiggins* 123 S.Ct. at 2533.

2533. The Court found these failure to investigate a client's background to be ineffective because counsel did not search far enough. Determining when trial counsel has failed to conduct an adequate investigation requires "a court [to] consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Id. at 2538. (Emphasis added). It is not enough for counsel to make a cursory investigation into a client's background. Rather, trial counsel is required to diligently and thoroughly examine a client's background for mitigation evidence.

After finding trial counsel ineffective for not developing existing mitigation information, the Court delineated the standard trial counsel should meet for penalty phase preparation. The *ABA Guidelines for the Appointment and Performance in Death Penalty Cases* explain the basic requirements that trial counsel must adhere.

> The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his

history from a narrow set of sources.[3]

Wiggins, 123 S. Ct. at 2537. Conducting a full investigation is necessary in order to make informed strategic decisions about a client's defense. "[A]ny reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defense." *Id; see also Armstrong v. State*, 862 So. 2d 705, 722 (Fla. 2003) (Anstead, J. concurring). Without looking at a complete picture of a client's background, trial counsel would be ill equipped to determine what course of action should be taken in a client's case in both the guilt and penalty phases.

The ABA Guidelines that the U.S. Supreme Court recognized as the norm in defending a capital case encapsulated acknowledged standards that have existed for quite some time. The Guidelines were first recognized in *Strickland v. Washington*, 466 U.S. 668, 688-689 (1984). The 1989 ABA Guidelines were in effect at the time of Mr. Blackwood's trial. Trial counsel had a professional responsibility that trial counsel had to fully investigate his background. "The [ABA] standards merely represent a codification of longstanding,

[3] The Court encouraged counsel to investigate a client's medical, educational, employment, training, family, and social history which would also encompass prior adult and juvenile correctional experiences and religious and cultural influences. *Wiggins*, 123 S. Ct. at 2537.

common-sense principles of representation understood by diligent, competent counsel in death penalty cases." *Hamblin v. Mitchell*, 354 F.3d 482, 487 (6th Cir. 2003)(emphasis added). The Court wrote:

> "the same type of longstanding norms referred to in *Strickland* in 1984 as 'prevailing professional norms' as 'guided' by 'American Bar Association standards and the like'...The Court in *Wiggins* clearly holds [citation omitted] that it is not making 'new law' on the ineffective assistance of counsel either in *Wiggins* or in the earlier case on which it relief for its standards, *Williams v. Taylor*, 529 U.S. 362," (citation omitted)."

Id.; see also Williams v. Taylor, 529 U.S. 362, 391 (2000); *Wiggins* 123 S. Ct. at 2535-2536, The Court's holding in *Wiggins* clarifies exactly what responsibilities trial counsel has always had to a client.

Furthermore, penalty phase investigations must begin before the trial commences to ensure that the best possible mitigation is brought before the sentencer. *See ABA Guidelines* 10.7(Commentary p. 83). The Florida Supreme Court recognizes the importance of beginning investigations in a timely manner. In *Deaton v. Dugger*, 635 So. 2d 4, 8 (1993), the Florida Supreme Court upheld a resentencing ordered by the trial court when "no evidence whatsoever was presented to the jury in mitigation and the trial judge found only one mitigating factor, even through

evidence presented at the rule 3.850 evidentiary hearing established that a number of mitigating circumstances existed." Trial counsel for Mr. Deaton waited until after the guilt phase to begin preparing for the penalty phase. *Id.* While reports, records, and collateral witnesses existed to assist in mitigation, Mr. Deaton's trial counsel did not have enough time to gather them due to the penalty phase starting the next day. *Id.* at 9.

Additionally, the Florida Supreme Court has upheld a resentencing when "the only witness who was available and willing to testify in favor of the defendant was a mental health expert who had merely talked with Mr. Lewis [the defendant] and had not yet reached a diagnosis because he did not have sufficient information."[4] *State v. Lewis*, 838 So. 2d 1102, 1114 (Fla. 2002). Waiting until a few days before the trial or penalty phase to conduct an investigation into a client's background deprives him of the full investigation guaranteed by the Sixth Amendment. See *Hamblin v. Mitchell*, 354 F. 3d 482, 487 (6th Cir. 2003); *see also Blanco v. Singletary*, 943 F. 2d 1477,

[4] Much like Mr. Blackwood's case, trial counsel waited until after the guilty verdict to contact a mental health expert for a mitigation evaluation. Also, the court-appointed psychologist was forced to rely only on the self-reporting of Mr. Lewis because trial counsel failed to provide supporting information. Also, trial counsel failed to contact family members about existing mitigation evidence or obtain mitigating evidence in the form of background records like medical and school records. *Lewis*, 838 So. 2d 1109.

1500-1502 (11th Cir. 1991). What is required is an individualized sentence focusing on the particularized characteristics of the individual defendant. *See Gregg v. Georgia*, 428 U.S. 153 (1976). This did not occur in Mr. Blackwood's case.

This Court has held that the lower court's findings of fact are subject to deference by this Court. *Stephens v. State*, 748 so. 2d 1028, 1033 (Fla. 1999). Mr. Blackwood submits that the findings as to deficient performance are fully supported by unrefuted evidence presented below.

Judge Cohn extensively quoted from the record to support his findings. The following excerpts can be found in Judge Cohn's Order:

> "This Court has found and concluded that trial counsel's performance was both deficient and prejudicial because he failed to adequately investigate and present mental health mitigation at the penalty phase proceeding which undermined confidence in the outcome of the trial. (PCR 312)
>
> 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. *(Id.* at 238.) After receiving the letter, on January 9, 1997, Mr. Ullman contacted Dr. Macaluso by telephone. (*Id.* at 273-274.) Dr. Macaluso was unhappy with the fee arrangement and he advised Mr. Ullman that he was not willing to work for $150.00.

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 "would 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. Dr. Ullman testified that he was upset by Dr. Macaluso's letter and thought that in reality it was a "CYA" letter because Dr. Macaluso did not want to be a witness for what he thought would be inadequate compensation. (PCR 314)

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. (*Id.* at 284.) Rather than ask for a continuance of the penalty phase proceeding 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, Supra.* (PCR 314-315)

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 "strategic 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 690-691. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Wiggins, supra* and *Strickland* at 690-691. 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 316)

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 "great weight to the jury's recommendation." (R. Vol. XIV, at 1581-1589.) (PCR 316)

The mitigating evidence available included the testimony of Dr. Block-Garfield who would have testified that although she did not find the statutory mitigator of extreme emotional or mental 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." (PCR 317)

The lower court is correct in its analysis by which the lower court found that Mr. Blackwood was prejudiced by his trial attorney's inadequate preparation. The lower court made the following analysis:

> "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*. (PCR 319)
>
> 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 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 320)
>
> This Court also finds that Mr. Blackwood did not receive the competent assistance of

> 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 320)
>
> Since this Court has found that both prongs of *Strickland, supra*, were met with respect to trial counsel's penalty phase preparation and presentation it will not be necessary to address trial counsel's alleged deficiencies with respect to the *Spencer* Hearing." (PCR 320)

CONCLUSION

This Court should affirm the trial court's vacating Mr. Blackwood's death sentence, and Mr. Blackwood should be granted a new penalty phase.

ARGUMENT II

THE LOWER COURT ERRED BY SUMMARILY DENYING MR. BLACKWOOD'S CLAIM I OF HIS AMENDED MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE WITH SPECIAL REQUEST FOR LEAVE TO AMEND IN VIOLATION OF HIS RIGHTS

Claim I addressed counsel's ineffective assistance in the guilt phase. In his Amended Motion to Vacate Judgment of Conviction and Sentence with Special Request for Evidentiary Hearing (hereinafter the "Amended Motion"), Mr. Blackwood set forth substantial and detailed claims demonstrating entitlement to an evidentiary hearing. These claims include specific fact-based allegations that Mr. Blackwood's trial counsel was

ineffective both during the guilt and penalty phases of the trial. The circuit court refused to grant an evidentiary hearing and summarily denied these claims. The Circuit Court erred because Mr. Blackwood has alleged facts not conclusively rebutted by the record and which demonstrate deficient trial counsel performance that prejudiced Mr. Blackwood. This Court should reverse the Circuit Court's Order summarily denying these claims and remand for an evidentiary hearing.

LEGAL STANDARD

Under Rule 3.850, a post-conviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief. *See Gaskin v. State*, 737 So. 2d 509 (Fla. 1999), *Rivera v. State*, 717 So. 2d 477 (Fla. 1998). The defendant is entitled to an evidentiary hearing on a claim of ineffective assistance of counsel if he alleges specific facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant. *See Gaskin* at 516 citing *Roberts v. State*, 568 So. 2d 1255, 1259 (Fla. 1990). The trial court must accept all allegations in the motion as true to the extent they are not conclusively rebutted by the record. *See Gaskin* at 516; *Valle v. State*, 705 So. 2d 1331 (Fla. 1997).

On Appeal, in order to uphold a trial court's summary denial

of claims raised in a 3.850 motion, the claims must be either facially or conclusively refuted by the record. *See Peede v. State*, 746 So. 2d 253, 257 (Fla. 1999). Where no evidentiary hearing is held below, this Court must accept the defendant's factual allegations to the extent they are not refuted by the record. *Id.* An evidentiary hearing is presumed necessary absent a conclusive demonstration that the defendant is entitled to no relief. *Gaskin* at 516. There is a presumption in favor of granting evidentiary hearings on initial 3.850 motions asserting fact-based claims. *See Gaskin* 737 So. 2d 509, 517 (Fla. 1999) n.17.

A. <u>TRIAL COUNSEL'S RACIST VIEW</u>:

The Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend sets forth an allegation of racial bias against trial counsel. (PCR 166) Trial counsel, while being arrested for a driving under the influence charge on November 16, 1999 was quoted in a probable cause affidavit by Deputy Grady:

> " He also used language that would appear to be out of character for a professional asking if he had to go to the County with all the niggers." (PCR 125)

Mr. Blackwood is African American. His trial counsel is Caucasian. Tragically, Mr. Blackwood's case is analogous to

State v. Davis, Fla. L. Weekly S82 February 19, 2004.

It is deeply offensive that trial counsel in *Davis* expressed racist views to a jury about his client, and that his racist views appeared to manifest itself by woeful representation of a client that received the death penalty. However, it is equally troubling in this case when an attorney who covertly has the same racist views and provides awful representation to an African American client who received the death penalty. This counsel did nothing to quote Judge Cohn. You must ask why.

In *Davis*, this Court wrote,

> "The trial court ordered a new penalty phase after concluding that Davis's trial counsel was ineffective in failing to adequately investigate and present evidence of Davis's brain damage and background, and in failing to assert the statutory "age" mitigator. We do not reach this issue, and instead conclude that a new guilt phase is warranted because the blatant expressions of racial prejudice by trial counsel in this case constitute ineffective assistance of counsel that affected the fairness and reliability of the proceedings to such an extent that our confidence in the outcome is undermined." (S82)

Similarly to *Davis*, the lower court ordered a new penalty phase for Mr. Blackwood. Although Mr. Blackwood's trial counsel did not express his racist views to Mr. Blackwood's jury, Mr. Blackwood is an African-American who received inadequate representation from a lawyer who viewed his race as inferior.

This Court emphasized the need to eliminate racism from infecting the criminal justice system when it wrote:

> "The necessity of vigilance against the influence of racial prejudice is particularly acute when the justice system serves as the mechanism by which a litigant is required to forfeit his or her very life. As the United States Supreme Court first stated more than twenty-five years ago, "death is different in kind from any other punishment imposed under our system of criminal justice." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973)(stating that because "[death is unique punishment in its finality and in its total rejection of the possibility of rehabilitation . . ., the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes"). We have acknowledged that "death is different" in recognizing the need for effective counsel in capital proceedings "from the perspective of both the sovereign state and the defending citizen." *Shepard & White, P.A. v. City of Jacksonville*, 827 So. 2d 925, 932 (Fla. 2002)." (S83)

The lower court has already condemned trial counsel for a woeful performance in the penalty phase, and this Court should permit an evidentiary hearing on guilt phase claims to determine whether trial counsel's racist views affected his performance in the guilt phase.

> "With respect to both the first and second prongs of the ineffective assistance of counsel claim, there is also evidence in this record to suggest that counsel's

> expressions of racial bias during voir dire affected his performance in both the guilt and penalty phases of Davis's trial, creating an unacceptable risk that prejudice clouded counsel's judgment and diminished the force of his advocacy."(S 84)

B. TRIAL COUNSEL'S SUBSTANCE ABUSE PROBLEMS:

It would be less disturbing to our justice system if trial counsel's inadequate representation could be attributed to a long-standing and well-documented substance abuse problem evidenced in the amended postconviction motions rather than racism. The pleading states that Mr. Ullman had a drug overdose right before he undertook representation of Mr. Blackwood. (PCR 167) In addition, the pleading states that Mr. Ullman denied having personal problems to Mr. Blackwood. (PCR 169) The pleading outlines deficiencies in the guilt phase that require a factual determination to determine if these deficiencies could be attributed to plain incompetence or the impact of a drug problem.

The Florida Supreme Court addressed in *State v. Bruno*, 807 So. 2d 55 (Fla. 2001), whether an attorney's alleged substance abuse problems affected his representation of Mr. Bruno.

This Court wrote:

> "In his Brief before this Court, Bruno asserts several instances of

ineffectiveness.[5] We address each of the subclaims in turn. In subclaim two,[6] Bruno contends that defense counsel was ineffective during the trial due to alcohol and drug impairments. Bruno points to the previous hospitalization of trial counsel for drug and alcohol use. Private counsel was retained in August 1986 to represent Bruno. Over the next few months, counsel developed a drinking problem and, when he was drinking, would occasionally use cocaine. He enrolled in Alcoholics Anonymous on October 15, 1986, and remained alcohol and drug free from then until March 1987, when he began drinking again but not using cocaine. He admitted himself into a hospital on March 15, 1987, for his drinking problem, remained hospitalized for twenty-eight days, and subsequently remained alcohol-and drug-free. After being released, counsel apprised both Bruno and the court of his problem and offered to withdraw, but Bruno asked him to continue as counsel. The trial, which originally had been set for March 30, 1987, was rescheduled for August 5, 1987, and began on that date. Counsel testified at the evidentiary hearing below that he never was under the influence of alcohol or drugs while working on this case. The trial court concluded that Bruno "failed to meet his burden of demonstrating

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[5] Bruno raises the following ten subclaims regarding ineffective assistance of counsel: defense counsel was impaired during the time that he represented Bruno; defense counsel had a conflict of interest with Bruno; defense counsel failed to present a voluntary intoxication defense; defense counsel failed to seek suppression of Bruno's initial statement to the police; defense counsel failed to attack Bruno's confession on intoxication grounds; defense counsel failed to effectively challenge the State's case; defense counsel failed to object to the instructions on excusable homicide and justifiable homicide; defense counsel failed to ensure that the jury challenges were recorded; defense counsel failed to investigate and present available mitigation; and defense counsel failed to object to the State's improper comments.

[6] The numbers of the subclaims in this opinion mirror the numbers in Bruno's brief. Subclaim one is not addressed, as it is simply an introduction to the other subclaims.

> how [counsel's] drug and alcohol usage prior to trial rendered ineffective his legal representation to the Defendant and how such conduct prejudiced the Defendant.: We agree." (at 62)

Although the Florida Supreme Court denied Bruno a new penalty phase due to trial counsel's substance abuse problem, that determination was reached only after the lower court conducted an evidentiary hearing. Here, no evidentiary hearing has been conducted.

C. <u>DEFICIENT JURY SELECTION</u>:

The amended pleading sets forth grossly deficient jury selection by trial counsel as evidenced by the following colloquy with Juror Pitz. Mr. Loe is the Assistant State Attorney.

> (Thereupon, Mr. Pitz entered the courtroom, after which the following proceedings were had:)
>
> THE BAILIFF: Sit right back there.
>
> THE COURT: Mr. Pitz.
>
> MR. PITZ: Yes, sir.
>
> THE COURT: You indicated that –
>
> MR. LOE: Have a seat.
>
> THE COURT: – you felt that anyone convicted of murder in the first degree should automatically receive the death sentence.

MR. PITZ: Yes, sir.

THE COURT: How long have you held that feeling, sir?

MR. PITZ: As long as I can remember.

THE COURT: Okay. Do you think this is a feeling that is going to stay with you if you're selected to serve on this jury?

MR. PITZ: Yes.

THE COURT: All right. Mr. Loe, any questions?

MR. LOE: No. Thank you.

Clearly, a cause challenge would have been granted against Mr. Pitz who would automatically vote for death. *Morgan v. Illinois*, 504 U.S. 719, 112 S. Ct., 119 L. Ed. 2d 492 (1992); *O'Connell v. State*, 480 So. 2d 1289 (Fla. 1986). Inexplicably, Mr. Ullman questions a juror who could have been excused for cause:

THE COURT: Mr. Ullman?

MR. ULLMAN: Well, let me ask you something. In every case, or are you assuming in every capital murder one?
Do you know the difference between murder one, murder two, murder three and manslaughter?

MR. PITZ: Isn't that what the judge said, murder one, first degree murder?

MR. ULLMAN: Right.

MR. PITZ: Isn’t that premeditated, calculated murder?

MR. ULLMAN: But you have the option in this case, if you so desire, if you were picked on this panel, to return a verdict of murder two or manslaughter.

MR. PITZ: Well, That’s different if it’s just a murder one, that’s my opinion. But –

MR. ULLMAN: Okay. So if it was murder one, you wouldn’t give it any aforethought whatsoever, you would automatically go to a death sentence?

MR. PITZ: Yes.

MR. ULLMAN: Do you know that the alternative is life in prison without the possibility of parole?

MR. PITZ: Yes.

MR. ULLMAN: Okay. But you understand the options of murder two and three and manslaughter?

MR. PITZ: Uhm, not completely no.

MR. ULLMAN: Would you follow the law in this case?

MR. PITZ: Yes.

MR. ULLMAN: Even if the law conflicted with your personal opinions and beliefs, what would you do, would you follow the law that the judge instructed you?

MR. PITZ: I would follow the law.

MR. ULLMAN: So you can put aside your personal convictions?

MR. ULLMAN: Yes

> MR. ULLMAN: No further questions.
>
> THE COURT: Anything else?
>
> MR. LOE: You won't hold it against me if you're seated as a juror, would you?
>
> MR. PITZ: No.
>
> MR. LOE: I have no further questions.
>
> THE COURT: Mr. Pitz, if you would step outside.
>
> (Thereupon, Mr. Pitz exited the courtroom, after which the following proceedings were had:)
>
> MR. LOE: I have no motion.
>
> MR. ULLMAN: No motion. Judge, I will wait.

(G.P. 143-15-146-16)

Mr. Ullman's counterproductive rehabilitation of an adverse juror still might have resulted in a cause challenge because the juror reaffirmed his response to Mr. Loe that he would automatically go for death. However, Mr. Ullman never challenged Mr. Pitz for cause, but exercised his first peremptory on Mr. Pitz. (G.P. 173 13 & 14)

The resulting prejudice from this bizarre exercise of challenge was to permit two other obviously hostile jurors to serve on Mr. Blackwood's case.

> MR. ULLMAN: Has anyone ever put a gun to your head? That's the kind of information I'm looking for.

MR. ROUSSEAU: No.

MR. ULLMAN: You know, not -- Ms. Wolf?

MS. WOLF: My mother-in-law was mugged, robbed, beaten.

MR. ULLMAN: Really?

MS. WOLF: Yeah.

MR. ULLMAN: Did they catch the suspect?

MS. WOLF: No.

MR. ULLMAN: Where did that happen?

MS. WOLF: North Miami.

MR. ULLMAN: All right. Down in Dade?

MS. WOLF: Uh-hum.

MR. ULLMAN: Were you involved in the case? Did you go down there and reassure her and talk to any detectives?

MS. WOLF: No, we didn't speak with anybody at the police. But it was a very cavalier attitude from her opinion.

MR. ULLMAN: Really. They never caught the suspect?

MS. WOLF: No.

MR. ULLMAN: The fact that that happened, is that going to affect your ability to sit here?

MS. WOLF: No, I wouldn't think so.

MR. ULLMAN: No?

MS. WOLF: No.

MR. ULLMAN: Were the suspects white or black?

MS. WOLF: Black.

MR. ULLMAN: How about in the back row? Over here, the front four?
Boy, you really don't want to sit on this jury, do you? Your hand –

MS. WEIL: Well, living here 25 years statistically –

MR. ULLMAN: Right.

MS. WEIL: My first one was strong armed robbery, my son, when he was 14.

MR. ULLMAN: They robbed something from him?

MS. WEIL: Yes. They beat him up and stole on school grounds. And they did catch the person who did that.
See, my problem lies in the system after that.

MR. ULLMAN: Well, tell me about that, because that's where we're at. I mean, are you dissatisfied?

MS. WEIL: Well, five times, we have been victims, and four of the five times, the culprits have been found, and all plea bargained. Any my husband and I attend every hearing, we'd take off time from work and kept going and going, and it got to the point where they got a sentence which was minimal.

MR. ULLMAN: Right.

MS. WEIL: And then we go home thinking that's their sentence and unbeknownst to us, their attorney brings them back in and they plea again without telling us, they got a

reduced sentence.

MR. ULLMAN: So am I pretty accurate in my summation here that you're not thoroughly thrilled with the criminal justice system?

MS. WEIL: That's correct.

MR. ULLMAN: Does anybody else feel that way because that's the kind of stuff that needs to be shared with me, that you're disenchanted, the system, for lack of a better word, stinks, all of the criminals are out there, they're getting away with quote murder? Does anybody feel that way?

Because, like I said, Ms. Wolf, you're smiling. I mean, all right. It is not an off-the wall position. There are no right and wrong answers here. But, like I said, this is the kind of information that needs to be imparted to me because I need to make a halfway intelligent choice. It is like flipping a coin here. I haven't had too many jurors stand up and say, you know what, he must have done it, we don't need any evidence. So if you feel that way, I won't even question you. I will make a deal, I won't even question you on it. But do me a favor and raise your hand.

(Thereupon, hands were raised, after which the following proceedings were had:)\

MR. ULLMAN: Wait. Wait. I got to get this down.

MS. WOLF: All right. I won't question you.

(G.P. 307-16-311-11)

The pleading clearly states Mr. Ullman's deficiency in framing questions that could have resulted in these two jurors

from being excused for cause. To Mr. Blackwood's detriment, Mr. Ullman never specifically asked Ms. Weil or Ms. Wolf if their views and experiences with the criminal justice system would affect their ability to be fair and impartial jurors. Mr. Ullman ultimately exhausted his peremptory challenges. (G.P. 353-6-9, 354-15-16) His lack of understanding of cause challenges resulted in Mr. Blackwood having two jurors, Ms. Weil and Ms. Wolf, who could not be viewed as "intelligent" choices by Mr. Ullman to serve on Mr. Blackwood's jury.

D. INEFFECTIVE CROSS-EXAMINATION:

The Amended Pleading clearly sets out several instances of ineffective cross-examination.

The issue of whether the killing of Ms. Thomas was premeditated was a critical issue in this trial. Mr. Ullman's cross-examination of the lead detective, Palazzo, was devastating to the defense. In fact, the following questions by Mr. Ullman was an effective direct by the State as to premeditation.

> Q Now, based on your involvement in this case, from start to finish, January – January 6th, '95 to today's date, what evidence is there that Mr. Blackwood planned from a premeditated design to effect the death of Ms. Thomas?
>
> A The – what I would base my probable cause, if you will, was

the things that were done to cause her death. Uhm, the amount of effort that he would have had to put in to kill her. And then the things that he did to her body, either while she was dying or once she was dead, things that he did to make sure that she was definitely dead.

Q Okay. So if I understand you correctly, there is no independent witnesses that say, listen, I planned on killing Carolyn Thomas?

A Oh, no.

Q There is no – there is no planning, any evidence of that, that he discussed killing her?

A No, if he did, we don't know it if – who he might have discussed it with.

Q So there is no evidence of that?

A Right.

Q So your answer, as far as a premeditation, is the murder itself?

A Yes.

Q And to base your opinion that the murder itself was done in such a way that that caused premeditation, you're relying on the choking and strangulation?

A Yes.

Q Hypothetically speaking, let me ask you a question. I shoot a person six times in the back, spur

of the moment, I just take my gun out, I don’t even know the person, I shoot him six times in the back, would you not make the same argument that because of the injuries it was premeditated?

A You can’t expect me to formulate an opinion just on that, because when we do an investigation, we have to look at the total – the totality of the circumstances. Why were you there? What were you doing? What was your relationship with that person? Uhm, did you have a reason to want them dead? You know, did you have a motive? Was there a point in time where you should have realized what you were doing was going to kill that person? And you should realize

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Q Okay.

A You’re scenario in itself, we couldn’t formulate a legal opinion on that. At least I couldn’t.

Q Good point.

(G.P. 675-9-677-10)

Ironically, Mr. Ullman made, unwittingly, a very “good point” for the State. Mr. Ullman further damaged Mr. Blackwood’s case by allowing Detective Palazzo to discredit Mr. Blackwood’s assertion that Mr. Blackwood didn’t know that Ms. Thomas was deceased when he left the house.

Q Didn’t he indicate on two occasions, if not three, during the course of the statement, he didn’t know she was dead?

A He did say that.

Q And he choked her until she was unconscious?

A That's what he said.

Q Okay. That's what he said. All right.
Now, as an investigator, did you think it was unusual that he didn't know she was dead when he had choked her?

A There is no doubt in my mind that before he left that house he knew she was dead.

(G.P. 677-18-678-5)

Another ill-conceived questioning occurred when Mr. Ullman without laying any foundation or calling a psychologist asked a hostile witness, Detective Palazzo, questions about Mr. Blackwood's intelligence.

Q On a one to ten, ten being a fairly bright individual, not necessarily a road scholar, and one being a fairly stupid, for lack of a better term, individual, or not that bright, where would you rate this gentleman, his intelligence level?

A I don't know him well enough to rate his intelligence. I only dealt with him that one afternoon during a statement.

Q Based on – you were what 33 minutes in the statement, and then how long for the pre-statement?

A Uhm, 10 to 15 minutes, I think it was.

Q Were you able to form an opinion as to his intelligence, street sophistication, his ability to communicate?

A Yeah. Sure.

Q Would you share that with us, if you can.

A I felt that he was intelligent. He was articulate. Of course, he has an accent, so he was difficult to understand.

Q Jamaican, right?

A Yes. Uhm, yeah. He wasn't – he wasn't unintelligent by any means. I don't know what his education background is, but –

Q Well, according to the statement through the Miranda waiver, it's what, 12th grade, 11th, 12th grade?

A That nature. I forget exactly what it is.

Q Uh-hum.

A But, no, he's by no means stupid. He seems quite intelligent based upon the things that we talked about.

(G.P. 678-19-679-24)

Mr. Ullman's performance was so deficient that if one did not know who was doing the questioning, then it would be logical to assume that the prosecutor was asking the questions. Mr. Ullman's questions advanced the State's theory on the critical

issue of premeditated. At the minimum, Mr. Blackwood should be granted an evidentiary hearing to ascertain what, if any, strategic reasons could justify Mr. Ullman's questions.

E. <u>DEFENSE COUNSEL'S FAILURE TO OBJECT:</u>

The Amended Pleading on pages 21 through 24 sets out trial counsel's deficient performance because trial counsel failed to object to responses that would have resulted in a Motion for Mistrial.

The following two examples will illustrate Mr. Ullman's deficiency.

During Detective Desaro's direct by Mr. Loe, the following testimony was elicited without objection by Mr. Ullman:

> I then spoke to Mr. Blackwood – Blackwood again and told him this information. He told me that his name was Errol Smith. I then informed him I was going to book him into the County Jail under the name of Lynford Blackwood was an alias of Errol Smith.
>
> Q Further communication between you and Mr. Blackwood at that time?
>
> A At that point, he informed me he didn't want to speak to me anymore, that he had the right to an attorney. At which point I concluded my interview with him at that time.
>
> Q Is that when arrangements were made for Officer Jones, the individual that just left, to

transport him initially at least to the county jail?

A That's correct.

(G.P. 588-10-24)

It is axiomatic that the prosecution may not comment in any way on the defendant's exercise of his right to remain silent from and after the time of his arrest. In the language favored by the courts of Florida, all evidence or argument that is fairly susceptible of being interpreted by the jury as a comment on the right of silence is impermissible. *Walker v. State*, 701 So. 2d 1258 (Fla. 5th DCA 1997); *Davis v. State*, 683 So. 2d 572 (Fla. 5th DCA 1996); *Dixon v. State*, 627 So. 2d 19 (Fla. 2d DCA 1993); *State v. Smith*, 573 So. 2d 306, 317 (1990).

The failure to object and move for a mistrial is the most egregious legal error Mr. Ullman committed. Unfortunately, it wasn't the only significant failure by Mr. Ullman.

Detective Palazzo offered his opinion on Mr. Blackwood's truthfulness:

Q With respect to Mr. Ullman's question to you sir, about do you doubt the defendant's word. When the defendant told you on that taped statement that he didn't know that Carolyn was pregnant, based on your interviews, your discussions, your investigation, and evidence, that's an outright lie, don't you think?

A Yes, I do.

(G.P. 686-3-9)

Given the fact that there were no eyewitnesses to the crime and Mr. Blackwood could provide the only account, it is shocking that Mr. Ullman would not object to an assertion that Mr. Blackwood was a liar.

CONCLUSION

It is difficult to conceive of a greater prejudice to a client than by characterizing at best an individual who would not want to talk to law enforcement without an attorney being present and at worse a liar. The prejudice to Mr. Blackwood is apparent and Mr Blackwood should have been granted an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant was furnished by U.S. Mail to : Melanie A. Dale, Esq., Assistant Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, FL 33401-3432 and to Susan Bailey, Esq., Assistant State Attorney, Office of the State Attorney, 201 S.E. Sixth Street, Room 660, Fort Lauderdale, FL 33301 this 11TH day of May, 2004.

CERTIFICATE OF COMPLIANCE

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

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