IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1520

LOWER TRIBUNAL No. 89-1139-CFC

MICHAEL COLEMAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

MARTIN J. MCCLAIN
Fla. Bar No. 0754773
McClain & McDermott, P.A.
Attorneys at Law
141 N.E. 30th Street
Wilton Manors, Florida 33334
Telephone: (305) 984-8344
FAX: (954)564-5412

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

Page

ARGUMENT IN REPLY[1]

ARGUMENT I

MR. COLEMAN'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE COUNSEL'S PERFORMANCE DURING THE PENALTY PHASE DEPRIVED MR. COLEMAN HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

In opposition to Mr. Coleman's claim, Appellee's argument appears to rest on the premise that trial counsel extensively prepared for the guilt phase portion of the trial by taking many depositions; that counsel properly relied on Mr. Coleman's mother and girlfriend for records and for developing mitigating circumstances instead of a trained investigator or someone familiar with the law as to what constituted useful mitigation; that trial counsel in the course of his work on the case traveled to Miami and observed horrendous conditions in Liberty City without presenting evidence of how those conditions actually affected Mr. Coleman; and that trial counsel spoke with an unknown kind of expert from the University of Florida regarding someone unknown aspect of Mr. Coleman's case (Answer at 21).

[1]Mr. Coleman will not reply to every issue and argument. However, he expressly does not abandon the issues and claims not specifically replied to herein. For arguments not addressed herein, Mr. Coleman stands on the arguments presented in his Initial Brief.

Appellee's attempt to justify trial counsel's performance at the penalty phase because he allegedly undertook the aforementioned actions, is both unpersuasive and misplaced. First, Appellee's insinuation that preparation for the guilt phase somehow precludes an attorney from being ineffective at the penalty phase, is contrary to both law and fact. This misconception is clearly exposed in the instant case, as trial counsel admitted that his lack of attention to the penalty phase was due to his focus on the guilt phase, "I would say primarily because, I mean, I really was convinced that the guy was not there, I mean, I really was. And, you know, we made preparations just by having his mother and his girlfriend available to testify about his past. But we - - you know, **we didn't really have time to do any elaborate preparations for the penalty phase.**" (PC-R. 706)(emphasis added). Thus, trial counsel defended the lack of penalty phase investigation upon his belief that Mr. Coleman was innocent and because of the need to investigate and prepare an innocence defense, counsel maintained that there just wasn't enough time to investigate and prepare for the possibility that a penalty phase would be necessary (PC-R. 723-24).

In Deaton v. Dugger, 635 So. 2d 4, 8 (Fla. 1993), trial counsel was found to have rendered ineffective assistance at the

penalty phase after he acknowledged that he did very little to prepare for the penalty phase before the guilt phase began. In Deaton, trial counsel explained the reason for this lack of penalty phase preparation saying: "I usually don't try to prepare the penalty phase in advance of the verdict, so for some reason I just don't like to get psyched up and get a defeated attitude. I usually don't prepare until I lose [the conviction phase], then I started scrambling for something to do about the penalty phase." There can be no reasonable trial strategy in focusing on the guilt phase portion of a case at the expense of penalty phase preparation. See Rompilla v. Beard, 125 S.Ct 2456, 2466 (2005). As this Court has held: "[A]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000), quoting Rose v. State, 675 So. 2d 567, 571 (Fla. 1996). While trial counsel may make decisions based on strategy, "[w]e have clarified, however, that ignorance of available mitigation evidence, such as family background, precludes counsel's strategic-decision reasoning and constitutes ineffective assistance of counsel." Hardwick v. Crosby, 320 F.3d 1127, 1186, n. 208 (11th Cir. 2003).

Second, Appellee's argument that trial counsel was not ineffective for his failure to investigate because he relied on

Mr. Coleman's mother and girlfriend to develop mitigation, is also contrary to both law and fact. It is trial counsel who has a duty to investigate and prepare. See, e.g. Rompilla, 125 S.Ct at 2466; Wiggins v. Smith, 123 S. Ct. 2727, 2537 (2003); Williams v. Taylor, 529 U.S. 362 (2000); Strickland v. Washington, 466 U.S. 668 (1984). Here, despite this duty, counsel did not utilize an investigator to assist him (PC-R. 694), he did not have Mr. Coleman evaluated by any mental health experts (PC-R. 697), he did not seek to obtain any school or background records (PC-R. 707-08), he did not inquire about drug use by Mr. Coleman (PC-R. 708), and he did not seek any records from the Department of Corrections (PC-R. 708).

Moreover, contrary to Appellee's assertion, trial counsel did not rely on Mr. Coleman's mother and girlfriend to actually develop mitigating evidence for presentation at the penalty phase. Rather, trial counsel as he explained in his testimony only spoke with Mr. Coleman's mother and his girlfriend in relation to the guilt phase alibi defense (PC-R. 694-95). This is further confirmed by the fact that when trial counsel was asked at the postconviction evidentiary hearing, "[W]hat inquiries did you make about his history in terms of potential developmental disabilities", counsel responded:

> A. The only thing I could recall is just growing

> up in Liberty City which is enough. That's probably the most horrendous place I've ever been. They've got barbed wire around all the businesses and, you know, I don't blame anybody for doing anything to get out of Liberty City. And certainly that would lead to some problems, but I don't know of anything specific.

(PC-R. 697).

Third, Appellee's reliance on the fact that trial counsel "observed 'horrendous' conditions in Liberty City" (Answer at 21), only confirms counsel's ineffectiveness. In Wiggins, 123 S.Ct. at 2538, the Supreme Court discussed counsel's decision to limit the scope of the investigation into potential mitigating evidence and the reasonableness of counsel's investigation:

> [A] court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Even assuming [trial counsel] limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.

Here, despite referring to Liberty City as "the most horrendous place I've ever been", trial counsel unreasonably failed to investigate the impact that this experience had on Mr. Coleman. As a result of this failure, at Mr. Coleman's penalty phase, trial counsel did not present any evidence or testimony about Mr. Coleman's life in Liberty City. Thus, the jury was never apprised of these conditions that trial counsel acknowledged

were “horrendous.” Such inaction by trial counsel is contrary to Wiggins.

Finally, Appellee’s insinuation that trial counsel adequately prepared because he spoke with an expert from the University of Florida, is both misleading and disingenuous. Appellee makes no explanation as to the circumstances of this supposed expert’s involvement or as to the specialty of the expert. Instead, Appellee seemingly leaves it to the imagination to conclude that perhaps trial counsel did consult with a mental health expert. This, of course, is patently untrue as trial counsel testified that he never sought the assistance of any mental health experts to prepare for mitigation evidence because he didn’t notice any mental defects in Coleman (PC-R. 707).

Despite trial counsel’s admitted failure to conduct a penalty phase investigation, Appellee attempts to label the failure to investigate as sound strategy. In making this effort to depict a failure to investigate as reasonable strategy, Appellee tries to rely on trial counsel’s statement that his strategy was mandated and dictated by Mr. Coleman’s position asserting his alibi (Answer at 22). Appellee, like trial counsel, seems to be under the mistaken impression that a defendant who proclaims his innocence during the guilt phase is

precluded from presenting mitigation during the penalty phase and relieves his counsel of any obligation to investigate and prepare for the penalty phase portion of the trial. This understanding is simply wrong and contrary to Strickland and its progeny.

This Court has repeatedly recognized that trial counsel cannot be relieved of his duty to investigate mitigating evidence available for presentation at the penalty phase because there can be no valid decision to forego such evidence unless and until a reasonable penalty phase investigation has been undertaken. State v. Lewis, 838 So. 2d 1102, 1113 (Fla. 2002) ("the obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated-this is an integral part of a capital case"). Trial counsel cannot justify his failure to conduct a reasonable penalty phase investigation because the guilt phase portion of the trial demanded too much of his time. Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992) (trial counsel rendered ineffective assistance when he failed to prepare for the penalty phase because he thought he would win at the guilt phase); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991) (trial counsel rendered ineffective assistance of counsel when he "virtually ignored the penalty phase of the trial").

Any "strategic" decisions made by trial counsel are unreasonable when he has failed to conduct an adequate investigation and reasonably explored the available options. Horton v. Zant, 941 F.2d 1449, 1162 (11th Cir. 1991). Blindly choosing how to defend at the penalty phase of a capital trial without having conducted an adequate investigation into the available mitigating evidence is deficient performance. Ragsdale v. State, 798 So. 2d 713, 718-19 (Fla. 2001). "[S]o called 'strategic' decisions that are based on a mistaken understanding of the law, or that are based on a misunderstanding of the facts are entitled to less deference." Hardwick, 320 F.3d at 1185-6 (citation omitted)(note omitted).

Appellee also attempts to excuse trial counsel's ineffectiveness by relying on counsel's testimony that he didn't see any mental defects in Mr. Coleman and that he seemed intelligent (Answer at 22). Once again, Appellee's logic is faulty in that it ignores trial counsel's well-established obligation to conduct a reasonable penalty phase investigation. Trial counsel never investigated Mr. Coleman's background to discover his lack of intelligence and other mental health issues. Thus, he failed to make an effort to discover all reasonably available mitigating evidence. Wiggins, 123 S.Ct. at 2537. Trial counsel's "strategic decision" not to pursue

mitigation because Mr. Coleman "seemed intelligent" resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of [his] [] deliberations prior to sentencing." Wiggins, 539 U.S. at 526-27.[2] Had trial counsel conducted a reasonable investigation, he would have learned that Mr. Coleman suffered from various mental health issues. Even Dr. Larson, the State's expert witness during the postconviction proceedings, agreed that Mr. Coleman suffered from polysubstance abuse (PC-R. 864), that Mr. Coleman was an abused or neglected child (PC-R. 871-72), and that there were signs of organicity (PC-R. 910-11). As Dr. Larson stated, "I have no doubt that this man had a very unfortunate childhood that had very like insults to his brain. He's certainly at risk for a certain amount of organicity" (PC-R. 914).[3] Thus, Mr. Coleman's mental deficiencies that trial counsel failed to observe or discover,

[2]Of course, Mr. Coleman was precluded from questioning trial counsel regarding his debilitating alcoholism at the time of Mr. Coleman's case and its impact on his ability to observe Mr. Coleman's mental deficiencies. See Argument II, *infra*. A relapsed alcoholic's diminished powers of observation are well known, as are the resulting rambling and often incoherent thought processes.

[3]Further, while Dr. Larson didn't believe that Mr. Coleman met the standard for mental retardation, he surmised that Dr. Toomer's score of 67 was a slight to moderate underestimate (PC-R. 907).

were recognized by the State's mental health expert to in fact exist.[4]

In defending trial counsel's performance, the State argues that counsel did provide Mr. Coleman's jury with ample mitigation (Answer Brief at 22-23). According to the State this ample mitigating evidence that trial counsel marshaled and presented depicted Mr. Coleman as "normal" in order to advance a "theme of lingering doubt" (Answer Brief at 23-24). However, the State's argument that a wealth of mitigating evidence was before the jury is contrary to this Court's decision on direct appeal affirming the trial judge's decision to override the life recommendation.[5] Moreover, this Court has repeatedly held that lingering doubt is not proper mitigation. Duest v. State, 855 So. 2d 33 (Fla. 2003); Darling v. State, 808 So. 2d 145 (Fla. 2002). Thus, the manner in which trial counsel defended at the

[4]Again, trial counsel's failure to notice Mr. Coleman's deficiencies reflect more upon trial counsel's observational skills or lack thereof, than upon the subtlety of the mental defects that characterize Mr. Coleman's mental functioning.

[5]The State's position is the classic cliche of "having one's cake and eating too." If this Court was correct on direct appeal that there was inadequate mitigation before the sentence judge to provide the jury's life recommendation with a reasonable basis, then trial counsel's strategy was premised upon an unreasonable understanding of the law and whether his strategy could provide a reasonable basis for a life sentence. However, if the State's position in its current Answer Brief is correct, then it should concede that this Court erred on direct appeal in affirming the judicial override.

penalty phase was premised upon 1) ignorance of the law, *i.e.* lingering doubt is not mitigating, and 2) ignorance of the compelling mitigation that existed and could have been presented had an adequate investigation been conducted.

As to the prejudice that Mr. Coleman suffered as a result of counsel's deficient performance, the State completely fails to recognize how the prejudice prong of the Strickland standard works in a case involving the judicial override of a life recommendation. Where the jury returned a life recommendation, the Strickland prejudice standard is met when there is a reasonable probability that the undiscovered and unpresented mitigating evidence would have provided a reasonable basis for the life recommendation and thus precluded a judicial override. Stevens v. State, 552 So. 2d 1082, 1085 (Fla. 1989). As this Court explained in Heiney v. State, 620 So. 2d 171, 174 (Fla. 1993), the death sentence in override cases must be vacated where there is previously unpresented mitigating evidence "which might have provided the trial judge with a reasonable basis to uphold the jury's life recommendation." In Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1326 (Fla. 1994), this Court granted postconviction relief where it concluded that: "Had these factors been discovered and presented to the court at Torres-Arboleda's original sentencing, there would have been a

reasonable basis in the record to support the jury's recommendation and the jury override would have been improper." Most recently, this Court in Williams v. State, 987 So. 2d 1, 11 (Fla. 2008), succinctly explained the proper standard in a case involving a judicial override: "In other words, the proper standard for prejudice is whether the omitted evidence would have provided a reasonable basis for a life recommendation and sentence."

Rather than addressing the substantial mitigation presented by Mr. Coleman during the postconviction proceedings and whether this mitigation meets the standard that this Court has adopted in override cases, Appellee attempts to sidestep the obvious conclusion that under the prejudice analysis of Strickland relief is required, by instead discussing what Mr. Coleman did not produce at the evidentiary hearing ("It is noteworthy what Coleman did **not** produce at the postconviction evidentiary hearing on the IAC claim")(Answer at 27)(emphasis in original). Of course, the proper standard is to focus on the mitigation which Mr. Coleman actually presented in support of his claim. Such mitigation included evidence of Mr. Coleman's impoverished background and difficult upbringing in an area torn apart by riots (PC-R. 627-28, 641-43, 644-51, 665-66); Mr. Coleman's relationship issues with his father, Ernest Coleman (PC-R. 631-

32, 643, 654-55); the impact that Ernest Coleman's murder had on Mr. Coleman when he was a child (PC-R. 633-37; 657-60); Mr. Coleman's childhood addiction of huffing fumes from transmission fluid as well as lacquer thinner (PC-R. 667-69); the molestation of Mr. Coleman when he was 12 or 13 years old by an acquaintance of the family (PC-R. 669-71); Mr. Coleman's low intelligence, including the fact that he was placed in special education classes in school (PC-R. 671, 748-49); the death of Mr. Coleman's step-brother, and how it impacted him (PC-R. 680-81); Mr. Coleman's head injury (PC-R. 675-76); Mr. Coleman's numerous deficits in terms of neuropsychological functioning (PC-R. 736-42); Mr. Coleman's diagnosis of chronic polysubstance abuse dating back to 1987, which also included alcohol and cocaine abuse (PC-R. 745); the effects of this extensive use of intoxicants at an early age (PC-R. 746); the fact that Mr. Coleman has a likelihood of brain damage (PC-R. 754); that Mr. Coleman also suffers from mental illness (PC-R. 759-60); and that two statutory mitigating circumstances were present, *i.e.* the crime was committed while under the influence of extreme mental or emotion disturbance and Mr. Coleman's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (PC-R. 770-71). Contrary to Appellee's assertion, Mr.

Coleman submits that "the important mitigation evidence that was available but was not presented by defense counsel would have provided an objective and reasonable basis for the jury's recommendation and a sentence of life." Williams, 987 So. 2d 1, 14 (Fla. 2008). This in turn would have precluded the trial judge's override of the jury's decision. Id.

Appellee also includes a subsection entitled "Additional case law supporting trial court's order." (Answer at 37). Appellee refers to numerous cases, many of which appear to have no bearing on the instant case. For instance, Appellee relies on Reed v. State, 640 So. 2d 1094 (Fla. 1994), for the proposition that "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." (Answer at 37). Mr. Coleman has no idea, as Appellee provides no indication or explanation, as to the relevance of Reed to the instant case. There has been no claim in any of the proceedings to this point that Mr. Coleman in any way, shape or form gave trial counsel a reason to believe that pursuing mitigation would be fruitless or harmful. Moreover, under Deaton and Lewis a capital defendant cannot validly waive the presentation of mitigating evidence when counsel has failed to conduct an

adequate investigation and fully advised the capital defendant as to the mitigation and what exactly it is that he seeks to waive.

Appellee also relies on Schiro v. Landrigan, 550 U.S. 465 (2007), for the proposition that if a defendant instructed his attorney not to offer any mitigating evidence, then counsel was not ineffective for failing to investigate (See Answer at 38)("If Landrigan issued such an instruction [to "his counsel not to offer any mitigating evidence"], counsel's failure to investigate further could not have been prejudicial under *Strickland*"). Again, as with the Reed case, Mr. Coleman is at a loss as to the relevance of Schiro to the instant proceedings. At no time has the State or trial counsel asserted that Mr. Coleman impeded, obstructed or ordered trial counsel not to conduct a penalty phase investigation. Appellee's reliance on these cases, which have no resemblance to the facts of Mr. Coleman's case, should be disregarded.

In an ironic twist, while relying on completely irrelevant cases, Appellee proceeds to assert that the cases primarily relied upon by Mr. Coleman, Williams v. State, 987 So. 2d 1 (Fla. 2008), Rompilla v. Beard, 545 U.S. 374 (2005), Wiggins v. Smith, 539 U.S. 510 (2003), Williams v. Taylor, 529 U.S. 362 (2000), and Hardwick v. Crosby, 320 F.3d 1127 (11th Cir. 2003),

are inapplicable because in the instant case, trial counsel conducted an adequate investigation (Answer at 47-48).

Appellee's statement is contradicted by trial counsel's own testimony, which reveals that he did not conduct an adequate penalty phase investigation due to his erroneous belief that a claim of innocence excused or precluded his investigation into mitigation:

> Q. So if Coleman had come to you and said I was,
> in fact, there - - but, by that, I mean, at the murder - - and was truthful with you, assuming as the jury found he was, would your trial standards have been different?
>
> A. **Yeah. We would have prepared for the penalty**
> **phase and not concentrated so much on the guilt phase, if that were the issue.**
>
> Q. So your trial strategy was mandated and dictated by your client's position?
>
> A. That's true.

(PC-R. 722)(emphasis added). Trial counsel further explained that in another case he tried where innocence was not an issue, he prepared for the penalty phase:

> [F]or example, I just had a case last year in Milton I tried, it was a capital case, and my client had given a confession, which we tried to keep out, and some of it came in. **But there was a good likelihood that he was going to be convicted because he had confessed. So we had eight people we put on, eight or nine people, character witnesses, high school principal, and everybody in the penalty phase, because there was a good chance of conviction.**

> **In this case, because he had the alibi defense, it was not like he had confessed, in that Teddy Sean Stokes case I tried over there. So we really concentrated on the guilt/innocence phase more than the penalty phase.**

(PC-R. 723-24)(emphasis added). Clearly, the cases relied upon by Mr. Coleman, Williams v. State, Rompilla v. Beard, Wiggins v. Smith, Williams v. Taylor, and Hardwick v. Crosby, are not only relevant to the instant case, but they also mandate that relief be granted under the circumstances presented here.

In one last twist, Appellee changes gears as to trial counsel's preparation for the penalty phase by proclaiming that "Stokes preparation for the penalty phase was intertwined with his preparation for the guilt phase and circumscribed by Coleman's insistence on his alibi that Coleman articulated to the jury and trial judge" (Answer at 48). Appellee fails to reveal where in the record trial counsel stated that his guilt and penalty phase investigations were "intertwined", or exactly what part of the guilt phase investigation overlapped with an investigation into mitigation. Further, as discussed earlier, Appellee's position that a proclamation of innocence precludes an investigation into mitigation is simply contrary to the law. Rompilla, 125 S.Ct at 2466.

Mr. Coleman submits that trial counsel failed in his duty to provide effective representation at the penalty phase. Had counsel performed effectively, there is a reasonable probability that the outcome of the proceedings would have been different. See Strickland v. Washington, 466 U.S. 668, 687 (1984); Wiggins v. Smith, 123 S.Ct. 2527 (2003). Accordingly, this Court should reverse the denial of post-conviction relief and order the imposition of a life sentence as it has done in all of the other judicial override in which ineffective assistance of counsel was found. See Williams v. State; Torres-Arboleda v. Dugger; Heiney v. State; Stevens v. State.

ARGUMENT II

MR. COLEMAN WAS DENIED A FULL AND FAIR EVIDENTIARY HEARING WHEN THE TRIAL COURT REFUSED TO CONSIDER TESTIMONY AND EVIDENCE RELATING TO HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

During Mr. Coleman's postconviction evidentiary hearing, the trial court refused to allow evidence concerning the fact that trial counsel was a relapsed alcoholic throughout his representation of Mr. Coleman. Appellee claims that the trial court's exclusion of this evidence was reasonable "because any evidence of counsel's intoxication is inadmissible unless and until the defendant proves Strickland ineffectiveness and then the defendant must show a linkage between that IAC and the

purported instruction" (Answer at 52). The State's argument is the proverbial "Catch-22". According to the State, the evidence which is sought to be introduced to demonstrate counsel's ineffective assistance, can only be introduced if the ineffectiveness has already been demonstrated by other evidence. Of course, if that were the case, then the evidence of counsel's intoxication would be inadmissible as cumulative. So in reality, the State's argument is that trial counsel's intoxication throughout his representation of Mr. Coleman is inadmissible in proceedings upon Mr. Coleman's claim that counsel failed to satisfy his duty to provide Mr. Coleman with effective representation within the meaning of the Sixth Amendment.

According to Appellee's logic, a special rule would apply in cases in which a criminal defendant seeks to show that trial counsel failed to meet his duty of care. In other cases involving the failure to meet a duty of care, evidence of intoxication is universally admissible because it is generally recognized that intoxication is relevant to whether a duty of care was met. Whether it be a traffic accident case or a medical malpractice case, an individual's intoxication is relevant to whether that individual failed to meet the standard of care expected by the law.

Yet here, under the State's argument there would never be a situation involving a claim that trial counsel rendered ineffective assistance in which the evidence of alcohol intoxication would be admissible. If, as Appellee claims, trial counsel must be shown to have rendered ineffective assistance prior to such evidence being admissible, then there would never be a reason to present evidence of his intoxication.[6] Mr. Coleman, or any defendant for that matter, would have already prevailed on the issue of ineffective assistance of counsel.

Appellee's reliance on Bryan v. State, 748 So. 2d 1003 (Fla. 1999), is inapplicable to the present situation. As Mr. Coleman explained in his Initial Brief, which Respondent conveniently ignores, a second or successive Rule 3.850 motion was at issue in Bryan. And this Court noted in Bryan that it had previously found trial counsel to have rendered effective assistance of counsel when considering the first Rule 3.850 motion. In fact in Bryan v. Dugger, 641 So. 2d 61, 64 (Fla. 1994), this Court specifically concluded that it affirmed a circuit court's finding that there was no reasonable probability that the result would have been any different had the proffered

[6]Certainly in the context of medical malpractice, it would be absurd to suggest that malpractice must first be shown before evidence that a doctor was intoxciated at the time he performed the surgery that resulted in a patient's death.

mitigating evidence been presented during the penalty phase. Thus when considering a successive petition premised upon trial counsel's admission that he had been a relapsed alcoholic at the time that he was representing Mr. Bryan, this Court concluded that "regardless of counsel's condition, he rendered effective assistance." Id. Since this Court had previously found there was no reasonable probability of a different outcome, whether trial counsel failed to meet the required duty of care, there was no prejudice.[7] Here, however, at the time of Mr. Coleman's evidentiary hearing, no such finding had been made as to trial counsel's representation of Mr. Coleman, nor can such a finding be made. The proffered mitigating evidence undoubtedly would have provided the jury's life recommendation with a reasonable basis and thereby precluded a judicial override. Thus, it was error to preclude collateral counsel from being allowed to develop the record to demonstrate that trial counsel's intoxication impaired his actual conduct at Mr. Coleman's trial

[7]This would be like a court after thoroughly reviewing a doctor's performance when he performed surgery on his patient, concluding that medical malpractice was not shown because the patient's death was not attributable to the surgery, but resulted from an unconnected illness. The subsequent discovery that the doctor had been drunk at the time of the surgery would not negate the court's finding that the death did not occur because of anything that occurred during the surgery.

by undermining his powers of observation and impairing his judgment.

Finally, Appellee concludes his argument by stating, "Therefore, the proposed evidence was irrelevant due to its lack of a logical nexus to Strickland's prongs, and there is not even a showing of an impaired state within any of the proceedings in this case" (Answer at 55). Appellee's statement is disingenuous. Mr. Coleman pled this issue in his 3.850 motion (PC-R. 385-86), and he was granted an evidentiary hearing on it (PC-R. 572). Yet, when collateral counsel attempted to develop a record during the evidentiary hearing as to this issue, the State objected, and the trial court sustained the State's objection (PC-R. 712, 716). Thus, Mr. Coleman cannot be faulted for failing to establish either a "nexus" or trial counsel's impaired state during the proceedings because he was deprived of the opportunity to do so.

Moreover, the nexus is obvious from the record. Counsel failed to notice the obvious mental deficits that impaired Mr. Coleman's functioning. Counsel failed to consider the possibility that despite the alibi defense that was presented at the guilt phase, the jury may still convict Mr. Coleman. As a result, counsel as he acknowledged did not adequately prepare for the penalty phase. Further, the State presupposes that a

relapsed alcoholic in the throes of a long alcoholic binge has no obligation to his client or to the courts to acknowledge his impairment in order to let the client and the courts evaluate whether he should remain on the case. The State's assumption in this regard is simply in error.

In addition, there is no recognition that trial counsel's bar records concerning his alcoholism were relevant to counsel's possible motivation when he testified to color his testimony to guard against future trouble with the Florida Bar over his conduct in Mr. Coleman's case. The Eleventh Circuit recently found that this Court and the State of Florida had failed to appreciate that the right of cross-examination included the right to impeach a witness with circumstances that may have given the witness motivation to color his testimony in order to advance his own self-interest to the detriment of the capital defendant. Smith v. Secretary, Dept. Of Corr., 2009 WL 1857302, *14 (11th Cir. June 30, 2009). Here, trial counsel had every reason to be concerned that his testimony may create additional difficulties for himself and his ability to practice law in light of the previous bar proceedings against him. Mr Coleman should have been permitted to pursue the evidence and present it in support of his claim that counsel rendered ineffective assistance of counsel.

Mr. Coleman submits that it was error to preclude counsel from being allowed to develop the record to demonstrate that trial counsel's intoxication impaired his actual conduct at Mr. Coleman's trial. If a new penalty phase is not granted on the basis of the other arguments contained herein, then a new evidentiary hearing must be ordered, at which this evidence may be presented in support of Mr. Coleman's claim that trial counsel rendered ineffective assistance of counsel within the meaning of the Sixth Amendment.

ARGUMENT III

NEWLY-DISCOVERED EVIDENCE SHOWS THAT MR. COLEMAN'S DEATH SENTENCE IS CONSTITUTIONALLY UNRELIABLE AND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Appellee disagrees with Mr. Coleman's contention that he is entitled to a life sentence in light of the fact that co-defendant Ronald Williams' death sentence was recently reduced to a life sentence by this Court (Answer at 55). Appellee's assertion is based primarily on the fact that Williams was not present for the murders and not personally involved in their heinous nature, thus he was less culpable (Answer at 57-58). Appellee ignores the fact that this argument was previously rejected by this Court:

> We also find that Williams' sentence of death is not disparate with the death sentences received by the actual triggermen since he specifically directed them to kill

> the victims. This was the type of criminal organization, enforcement-style killing in which we have upheld the death sentence. See Antone v. State, 382 So. 2d 1205 (Fla.) cert. denied, 449 U.S. 913, 101 S. Ct. 287, 66 L. Ed. 2d 141 (1980). This is one of the types of murders to which our death sentence was intended to apply.

Williams v. State, 622 So. 2d 456, 464 (Fla. 1993).

Appellee also claims that "Williams' additional mitigation was more substantial than Coleman's postconviction evidence that was weak and even harmful to Coleman" (Answer at 59). Appellee relies on the fact that in Williams' case, defense counsel failed to present mental health evidence as well as evidence of Williams' difficult childhood, and instead counsel presented only minimal mitigation evidence that Williams helped his loved ones as much as he could (Answer at 48-49). Yet, Appellee steadfastly ignores the fact that this is a nearly identical scenario to Mr. Coleman's case. Here, similar to Williams, the only mitigating circumstances found by the trial court were Mr. Coleman's "close family ties and support of his mother." Coleman v. State, 610 So. 2d 1283, 1287 (Fla. 1992). And here, as in Williams, the mitigation neglected by Coleman's counsel included mental health issues as well as Mr. Coleman's difficult childhood. Mr. Coleman submits that as in Williams, the extensive mitigation established during the postconviction evidentiary hearing would have more than established a

reasonable basis for the jury's recommendation of a life sentence and required the imposition of a life sentence.

Additionally, Appellee attempts to distinguish the two cases by stating that, unlike in Williams, "[H]ere, counsel reasonably decided that his lingering doubt plea would be undermined by negative evidence." (Answer at 49). In making this statement, Appellee ignores the fact that a decision not to present valid mitigation based on a mistaken understanding of the law cannot constitute a reasonable decision. Hardwick, 320 F.3d at 1185-6. Given that lingering doubt is not an appropriate mitigating circumstance in Florida, Darling v. State, 808 So. 2d 145 (Fla 2002), Duest v. State, 855 So. 2d 33 (Fla. 2003), there can be no reasonable strategy in arguing it instead of presenting valid, compelling mitigation.

As with the ineffective assistance claim, the State ignores the simple fact that Mr. Coleman's case is one in which the jury's life recommendation was overridden. Just as this fact has significance when applying the Strickland prejudice standard, it is also signicant when evaluating whether new evidence warrants collateral relief. There is no requirement that the movant must show that the new evidence would probably have caused the jury to return a life recommendation because it already did return a life recommendation. The question that

arises is a question of law, *i.e.* whether the new evidence if it had been known at the time of sentencing would have provided the jury's life recommendation with a reasonable basis that precluded a judicial override. In other words, could the life sentence for the co-defendant have reasonably lead the jury to recommend a life sentence. See Stevens, 552 So. 2d at 1085. As this Court explained in Heiney, 620 So. 2d at 174, the death sentence in override case must be vacated where the previously unpresented mitigating evidence "might have provided the trial judge with a reasonable basis to uphold the jury's life recommendation." In Torres-Arboleda, 636 So. 2d at 1326, this Court granted postconviction relief where it concluded that: "Had these factors been discovered and presented to the court at Torres-Arboleda's original sentencing, there would have been a reasonable basis in the record to support the jury's recommendation and the jury override would have been improper." Most recently, this Court in Williams, 987 So. 2d at 11, succinctly explained the proper standard in a case involving a judicial override: "In other words, the proper standard for prejudice is whether the omitted evidence would have provided a reasonable basis for a life recommendation and sentence."

Here, the State is erroneous in its presumption that Mr. Coleman must prove that the jury would have found the life

sentence for the co-defendant warranted a life sentence for Mr. Coleman. Since a life recommendation was in fact returned in Mr. Coleman's case, the correct question is whether the jury "could" have reasonably based its life recommendation upon the fact that the ringleader received a life sentence. Under the proper standard, it is undeniable that the life sentence for the co-defendant could have provided the jury's life recommendation with a reasonable basis which precluded a judicial override.

Contrary to Appellee's argument, the imposition of a life sentence upon Williams (who as this Court explained was the person in charge and who ordered the homicides) constitutes mitigation as to Mr. Coleman that "operates to provide a basis for a life recommendation and, hence, preclude a trial judge's override of the jury's decision." Mr. Coleman's sentence of death must now be vacated and reduced to a sentence of life imprisonment.

ARGUMENT IV

MR. COLEMAN IS MENTALLY RETARDED AND THEREFORE HIS EXECUTION IS FORBIDDEN BY SECTION 921.137, FLA. STAT. (2001), AND BY ATKINS V. VIRGINIA, 536 U.S. 304 (2002). ADDITIONALLY, THE PROCEDURE PROVIDED BY RULE 3.203, FLA. R. CRIM. P., VIOLATES THE SIXTH, EIGHTH AND THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION. MOREOVER, MR. COLEMAN WAS DENIED AN ADEQUATE HEARING DUE TO THE FACT THAT THE LOWER COURT FAILED TO CONDUCT A PROPER INQUIRY INTO MR. COLEMAN'S COMPETENCY.

In addressing the issue of Mr. Coleman's mental retardation, Appellee relies on the trial court's "extensive, well-reasoned, and evidence-grounded order." (Answer at 64). In doing so, Appellee ignores the fact that the trial court erroneously assumed that because Mr. Coleman could perform basic life skills, he is not mentally retarded (PC-S2. 1321). Appellee, like the lower court, also ignores the fact that the only valid IQ score utilizing a recognized and approved test for a mental retardation determination was that of 67 (PC-R. 749), and that Dr. Larson's self-estimated IQ score based on Mr. Coleman's 7th grade testing has no evidentiary value.[8] Moreover, Appellee ignores the fact that only Dr. Toomer used a recognized test (SIB) as an aid to determine adaptive functioning.[9] Appellee also ignores the fact that Dr. Larson failed to consider the critical fact that Mr. Coleman was in special

[8]At the 2001 postconviction evidentiary hearing, Dr. Larson acknowledged that he was taking the results from some achievement test that was given in the 7th grade and using that to extrapolate an IQ conclusion (PC-R. 903). Dr. Larson further stated that he didn't know under what conditions the seventh grade testing was conducted (PC-R. 902). And, Dr. Larson acknowledged that there could have been error in that process as well (PC-R. 902).

[9]Dr. Larson spoke to no one and narrowly picked out certain functions that Mr. Coleman could perform to conclude that he was not mentally retarded.

education classes while in school.[10] And, Appellee ignores the fact that at the time of Dr. Larson's evaluation of Mr. Coleman at the Escambia County jail, Mr. Coleman was delusional and in fear that Dr. Larson and the Escambia County jailers intended to kill him. Because Dr. Larson was unaware of this delusion, he failed to appreciate Mr. Coleman's extreme terror when being tested by Dr. Larson and the likely effect such extreme terror had on his performance on the I.Q. testing.[11]

Contrary to Appellee's assertion, Mr. Coleman has proven that he is mentally retarded. Mr. Coleman has significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social and practical adaptive skills. This disability originated before the age of 18. Mr. Coleman's death sentence must be vacated in favor of a life sentence.

In addressing the competency issue, Appellee asserts that there were no reasonable grounds to believe that Mr. Coleman was incompetent, thus a competency determination was not required

[10]When he was asked about this fact, Dr. Larson stated, incredulously, that it would make no difference in his determination of mental retardation (PC-S2. 1174).

[11]It is for this reason that a competency evaluation was absolutely essential, so that the mental health experts would be made aware of Mr. Coleman's delusional behavior and so that it could be properly considered when determing whether Mr. Coleman is mentally retarded.

(Answer at 72). In making this argument, Appellee ignores that undersigned counsel alerted the court to his concerns for Mr. Coleman's mental condition based on the fact that during a previous telephone conversation and subsequent visit, Mr. Coleman was speaking in an incoherent manner; he was unable to assist counsel in any meaningful fashion; he was paranoid; he believed that he had recently been kidnapped; he believed that he was going to be killed in Pensacola; and he believed that his food might be poisoned (PC-S2. 1041-46).

Likewise, Appellee ignores the content of the phone call that the trial court and court-appointed counsel, Harry Brody, had with Mr. Coleman prior to the mental retardation hearing. In this conversation, it was quite apparent that there was a need for a competency determination. Mr. Coleman reiterated the same type of paranoia he had previously stated to undersigned counsel: "I don't want to go down there. They tried to kill me down here." (PC-S2. 1082); "They told me they was going to kill me down there if they found out I was going to go down there. Them people in the jail - - the people in the jail told me." (PC-S2. 1082-85); "They told me they was going to kill me down there and they put something in the food that made me shake down there, and I told them I wasn't going to eat no more."(PC-S2. 1082-85). *See* Hill v. State, 473 So. 2d 1253, 1259 (Fla. 1985).

Clearly, contrary to Appellee's assertion as well as the trial court's determination, Mr. Coleman's responses during his phone testimony were not indicative of an individual who could make "informed, voluntary decisions." In fact, the responses were entirely consistent with undersigned counsel's assertions in his motion seeking a competency determination. This case should be remanded for an appropriate competency determination.

ARGUMENT V

THE LOWER COURT JUDGE ERRED IN REFUSING TO RECUSE HIMSELF FROM THE POSTCONVICTION PROCEEDINGS.

The State's argument that the motions seeking judicial disqualfication were properly denied fails to anticipate this Court's recent ruling in Marek v. State, 11 So. 3d 355 (Fla. 2009). In Marek, this Court found that the circuit court erred in denying a motion for judicial disqualfication because the motion was facially sufficient to warrant disqualification. In other words, accepting the factual allegations as true, would this cause a reasonable person to be in fear that he would not receive a full and fair hearing before an impartial tribunal.

Because of the lower court's action, undersigned counsel on behalf of Mr. Coleman was in fear that he would not receive a fair hearing regarding the allegations he made on Mr. Coleman's behalf. Likewise, Mr. Coleman was in fear that Judge Geeker's

predetermination of the issues remanded by this Court signified that he would not receive a fair hearing before Judge Geeker. Mr. Coleman's fear was that Judge Geeker would be unable to provide a fair and impartial assessment of his entitlement to collateral relief. This fear was objectively reasonable. Just as in Marek, the motions filed on Mr. Coleman's behalf were facially sufficient and warranted judicial disqualfication.

Mr. Coleman had a reasonable fear that he would not receive the benefit of a neutral and impartial judge in light of Judge Geeker's *ex parte* communication. Judge Geeker erred in failing to grant the motion to disqualify. The State's analysis as set forth in its Answer Brief is legally defective. Mr. Coleman's case should be remanded for new proceedings before a neutral, detached judiciary.

ARGUMENT VI

THE OUTCOME OF MR. COLEMAN'S GUILT/INNOCENCE AND SENTENCING PHASES WAS MATERIALLY UNRELIABLE DUE TO THE WITHHOLDING OF EXCULPATORY OR IMPEACHMENT MATERIAL, IN VIOLATION OF MR. COLEMAN'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The United States Supreme Court recently issued its decision in Cone v. Bell, 129 S. Ct. 1769 (2009). There, the Supreme Court found that the State's failure to disclose information in its possession which could have been useful to the defense warranted a full consideration of the impact that

the undisclosed information may have had on the outcome of the defendant's capital trial. Here, the circuit court failed in the first instance to properly recognize the favorable nature of the undisclosed material.

Further, the Eleventh Circuit recently recognized that this Court had failed to properly value a criminal defendant's right to cross-examine a witness on behalf of the State about reasons that he or she might have in coloring their testimony in order to curry favor with the State. Smith v. Secretary, Dept. Of Corr., 2009 WL 1857302, *14 (11th Cir. June 30, 2009). Information in the State's possession which would have provided the defense with potential impeachment evidence demonstrating why a witness would want to curry favor with the State is exculpatory within the meaning of due process and Brady v. Maryland, 373 U.S. 83 (1963). The failure to disclose such information must be evaluated cumulatively with any other withheld evidence in order to determine whether confidence in the reliability of the trial is undermined.

Here, a proper analysis of Mr. Coleman's Brady claim did not occur in the circuit court in compliance with either Cone v. Bell or Smith v. Secretary, Dept. of Corr. and the language set forth therein. Accordingly, a reversal is required so that a proper analysis can be undertaken.

CONCLUSION

For all the foregoing reasons and those stated in the Initial Brief, Mr. Coleman submits that relief is warranted in the form of a new trial, a new sentencing proceeding or any other relief that this Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by first class mail, postage prepaid, to Stephen White, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, on this ____ day of August, 2009.

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MARTIN J. MCCLAIN
Fla. Bar No. 0754773
McClain & McDermott, P.A.
Attorneys at Law
141 N.E. 30th Street
Wilton Manors, FL 33334
(305) 984-8344

Counsel for Mr. Coleman

CERTIFICATE OF FONT

This is to certify that this Reply Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

_____
MARTIN J. MCCLAIN