**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC04-1520**

**LOWER TRIBUNAL No. 89-1139-CFC**

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**MICHAEL COLEMAN,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

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# INITIAL BRIEF OF APPELLANT


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## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page**

## INTRODUCTION[1]

The crimes with which Mr. Coleman was charged occurred in the course of a dispute among drug dealers. Ronald Williams who ran a drug operation out of Miami was angered when someone stole drugs and money from his operative in Pensacola. Accordingly, he sent associates to assist his operative in Pensacola to find the drugs and money and to deal with whoever had stolen them. This led to considerable mayhem including the murder of four people who were believed to be the culprits or their associates by those acting on behalf of Williams. Besides the dead, there were two survivors who identified the four individuals that they believed they had seen commit the murders and mayhem. Michael Coleman was one of the individuals identified as one of the men involved.

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[1]This proceeding arises from the appeal of the denial of Mr. Coleman's motion for postconviction relief. The circuit court denied Mr. Coleman's claims after an evidentiary hearing.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate volume and page number(s) following the abbreviation:

"R." – record on direct appeal to this Court;

"PC-R." - record on postconviction appeal to this Court;

"PC-S." – supplemental record on postconviction appeal;

"PC-S2." - second supplemental record on postconviction appeal;

"D-Ex." - Defense exhibits entered at the evidentiary hearing and made part of the postconviction record on appeal.

Mr. Coleman asserted his innocence and testified that he had been in Miami at the time of the murders in Pensacola. He presented witnesses in his defense who corroborated his testimony and indicated that he had in fact been in Miami at the time of the homicides.

Mr. Coleman was tried jointly with two co-defendants, Timothy Robinson and Darrell Frazier who the State alleged had been part of the group in Pensacola who carried out the murders. Robinson's DNA was found to match semen found on two female victims. There was no biological evidence linking Mr. Coleman to the murders or crime scene. The jury returned guilty verdicts against all three defendants.

Mr. Coleman's trial attorney, Ted Stokes, focused virtually all of his time and energy into the guilt phase of the trial. Stokes acknowledged in collateral proceedings that he didn't really have any time to do any elaborate preparations for the penalty phase. As a result, a mental health expert did not evaluate Mr. Coleman, school records were not obtained, medical records were not seen, and witnesses were not spoken to about Mr. Coleman's horrendous childhood. Stokes, who was having severe alcohol problems at the time of the trial, also testified that he believed that Mr. Coleman was relatively intelligent, and thus never learned of his extremely low IQ, his brain damage, or his other mental problems. No evidence was presented regarding Mr. Coleman's life growing up in extreme poverty in

Liberty City or his experiences of living in terror there during and after the rioting in the 80's.

Because counsel did not investigate for mitigation, he was not in a position to make any decisions regarding its use before the jury. Even worse, after the jury returned a life recommendation, counsel was unprepared to present the available mitigation to provide the life recommendation with a reasonable basis that would have precluded an override by the trial judge and the imposition of a death sentence. Because of counsel's deficient performance, collateral relief is warranted.

## STATEMENT OF THE CASE

On February 28, 1989, Michael Coleman, Timothy Robinson and Darrell Frazier were indicted by an Escambia County grand jury, on four counts of first degree murder,[2] one count of attempted first degree murder, six counts of kidnapping, two counts of sexual battery,[3] one count of conspiracy to traffic cocaine, one count of burglary of a dwelling and two counts of robbery (R. 2101-05).[4] Trial started on May 22, 1989, and on June 1, 1989, Mr. Coleman was found guilty on all counts (R. 2415-23).[5]

[2]The murder victims were Derek Hill, Morris Alphonso Douglas, Michael McCormick and Mildred Baker.

[3]Darrell Frazier was not charged on the sexual battery counts.

[4]These three individuals were tried together. Two other co-defendants were also indicted on the four homicides. Ronald Lee Williams was tried separately in a subsequent trial. Bruce Frazier, the fifth co-defendant, plead to the lesser included offense of second degree murder.

[5]Timothy Robinson, Darrell Frazier and Ronald Lee Williams were also convicted of first degree murder.

Following a penalty phase conducted on June 2, 1989, the jury recommended life by a vote of six (6) to six (6). However, the trial court imposed death over the jury's recommendation and on September 29, 1989, the court entered its written findings (R. 2609-14). On appeal, this Court affirmed the convictions and death sentences. Coleman v. State, 610 So. 2d 1283 (Fla. 1992), cert. denied, 114 S.Ct. 321 (1994).

In postconviction proceedings, Mr. Coleman was initially represented by the Capital Collateral Representative (CCR). CCR sought to withdraw and moved for the appointment of conflict-free counsel because it had also been appointed to represent two of Mr. Coleman's co-defendants (PC-S. 15, 40). After a series of motions before this Court as well as the circuit court, attorney Maria Laverde was appointed as counsel for Mr. Coleman on October 14, 1998 (PC-S. 428-29). On February 4, 2000, Laverde filed an amended motion to vacate (PC-R. 349-447).[6]

On July 25, 2000, a Huff hearing was held in circuit court (PC-R. 519-69). Subsequently, the court granted an evidentiary hearing on several of Mr. Coleman's claims (PC-R. 570-73). The evidentiary hearing was held on January 24-25, 2001.

[6]On March 24, 1997, CCR filed a 3.850 motion on behalf of Mr. Coleman (PC-S. 169-209). In that motion, CCR explained that although it had a conflict of interest in this case, it was filing an incomplete motion in order to toll Mr. Coleman's federal habeas clock (PC-S. 170-184).

After the evidentiary hearing, but prior to the circuit court's ruling, Laverde filed on February 28, 2002 a Motion for Appointment of Neuropsychological Expert to Conduct Testing of Michael Coleman (PC-R. 1241-43). Dr. Toomer had testified at the evidentiary hearing that Mr. Coleman's IQ was 67. In light of the newly enacted statute barring the execution of the mentally retarded, and that the grant of certiorari review by the U.S. Supreme Court in order to address whether it was constitutional to execute the mentally retarded, counsel sought a determination of whether Mr. Coleman was retarded (PC-R. 1241-42).[7]

On October 6, 2003, Laverde asked to withdraw from the case on the ground that she was unable to pay the annual Florida bar dues (PC-R. 1246). The circuit court granted the motion (PC-R. 1247-48), and on March 30, 2004, attorney Baya Harrison was appointed as registry counsel for Mr. Coleman (PC-R. 1254).

On May 10, 2004, Harrison filed an amended postconviction motion based on Ring v. Arizona, 536 U.S. 584 (2002) (PC-R. 1262-67). On May 14, 2004, Harrison filed a Notice in which he sought to withdraw the Atkins claim and the abeyance request (PC-R. 1273-74). According to Harrison, Dr. Toomer had indicated in his postconviction testimony that Mr. Coleman was not mentally retarded (PC-R. 1273).

[7]Laverde also filed a motion to hold proceedings in abeyance until the mental retardation issue was resolved (PC-S. 754).

On July 16, 2004, the circuit court issued an Order Denying the Defendant's motion to vacate (PC-R. 1285-1323). On July 28, 2004, Harrison filed a Notice of Appeal on behalf of Mr. Coleman (PC-R. 1324-25). An amended Notice of Appeal was filed on August 4, 2004 (PC-R. 1328-29).

While his appeal was pending in this Court, Mr. Coleman's family retained undersigned counsel to handle Mr. Coleman's appeal. When reviewing the record on appeal, undersigned counsel discovered that at the 2001 evidentiary hearing, testimony was presented that Mr. Coleman had an IQ score of 67. After discovering this testimony in the record, undersigned filed a motion seeking relinquishment of jurisdiction in order to permit presentation of a claim that Mr. Coleman was mentally retarded and that his execution was barred by the Eighth Amendment.

On September 23, 2005, this Court issued an order relinquishing jurisdiction for a determination of Mr. Coleman's mental retardation. Coleman v. State, Case No. SC04-1520, September 23, 2005, Order. Thereafter, on January 19, 2006, undersigned counsel filed in the circuit court a Motion to Withdraw for Purposes of the Atkins Proceedings (PC-S2. 955). Undersigned counsel explained that he had been retained for purposes of the appeal in this case (PC-S2. 955), and that he was not retained for Atkins proceedings (PC-S2. 957). Undersigned counsel was directed by the circuit court to file his motion to withdraw in this Court, which he did on January

27, 2006. On May 5, 2006, this Court issued an order transferring Mr. Coleman's motion to the circuit court for resolution. Coleman v. State, Case No. SC04-1520, May 5, 2006, Order.

Also during this time frame, undersigned counsel had filed several motions in this Court in an attempt to obtain records relating to Mr. Coleman's case from prior collateral counsel, Harrison. Undersigned related that he had received little from Harrison despite the fact that Harrison had billed a significant amount of money for time expended on behalf of Mr. Coleman. Further, in footnote 2 of an emergency petition to this Court, undersigned stated:

> In reviewing the record, undersigned counsel also discovered that Mr. Coleman had diligently sought to present his mental retardation claim. Mr. Coleman's first registry attorney, Ms. Laverde, sought to raise mental retardation as a bar to his execution in February of 2002, within one year of the enactment of Section 921.137, Fla. Stat. (2001). Later in June of 2002, the United States Supreme Court issued *Atkins v. Virginia*, 536 U.S. 304 (2002). Thereafter, Ms. Laverde submitted notice of *Atkins* as supplemental authority. When Ms. Laverde was replaced as registry counsel, her successor, Baya Harrison, purported to withdraw Mr. Coleman's claim. This was done without Mr. Coleman's knowledge or consent. As has been revealed in the proceedings on undersigned counsel's motion to obtain Mr. Coleman's attorney files, Mr. Harrison had not obtain the mental health records from Ms. Laverde that support Mr. Coleman's retardation claim when he filed to withdraw the claim.

Coleman v. State, Case No. SC05-2217, December 19, 2005, Emergency Petition.

> On May 4, 2006, this Court entered an order stating: The Court has considered the allegations concerning registry counsel Harrison in note 2 on page 3 of the

> petition. To monitor the performance of assigned counsel in accordance with section 27.711(12), Florida Statutes (2005), Harrison shall file in the circuit court a response to note 2 of the petition within thirty (30) days of the service of the petition. This response shall also be served upon petitioner's counsel, counsel for the State of Florida, and the Executive Director of the Commission on Capital Cases. Thereafter, the circuit court shall holding a hearing and consider whether any sanctions should be imposed by reason of the allegations, including the reimbursement of the State of attorney fees paid to Harrison. Harrison, McClain, counsel for the State, and the Executive Director of the Commission on Capital Cases shall be served notice of the date and time of the hearing and shall appear at the hearing. Within thirty (30) days of the hearing, the circuit court shall file and serve a report and recommendations with this Court.

Coleman v. State, Case No. SC05-2217, May 4, 2006, Order.

On May 19, 2006, the circuit court granted undersigned counsel's motion to withdraw and appointed Harrison to represent Mr. Coleman in the pending proceedings (PC-S2. 984-85). On May 26, 2006, undersigned counsel filed a Motion to Disqualify Judge and Supporting Memorandum of Law. The motion was based on the fact that despite the directive from this Court to hold a hearing regarding Harrison and his conduct as Mr. Coleman's registry counsel, the circuit court entered an order for Harrison to once again serve as Mr. Coleman's registry counsel.[8] The motion was denied on June 6, 2006 (PC-S2. 993).

[8]In this regard, the lower court specifically stated: "The Court finds that Mr. Harrison meets the statutory requirements for appointment and has the ethical standards necessary for such representation in accordance with Fla. Stat. §27.710(5)(b)." (PC-S2. 984-85). Undersigned counsel asserted that the circuit court had prejudged the matter upon which this Court had ordered the court to conduct a hearing.

On June 12, 2006, Harrison filed a Motion to Withdraw as Reappointed Counsel for the Defendant. On July 5, 2007, undersigned counsel filed a Second Motion to Disqualify Judge and Notice that Mr. Coleman May be Incompetent (PC-S2. 1037-50).[9] This motion was denied on July 13, 2007 (PC-S2. 1071).

On August 18, 2006, the circuit court granted Harrison's motion to withdraw and appointed attorney Harry Brody to represent Mr. Coleman (PC-S2. 1009-10).

On March 13, 2007, the circuit court issued an order appointing Dr. James Larson on behalf of the State to evaluate Mr. Coleman for a determination of mental retardation (PC-S2. 1022). The court also noted that defense counsel previously represented that it had retained Dr. Jethro Toomer to evaluate Mr. Coleman (PC-S2. 1022).

On July 17, 2007, an evidentiary hearing was held on Mr. Coleman's claim that he was mentally retarded (PC-S2. 1072). On July 31, 2007, the circuit court issued an order finding that Mr. Coleman was not mentally retarded (PC-S2. 1311-22). On August 27, 2007, a Notice of Appeal was filed (PC-S2. 1510-11).

On August 2, 2007, the circuit court held a hearing concerning the allegations against Harrison (PC-S2. 1490). After the hearing the court issued an order on August 28, 2007 (PC-S2. 1490-92). In that order, the court recommended that Harrison's assistant, John Nall, repay the State of Florida

[9]This motion to disqualify was based on an improper *ex parte* communication between the circuit court and Harrison.

$3,440 (PC-S2. 1492). The court found no error in Harrison's decision to abandon Mr. Coleman's mental retardation claim and recommended no sanctions against Harrison (PC-S2. 1491-92). On September 27, 2007, a Notice of Appeal was filed (PC-S2. 1521-22).

On April 2, 2008, undersigned counsel filed a Motion for Relinquishment of Jurisdiction for Consideration of New Evidence in this Court. This motion was premised upon this Court's recent decision to reduce Ronald Williams' death sentence as providing a reasonable basis for the jury's recommendation that Mr. Coleman receive a life sentence. On August 28, 2008, this Court issued an order denying the motion but gave Mr. Coleman leave to brief the issue herein. Coleman v. State, Case No. SC04-1520, August 28, 2008 Order.

## STATEMENT OF THE FACTS

### THE TRIAL

Testimony was presented at trial regarding an organization known as the "Miami Boys", headquartered in Miami, Florida, which operated a drug distribution organization throughout the State of Florida, essentially distributing crack cocaine to a series of lieutenants and workers living in different parts of the state. The organization was headed by Ronald Williams (R. 613, 641, 766, 1597). The supervisor of the Pensacola drug distribution area was Bruce Frazier.

Bruce Frazier had an apartment in Pensacola where he lived and where the crack cocaine and proceeds from its sale

were kept (R. 649, 721, 727). Upon receipt of a supply of crack cocaine, Bruce Frazier would sell the drugs through several sellers from the Truman Arms apartment complex in Pensacola (R. 649-50). The proceeds were returned to Bruce Frazier who kept them in a safe at his apartment at the Beauclair apartment complex (R. 650, 682)

In August of 1988, Williams drove to Jacksonville, Florida, with a number of other people. Williams met Timothy Robinson in Jacksonville, where Williams revealed that he was in possession of a large quantity of cocaine (R. 646). This group then went to Pensacola, Florida, the next day, where the cocaine was left with Bruce Frazier for distribution (R. 648). Upon sale, the money was placed in Bruce Frazier's safe (R. 682).

Bruce Frazier's girlfriend, Renee Grandison, lived at Truman Arms, which complex was a major distribution point for the cocaine (R. 738). Just before September 20, 1988, Grandison and Bruce Frazier argued, at which time Grandison threatened to notify the police of Bruce Frazier's drug involvement (R. 743). In fear that she would carry out her threats, Bruce Frazier directed that the safe containing the crack and the money be moved from his apartment to the apartment of Michael McCormick. McCormick was a worker for the organization and occupied a duplex apartment with Mildred Baker. The other side of the duplex was rented by Derek Hill and Morris Alphonso Douglas.

After the safe was relocated to McCormick's apartment it was stolen by Hill and Douglas, who took the safe to the home

of Tina Crenshaw (R. 1179). Present at the time the two men forced open the safe, in addition to Crenshaw, was another individual, Amanda Merrill (R. 1181). Upon opening the safe, several thousand dollars in cash and a quantity of crack was discovered (R. 1182-83, 1214). Crenshaw took the money, placing it in a pillowcase which she hid in a closet in her home (R. 1183). As for the crack, she placed it in a duffle bag and hid it in her car (R. 1184). Hill and Douglas left Crenshaw's home, but returned a few hours later, at which time they gave some money to Merrill and Crenshaw and then the four went to a dog track in Pensacola (R. 1184).

Hill, Douglas, Crenshaw and Merrill eventually returned to Hill's apartment for dinner (R. 1185). When there was a knock on the door, Hill opened it to find McCormick accompanied by three men later identified as Timothy Robinson, Michael Coleman, and Bruce Frazier, all of whom were carrying guns (R. 1186). McCormick, who was talking loudly, told Hill "these people want their stuff, and they're not playing." (R. 1294). Hill pretended not to know to what McCormick was referring (R. 1294).

Thereafter, Robinson told everyone to sit down and shut up (R. 1294). He also made everyone take off their clothes, and searched the area for weapons (R. 1295). Robinson hit McCormick with his gun several times and then pointed the gun in everyone's face, stating "somebody better start talking and start talking fast." Robinson then struck Hill,

subsequently stabbing him with a knife obtained from the kitchen (R. 1297).

Crenshaw then told the intruders she knew where to find the “stuff” they were looking for (R. 1297). Robinson took her to a bedroom to interrogate her (R. 1297). Bruce Frazier accompanied Robinson, and he returned shortly to the other room to inquire as to where Crenshaw’s clothes were located. He then took the clothes back into the bedroom (R. 1297).

At about the same time, Darrell Frazier came to the apartment with Mildred Baker (R. 1298). Baker was also directed to remove her clothing, and was left at the apartment, tied up, with Hill, Douglas, McCormick, and Merrill (R. 1299-1300). Bruce Frazier and Darrell Frazier left the apartment with Crenshaw and drove her to her house to retrieve the safe.

Once at Crenshaw’s home, Darrell Frazier told her all he wanted was to get this “stuff” back (R. 1189). Crenshaw told Darrell Frazier that the duffle bag with the cocaine was in her car, which he retrieved and put in his own car (R. 1190). Darrell Frazier was let in to Crenshaw’s home by Crenshaw’s mother, while Crenshaw remained in Darrell Frazier’s car (R. 1190). Darrell Frazier began to search Crenshaw’s home, but unable to find the money, he returned to his car. Crenshaw was then untied and she returned to the home with Darrell Frazier and retrieved the pillowcase with the cash (R. 1190-91). As Darrell Frazier left Crenshaw’s home, Crenshaw closed the door,

shutting both of the Fraziers outside (R. 1192). Darrell and Bruce Frazier then returned to the duplex (R. 1192).

While the Fraziers and Tina Crenshaw were gone, Robinson and allegedly Mr. Coleman engaged in involuntary sexual relations with Baker and Merrill (R. 1300-01). DNA examination established that Robinson was involved in sexual activity with both women, but it did not support the presence of Mr. Coleman's DNA (R. 1040, 1044, 1055).

Upon the Fraziers' return, Merrill, who had been moved to a bedroom, testified she heard one of them tell Robinson, "We got what we want, come on, let's go" (R. 1303). Robinson responded, "No, I am going to do this." (R. 1303). Merrill then testified that she heard a gunshot in the other room (R. 1303). At about the same time, Merrill testified that Mr. Coleman entered the bedroom and cut her neck with a knife (R. 1303). Mr. Coleman walked out and Merrill then heard additional shots; Mr. Coleman again returned to the bedroom and cut her neck twice more and then left (R. 1303-04). Merrill then testified that she heard Baker telling the occupants of the other room that she would tell them what she knew, after which Merrill heard additional gunshots (R. 1304). Someone then returned to Merrill's room and shot her (R. 1304). After the men had left the apartment Merrill untied herself, left the apartment, and called 911 (R. 1305).

In his defense, Mr. Coleman presented an alibi, asserting that he was in Miami at the time of the murders. Mr.

Coleman testified on his own behalf, and his counsel also presented the alibi testimony of Mary Tookes, Mr. Coleman's fiancé (R. 1451-57), as well as his mother, Dolly Leverson (R. 1457).

**THE PENALTY PHASE**

At the penalty phase, trial counsel presented two witnesses, Dolly Leverson and Mr. Coleman. Leverson testified that she lived in Liberty City, that Mr. Coleman went as far as the 10th grade in school, and that he excelled in basketball (2030-31). She also stated that Mr. Coleman had been convicted of some crimes before, but he acknowledged his guilt (R. 2031). Here, however, Mr. Coleman maintained that he was not guilty (R. 2031).

Finally, Leverson testified that Mr. Coleman is not a violent person (R. 2032), that she did not believe he could kill someone (R. 2032), and that Mr. Coleman was not in Pensacola at the time of the crimes (R. 2031).

Mr. Coleman testified that he wasn't in Pensacola at the time of the murders, that his blood didn't match, and that he didn't commit these crimes (R. 2032-34).

**THE POSTCONVICTION EVIDENTIARY HEARING**

At the postconviction evidentiary hearing, several witnesses testified about the ineffective assistance of counsel claim at the penalty phase.[10] Marie Wims testified that she is the older sister of Dolly Leverson, Mr. Coleman's mother (PC-R. 612). According to Marie, her family came from Arlington,

Georgia (PC-R. 612). Marie's mother, Ruby Richardson Brannon George, had three children from a previous marriage (PC-R. 613). After the separation of that marriage, Ruby married Roy George in 1930 (PC-R. 613). Ruby had a total of sixteen children, but only six lived (PC-R. 620).

Around 1951, Marie's oldest brother, Willy, moved to Miami (PC-R. 620). Marie, Dolly and Ruby followed a few years later (PC-R. 621). Dolly was around eleven or twelve when she moved to Miami (PC-R. 621). Within a year of her arrival, Dolly became pregnant (PC-R. 622). She had the baby, but it was put up for adoption (PC-R. 622). About a year later, when Dolly was fourteen or fifteen, she got pregnant again. This produced Michael Coleman (PC-R. 622). The father was a man named Ernest Lee Coleman, and he was between twenty and twenty two years old (PC-R. 622, 624).

While pregnant with Michael, Dolly lived with Marie for a while, then she and Ernest moved in together (PC-R. 624). Dolly then went back home to Georgia where Ruby, her mother, was then living (PC-R. 624), because Marie and Ernest weren't able to take care of her during her pregnancy (PC-R. 625).[11]

After Michael was born, Dolly returned to Miami.[12] but she left Michael in Georgia with her mother, Ruby (PC-R. 626).[13] When Ruby became sick with diabetes, she and Michael went back to Miami so that Marie and her brother could take care of her (PC-R. 627). Michael remained with Ruby who was now sick (PC-R. 643).

Marie described Michael as a very quiet child (PC-R. 633). He was neither loud nor aggressive, instead somewhat muted (PC-R. 633). Marie had a son, Samuel, who would play with Michael (PC-R. 627). Samuel was about ten years older than Michael (PC-R. 627). The house they lived in had a hole in the roof which let pigeons in to roost (PC-R. 628). Michael would often retreat to play with the pigeons as if they were his pets (PC-R. 628).

The house that they lived in was in Liberty City (PC-R. 646). The area in which they lived had riots in 1968 (PC-R. 647).[14] There were a lot of killings, businesses were set on fire, cars were being overturned, people were throwing bricks and bottles, and looting was going on (PC-R. 648-49). The police were having problems coming into the area because they were in fear for their lives (PC-R. 649-50). It was like being in the middle of a war (PC-R. 650).[15]

Aside from the riots, Dolly testified at the postconviction hearing that this wasn't the best neighborhood in which to raise a child (PC-R. 651). Garbage was piled up on the streets and there were rats the size of squirrels (PC-R. 651). Further, things were hard for Dolly; she was young and didn't have a lot of work experience (PC-R. 665). It was tough to make ends meet (PC-R. 665). Michael lived with her part-time as he was often sent back and forth between Dolly and Ruby's house (PC-R. 666).

Michael's uncle, Willie, worked at a gas station (PC-

R. 628). Michael was often forced to working at the gas station in order to help out (PC-R. 628). At the postconviction hearing, Dolly testified that she found out that Michael had discovered how to get high off transmission fluid (PC-R. 669). He huffed the fumes (PC-R. 669). Michael had also been pressed into working at the upholster shop where Dolly's boyfriend worked (PC-R. 668). She learned that there he was huffing the lacquer thinner (PC-R. 669). This was going on when Michael was coming out of elementary school and going into junior high (PC-R. 669).

When Michael was small, his father had married a woman named Evelyn (PC-R. 631). After this marriage, Michael and his father were not close (PC-R. 631). Evelyn had a son from a previous relationship. She worried that Michael would take Ernest away from her son (PC-R. 632). Evelyn discouraged a relationship between Michael and Ernest (PC-R. 632).[16]

When Michael was twelve, his father died (PC-R. 633). As Dolly explained in her postconviction testimony, she got a call that Ernest was in the hospital and that he was in a coma (PC-R. 657). He had been hit with a blunt instrument (PC-R. 657). Dolly considered whether to take Michael to see him (PC-R. 658). Ultimately, she took him to the hospital to see his father (PC-R. 658). Michael took it very badly, "You know, a child to see his dad dead, and he would call him and he wouldn't answer him." (PC-R. 658). Ernest died in the hospital (PC-R. 658).

Michael decided that Evelyn killed his father (PC-R. 658). When asked why he thought this, Michael stated “my daddy came to me and told me she killed him.” (PC-R. 659).

The loss of a relationship with his father that culminated with his father’s death, caused Michael to go into a shell (PC-R. 634).[17] Michael withdrew inside himself (PC-R. 637). He also showed anger and hostility:

He was - - I would say he got hostile. Sometimes he would say that nobody loved him, you know. His daddy was dead and he didn't have nobody. And I would tell him, I say, Mike, I say, you still have me. I say, I'm still here with you, and I'll do all I can to try to help you, you know. **But it looked like, I don't know, to me he just though that his world had come to an end because he had lost his dad, you know. He just never was the same.**

(PC-R. 660)(emphasis added).

At the postconviction hearing, Dolly testified that craving for a father left him susceptible to exploitation. There was a man named Jerry who was a friend of the family (PC-R. 669). After Ernest's death, Jerry took a special interest in Michael taking him for rides (PC-R. 670). Dolly later learned that Jerry was sexually molesting Michael (PC-R. 671).

As to Michael's education, he struggled academically. Dolly testified at the postconviction hearing that Michael was placed in special education classes in school (PC-R. 671). Dolly was unaware that Michael had a hearing problem (PC-R. 672). This was noted in school records but Dolly testified that no one ever told her (PC-R. 672).

But after his father's death, Michael's school performance deteriorated further (PC-R. 660). Michael started skipping school (PC-R. 661). He had gotten into a fight and he had broken another student's nose (PC-R. 660). Michael had been upset because the boy had been talking about Michael's dad (PC-R. 661). As a result of this incident, Michael was expelled from school (PC-R. 661). He was sent to Okeechobee Boys School (PC-R. 663).[18] Dolly visited him there once or twice (PC-R. 664).

After Michael returned from the boys school before he turned 18, he stayed with Dolly (PC-R. 673). He still spent time with his grandmother, but she was sick and didn't supervise

him a lot (PC-R. 673-74). Dolly thought Michael was still going to school, and still going to the gas station after school (PC-R. 674). But, this wasn't the case as Dolly later learned (PC-R. 675).

Dolly testified that during his teenage years and as an adult, Michael did not have a lot of close friends (PC-R. 679). He never married and didn't have any children (PC-R. 679). Michael was mostly a loner (PC-R. 679). It was not easy for him to trust people (PC-R. 679).

By the time he was 18, Michael was in prison as Zephyrhills (PC-R. 675). Dolly was notified that Michael had been hit in the head with a horseshoe after being jumped by some of the boys there (PC-R. 676). Michael was knocked unconscious and taken to the hospital (PC-R. 676).

After he did his time, Michael returned to Miami (PC-R. 676). Not too long after that, Michael was sent to prison again at UCI (PC-R. 676). When he was released from UCI, Michael lived with Dolly until his arrest in the present case (PC-R. 678).

Dolly testified at Michael's penalty phase in 1989 (PC-R. 682). She talked about Michael's good characteristics (PC-R. 682). Michael's trial counsel never asked Dolly about any of the things she discussed at the postconviction hearing (PC-R. 687).

Attorney Ted Stokes testified during the postconviction evidentiary hearing that he was appointed to

serve as Mr. Coleman's trial attorney (PC-R. 692). Stokes had previously handled five murder trials and two capital trials (PC-R. 693). His thought his caseload was probably high at the time (PC-R. 693). Stokes didn't recall how much time he had to prepare for trial, perhaps it was four months (PC-R. 693). He didn't recall whether depositions had already been conducted by other co-defendants' attorneys (PC-R. 694).

When Stokes met with Mr. Coleman, he provided an alibi defense (PC-R. 694). Stokes didn't have an investigator appointed (PC-R. 694). He took depositions and went to Miami to speak with alibi witnesses (PC-R. 694). In Miami, Stokes spoke with Mr. Coleman's mother, his girlfriend at the time, Mary Toots, and a former girlfriend named Dedra (PC-R. 695). He also spoke with Cassandra Pritchett, who was going to be an alibi witness (PC-R. 695). These names were given by Mr. Coleman as witnesses to him being in Miami at the time of the crimes (PC-R. 695). Stokes presented an alibi defense at trial (PC-R. 699).

With regard to the penalty phase, Stokes didn't employ any experts (PC-R. 697). He saw Mr. Coleman as an intelligent person and didn't see any mental defects (PC-R. 697). Stokes testified as to his inquiries with Mr. Coleman's family:

Q. When you spoke with his family in Miami or by telephone, what inquiries did you make about his history in terms of potential developmental disabilities?

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).

Stokes mainly focused on the first stage of the trial (PC-R. 706). "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).[19]

Stokes believed they started the penalty phase the next day after the guilty verdict (PC-R. 707). He never sought the assistance of any mental health experts to prepare for mitigation evidence because he didn't see any mental defects in Mr. Coleman (PC-R. 707). Stokes did not seek to obtain any school or background records; all he had was what was provided by Mr. Coleman's mother and his girlfriend (PC-R. 707-08). Stokes did not inquire about whether Mr. Coleman had ever been in special education classes (PC-R. 708). Stokes did not ever inquire about drug use (PC-R. 708). And Stokes never requested the Department of Corrections' records relating to a head injury (PC-R. 708).

Stokes stated that Mr. Coleman had testified in the guilt phase about his alibi and at the penalty phase he maintained his innocence (PC-R. 720). Stokes said that he would have done the penalty phase differently if Mr. Coleman had admitted his guilt:

Q. Did you see any reason in his defense, if he was not there, to try to develop mitigating evidence to present to a jury?

A. You mean in the penalty phase?

Q. Yes.

A. I really just had to rely on his family, is what we had, his girlfriend and his mother, in developing mitigating circumstances.

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

Q. And your trust and belief in him?

A. Right.

Q. Mr. Stokes, if your defense then was an alibi, I guess you wanted Mr. Coleman to be as normal of a human being as possible. You painted him as a - - your strategy would be to normalize him or make him human.

A. At least in the penalty phase, you know. I think I said that he was not a killer, didn’t have the killer instinct. Even if they believed that he was there in Pensacola and he was this Mad Max, he couldn’t kill Amanda Merrill. He cut her throat, but he stopped before he got to the jugular, and that would show that he was not the killer, that he was not capable of such as that.

(PC-R. 722)(emphasis added).

Stokes again reiterated that because there was an innocence issue in this case, he concentrated less on the penalty phase:

Q. Mr. Stokes, you do recognize that regardless of what a client says or how a client may conduct himself, that an attorney representing someone in a death penalty case has an obligation to prepare for both stages of the trial?

A. That's true. We prepared for it, but, for 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 confesses. 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).

Stokes' theme during the penalty phase appeared to be based on Mr. Coleman's innocence. Stokes wanted to present that Coleman was not capable of murder; "And once we got into the Liberty City background and all the drugs and all this, it would lead the jury to believe that he was capable of it." (PC-R. 729).

With regard to the Brady issue, Stokes was shown D-Ex. 1, which is a copy of a mailing to Amanda Merrill advising her that the warrant for her arrest was being issued (PC-R. 701). Stokes didn't recall seeing this before (PC-R. 701). Stokes stated that other than witness Pritchett, Merrill's testimony was the primary testimony (PC-R. 702). Further, she was the only eyewitness (PC-R. 702). If Stokes was aware that she had been convicted of a felony or of a crime involving dishonesty or moral turpitude, he would've asked her about it (PC-R. 702). This would have helped him in impeaching her credibility (PC-R. 703).

Additionally, Stokes testified that had he been advised that State witnesses Arabella Washington, Cassandra Pritchett and Gwendolyn Cochran had convictions for felonies or crimes of moral turpitude or dishonesty, this would have assisted him in attempting to impeach their credibility (PC-R. 702-03).

Moreover, Stokes testified that he was not aware that Travis Williams and Gregory Manning were considered suspects by

the State (PC-R. 705). Stokes would have wanted to depose these individuals had they been listed as suspects (PC-R. 705). It would have affected the way he approached the defense when he prepared for this trial (PC-R. 706).

During the postconviction hearing, collateral counsel also presented the testimony of Dr. Jethro Toomer, a mental health expert with a specialty in clinical and forensic psychology (PC-R. 731). Dr. Toomer examined Mr. Coleman at UCI for about four to five hours (PC-R. 734). He also reviewed the postconviction motion, the Florida Supreme Court opinion, Judge Geeker's reasons for imposition of the death penalty, school records, including those from Okeechobee Boys School, and also a case history conducted by investigator Monica Jordan (PC-R. 734).[20] Based upon his evaluation and review of the material, Dr. Toomer was asked his opinion concerning Mr. Coleman (PC-R. 735). Dr. Toomer found that Mr. Coleman has numerous deficits in terms of neuropsychological functioning (PC-R. 736).[21]

Dr. Toomer testified that Mr. Coleman has "word retrieval difficulties" (PC-R. 738). Mr. Coleman's overall reasoning ability is primarily concrete as opposed to abstract (PC-R. 739). Dr. Toomer explained:

[W]e’re talking about someone whose level of functioning is primarily concrete, and under normal circumstances, that’s an important caveat.

Under normal circumstances, individuals begin to manifest the ability to abstract. You begin to see signs of them moving from concrete to the abstract in terms of their reasoning ability sometime just prior to the teen years, that kind of thing.

(PC-R. 741-42).

According to Dr. Toomer, an individual who is functioning concretely doesn’t go beyond the literal meaning in terms of projecting into the future or weighing alternatives, because that requires a measure of abstraction in that you are going beyond the literal meaning of the words in terms of time and other variables (PC-R. 742).

At some point, individuals begin to see - - they begin to sense that something is not here, you know. In other words, others are able to function abstractly more so than I am, other individuals are able to reason at a level that I'm having difficulty with. And as a result, a lot of times what you have is individuals begin to master ways of hiding that, of camouflaging that. Sometimes they do things like simply going along with the decisions of others, or what have you, without questioning, indicating that they understand when they may not fully understand, all those kinds of things may occur.

(PC-R. 744).

Dr. Toomer observed that Mr. Coleman's responses during the clinical interview reflected a pattern of chronic substance abuse dating back to 1987 (PC-R. 745). Dr. Toomer called it polysubstance abuse, because in addition to alcohol and cocaine back at age seven or eight, Mr. Coleman was also sniffing transmission fluid and lacquer thinner (PC-R. 745). Dr. Toomer explained the effects of this extensive use of intoxicants at an early age:

Well, I would think in my opinion, you know, when you have someone with a history of not just a substance abuse, but someone who has been using inhalants beginning at an early age, you're talking about exacerbation is a likelihood of some underlying organicity, organic impairment as a result of that, not just the fact that it's a toxic substance, but the fact that it's being inhaled, you know, at a much earlier age. And when you talk about inhaling a particular substance, whether you are talking about something like this transmisison fluid, or you are talking about cocaine nasally, you are talking about an impact that is more direct, an impact that is basically more intense, if you will, in terms as opposed to it being - - some substance being utilized in some other particular fashion, of being ingested in some other particular fashion.

But I think here we are talking about the age of the onset, you know. **You've got this kind of process occurring at a very early age, and the likelihood of some impairment resulting from that is very significant.**

(PC-R. 746)(emphasis added).[22]

Dr. Toomer tested Mr. Coleman's academic levels. He scored very poorly in terms of basic academic skills (PC-R. 748). His reading was at a third grade level and his math skills were at a fourth grade level (PC-R. 748). There was also a history of placement in specialized education classes(PC-R.748).

Dr. Toomer also performed intelligence testing, utilizing the Wechsler Adult Intelligence Scale-III (PC-R. 749). Mr. Coleman had a full sale IQ of 67 (PC-R. 749).[23] This score places Mr. Coleman's intellectual functioning in the mentally deficient range (PC-R. 749).[24]

Mr. Coleman's school records reflect inconsistency and lack of achievement (PC-R. 753). One year, Mr. Coleman failed all of his courses (PC-R. 754). Other times, there were a few C's, but mainly D's and F's (PC-R. 754). The records also verified that Mr. Coleman was placed in special education classes (PC-R. 753).

From his testing and his examination of the school records, Dr. Toomer concluded that there was a likelihood that Mr. Coleman suffered organic brain impairment (PC-R. 754).[25]

In addition to apparent brain damage, Dr. Toomer testified that Mr. Coleman also suffers from mental illness (PC-R. 759). Aside from polysubstance abuse, Mr. Coleman also suffers from severe depression (PC-R. 759-60).[26] Dr. Toomer explained the effects these illnesses and deficiencies had on Mr. Coleman:

A. Yeah. I think the deficits and abstract reasoning have been, for the most part, lifelong. And I think that in this situation, or in any situation that's stressful, that requires immediacy, that demands immediacy, that requires abstract reasoning, he is going to have a problem.

You add to that the other deficits in terms of the likelihood of some organic impairment, you add to that the likelihood of, you know, his ingesting toxic substances, and what you've got is someone who is incapable of responding in a premeditated fashion and who is basically going to be - - whose function is going to be motivated primarily by the deficits, motivated by those factors that we just mentioned.

(PC-R. 769-70).

Based on his review of the records, his examination and his testing, Dr. Toomer found two statutory mitigators: 1) the crime was committed while under the influence of extreme mental or emotion disturbance, and 2) Mr. Coleman's ability to appreciate the criminality of his conduct or to conform to the requirements of the law was substantially impaired (PC-R. 770-71).

During the postconviction evidentiary hearing, the State presented several rebuttal witnesses. Amanda Merrill, one of the victims in the case, testified that in 1988 she was arrested for aggravated assault; the charges were later dropped (PC-R. 840). She also had a charge for worthless checks; she payed restitution and adjudication was withheld (PC-R. 841).

Dr. James Larson, a psychologist, observed Dr. Toomer's testimony (PC-R. 843). He also reviewed the raw data from the Millon test that Dr. Toomer performed, and he submitted it to the national computer to score the test (PC-R. 844). Dr. Larson further reviewed the raw data for the Carlson Psychological Survey and he sent it to the company that publishes the test to score it (PC-R. 846).[27] Dr. Larson testified that he had everything Dr. Toomer had to make an evaluation of Mr. Coleman (PC-R. 849). He came to different interpretations to some degree and to some different conclusions (PC-R. 849).[28] As for differences, Dr. Larson found that Mr. Coleman met the criteria for antisocial personality disorder

(PC-R. 853).[29] Further, through performing a test relying exclusively on the record in this case, Dr. Larson concluded that Mr. Coleman fit into the subset of psychopathy (PC-R. 858-60).

Dr. Larson also evaluated Mr. Coleman for approximately two hours (PC-R. 862).[30] According to Dr. Larson, Dr. Toomer's diagnosis of depression may or may not be viable; Mr. Coleman could just be depressed because he is on death row (PC-R. 864).[31] However, Dr. Larson concurred with Dr. Toomer's diagnosis of polysubstance abuse (PC-R. 864). Dr. Larson stated that there is ample documentation in the record of polysubstance abuse (PC-R. 864). Dr. Larson also concurred with Dr. Toomer's diagnosis that Mr. Coleman was an abused or neglected child (PC-R. 871-72). And, Dr. Larson agreed that there were signs of organicity (PC-R. 910-11).[32] But, he disagreed that this excludes a finding of anti-social personality disorder (PC-R. 910-11). Thus, Dr. Larson concurred in the finding of three non-statutory mental mitigators that were not presented to Mr. Coleman's jury and/or sentencing judge.

With regard to Mr. Coleman's intelligence, Dr. Larson stated that Dr. Toomer used a well-known standardized intelligence test (PC-R. 866). Dr. Larson claimed that while the scores fall in the range of retardation, Dr. Toomer concluded that Mr. Coleman was not retarded (PC-R. 867). Based on this observation, Dr. Larson stated, "What that means to me is that these scores are underrepresentations; that is, they

aren't the best measures of intelligence" (PC-R. 867).[33]

Dr. Larson noted that in the 7th grade, Mr. Coleman's reading comprehension was in the 25th percentile and in arithmetic, he was at the 10th percentile (PC-R. 868). Dr. Larson claimed that Mr. Coleman's reading level is what one would expect from someone in the low average range, somewhere around 90 (PC-R. 868). His arithmetic score is an expectation for someone with an IQ of about 80 (PC-R. 869). Dr. Larson surmised that the IQ scores are most likely underrepresentations, and he thought they were in actuality several points higher, maybe ten points or more higher (PC-R. 869-70).[34]

However, Dr. Larson didn't know under what conditions the seventh grade testing was conducted (PC-R. 902). He acknowledged that there could have been error in that process as well (PC-R. 902). Dr. Larson further 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 didn't conduct any independent IQ testing (PC-R. 900).

**THE MENTAL RETARDATION HEARING**

[10]There was also testimony and the introduction of several exhibits as to a Brady issue.

[11]Dolly Leverson similarly testified at the postconviction hearing that she was fifteen when she became pregnant with Michael (PC-R. 641). When Michael was born, she was living with Michael's father, Ernest (PC-R. 642). Because Ernest and Marie worked, Dolly had no one with her if she went in to labor (PC-R. 642). So Ernest sent her to Georgia to her mother (PC-R. 642).

While she was in Georgia, Dolly didn't get any prenatal care (PC-R. 641). By this point, Ruby had returned to Georgia.

[12]In her postconviction testimony, Dolly explained that when Michael was two years old, she had twin girls (PC-R. 644). She married the father and lived with him until he went to Vietnam, and left her with no means of support (PC-R. 644). Financially, she was bad off (PC-R. 646). Without her mother's help, Dolly wouldn't have made it (PC-R. 646). Dolly's mom helped with the kids and with financial stuff (PC-R. 646). Aside from Michael, she had two babies, and one was very sick and had to have surgery (PC-R. 646). Dolly got state assistance, but this still did not cover all of their needs, and they had to go without (PC-R. 646).

[13]According to Dolly, when she returned to Miami, she did not take Michael with her because her Dolly's mother said that she was not old enough to raise a child (PC-R. 642). So Dolly left Michael with her mother, Ruby (PC-R. 642). Back in Miami, Dolly lived with her brother (PC-R. 642). By then, Ernest was already with Evelyn, the woman he eventually married (PC-R. 643).

[14]Michael was 7 going on 8 during the riots (PC-R. 687).

[15]This is the same neighborhood where Michael lived and had to walk to school (PC-R. 650). Michael couldn't help but see it (PC-R. 650).

[16]In her postconviction testimony, Dolly explained that Michael wanted a relationship with his father, but Evelyn kept this from happening (PC-R. 654-55). When Michael returned from his few visits with his father, he would be upset and couldn't understand why Evelyn didn't want him to be with his father (PC-R. 655). Michael would mope around the house or would just stay in his room (PC-R. 657).

[17]In her postconviction testimony, Dolly explained that Michael wasn't with his dad like he wanted to be because of Evelyn (PC-R. 643). This was very distressing to Michael who did not understand. Then when his dad died, he took it very hard.

[18]Before his father died, Michael had not gotten into any serious trouble like this (PC-R. 663).

[19]Stokes thought he requested a continuance after the first phase so he could present an expert from the University of Florida (PC-R. 706). Stokes couldn't remember his name, but he wasn't available for this time frame (PC-R. 706). The court denied the continuance (PC-R. 707).

[20]Dr. Toomer also spoke with Mr. Coleman's mother and his aunt, Ms. Wims (PC-R. 796).

[21]Dr. Toomer prepared a report which was marked as D-Ex. 12 (PC-R. 736).

[22]This further exacerbated the problem of Mr. Coleman's inability to reason abstractly (PC-R. 748).

[23]Dr. Toomer did not render an opinion as to mental retardation because while he had an IQ score, he had not analyzed of Mr. Coleman's adaptive functioning (PC-R. 772).

[24]Dr. Toomer confirmed that everything was consistent between the testing and life history that Mr. Coleman provided and the life history provided by others (PC-R. 751).

[25]Dr. Toomer saw no indication of malingering in this case (PC-R. 759).

[26]Dr. Toomer saw nothing that suggested the existence of an antisocial personality disorder (PC-R. 761).

[27]Dr. Larson stated that the Millon test had shortcomings of being applied to the incarcerated population (PC-R. 877). According to Dr. Larson, Dr. Toomer didn't follow the recommended procedure for the Carlson Survey (PC-R. 879).

[28]Dr. Larson did possess a conflict of interest in that he had been hired as defense experts for Mr. Coleman's co-defendant, Ronald Williams, and had previously testified on Mr. Williams' behalf (PC-R. 851).

[29]According to Dr. Larson, 70 to 80 percent of incarcerated men have that diagnosis (PC-R. 853-54).

[30]Despite the time spent with Mr. Coleman during his second evaluation, Dr. Larson did virtually no testing (PC-R. 890).

[31]Yet, according to Dr. Larson, Mr. Coleman's demeanor on the day of his interview was consistent with being depressed (PC-R. 897).

[32]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).

During the mental retardation hearing, both Dr. Toomer and Dr. Larson were again called to testify. Dr. Toomer testified that at the first hearing, he did not render an opinion regarding mental retardation, as there was no assessment of adaptive functioning deficits (PC-S2. 1098-99). Dr. Toomer had not looking at the issue of mental retardation (PC-S2. 1100). Rather, he did a comprehensive psychological evaluation to assess his functioning (PC-S2. 1100).

In light of the remand for a retardation determination, Dr. Toomer went back to try and complete the other prong, to assess adaptive functioning (PC-S2. 1099-1100). When Dr. Toomer saw Mr. Coleman in preparation for this hearing, he was in a good deal of pain and discomfort because of a problem with his back (PC-S2. 1102-03).[35] Throughout the process, he struggled to find a comfortable position (PC-S2. 1102-03). Dr. Toomer also observed some minor depression; but beyond that Mr. Coleman was cooperative during the process in spite of his physical deficits (PC-S2. 1102-03).

In order to assess adaptive functioning, Dr. Toomer utilized the Scales of Independent Behavior-Revised (SIB-R); he

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[33]However, Dr. Larson later stated that he agreed with Dr. Toomer's statement that the results on the IQ testing alone is not sufficient to diagnosis mental retardation (PC-R. 899).

[34]Dr. Larson felt that Dr. Toomer's scores are slight to moderate underestimates (PC-R. 907).

[35]Dr. Toomer saw Mr. Coleman at UCI in Starke (PC-S2. 1103).

administered it to Mr. Coleman and his mother (PC-S2. 1100). "[T]he goal of the process in terms of assessing adaptive functioning, the goal of the process is to identify adaptive functioning deficits by speaking with individuals who had knowledge of the defendant during his developmental years, and the mother was the one who was most readily accessible for that particular purpose." (PC-S2. 1101).

Dr. Toomer went back and reviewed documents that included school records (PC-S2. 1102). Dr. Toomer stated that Mr. Coleman's history suggests impairment of long standing duration (PC-S2. 1105). Mr. Coleman was placed in Special Ed classes in school (PC-S2. 1106). He was failing a large number of classes during certain periods of his educational history (PC-S2. 1106).

Dr. Toomer administered the long form SIB-R to Mr. Coleman; the scores indicated Mr. Coleman's age as 13 years (PC-S2. 1119). When he gave the test to Mr. Coleman's mother, the adaptive functioning level was equivalent to someone approximately eight years old (PC-S2. 1119). Dr. Toomer explained that this is not unusual:

> In terms of the protocols, you will get differences in terms of adaptive functioning that can vary from person to person. And the critical factor with regard to the SIB is that it's not so much that, you know - - it's not so much with regard to the level, but the fact that there are deficits in terms of adaptive functioning reflected in the protocol.

(PC-S2. 1119). Dr. Toomer also stated that it is not unusual in terms of an individual being mentally retarded but still having - - being able to manifest certain life skills (PC-S2. 1123).

Dr. Toomer concluded that Mr. Coleman is retarded under the criteria that the legislature has set forward in Florida for mental retardation (PC-S2. 1108). In addition to the test scores, with regard to adaptive functioning deficits, Mr. Coleman had limitations in 11 areas (PC-S2. 1108). Dr. Toomer also looked at onset of deficits prior to age 18 (PC-S2. 1109).

Dr. Larson testified during the mental retardation hearing that before the present determination of Mr. Coleman for mental retardation, Dr. Larson consulted with Dr. Toomer (PC-S2. 1130). It was agreed that the psychological testing would be performed in Pensacola and that Dr. Larson's psychologist would actually do the testing (PC-S2. 1130). Dr. Larson also met with Mr. Coleman on two occasions to conduct a clinical interview (PC-S2. 1131).

Mr. Coleman obtained a full scale score of 49 (PC-S2. 1131). On the wide range achievement test, Mr. Coleman got the lowest score possible (PC-S2. 1132). Dr. Larson discounted the current psychological testing because Mr. Coleman malingered on the TOMM very badly (PC-S2. 1131).[36] According to Dr. Larson,

[36]The TOMM is the Test of Memory Malingering; it's used to see if someone is malingering (PC-S2. 1130).

Mr. Coleman clearly didn't put forth a good faith effort, and he gave random responses (PC-S2. 1131-33).[37]

To address the issues of mental retardation, Dr. Larson turned to record review (PC-S2. 1133). He looked at school records and Dr. Toomer's past IQ testing (PC-S2. 1133). For adaptive behavior, he looked at Mr. Coleman's testimony and the trial transcript, as well as his interview notes from the 1990 evaluation (PC-S2. 1134). Dr. Larson did not talk to Mr. Coleman's mother; he didn't think it was necessary in terms of the task (PC-S2. 1162).

Similar to his previous testimony, Dr. Larson felt that the IQ of 67 is an underestimate (PC-S2. 1134). Some of Mr. Coleman's grades in school were above the kind of scores he would expect from someone who is retarded (PC-S2. 1135). Dr. Larson concluded that while Mr. Coleman may have intellectual

[37]However, Dr. Larson later acknowledged that there were several possible reasons for Mr. Coleman's poor performance. Dr. Larson was aware that Mr. Coleman refused to take his high blood pressure medication at the jail (PC-S2. 1166). Also, Mr. Coleman was in physical discomfort during his exam due to his back (PC-2. 1152). Further, Mr. Coleman was initially housed in disciplinary confinement when he was at the jail (PC-S2. 1166-67). Dr. Larson was concerned that the fact that he was in such a restrictive environment and was suffering from back pain and not taking his medicine, that this was going to impact the score (PC-S2. 1167).

Additionally, Mr. Coleman had informed Dr. Larson that he was having hallucinations; he said he was seeing and talking to ghosts (PC-S2. 1152). However, there is no indication that Dr. Larson was informed that Mr. Coleman was delusional at the time that he was administered the IQ testing and that he believed that he had been moved to the Escambia County jail so he could be killed. Such extreme distress could easily have affected Mr. Coleman's ability to perform on the IQ testing that was administered while Mr. Coleman feared for his life.

deficits and deficiencies, there's also evidence that he was functioning in the low average range (PC-S2. 1136).[38]

With regard to adaptive behavior, Dr. Larson stated that he found a number of things in the record that did not support a finding of impairment (PC-S2. 1137). According to Dr. Larson, these included that Mr. Coleman got an experienced attorney to present an alibi defense (PC-S2. 1137); he let security officers know during the last evidentiary hearing that he didn't want to hear emotionally upsetting testimony (PC-S2. 1137); he played basketball and knew the rules (PC-S2. 1138); he was described by his mother as good at cards, and he described himself as a good gambler (PC-S2. 1139); he seemed to handle himself quite well when he testified (PC-S2. 1140); he employed a fairly large vocabulary (PC-S2. 1141); he could fly on a plane (PC-S2. 1141); and he knew how many gold teeth he had (PC-S2. 1142).[39]

Dr. Larson acknowledged that while it's possible that Mr. Coleman could have an IQ below 70, he doesn't meet the prong on impaired adaptive functioning (PC-S2. 1145). Dr. Larson

[38]Dr. Larson in his review didn't notice any reference to Mr. Coleman being in special education classes in school (PC-S2. 1149). However, Dr. Larson stated that it would make no difference in his determination of retardation if he found out that Mr. Coleman was in special education classes (PC-S2. 1174).

[39]Nevertheless, Dr. Larson acknowledged that the records did confirm that Mr. Coleman had significant mental problems dating back to early childhood (PC-S2. 1166).

concluded that Mr. Coleman does not qualify for the definition of mental retardation under Florida Law (PC-S2. 1146).

## SUMMARY OF ARGUMENT

1. Mr. Coleman was deprived of the effective assistance of counsel at his capital trial. Because there was an issue as to guilt in this case, trial counsel chose to focus on the guilt phase proceedings at the expense of penalty phase preparation. Trial counsel failed to uncover readily available information and instead focused on lingering doubt during the penalty phase. The extensive mitigation established during the postconviction evidentiary hearing would have provided a reasonable basis for the jury's recommendation of a life sentence.

2. Mr. Coleman was denied a full and fair evidentiary hearing when the trial court refused to consider evidence relating to trial counsel's intoxication during the time of Mr. Coleman's trial. Collateral counsel should have been allowed to develop the record to demonstrate that trial counsel's intoxication impaired his actual conduct at trial.

3. Newly discovered evidence demonstrates that Mr. Coleman's death sentence is constitutionally unreliable. Subsequent to Mr. Coleman's conviction and sentence, Ronald Williams, the ringleader in this case, received a life sentence from this Court. The imposition of a life sentence upon Mr. Williams constitutes mitigation as to Mr. Coleman that operates

to provide a basis for a life recommendation and, hence, precludes a trial judge's override of the jury's decision.

4. Mr. Coleman's death sentence is unconstitutional due to the fact that he is mentally retarded. The procedures and standards used by the lower court in determining Mr. Coleman's mental retardation were erroneous and in violation of Mr. Coleman's constitutional rights. 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.

5. Judge Geeker should have disqualified himself from the postconviction evidentiary hearing proceedings. Mr. Coleman had a reasonable fear that the judge could not be fair and impartial due to his pre-determination of issues as well as his *ex parte* communication with a critical witness. This case should be remanded for a new proceeding before an impartial judge.

6. Mr. Coleman was deprived of his rights to due process when the State failed to disclose exculpatory evidence in its possession to Mr. Coleman. Confidence in the reliability of the outcome of the proceedings is undermined by the non-disclosures.

7. It was unconstitutional for the trial court to find as an aggravating circumstance that Mr. Coleman had previously been convicted of another felony involving the use or threat of violence to a person. To the extent that trial counsel did not preserve this claim, Mr. Coleman received ineffective assistance.

## STANDARD OF REVIEW

The constitutional arguments advanced in this brief present mixed questions of fact and law. As such, this Court is required to give deference to findings of historical fact. However, legal conclusions of the lower court are to be reviewed *de novo*. See Ornelas v. U.S., 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); Stephens v. State, 748 So.2d 1028 (Fla. 1999).

## 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 WAS INEFFECTIVE.**

### A. THE LEGAL STANDARD

As explained by the U.S. Supreme Court, an ineffective assistance of counsel claim is comprised of two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Williams v. Taylor, 120 S.Ct. 1495, 1511 (2000), quoting Strickland v. Washington, 466 U.S. 668, 687 (1984).

In Williams, 120 S.Ct. at 1514, the Supreme Court found deficient performance where counsel failed to prepare for the penalty phase of a capital case until a week before trial, "failed to conduct an investigation that would have uncovered extensive records," "failed to seek prison records," and "failed

to return phone calls of a certified public accountant." Justice O'Connor in her concurring opinion explained "trial counsel failed to conduct investigation that would have uncovered substantial amounts of mitigation," and as a result this was a "failure to conduct the requisite, diligent investigation." Id.

In Wiggins v. Smith, 123 S.Ct. 2527 (2003), 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. The Court stated:

> [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.

Wiggins, 123 S.Ct. at 2538.

Subsequently, in Rompilla v. Beard, 125 S.Ct 2456, 2466 (2005), the United States Supreme Court reiterated that:

> 'It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and **to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.** The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.' 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.).

(Emphasis added)(note omitted).

**B. DEFICIENT PERFORMANCE**

Mr. Coleman's trial counsel failed in his duty to provide effective representation for his client at the penalty phase. There was a wealth of mitigation that counsel did not present because his inadequate investigation failed to discover it. As a result, Mr. Coleman was deprived of substantial and compelling mitigating evidence.

During his postconviction testimony, it became clear that trial counsel, Ted Stokes, gave scant attention to preparation for a penalty phase proceeding. Investigation of mitigating evidence in Mr. Coleman's history was simply not conducted. Stokes 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 whether Mr. Coleman had ever been in special education classes (PC-R. 708), 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).

Stokes only spoke with Mr. Coleman's mother and his girlfriend in relation to the guilt phase alibi defense (PC-R. 694-95). Stokes testified as to the extent of any inquiries he made to Mr. Coleman's family regarding mitigation:

> Q. When you spoke with his family in Miami or by telephone, what inquiries did you make about his history in terms of potential developmental disabilities?
>
> 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).[40]

As he admitted in his testimony, Stokes' 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).

Stokes testified that he would have conducted the penalty phase differently if Mr. Coleman had admitted his guilt:

[40]At Mr. Coleman's penalty phase, Stokes did not present any evidence or testimony about Mr. Coleman's life in Liberty City.

Q. Did you see any reason in his defense, if he was not there, to try to develop mitigating evidence to present to a jury?

A. You mean in the penalty phase?

Q. Yes.

A. I really just had to rely on his family, is what we had, his girlfriend and his mother, in developing mitigating circumstances.

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

Q. And your trust and belief in him?

A. Right.

Q. Mr. Stokes, if your defense then was an alibi, I guess you wanted Mr. Coleman to be as normal of a human being as possible. You painted him as a - - your strategy would be to normalize him or make him human.

A. At least in the penalty phase, you know. I think I said that he was not a killer, didn't have the killer instinct. Even if they believed that he was there in Pensacola and he was this Mad Max, he couldn't kill Amanda Merrill. He cut her throat, but he stopped before he got to the jugular, and that would show that he was not the killer, that he was not capable of such as that.

(PC-R. 722)(emphasis added).

Stokes testified 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).

Despite Stokes' lack of investigation and preparation, the lower court determined that his action, or inaction, did not constitute deficient performance. In its order denying relief, the lower court found that trial counsel's decision to focus on the guilt phase and to argue that Mr. Coleman was not a killer constituted a reasonable trial strategy:

> In his third subclaim, the Defendant alleges that defense counsel was ineffective for failing to present mitigating evidence or evidence contradicting the State's aggravating circumstances. **At the evidentiary hearing, Mr. Stokes testified that his trial strategy was to focus on the guilt phase**, and to paint the Defendant as a normal individual who was not capable of murder and not the killer. Mr. Stokes testified that in his professional opinion, presenting the Defendant's "Liberty City background and all of the drugs . . . would lead the jury to believe he was capable of it." Further, Mr. Stokes testified that because the jury recommended against the death penalty he believed his strategy worked. Mr. Stokes testified that he did not believe presenting mitigating evidence of the Defendant's childhood and background or mental

> state would have made a difference to the Court. Strategic decisions made by counsel which are reasonable under the norms of professional conduct do not constitute "ineffective assistance of counsel." *See* Schwab v. State, 814 So. 2d 402, (Fla. 2002). Furthermore, a strong presumption exists that the challenged action constitutes sound trial strategy on the part of the defense. "[D]efense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected." Spencer, 842 So. 2d at 62. The Court finds that the Defendant has not overcome this presumption and shown that trial counsel's performance was unreasonable.

(PC-R. 1293-94)(footnotes omitted)(emphasis added).

What is completely ignored by the judge in denying relief is the fact that once the jury returned a life recommendation is that counsel's failure to investigate for mitigating evidence rendered him unprepared to present the mitigation to the judge at the time of the sentencing. Had the available mitigating evidence been presented to support the life recommendation and to provide it a reasonable basis under Florida law, an override of the life recommendation would have been precluded. This is precisely what this Court found in Williams v. State, 987 So. 2d 1, 13-14 (Fla. 2008). There this Court found ineffective assistance when after obtaining a life recommendation, trial counsel failed to present available mitigating evidence at the sentencing in order to provide a reasonable basis for the life recommendation and thereby preclude an override and the imposition of a death sentence.[41]

[41]The decision in Williams concerned Mr. Coleman's co-defendant, Ronald Williams. Judge Geeker, the same judge that presided in Mr. Coleman's case, had overridden a life recommendation and imposed a sentence of death. In collateral

In finding that trial counsel's performance was not deficient, Judge Geeker ignored the precedent of this Court, the Eleventh Circuit Court of Appeals and the U.S. Supreme Court. Contrary to the lower court's ruling, 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 125 S.Ct. at 2466. 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). There can be no reasonable strategy in arguing linger doubt, as counsel

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proceedings, Judge Geeker as he did in Mr. Coleman's case found trial counsel's failure to present mitigating evidence reasonable. As this Court explained, Judge Geeker:

> held that because trial counsel was successful in securing a life recommendation from the jury, the only relevant question was whether this mitigating evidence would have made a difference to him since he was also the sentencing judge in the case. He then found that the evidence contained in the report would not have made a difference to his decision to override the jury's life recommendation.

Williams v. State, 987 So. 2d at 13-14. This Court found this reasoning erroneous and reversed and remanded for the imposition of a life sentence.

did here,[42] instead of presenting valid, compelling mitigation. See, e.g., Darling v. State, 808 So. 2d 145 (Fla 2002)("We have repeatedly observed that residual doubt is not an appropriate mitigating circumstance."); see also Duest v. State, 855 So. 2d 33 (Fla. 2003). Using the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty, the Court in Wiggins held that counsel's minimal investigation into the defendant's background (only reviewing the defendant's PSI report and a DSS file), and abandonment of that investigation in order to focus on lingering doubt, fell short of reasonable professional standards:

[42]During his closing argument at the penalty phase, Stokes stated:

> The worst thing about the death penalty and the worst thing about recommending it is the finality of it. I think you'll recall reading just recently I believe that man's name was Mr. Richardson who had been sentenced some 20 years ago for poisoning his children. The man served 20 years in state prison and was later determined that he didn't poison his children so they let him out and he's working down here at the health club place in Fort Walton for Dick Gregory, I believe it is.
>
> And so, what I'm asking you to do in this case is at least give Mr. Coleman the chance that Mr. Richardson had, **so that when it's determined that he did not commit this crime, and when and if that man who did commit the crim is finally caught and brought to justice, that Mr. Coleman can be released from prison. You've heard his testimony, you've heard from his mother. If you recommend the death penalty in this case, if the Court follows that recommendation then an innocent man is going to die in the electric chair.** Thank you.

(R. 2081-82)(emphasis added).

> Counsel's conduct...fell short of the standards for capital defense work articulated by the American Bar Association...standards to which we have long referred as guides to determining what is reasonable. 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." (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty 11.4.1(C), p. 93 (1989)).

Id. at 2537 (citation omitted).

Similar to Wiggins, counsel seemingly abandoned his penalty phase investigation and instead focused on lingering doubt. Counsel's strategy was not a reasonable one. Because he had failed to conduct a reasonable investigation, counsel was unprepared to present the available mitigation either to the jury or to the sentencing judge once a life recommendation had been obtained.

With regard to mental health testimony, Stokes failed to request the assistance of experts to evaluate Mr. Coleman for mitigation. According to Stokes, he saw Mr. Coleman as an intelligent person and didn't see any mental defects (PC-R. 697). In his order denying relief, Judge Geeker found no error:

> Fifth, the Defendant alleges that defense counsel was ineffective for failing to request a mental health expert on behalf of the Defendant. At the evidentiary hearing, Mr. Stokes testified that he believed the Defendant was "very intelligent", streetwise, and mentally competent. **Accordingly, Mr. Stokes, based upon his assessment of the Defendant, decided that calling a mental health expert to testify was not necessary.**
>
> Based upon the Defendant's trial testimony and performance under cross examination, as well as Mr. Stokes' testimony that he believed the Defendant was bright, competent and intelligent, the Court finds

> that the Defendant has failed to meet his burden of showing that counsel's performance was deficient in any way. *See* Strickland v. Washington, 466 U.S. at 689 (1984)(holding that Courts should "eliminate the distorting effects of hindsight" in evaluating an attorney's performance).

(PC-R. 1294)(emphasis added).

Judge Geeker's order is contrary to fact and law. Had Stokes 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).

No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, Williams v. State, 987 So. 2d at 13-14, or on the failure to properly investigate or prepare. Williams v. Taylor; Wiggins v. Smith; Rompilla v. Beard. Here, under the applicable law, counsel's performance was deficient.

**C. PREJUDICE**

In Mr. Coleman's case, the lower court failed to conduct a prejudice analysis. This Court recently reiterated the standard for determining prejudice in an override case:

> [T]he trial court would essentially be precluded from overriding the jury's life recommendation unless the court could state that "the facts suggesting a sentence of death [were] so clear and convincing that virtually no reasonable person could differ." *Tedder, 322 So. 2d at 910*. In other words, to show prejudice in this type of case, Williams must show that his counsel failed to present evidence which would support a life sentence and constitute "a reasonable basis in the record to support the jury's [life] recommendation." *Stevens, 552 So. 2d at 1085* ("If there is a reasonable basis in the record to support the jury's recommendation, an override is improper.").

Williams v. State, 987 So. 2d 1, 13-14 (Fla. 2008). Under this Court's analysis in Williams, Mr. Coleman was prejudiced by counsel's deficient performance. As in Williams, his sentence of death must be vacated and the case remanded for the imposition of a life sentence. See Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1325-26 (Fla. 1994) (holding that counsel was ineffective in failing to discover and present evidence that a coperpetrator received disparate treatment, the defendant grew up in abject poverty, the defendant was a good child, and the defendant supported his family after his father died--evidence which could have supported the jury's life recommendation); Heiney v. State, 620 So. 2d 171, 174 (Fla. 1993) (holding that counsel was ineffective for failing to present mitigating evidence at sentencing where mitigating factors could have established reasonable basis to uphold jury's life recommendation so as to make jury override by court improper).

In Mr. Coleman's case, the only mitigating circumstances found by the trial court were Mr. Coleman's "close family ties and support of his mother." Coleman, 610 So. 2d at

1287. Despite striking the avoiding arrest aggravator, this Court affirmed the override, stating, "[T]he potential mitigating evidence presented in the instant case is of little weight and provides no basis for the jury's recommendation." Id. at 1287.

Mr. Coleman submits that 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. 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).

The virtually complete lack of mitigation presented during Mr. Coleman's penalty phase pales in comparison to the substantial mitigation listed above. This evidence is of the type that has been repeatedly recognized by this Court as mitigating. For example, this Court has repeatedly found that an individual's chemical dependency on drugs and alcohol constitutes valid mitigation. See Miller v. State, 770 So. 2d 1144, 1150 (Fla. 2000); Mahn v. State, 714 So. 2d 391, 400-1 (Fla. 1998); Kokal v. Dugger, 718 So. 2d 138, 142 (Fla. 1998); Robinson v. State, 684 So. 2d 175, 179 (Fla. 1996); Besaraba v. State, 656 So. 2d 441, 447 (Fla. 1995); Caruso v. State, 645 So. 2d 389, 397 (Fla. 1994); Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993); Mendyk v. State, 592 So. 2d 1076, 1080 (Fla. 1992); Clark v. State, 609 So. 2d 513, 516 (Fla. 1992); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Carter v. State, 560 So. 2d 1166, 1169 (Fla. 1990); Heiney v. Dugger, 558 So. 2d

398, 400 (Fla. 1990); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985); Huddleston v. State, 475 So. 2d 204, 206 (Fla. 1985); Norris v. State, 429 So. 2d 688, 690 (Fla. 1983).

This Court has also recognized mental health disorders as non-statutory mitigation and, in cases like that of Mr. Coleman, as statutory mitigation. See Orme v. State, 896 So. 2d 725, 732 (Fla. 2005); Davis v. State, 875 So. 2d 359, 372 (Fla. 2003); Arbelaez v. State, 775 So. 2d 909, 912 (Fla. 2000); Marquard v. State, 641 So. 2d 54, 56 n.2 (Fla. 1994); Cochran v. State, 547 So. 2d 928, 932 (Fla. 1989); Mann v. State, 420 So. 2d 578, 581 (Fla. 1982).

This Court has recognized that being raised in dysfunctional family circumstances is mitigating. See Rodgers v. States, 29 Fla. L. Weekly S 724, *26 (Fla. Nov. 24, 2004); Snipes v. State, 733 So. 2d 1000, 1008 (Fla. 1999); Mahn v. State, 714 So. 2d 391, 401-2 (Fla. 1998).

This Court has recognized that a defendant's impoverished background is mitigating. See Foster v. State, 614 So. 2d 455, 461 (Fla. 1993)(trial court gave special instruction to jury allowing the consideration of any factor in mitigation and specifically including poverty); Maxwell v. State, 603 So. 2d 490, 492 (Fla. 1992)("disadvantaged youth" found mitigating); Meeks v. Dugger, 576 So. 2d 713, 716 (Fla. 1991)(this court included "background of poverty and depravation" and "severe emotional problems as a result of his deprived childhood" in the

category of "substantial nonstatutory mitigating evidence"); Brown v. State, supra (this Court specifically held the trial court erred in rejecting "disadvantaged childhood, his abusive parents, and his lack of education and training" as mitigating).

This Court has found low intelligence to be mitigating. See Henyard v. State, 689 So. 2d 239, 244 (Fla. 1997)(trial court found low intelligence and emotional deficits to be mitigating); Sinclair v. State, 657 So. 2d 1138, 1142 (Fla. 1995)(trial court found "dull normal intelligence" mitigating); Larkins v. State, 655 So. 2d 95, 100-101 (Fla. 1995)(this Court recognized "poor reader"; "difficulty in school"; "dropped out of school at the fifth or sixth grade"; and "functions at the lower 20% of the population in intelligence" mitigating; remand for resentencing by trial court upon finding that mitigation in record was inconsistent with trial court's finding of no nonstatutory mitigation); Thompson v. State, 648 So. 2d 692, 697 (Fla. 1994)(this Court, in explaining its approach to Penry v. Lynaugh, 492 U.S. 302 (1989), stated that it has "elected to follow the approach of the United States Supreme Court and treat low intelligence as a significant mitigating factor with the lower scores indicating the greater mitigating influence."); Brown v. State, 526 So. 2d 903, 907-908 (Fla. 1988)(defendant's IQ of 70-75, classified as borderline defective or "just above the level for mild mental retardation" was part of the "ample evidence mitigating against death").

Finally, this Court has recognized child abuse as a mitigating circumstance. See Jackson v. State, 704 So. 2d 500, 506-507 (Fla. 1998)(trial court failed to adequately address nonstatutory mitigating circumstances, including defendant's difficult childhood that included sexual assault); Chandler v. State, 702 So. 2d 186, 200 (Fla. 1997)(trial court found that it is a mitigating factor that defendant had a deprived childhood or suffered abuse as a child); Boyett v. State, 688 So. 2d 308, 310 (Fla. 1997)(traumatic family life and history of sexual abuse among nonstatutory mitigating circumstances supporting life sentence recommendation); Strausser v. State, 682 So. 2d 539, 540 at n. 3, 542 (Fla. 1996)(trial court found nonstatutory mitigation in that defendant was severely abused as a child; jury override reversed where substantial mitigation, including expert testimony that Stausser had been physically and sexually abused by his stepfather as a young child, supported jury recommendation); Campbell v. State, 571 So. 2d 415 (Fla. 1990)(abused or deprived childhood).

The prejudice here is clear. "[T]he 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 at 14. This in turn would have precluded the trial judge's override of the jury's decision. Id. Relief in the form of a life sentence is warranted.

**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.**

In Claim VIII of his 3.850 motion, Mr. Coleman alleged ineffective assistance of counsel based on the following points:

> (1) **defense trial counsel's intoxication throughout his representation of Mr. Coleman**;
>
> (2) defense trial counsel's failure to investigate first and second stage evidence in Mr. Coleman's case;
>
> (3) defense trial counsel's failure to present mitigating evidence, and evidence to contradict the government's aggravating circumstances alleged;
>
> (4) defense trial counsel's failure to object to jury instructions and unconstitutional statutes;
>
> (5) defense trial counsel's failure to request a mental health expert on behalf of Mr. Coleman; and
>
> (6) defense trial counsel's failure to object to the charge of attempted felony murder that was filed against Mr. Coleman.

(PC-R. 385-86)(emphasis added).

In its order granting an evidentiary hearing, the lower court stated:

> Defendant raises twenty-one claims in his amended motion, some with numerous sub-issues. At the Huff hearing, the State indicated that it had no objection to an evidentiary hearing on claim VIII - Ineffective Assistance of Counsel with six sub-claims, and on claim IX - Defendant received Inadequate Mental Health Assistance - to the extent that it overlapped the claim raised in ground VIII. The State opposed an evidentiary hearing on the remaining claims.

(PC-R. 570).

* * * *

> 3. The Court will convene an evidentiary hearing on the following **three grounds and all sub issues contained therein:**

IV. The State Withheld Exculpatory Impeachment Evidence;

VIII. **Ineffective Assistance of Counsel**;

IX. Defendant Received Inadequate Mental Health Assistance.

(PC-R. 572)(emphasis added).

Thus, Mr. Coleman was granted an evidentiary hearing on all sub issues of his ineffective assistance claim. This included the allegation of "defense trial counsel's intoxication throughout his representation of Mr. Coleman." Yet, when collateral counsel began to question Stokes about his alcohol abuse, the State objected (PC-R. 708-09). Based on the State's argument that under this Court's decision in the Bryan case Mr. Stokes' alcoholism was irrelevant to these proceedings, the lower court sustained the State's objection (PC-R. 712, 716).[43]

[43]Collateral counsel was permitted, however, to proffer the documents that she had intended to question Stokes about (PC-R. 834-35). They were as follows:

> D-Ex. 3 is a notice of administrative hearing dated February 26, 1991; it concerns a DWI received by Stokes in October of 1988 (PC-R. 834).
> D-Ex. 4 is a certificate of Stokes attending a DWI education school on June 8, 1989, which would have been the week immediately after Mr. Coleman's trial (PC-R. 834).
> D-Ex. 5 is a letter from the Baptist Hospital in Pensacola to a Judge Green, verifying that Stokes successfully completed inpatient treatment related to alcoholism in early 1990 (PC-R. 835).
> D-Ex. 6 is an order from this Court relating to Bar complaints No. 90-438 and 90-573 approving the referee's report. Attached to that as part of the same exhibit is a conditional plea for consent

The lower court's ruling was erroneous. In Bryan v. State, 748 So. 2d 1003 (Fla. 1999), a second or successive Rule 3.850 motion was at issue. This Court noted that it had previously found trial counsel to have rendered effective assistance of counsel in Mr. Bryan's case when considering the first Rule 3.850 motion.[44] Thus, this Court concluded that "regardless of counsel's condition, he rendered effective assistance." Id. Here, however, at the time of Mr. Coleman's evidentiary hearing, no such finding had been made as to Stokes' representation of Mr. Coleman. Thus, it was error to preclude counsel from being allowed to develop the record to demonstrate that Stokes' 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.

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judgment detailing the specifics of those complaints and how it was evolved (PC-R. 835).

D-Ex. 7 is another order from this Court relating to Bar complaint No. 93-408.

D-Ex. 8 is an affidavit from Stokes presented in the Anthony Bryan case. The affidavit relates to his use of alcohol and it covers the same time frame as Mr. Coleman's case (PC-R. 835).

D-Ex. 9 is an affidavit from Sharon Price, Stokes' former secretary. It relates to information concerning Stokes and his alcohol problem up until May of 1989, on the eve of Mr. Coleman's trial (PC-R. 836).

D-Ex. 10 is a letter from Stokes to Olivia Klein, who was staff counsel for the Florida Bar at the time (PC-R. 836).

D-Ex. 11 is a letter from the Florida Bar to Stokes concerning the complaint of Florida Bar No. 2000-521 (PC-R. 836).

[44]Stokes was also the trial counsel in the Bryan case.

## 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.**

In Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), this Court held that a defendant could collaterally challenge his death sentence when a co-defendant's death sentence is subsequently reduced to a life sentence. Specifically, this Court wrote:

> Two requirements must be met in order to set aside a conviction or sentence because of newly discovered evidence. First, the asserted facts "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." *Hallman, 371 So. 2d at 485*. Second, "the newly discovered evidence must be of such nature that it would *probably* produce an acquittal on retrial." *Jones v. State, 591 So. 2d 911, 915 (Fla. 1991)*. The *Jones* standard is also applicable where the issue is whether a life or death sentence should have been imposed. *Id.*

Scott, 604 So. 2d at 468 (emphasis added). In Scott, this Court granted relief and reduced Scott's sentence to one of life imprisonment. In doing so, this Court explained:

> In the instant case, we find that both requirements have been met and relief is appropriate. **Robinson's life sentence was not imposed until after Scott's direct appeal was completed. Thus, this fact could neither be known nor discovered at the time that this Court reviewed Scott's death sentence. Moreover, the record in this case shows that Scott and Robinson had similar criminal records, were about the same age, had comparable low IQs, and were equally culpable participants in the crime.**

Id.

When this Court considered Mr. Coleman's direct appeal, this Court affirmed the sentencing judge's decision to

override a jury's life recommendation and impose a sentence of death. Coleman v. State, 610 So. 2d 1283 (Fla. 1992). At the time of Mr. Coleman's sentencing, Mr. Coleman's co-defendant, Ronald Williams, had not been tried or sentenced. Only after Mr. Coleman was sentenced to death was Mr. Williams charged, tried and convicted. At Mr. Williams' trial, the State presented a case that included the following:

> Darrell Frazier testified that, during the several days prior to the murders, he, Williams, Coleman, and Robinson met several times to discuss the theft and at one meeting Williams stated that, if McCormick was involved with the theft, he should be "dropped." **Darrell Frazier testified that Williams ordered them to "drop" whoever was involved with the theft of his money and drugs**. Darrell also testified that, after returning from Crenshaw's house, he told Robinson, "Let's go man. We got what we came for," and that Coleman responded "No, man, the nigger told us we got to drop them, man." Darrell testified that, upon being advised that Crenshaw had been released, Williams told Darrell that he had "fucked up. [He] shouldn't have did that." Darrell Frazier also stated that, upon returning to Miami, Williams paid him, Robinson, and Coleman $ 9,000 each and paid Bruce Frazier $ 3,000.

Williams v. State, 622 So. 2d 456, 459 (Fla. 1993)(emphasis added). Mr. Frazier's testimony was not presented at Mr. Coleman's trial because he was a co-defendant who stood trial along side Mr. Coleman and another co-defendant, Mr. Robinson. Coleman v. State, 610 So. 2d at 1285 ("These codefendants did not blame one another for these crimes, nor did anyone confess. Coleman and Robinson raised alibi defenses, and Frazier held the State to its burden of proof by standing mute.").[45]

[45]After receiving a death sentence along side Mr. Coleman, Frazier agreed to testify against Williams in exchange for a reduction of his death sentence. Williams, 622 So. 2d at 460.

When considering Mr. Williams' direct appeal challenging his conviction and sentence of death, this Court affirmed the sentencing judge's decision to override the jury's life recommendation. This Court explained:

> The record unequivocally establishes that **Williams was in charge and that he ordered his "enforcers" to recover his drugs and money and to kill anyone involved with the theft**. Furthermore, the record also reflects that the Fraziers were less culpable because they disobeyed Williams' orders by allowing Crenshaw to escape and because they did not kill any of the victims.

Williams, 622 So. 2d at 464 (emphasis added).

In January of this year, this Court granted Williams post-conviction relief and ordered his death sentence reduced to a sentence of life imprisonment. This Court explained:

> Further, as in these prior cases, we conclude 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**. Under our case law, it is the existence of such evidence of mitigation in the record that operates to provide a basis for a life recommendation and, hence, preclude a trial judge's override of the jury's decision.

Williams, 987 So. 2d at 14 (emphasis added).

Under the same reasoning that this Court used in ordering Williams' sentence reduced, 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." Certainly, a life sentence

for the mastermind who ordered his brain damaged underlings to commit murder on his behalf would provide a jury with a reasonable basis for recommending a life sentence for one of the underlings. When considered cumulatively with the mitigating evidence presented during Mr. Coleman's postconviction proceedings, State v. Gunsby, 670 So. 2d 920 (Fla. 1996), it is clear that 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.**

On June 20, 2002, the U.S. Supreme Court announced that the execution of the mentally retarded violated the Eighth Amendment and the evolving standards of decency. Atkins v. Virginia, 122 S. Ct. 2242 (2002). While so holding, the Supreme Court indicated, "As was our approach in Ford v. Wainwright, with regard to insanity, we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." Atkins, 122 S. Ct. at 2250, quoting Ford v. Wainright, 477 U.S. 399, 405 (1986).

### A. RULE 3.203

Rule 3.203, Fla. R. Crim. P., provides the following definition of mental retardation:

> As used in this rule, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services in rule 65B-4.032 of the Florida Administrative Code. The term "adaptive behavior," for the purpose of this rule, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

Rule 3.203(b), Fla. R. Crim. P. (2004).

However, Rule 3.203(d)(4) as currently written does not provide a constitutionally adequate procedure for resolution of mental retardation claims presented by individuals whose death sentences were final before the decision in Atkins. According to Rule 3.203(d)(4), a death-sentenced defendant whose conviction and sentence are final and who argues that his mental retardation precludes a sentence of death "shall" raise his Eighth Amendment challenge in a motion pursuant to Rule 3.851.

The procedure for determining mental retardation and hence eligibility for a death sentence adhere to Sixth Amendment guarantees. Rule 3.203 does extend Sixth Amendment guarantees to those who have not yet been sentenced. Those who have no death sentence in place will receive the right to the effective assistance of counsel under Strickland v. Washington

at the Rule 3.203 proceeding. They will have the right to the disclosure of exculpatory or favorable evidence relevant to the mental retardation defense that is in the State's possession. Brady v. Maryland, 373 U.S. 83, 87 (1963). They will have the right to assistance of a competent mental health expert. Ake v. Oklahoma, 470 U.S. 68 (1985). These individuals will have the right of confrontation and the right to a jury. Crawford v. Washington, 124 S.Ct. 1354 (2004); Blakely v. Washington, 124 S. Ct. 2531 (2004). An individual not yet under a sentence of death will have the right to a direct appeal of an adverse verdict to this Court. That appeal will include an enforceable guarantee that the death-sentenced individual will receive effective appellate representation. Evitts v. Lucey, 469 U.S. 387 (1985).

Yet for those who are currently under a sentence of death, Rule 3.203 strips them of all of those Sixth Amendment and due process guarantees. By having proceedings for determining the death-sentenced defendant's mental retardation conducted in Rule 3.851 proceedings, the death-sentenced defendant will not receive the benefits of the Sixth Amendment. There will be no Strickland guarantee. Lambrix v. State, 698 So. 2d 247 (Fla. 1996). This Court has never held that Ake v. Oklahoma applies in Rule 3.851 proceedings. Further, Rule 3.851 proceedings have been defined as quasi-criminal in nature. State ex rel. Butterworth v. Kenny, 714 So. 2d 404, 409-10 (Fla. 1998). As a result, the State has argued that Rule 3.851

proceedings are properly designated as civil, and thus not criminal proceedings within the meaning of the Sixth Amendment. Roberts v. State, 840 So. 2d 962, 971 (Fla. 2002). Thus, the State argues that Sixth Amendment rights do not attach to a Rule 3.851 proceeding. An appeal from the denial of Rule 3.851 relief is not a direct appeal that includes an enforceable right to effective appellate representation under due process. Finally, a defendant raising a mental retardation claim under Rule 3.851 will have no post-conviction procedure in which he may challenge his counsel's effectiveness or the State's failure to disclose exculpatory information.

Rule 3.203(d)(4) provides those who are already under a death sentence with less constitutional protection on a basis that can stand no scrutiny and justify no distinction--i.e. the death sentence was already in place. Everyone facing a death sentence who argues retardation must have the same opportunity with the same constitutional protections to present his claim.

Rule 3.203(d)(4) does not provide for a constitutionally adequate procedure for resolution of a defendant's retardation who is already under a sentence of death. Mr. Coleman contends that any pending death sentence must be vacated where a prima facie showing of mental retardation is made, and a criminal trial that comports with the Sixth Amendment must be ordered to determine whether the defendant is in fact retarded.

Mr. Coleman's mental retardation issue should have occurred in a proceeding which comported with the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

**B. MR. COLEMAN'S COMPETENCY**

On or about July 3, 2007, undersigned counsel filed a motion in the lower court entitled Second Motion To Disqualify Judge And Notice That Mr. Coleman May Be Incompetent (PC-S2. 1037-50). With regard to the competency issue, counsel explained:

> 8. Meanwhile on Friday, June 15, 2007, undersigned counsel received a call from authorities at Union Correctional Institution (hereinafter UCI) where Mr. Coleman is housed on death row. Concern for Mr. Coleman's mental and physical condition were expressed and undersigned counsel was requested to contact Mr. Coleman. Undersigned counsel scheduled an appointment to see Mr. Coleman on Tuesday, June 19th. However, while counsel was at UCI meeting with other clients, he was advised that Mr. Coleman was not available. He had been taken from UCI to a medical facility. Upon leaving UCI, counsel arranged for a telephone call with Mr. Coleman to occur on June 21st. During undersigned counsel's ensuing phone call with Mr. Coleman, counsel became quite concerned for Mr. Coleman's mental state. Mr. Coleman told undersigned counsel how he had been kidnapped and taken to Pensacola where someone told him that he was going to be killed before he was allowed to leave. Mr. Coleman said that someone came to the cell he was in and told him this. In the phone conversation, Mr. Coleman also talked about how his back was injured. He indicated that the trip there had been very hard on his back. He had been in a lot of pain, and still was. He said that the staff at UCI was arranging for him to have surgery soon. He said that when he was kidnapped and taken to Pensacola even though he was in extreme pain, he was denied the medication that UCI provided him in light of his condition. When Mr. Coleman talked about what occurred on the trip to Pensacola, he broke down and sobbed. He said he was afraid to eat while he was there because he thought they might kill him with

poison. He related that he saw a doctor in Pensacola and he asked him if his lawyer knew what was going on. The doctor replied that his lawyer knew, but apparently did not care and did not want to be present. Mr. Coleman told undersigned counsel that he never wanted to go back to Pensacola because he knew that they were going try to kill him there. He said he even signed a paper to that effect, so that there would be some document showing that the people in Pensacola had no right to kidnap him. Near the end of the conversation, Mr. Coleman said that he hoped that he died during the surgery that he said he had been told was going to happen soon because he was so tired of "this" and could not take it anymore.

9. In this telephonic conversation, Mr. Coleman's thoughts and words were a jumble. He did not express the thoughts discussed in the proceeding paragraph in a logical or cogent fashion. It took some effort to make sense of what he was saying. Mr. Coleman has always had difficulty with names. He seldom remembers anyone's full name. What he remembers may be a first name, a last name or some kind of nickname. Sometimes all that he can relate is a description. In telling this story of this kidnapping and the threat on his life, he provided no names. Mr. Coleman sounded exceedingly fearful. He seemed to genuinely believe that there had been an effort to kill him while he was in Pensacola, and it was clear that he would do whatever he could to avoid returning to Pensacola because of what must be a paranoid delusion. Despite his fear of being killed in Pensacola, at the end of the conversation it was clear that he was seriously thinking that death might be a relief. His statement that may be he would die during surgery was made quietly, almost to himself, and the manner with which he spoke was full of absolute despair and hopelessness.

10. Because of the paranoid ideation displayed by Mr. Coleman in the June 21st phone call and because of what sounded like suicidal inclination, undersigned counsel scheduled another trip to UCI to see Mr. Coleman on June 26, 2007. Before his departure for UCI, counsel received Mr. Harrison's pleadings, Part I and Part II. Upon reading these documents counsel believed a motion to disqualify was necessary. Accordingly, counsel decided he needed to explore Mr. Coleman's competency to sign a verification of the motion to disqualify.

11. When Mr. Coleman was brought in to an interview room to meet with counsel, it was clear that he was in extreme pain and was experiencing difficulty in walking. Once again, Mr. Coleman immediately began talking about how he had been kidnapped and taken to Pensacola. He again explained that when he got there and he was alone in a cell, this person who was covering his identification badge and his face told him that "they" were going to kill him before he left and that he needed to think about that. Mr. Coleman related how afterwards he was afraid to eat because he thought "they" may be poisoning him. When "they" did not give him the medication that he had been receiving at UCI, Mr. Coleman said that he said nothing because he was afraid "they" would poison the medication. Mr. Coleman talked about how much his back hurt from the trip, but he tried not to complain because he thought "they" might do something to make it worse. He said he was afraid to be alone with anyone while he was there because he did not know if it would be the person who would try to kill him. He said that "they" took him to a "doctor" while he was there. Mr. Coleman said the "doctor" indicated that his lawyer knew he was there. Mr. Coleman said he protested that his lawyer had not told him anything about going to Pensacola. Mr. Coleman said that he thought the "doctor" was trying to trick him. He knew that his lawyer would have told him about going to Pensacola if he had known that it was going to happen. As a result, he was even more scared and afraid of what the doctor was up to. So, he just said and did whatever the doctor wanted and hoped it would be over. Mr. Coleman said the "doctor" kept hurrying him. Mr. Coleman said all he could think about was how he wanted to be back at UCI.

12. Mr. Coleman was unable to give any names. He did not remember the doctor's name. He could not remember his court-appointed lawyer's name. He said when he got back to UCI he signed some paper some "girl" gave him. He said she was a investigator who said she worked for his lawyer, but he did not remember her name. Signing the paper meant he could never be kidnapped and taken to Pensacola again. He knew if he went back that "they" would kill him.

13. When I turned the subject to Mr. Harrison's pleadings, I had to change subjects and get Mr. Coleman to understand what I was talking about. Mr. Coleman knows Mr. Harrison simply by "Baya". When "Baya's" name comes up, Mr. Coleman always gets agitated. So with the mention of "Baya", Mr. Coleman

> immediately started into a rant about Mr. Harrison. Undersigned Counsel then tried to discuss with him the fact that Mr. Harrison had filed pleadings with the Court in which he made some allegations about him. This caused Mr. Coleman to again launch into a paranoid rant against Mr. Harrison. Mr. Coleman recited his understanding of how "Baya" had come to prison and tried to get access to the papers that he had at the prison because he was working for the State. Mr. Coleman made it clear that he did not want anything to do with Mr. Harrison. However, he was not able to engaged in a meaningful dialogue regarding the events in 2004 while Mr. Harrison was his court-appointed counsel.
>
> 14. It became very apparent that Mr. Coleman is not currently able to assist undersigned counsel in any meaningful fashion as to the facts and events giving rise to Mr. Harrison's allegations. Counsel does not believe that Mr. Coleman is competent to sign a verification to a motion to disqualify. During the recent interviews, Mr. Coleman either could not stay focused or undersigned counsel could not track his answers. Further, Mr. Coleman is a critical and necessary witness as to the August 2nd hearing. However, due to his paranoid delusion that there are people in Pensacola who will kill him if he gets transported there, Mr. Coleman's ability to testify is doubtful. Any effort to transport Mr. Coleman so that he could testify may result in Mr. Coleman harming himself.

(PC-S2. 1041-46)(footnotes omitted).

On July 17, 2007, an evidentiary hearing was held in the circuit court regarding Mr. Coleman's claim that he was mentally retarded (PC-S2. 1072). Mr. Coleman's court appointed counsel for the hearing, Harry Brody,[46] addressed the competency issue as follows:

[46]Mr. Brody was appointed by Judge Geeker to represent Mr. Coleman in the proceedings to determine whether he was mentally retarded and thus ineligible to be sentenced to death. Normally, criminal defendants charged in a capital counsel would be entitled to effective representation within the meaning of the Sixth Amendment at proceedings to determine mental retardation. However since the hearing in Mr. Coleman's case was occurring in Rule 3.851 proceeding, the State has asserted

that Mr. Coleman was not entitled to effective representation and that Mr. Coleman cannot challenge Mr. Brody's dismal performance as counsel.

Nevertheless, Mr. Brody has a track record as evidenced by the recent opinion in Downs v. McNeil, 2008 U.S. App. LEXIS 6090 (11th Cir. March 24, 2008). There, the Eleventh Circuit wrote:

> Downs alleges that his lead attorney was abusing alcohol and living out of his car during the time he represented Downs. Concerned counsel's alcoholism was delaying the filing of his habeas petition, Downs wrote to another attorney working on his case:
>
> I saw . . . an investigator from your office last Tuesday . . . . I tried talking to [him] about the status of my federal appeal, but he said [CCRC-N attorney Harry] Brody would have to respond to legal matters. Every time I've seen Brody it's ob[v]ious that he has been drinking. His condition was so bad this last visit that he damn near fell out of his chair. . . . In all candor, his condition concerns me greatly.
>
> Does Brody understand the importance of protecting my right to federal review? I keep telling him to initiate federal action now instead of waiting to see if the writ is denied by the Florida Supreme Court. He keeps saying that if the state writ is denied, there will be a petition for rehearing followed by a mandate. But what if the court denies the writ and says no rehearing will be entertained. Then what?! He needs to understand that my federal appeal needs to be initiated now, instead of waiting.

Downs, 2008 U.S. App. LEXIS 6090 at *9-10. The Eleventh Circuit concluded an evidentiary hearing on Downs' claims were required.

> I have not asserted any competency problems in the case myself. I have no idea about his - - what he's seen. I've not discussed it with him, but I'm not - - we're not asserting any lack of competency issues at this time, competency to conduct post-conviction.

(PC-S2. 1076).[47]

Judge Geeker stated:

[47]It is unclear what is the appropriate vehicle for Mr. Coleman to challenge Mr. Brody's dreadful performance as his counsel in the proceeding that determined his eligibility for a death sentence. Since a full record detailing Mr. Brody's failings and misconduct has not been developed, presumably this is not the proper forum for presenting Mr. Coleman's Sixth Amendment challenge to Mr. Brody's ineffective assistance.

> I understand that he's [Martin McClain] representing Mr. Coleman in some other matters before the Florida Supreme Court. But as far as these matters, I'm not going to find that he has a standing to raise issues on behalf of Mr. Coleman. You're his counsel of record.

(PC-S2. 1076).

Mr. Coleman, who was not present for the hearing, testified via phone from UCI as to the waiver of his presence at the hearing (PC-S2. 1080).[48] Mr. Coleman stated, "I don't want to go down there. They tried to kill me down here." (PC-S2. 1082). Subsequently, the following exchange occurred:

[48]Mr. Coleman signed a waiver not to come to the hearing (PC-S2. 1081).

THE COURT: Okay. So you are satisfied and comfortable with the decision you made not to come here for the hearing; is that correct?

THE DEFENDANT: **Them people in the jail - - I don't want to go down there.**

THE COURT: You didn't did not want to come down here?

THE DEFENDANT: I didn't want to go down there.

THE COURT: Mr. Brody is going to ask you another question, Mr. Coleman.

MR. BRODY: You do not want to be brought over for his hearing, do you?

THE DEFENDANT: No, I don't want to go down there.

MR. BRODY: Okay. Because you're worried - - because you're worried - - why?

THE DEFENDANT: **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.**

MR. BRODY: When you were there, nothing like that happened to you; isn't that right?

THE DEFENDANT: What did you say?

MR. BRODY: Nobody hurt you while you were here, right?

THE DEFENDANT: 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.

MR. BRODY: Right, so you had some problems. And you also have - - you also told me about you've had back problems, right?

THE DEFENDANT: Back problems?

MR. BRODY: Your back hurts, too, when you're transported?

THE DEFENDANT: Yeah. I got to get a thing - - surgery - - cutting people to cut my back there. Yeah, they are going to cut my back down there, you know.

MR. BRODY: Surgery?

THE DEFENDANT: Yeah, yeah. They are going to have my surgery. Yeah.

MR. BRODY: And you had expressed that long trip bound up, that's also a reason why you expressed you didn't want to come, right?

THE DEFENDANT: Yeah, yeah, yeah.

MR. BRODY: Okay. So you want - - I mean, we're going to have this hearing. Otherwise, they'll come get you and bring you over here. So do you want to come or not want to come?

THE DEFENDANT: I don't want to go down there, no.

MR. BRODY: You don't want to come, right?

THE DEFENDANT: No, I don't want to go down there.

(PC-S2. 1082-1085)(emphasis added). The hearing then proceeded without Mr. Coleman's presence and without a competency evaluation.

In his subsequent order denying the mental retardation issue, Judge Geeker stated:

> Although Defendant's appellate attorney has made an allegation that Defendant may be incompetent to proceed, counsel for Defendant, Harry Brody, affirmatively stated that he was not asserting any lack of competence on behalf of his client, and saw no basis for such. This Court listened to the responses being given to questions asked by the Court and counsel, and was satisfied that Defendant was able to make informed, voluntary decisions with regard to his waiver of appearance.

(PC-S2. 1311, fn 1).

Judge Geeker erred in not making a determination of Mr. Coleman's competency. Under Rule 3.851(g)(2), Fla. R. Crim. P.,

> Collateral counsel may file a motion for competency determination and an accompanying certificate of counsel that the motion is made in good faith and on reasonable grounds to believe that the death-sentenced prisoner is incompetent to proceed. The motion and certificate shall replace the signed oath by the prisoner that otherwise must accompany a motion filed under this rule.

And, in accordance with Rule 3.851 (g)(3), Fla. R. Crim. P.,

> If, at any stage of a postconviction proceedings the court determines that there are reasonable grounds to believe that a death-sentenced prisoner is incompetent to proceed and that factual matters are at issue, the development or resolution of which require the prisoner's input, a judicial determination of incompetency is required.

Here, despite reasonable grounds for incompetence advanced by one of Mr. Coleman's counsel, the court failed to conduct an adequate inquiry into the matter. Moreover, contrary to Judge Geeker'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.

**C. THE EVIDENTIARY HEARING**

During the mental retardation hearing, both Dr. Toomer and Dr. Larson were called to testify.[49] Dr. Toomer testified that at the 2001 hearing, he did not render an opinion regarding mental retardation, as there was no assessment of adaptive functioning deficits (PC-S2. 1098-99).[50] Dr. Toomer was not looking at the issue of mental retardation (PC-S2. 1100). Rather, he was doing a comprehensive psychological evaluation to assess his functioning (PC-S2. 1100).

As part of this process, Dr. Toomer went back to try and complete the other prong, to assess adaptive functioning (PC-S2. 1099-1100). When Dr. Toomer saw Mr. Coleman in preparation for the retardation hearing, he was in a good deal

[49]Dr. Toomer and Dr. Larson also testified during Mr. Coleman's original postconviction evidentiary hearing in 2001.

[50]At the first hearing, through intelligence testing, Dr. Toomer determined that Mr. Coleman had a full sale IQ of 67 (PC-R. 749). Dr. Toomer also noted that Mr. Coleman's school records reflected inconsistency and lack of achievement (PC-R. 753). In one instance, Mr. Coleman failed all of his courses (PC-R. 754). In other instances, there were a few C's, but mainly D's and F's (PC-R. 754). The records also verified that Mr. Coleman was placed in special education classes (PC-R. 753).

of pain and discomfort because of a problem with his back (PC-S2. 1102-03).[51] Throughout the process, he struggled to find a comfortable position (PC-S2. 1102-03). Dr. Toomer also observed some minor depression; but beyond that Mr. Coleman was cooperative during the process in spite of his physical deficits (PC-S2. 1102-03).

In order to assess adaptive functioning, Dr. Toomer used the Scales of Independent Behavior-Revised (SIB-R); he gave it to Mr. Coleman and his mother (PC-S2. 1100). "[T]he goal of the process in terms of assessing adaptive functioning, the goal of the process is to identify adaptive functioning deficits by speaking with individuals who had knowledge of the defendant during his developmental years, and the mother was the one who was most readily accessible for that particular purpose." (PC-S2. 1101).

Dr. Toomer went back and reviewed documents that included school records (PC-S2. 1102). Dr. Toomer stated that Mr. Coleman's history suggests impairment of long standing duration (PC-S2. 1105). Mr. Coleman was placed in Special Ed classes in school (PC-S2. 1106). He was failing a large number of classes during certain periods of his educational history (PC-S2. 1106).

Dr. Toomer administered the long form SIB-R to Mr. Coleman; the scores indicated Mr. Coleman's age to 13 years (PC-

[51]Dr. Toomer saw Mr. Coleman at UCI in Starke (PC-S2. 1103).

S2. 1119). When he gave the test to Mr. Coleman's mother, Mr. Coleman's adaptive functioning level was eqivalant to someone approximately eight years old (PC-S2. 1119). Dr. Toomer explained that this is not unusual:

> In terms of the protocols, you will get differences in terms of adaptive functioning that can vary from person to person. And the critical factor with regard to the SIB is that it's not so much that, you know - - it's not so much with regard to the level, but the fact that there are deficits in terms of adaptive functioning reflected in the protocol.

(PC-S2. 1119). Dr. Toomer also stated that it is not unusual in terms of an individual being mentally retarded but still having - - being able to manifest certain life skills (PC-S2. 1123).

Dr. Toomer concluded that Mr. Coleman is retarded under the criteria that the legislature has set forward in Florida for mental retardation (PC-S2. 1108). In addition to the test scores, with regard to adaptive functioning deficits, Mr. Coleman had limitations in 11 areas (PC-S2. 1108). Dr. Toomer also looked at onset of deficits prior to age 18 (PC-S2. 1109).

Dr. Larson testified during the mental retardation hearing that before the present determination of Mr. Coleman for mental retardation, Dr. Larson consulted with Dr. Toomer (PC-S2. 1130). It was agreed that the psychological testing would be performed in Pensacola and that Dr. Larson's psychologist would actually do the testing (PC-S2. 1130). Dr. Larson also met with Mr. Coleman on two occasions to conduct a clinical interview (PC-S2. 1131).

Mr. Coleman obtained a full scale score of 49 (PC-S2. 1131). On the wide range achievment test, Mr. Coleman got the lowest score possible (PC-S2. 1132). Dr. Larson discounted the current psychological testing because Mr. Coleman malingered on the TOMM very badly (PC-S2. 1131).[52] He clearly didn't put forth a good faith effort (PC-S2. 1133).[53] Mr. Coleman gave random responses (PC-S2. 1131).[54]

To address the issues of mental retardation, Dr. Larson turned to record review (PC-S2. 1133). He looked at school records and Dr. Toomer's past IQ testing (PC-S2. 1133).

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[52]The TOMM is the Test of Memory Malingering; it's used to see if someone is malingering (PC-S2. 1130).

[53]Dr. Larson was unaware of Baya Harrison's testimony in August of 2007 that he waived the retardation claim on behalf of Mr. Coleman because he claimed that Mr. Coleman was adamant that he did not want anyone calling him retarded or thinking he was retarded.

[54]Dr. Larson later acknowledged that there were several possible reasons for Mr. Coleman's poor performance. Dr. Larson was aware that Mr. Coleman refused to take his high blood pressure medication at the jail (PC-S2. 1166). Also, Mr. Coleman was in physical discomfort during his exam due to his back (PC-2. 1152). Further, Mr. Coleman was initially housed in disciplinary confinement when he was at the jail (PC-S2. 1166-67). Dr. Larson was concerned that the fact that he was in such a restrictive environment and was suffering from back pain and not taking his medicine, that this was going to impact the score (PC-S2. 1167).

Additionally, Mr. Coleman had informed Dr. Larson that he was having hallucinations; he said he was seeing and talking to ghosts (PC-S2. 1152). However, there is no indication that Dr. Larson was aware that Mr. Coleman was operating under the delusion that he was to be killed while be housed in the Escambia County jail in order to facilitate Dr. Larson's evaluation. Certainly, such a delusion produced a desire to get out of there as fast as possible, as evidence by Mr. Coleman's telephonic appearance at the July 17, 2007, hearing.

For adaptive behavior, he looked at Mr. Coleman's testimony and the trial transcript, as well as his interview notes from the 1990 evaluation (PC-S2. 1134). Dr. Larson did not talk to Mr. Coleman's mother; he didn't think it was necessary in terms of the task (PC-S2. 1162).

Similar to his previous testimony, Dr. Larson felt that the IQ of 67 is an underestimate (PC-S2. 1134). Some of Mr. Coleman's grades in school were above the kind of scores he would expect from someone who's retarded (PC-S2. 1135). Dr. Larson concluded that while Mr. Coleman may have intellectual deficits and deficiencies, there's also evidence that he was functioning in the low average range (PC-S2. 1136).[55]

With regard to adaptive behavior, Dr. Larson stated that there were a number of things in the record that suggested Mr. Coleman did not have impaired behavior (PC-S2. 1137). For example, according to Dr. Larson, Mr. Coleman got an experienced attorney to present an alibi defense (PC-S2. 1137); he was able to communicate with security officers during the last evidentiary hearing that he didn't want to hear testimony that would emotionally upset him (PC-S2. 1137); he played basketball and knew the rules (PC-S2. 1138); his mother of unknown intelligence thought he a very good card player, and he thought

[55]Dr. Larson in his review didn't notice any reference to Mr. Coleman being in special education classes in school (PC-S2. 1149). However, Dr. Larson stated that it would make no difference in his determination of retardation if he found out that Mr. Coleman was in special education classes (PC-S2. 1174).

of himself as a good gambler (PC-S2. 1139); he handled himself quite well when he testified (PC-S2. 1140); he used a vocabulary that Dr. Larson considered large (PC-S2. 1141); he could fly on a plane (PC-S2. 1141); and he knew how many gold teeth he had (PC-S2. 1142).[56]

Dr. Larson acknowledged that while it's possible that Mr. Coleman could have an IQ below 70, in his opinion he didn't meet the prong on impaired adaptive functioning (PC-S2. 1145). Dr. Larson concluded that Mr. Coleman did not qualify for the definition of mental retardation under Florida Law (PC-S2. 1146).

**D. THE LOWER COURT'S ORDER**

In its order denying relief, the lower court found that Mr. Coleman failed to show that he is mentally retarded:

[56]However, Dr. Larson acknowledged that the records did confirm that Mr. Coleman had significant mental problems dating back to early childhood (PC-S2. 1166).

> After much consideration, the Court finds credible Dr. Larson's conclusion that Defendant functions above the retarded range, possibly with an IQ in the range of 80-90. Although the Court appreciates Dr. Toomer's professional qualifications and opinion, the Court finds Dr. Toomer's IQ test results of 67 to be of limited value, given the remainder of the evidence before the Court. In assessing Dr. Toomer's opinions, this Court finds them conclusory in nature, lacking specific indicia of factual trustworthiness referenced by the record, and devoid of credible rebuttal to Dr. Larson's findings.

(PC-S2. 1316). The lower court went on to state:

> Dr. Larson testified in 2001 that Defendant's achievement test scores in school would equate roughly to someone with an IQ in the low average range, which Defendant achieved in spite of inconsistent academic exposure. At the 2007 evidentiary hearing, Dr. Larson again testified that Defendant's math scores on achievement tests taken as a child would equate to approximately an IQ of 81. Therefore, although the IQ score of 67 taken alone might suggest subaverage intellectual functioning, the score is belied by the remaining evidence before the Court. The Court accepts as credible the testimony of Dr. Toomer and the previously offered testimony of Defendant's mother that Defendant was enrolled in special education classes for at least a portion of his formal schooling during his youth, and also accepts that Defendant often manifested poor academic performance in terms of grades. However, while these factors may indicate Defendant suffered from some deficiencies, the Court is persuaded by Dr. Larson's testimony that Defendant's early achievement testing scores revealed him to be operating within a low-average IQ range. Further, no other credible, objective evidence from Defendant's youth indicates mental retardation. The Court is not swayed by Defendant's poor academic performance. In fact, the two unchallenged explanations for such performance available to the Court militate against a finding of subaverage intellectual functioning - first, that Defendant was chronically absent from school, and second, that he suffered from an unaddressed hearing impairment.

(PC-S2. 1317) (footnotes omitted).

With regard to adaptive behavior, the court found that Mr. Coleman was good at cards (PC-S2. 1319), that his mother referred to him as "just the average child" (PC-S2. 1319), that Mr. Coleman could travel by airplane (PC-S2. 1320), that his defense counsel thought he was intelligent (PC-S2. 1320), and that his level of vocabulary and communication skills were above what one would expect of an individual with impaired adaptive behavior (PC-S2. 1321).

The lower court's order is erroneous. The only valid IQ score utilizing a recognized and approved test for a mental retardation determination was that of 67.[57] Dr. Larson's self-estimated IQ score based on Mr. Coleman's 7th grade testing has no evidentiary value. 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).

Moreover, only Dr. Toomer used a recognized test (SIB) as an aid to determine adaptive functioning. Dr. Larson spoke to no one and narrowly picked out certain functions that Mr.

[57]Dr. Toomer utilized the Wechsler Adult Intelligence Scale-III for this test (PC-R. 749).

Coleman could perform to conclude that he was not mentally retarded.[58]

And, Dr. Larson failed to consider the critical fact that Mr. Coleman was in special education classes while in school. 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).

> Contrary to the lower court's determination, Mr. Coleman has

[58]But as Dr. Toomer testified, it is not unusual in terms of an individual being mentally retarded to still be able to manifest certain life skills (PC-S2. 1123).

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.

## ARGUMENT V

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

### A. FIRST MOTION TO DISQUALIFY

On May 4, 2006, this Court entered an order in Coleman v. State, Case No. SC05-2217, stating:

> The Court has considered the allegations concerning registry counsel Harrison in note 2 on page 3 of the petition. To monitor the performance of assigned counsel in accordance with section 27.711(12), Florida Statutes (2005), Harrison shall file in the circuit court a response to note 2 of the petition within thirty (30) days of the service of the petition. This response shall also be served upon petitioner's counsel, counsel for the State of Florida, and the Executive Director of the Commission on Capital Cases. Thereafter, the circuit court shall holding a hearing and consider whether any sanctions should be imposed by reason of the allegations, including the reimbursement of the State of attorney fees paid to Harrison. Harrison, McClain, counsel for the State, and the Executive Director of the Commission on Capital Cases shall be served notice of the date and time of the hearing and shall appear at the hearing. Within thirty (30) days of the hearing, the circuit court shall file and serve a report and recommendations with this Court.

Coleman v. State, Case No. SC05-2217, May 4, 2006, Order.[59]

[59]Pursuant to this order, undersigned counsel was required to appear and participate in the ordered hearing concerning Harrison and his conduct in the course of his work as Mr. Coleman's registry counsel.

On May 15, 2006, Judge Geeker held a hearing in Mr. Coleman's case to consider undersigned counsel's motion to withdraw from the mental retardation proceedings because Mr. Coleman's family had been unable to raise sufficient funds to hire him to handle such proceedings ordered by this Court. Several days later, Judge Geeker issued an order granting the motion to withdraw and reappointing Mr. Harrison as registry counsel for Mr. Coleman (PC-S2. 984-85). Judge Geeker specifically stated: "The Court finds that Mr. Harrison meets the statutory requirements for appointment and has the ethical standards necessary for such representation in accordance with Fla. Stat. §27.710(5)(b)." (PC-S2. 984-85).

As a result of Judge Geeker's order, on May 26, 2006, undersigned counsel filed a motion to disqualify him from the proceedings ordered by this Court concerning Harrison (PC-S2. 986-92). In this motion, undersigned counsel asserted:

> 2. Pursuant to this order [of the Florida Supreme Court], undersigned counsel is required to appear and participate in the ordered hearing concerning Harrison and his conduct in the course of his work as Mr. Coleman's registry counsel. As a party to the ordered proceedings, undersigned counsel has standing to file this motion to insure that the hearing is conducted before a judge who has not prejudged the issues to be heard.
>
> 3. Pursuant to this order [of the Florida Supreme Court], this Court is required to preside over a hearing on the allegations against Harrison concerning his conduct in the course of his work as Mr. Coleman's registry counsel. Yet, despite the directive from the Florida Supreme Court to hold a hearing regarding Harrison and his conduct as Mr. Coleman's registry counsel, this Court has entered an order dated May 19, 2006, appointing Harrison to once again serve as Mr. Coleman's registry counsel. In

> this regard, this Court specifically stated: "The Court finds that Mr. Harrison meets the statutory requirements for appointment and has the ethical standards necessary for such representation in accordance with Fla. Stat. §27.710(5)(b)." Order (5/19/06) at 2. Clearly, this Court has prejudged the matter upon which the Florida Supreme Court has ordered this Court to conduct a hearing.
>
> 4. Rule 2.160(d) also provides that grounds for a disqualification motion include a "specifically described prejudice or bias of the judge." Canon 3(E)(1)(a) of the Code of Judicial Conduct provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge . . . has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of dispued evidentiary facts concerning the proceedings." The language of Canon 3(E)(1)(d) is mandatory. *See Roberts v. State, 840 So.2d 962 (Fla. 2002).* Judge Geeker's statement in his May 19, 2006, order appointing Mr. Harrison as Mr. Coleman's counsel is a prejudgment of the matters to be heard and demonstrate bias and prejudice. *Suarez v. Dugger, 527 So. 2d 191, 192 (Fla. 1988)* (a judge's statement to a newspaper following the signing of the defendant's death warrant that he did not believe that the case merited postponement demonstrated prejudice against the defendant and warranted his disqualification from proceedings on a motion to vacate the conviction and sentence of death).

(PC-S2. 986-89) (footnotes omitted)).

Undersigned counsel observed in a footnote:

> It would appear that Harrison's representation of Mr. Coleman is burdened by a conflict of interest given that Mr. Coleman's allegations against Harrison lead to the Florida Supreme Court to order a hearing on those allegations. Undersigned counsel has been advised by prison officials that Harrison appeared at Union Correctional Institution immediately after the Florida Supreme Court's order and demanded that he be provided access to Mr. Coleman's personal effects. When denied such access, Harrison made a public records demand on prison officials in order to gather information regarding Mr. Coleman. Harrison's actions occurred before this Court's order re-appointing him as registry counsel. When the prison officials

> advised Mr. Coleman of Harrison's actions, Mr. Coleman was petrified. He was afraid that Harrison was working with the State in order to try speed up his execution.

(PC-S2. 988, fn. 2). On June 6, 2006, Judge Geeker signed an order denying the motion to disqualify (PC-S2. 993). In this order, Judge Geeker found "that the instant motion is legally insufficient." (PC-S2. 993).

Contrary to Judge Geeker's determination, Harrison's appointment not only constituted "a prejudgment of the matters to be heard and demonstrate[d] bias and prejudice," but also burdened Mr. Coleman with an attorney laboring under an obvious conflict of interest.[60] Because of the lower court's action,

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[60]On June 8, 2006, Harrison filed a motion to withdraw as reappointed counsel for the defendant, in which he stated:

> 4. Complicating the matter is the fact that, per the May 4, 2006 Supreme Court Opinion, I must respond to allegations against me made by Mr. McClain to the effect that I abandoned Mr. Coleman's Atkins (mental retardation) claim without just cause. He served me with a copy of his petition on June 1 or 2, 2006. According to the May 4, 2006 Opinion, I am afforded 30 days thereafter within which to submit a response.
>
> 5. In the process of answering those charges, it puts me in a conflict situation in terms of further representation of Mr. Coleman, especially regarding the mental retardation issue.

Accordingly, Harrison "requested that the Court enter an order allowing [him] to withdraw as counsel for Mr. Coleman." And in his "Wherefore" clause, Harrison sought a speedy ruling on the motion explaining:

> I ask further that his motion be ruled upon without a hearing just as soon as is reasonably possible since, as noted above, I must submit my response to Mr. McClain's allegations soon. I am uncomfortable doing that while I am still record counsel.

undersigned counsel 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 a collateral relief. This fear was objectively reasonable.

All parties before a court are entitled to full and fair proceedings, including the fair determination of the issues by a neutral, detached judge. In re Murchison, 349 U.S. 133 (1955); Porter v. Singletary, 49 F.3d 1483 (11th Cir. 1995). The aforementioned circumstances of this case are of such a nature that they were "sufficient to warrant fear . . . that [neither Mr. McClain nor Mr. Coleman would] receive a fair hearing by the assigned judge." Suarez v. Dugger, 527 So. 2d 191, 192 (Fla. 1988). The proper focus of this inquiry is on "matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his [or her] ability to act fairly and impartially." Chastine v. Broome, 629 So. 2d 293 (Fla. 4th DCA 1993).

Due process guarantees to every party the right to a neutral detached judiciary in order "to convey to [him] a feeling that the government has dealt with him fairly, as well

as to minimize the risk of mistaken deprivations of protected interests." Carey v. Piphus, 425 U.S. 247, 262 (1978). "Judges should be especially vigilant that every litigant gets that to which he or she is entitled: the cold neutrality of an impartial judge." Rose v. State, 601 So. 2d 1181, 1184 (Fla. 1992). The U.S. Supreme Court has explained that in deciding whether a particular judge is able to preside over a litigant's trial:

> the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." Ungar v. Sarafite, 376 U.S. 575, 588, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964). "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," but due process of law requires no less. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955).

Taylor v. Hayes, 418 U.S. 488, 501 (1974).

The purpose of the disqualification rules direct that a judge must avoid even the **appearance** of impropriety:

> It is the established law of this State that every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of the court to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any manner where his qualification to do so is seriously brought into question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice. Crosby v. State, 97 So.2d 181 (Fla. 1957); State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613 (1939); Dickenson v. Parks,

> 104 Fla. 577, 140 So. 459 (1932); State ex rel. Mickle v. Rowe, 100 Fla. 1382, 131 So. 3331 (1930).
>
> * * * *
>
> The prejudice of a judge is a delicate question for a litigant to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge in question should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause who neutrality is shadowed or even questioned. Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932); State ex rel. Aguiar v. Chappell, 344 So.2d 925 (Fla. 3d DCA 1977).

State v. Steele, 348 So. 2d 398 (Fla. 3d DCA 1977).

In Steele, the Court concluded that "[a] judge must not only be impartial, **he must leave the impression of impartiality upon all those who attend court**." Id. at 401 (emphasis added) (citation omitted). "The attitude of the judge and the atmosphere of the courtroom should be such that no matter what charge is lodged against a litigant or what cause is before the court, the litigant can approach the bar with every assurance that he is in a forum which is everything a court represents: impartiality and justice." Id. Judge Geeker had the duty to "scrupulously guard [the parties' right to the cold neutrality of an impartial judge] and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought into question." Id. Because Judge Geeker has breached this duty, he has "discredit[ed] and place[d] the judiciary in a compromising attitude which is bad for the administration of justice." Id.

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 predetermination of the issue remanded by this Court. Judge Geeker erred in failing to grant the motion to disqualify. This case should be remanded for new proceedings before a neutral, detached judiciary.

**B. SECOND MOTION TO DISQUALIFY**

On July 5, 2007, undersigned counsel filed a second motion to disqualify on the following basis:

1. On May 4, 2006, the Florida Supreme Court entered an order stating:

> The Court has considered the allegations concerning registry counsel Harrison in note 2 on page 3 of the petition. To monitor the performance of assigned counsel in accordance with section 27.711(12), Florida Statutes (2005), Harrison shall file in the circuit court a response to note 2 of the petition within thirty (30) days of the service of the petition. This response shall also be served upon petitioner's counsel, counsel for the State of Florida, and the Executive Director of the Commission on Capital Cases. Thereafter, the circuit court shall holding a hearing and consider whether any sanctions should be imposed by reason of the allegations, including the reimbursement of the State of attorney fees paid to Harrison. Harrison, McClain, counsel for the State, and the Executive Director of the Commission on Capital Cases shall be served notice of the date and time of the hearing and shall appear at the hearing. Within thirty (30) days of the hearing, the circuit court shall file and serve a report and recommendations with this Court.

Order (5/4/06) at 2.

2. Pursuant to this order, a hearing is set for August 2, 2007. On June 5, 2007, this Court issued an order granting Mr. Harrison's request to submit a detailed response to the Florida Supreme Court's order *in camera*. This Court ruled that "Mr.

Harrison's response shall be submitted in a sealed internal envelope clearly marked with the case name and number, and a designation stating 'Response of Baya Harrison III – For In Camera Inspection by the Court. This document is not to be filed until further order of the Court.' Mr. Harrison should make his submission by the close of business on June 22, 2007. **Copies should be provided to counsel for Defendant, Martin McClain, and to Lori Jobe, Assistant General Counsel for the Florida Department of Financial Services**".

3. Meanwhile, this Court scheduled an evidentiary hearing to determine whether Mr. Coleman is mentally retarded within the meaning of *Atkins v. Virginia*. This hearing is also pursuant to a remand by the Florida Supreme Court.

4. On June 25, 2007, undersigned counsel received a package from Mr. Harrison containing two documents: "Part I of In Camera Response of Baya Harrison to Court Order of June 5, 2007" (hereinafter Part I); and "Part II of In Camera Response of Baya Harrison to Court Order of June 5, 2007" (hereinafter Part II). Pursuant to this Court's order, the certificate of service on Part I and Part II does not reflect service on Mr. Coleman or the attorney that this Court appointed to handle the mental retardation evidentiary hearing. The certificate of service does reflect that Part I and Part II were both sent directly the Honorable Nicholas P. Geeker.

5. Undersigned counsel is uncertain of whether the contents of Part I and Part II can be discussed in a public document. However, given counsel's obligation to Mr. Coleman and given his need to preserved the record for review by the Florida Supreme Court of this Court's ruling on this motion should that be necessary, counsel feels obligated to discuss Mr. Harrison's factual allegations concerning Mr. Coleman in specific, albeit generic, terms. Within his pleadings, Mr. Harrison accuses Mr. Coleman of endeavoring to embroil Mr. Harrison in criminal activity. Mr. Harrison also opines that Mr. Coleman is not mental retarded and makes factual allegations that he avers justifies this legal conclusion.

6. The assertions, allegations and accusations set forth by Mr. Harrison in Part I and Part II are clearly intended by Mr. Harrison to prejudice Mr. Coleman and to extract revenge for the representations made by undersigned counsel in the

> Florida Supreme Court that lead to the May 4, 2006, order. Clearly, Mr. Harrison has an axe to grind and he is grinding it. But while Mr. Harrison seeks to prejudice this Court against Mr. Coleman, the assertions, allegations and accusations are under seal and kept from the attorney appointed by this Court to represent Mr. Coleman at the mental retardation evidentiary hearing. Under the circumstances, Mr. Harrison's communication with this Court constitutes *ex parte* communication. It deprives Mr. Coleman of due process keeping his court-appointed attorney in the dark regarding highly prejudicial matter being presented to this Court by Mr. Coleman's former attorney who has an axe to grind and a score to settle. Mr. Coleman is being denied notice and a reasonable opportunity to be heard.

(PC-S2. 1037-50)(footnotes omitted). Again, Judge Geeker denied the motion to disqualify (PC-S2. 1071).

Judge Geeker's ruling was erroneous. Mr. Coleman was and is entitled to full and fair proceedings before this Court, Holland v. State, 503 So. 2d 1250 (Fla. 1987); Easter v. Endell, 37 F. 3d 1343 (8th Cir. 1994), and this includes equal access to the court in order to be heard on pending matters. Smith v. State, 708 So. 2d 253, 255 (Fla. 1998)("We reject the State's argument that Smith's due process rights were not violated by the ex parte communications because he had ample opportunity to object to the substance of the proposed order.").

The Code of Judicial Conduct states: "A judge should [] neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding." Fla. Bar Code Jud. Conduct, Canon 3 A(4). As Justice Overton once explained for this Court:

> [C]anon [3 A(4)] implements a fundamental requirement for all judicial proceedings under our form of government. Except under limited circumstances, no

> party should be allowed the advantage of presenting matters to or having matters decided by the judge without notice to all other interested parties. This canon was written with the clear intent of excluding all ex parte communication except when they are expressly authorized by statutes or rules.

In re Inquiry Concerning a Judge: Clayton, 504 So. 2d 394, 395 (Fla. 1987). Through information obtained in an *ex parte* fashion, the Court obtains knowledge regarding the facts in dispute that a counsel who is unaware of the content of the communication cannot address or rebut. The trier of fact cannot have *ex parte* communications with a party. Love v. State, 569 So. 2d 807 (1st DCA 1990); Rose v. State, 601 So. 1181 (Fla. 1992); Rollins v. Baker, 683 So. 2d 1138 (5th DCA 1996); McKenzie v. Risley, 915 F.2d 1396 (9th Cir. 1990). This prohibition of *ex parte* proceedings applies in collateral proceedings. This Court has specifically denounced *ex parte* communications in the course of collateral proceedings:

> Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant.
>
> * * *
>
> We are not here concerned with whether an ex parte communication **actually** prejudices one party at the expense of the other. The most insidious result of ex parte communications is their effect of the appearance of the impartiality of the tribunal The impartiality of the trial judge must be beyond question.

Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992)(emphasis added). In circumstances similar to those found here, this Court ruled that a capital collateral litigant's due process rights were violated by *ex parte* contact between the prosecutor

and the judge during the pendency of the Rule 3.850 motion. Smith v. State, 708 So. 2d at 255. There, this Court "conclude[d] that the 'impartiality of the tribunal' was compromised and the ex parte communications were improper." Smith, 708 So. 2d at 255. The case was then remanded for new proceedings before a new judge.

Canon 3(E)(1)(a) of the Code of Judicial Conduct provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge . . . has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceedings." The language of Canon 3(E)(1)(d) is mandatory. See Roberts v. State, 840 So.2d 962 (Fla. 2002). Here, Judge Geeker ordered Harrison to provide under seal his response to the allegations set forth in this Court's remand order which includes privileged information.

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. This 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.**

**A. THE LEGAL STANDARD**

The U.S. Supreme Court has held that "the suppression by the prosecution of evidence favorable to an accused" violates due process. Brady v. Maryland, 373 U.S. 83, 87 (1963); Kyles v. Whitley, 514 U.S. 419, 437 (1995); Strickler v. Greene, 527 U.S. 263, 281-82 (1999). In Hoffman v. State, 800 So. 2d 174 (Fla. 2001), this Court stated:

> This argument [that the defense should have figured out that exculpatory evidence existed] is flawed in light of **Strickler and Kyles**, which squarely **place the burden on the State to disclose to the defendant all information in its possession that is exculpatory**. In failing to do so, the State committed a Brady violation when it did not disclose the results of the hair analysis pertaining to the defendant.
>
> However, in order to be entitled to relief based on this nondisclosure, Hoffman must demonstrate that the defense was prejudiced by the State's suppression of evidence.

Id. at 179 (emphasis added). A due process violation is established when a three-part test is met:

> The evidence at issue [was] favorable to the accused, either because it [was] exculpatory, or because it [was] impeaching; that evidence [was] suppressed by the State, either willfully or inadvertently; and prejudice [ ] ensued.

Strickler v. Greene, 527 U.S. at 281-82.[61] Prejudice is shown when confidence in the reliability of the conviction is

[61] "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight."

undermined as a result of the prosecutor's failure to disclose favorable information. Cardona v. State, 826 So.2d 968 (Fla. 2002); Rogers v. State, 782 So.2d 373 (Fla. 2001); State v. Gunsby, 670 So.2d 920 (Fla. 1996); Gorham v. State, 597 So.2d 782 (Fla. 1992); Roman v. State, 528 So.2d 1169 (Fla. 1988). As this Court has said:

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Banks v. Dretke, 124 S. Ct. 1256, 1263 (2004). Thus, a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Id. at 1275.

> [W]here the State commits a discovery violation, the standard for deeming the violation harmless is extraordinarily high. A defendant is presumed to be procedurally prejudiced "if there is a reasonable probability that the defendant's trial preparation or strategy would have been materially different had the violation not occurred." Pomeranz v. State, 703 So. 2d 465, 468 (Fla. 1997) (quoting State v. Schopp, 653 So. 2d 1016, 1020 (Fla. 1995)). Indeed, "only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless." Id.

Cox v. State, 819 So. 2d 705, 712 (Fla. 2002).

**B. THE UNDISCLOSED EVIDENCE**

The State failed to disclose numerous criminal histories of persons who ultimately testified as State witnesses during Mr. Coleman's trial. For example, at the postconviction hearing, trial counsel, Stokes, was shown D-Ex. 1, which is a copy of a mailing to Amanda Merrill advising her that the warrant for her arrest was being issued (PC-R. 701). Stokes didn't recall seeing this before (PC-R. 701). Stokes stated that other than witness Pritchett, Merrill's testimony was the primary testimony (PC-R. 702). Further, she was the only eyewitness (PC-R. 702). If Stokes was aware that she had been convicted of a felony or of a crime involving dishonesty or moral turpitude, he would've asked her about it (PC-R. 702). This would have assisted him in attempting to impeach her credibility (PC-R. 703).

Additionally, Stokes testified that had he been advised that witnesses Arabella Washington, Cassandra Pritchett and Gwendolyn Cochran had convictions for felonies or crimes of

moral turpitude or dishonesty, this would have assisted him in attempting to impeach their credibility (PC-R. 702-03).

Moreover, Stokes testified that he was not aware that Travis Williams and Gregory Manning were considered suspects by the State (PC-R. 705). Stokes would have wanted to depose these individuals had they been listed as suspects (PC-R. 705). It would have affected the way he approached the defense when he prepared for this trial (PC-R. 706).

The U.S. Supreme Court has held:

> The materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Strickler v. Green, 527 U.S. 263, 290 (1999)(quoting Kyles v. Whitley, 514 U.S. 419, 435 (1995).

If the criminal histories of the aforementioned witnesses had ben disclosed, effective defense counsel could have weakened their credibility through impeachment. In evaluating whether habeas relief is warranted upon a claim that the State failed to disclose exculpatory evidence, the undisclosed or undiscovered information must be evaluated cumulatively to determine whether confidence is undermined in the outcome. Kyles. In the Brady context, the "prejudice" evaluation of the withheld evidence must be considered "collectively, not item-by-item." Kyles, 514

U.S. at 436.[62] Here, a cumulative analysis of all of the withheld evidence undermines confidence in the outcome of the trial and requires that Mr. Coleman be granted a new trial.

**ARGUMENT VII**

[62]In denying relief as to this issue, Judge Geeker stated, "With regard to the Defendant's subclaim that the State withheld the 'criminal histories of person who ultimately testified at Defendant's trial', the court finds that based upon the testimony and evidence presented at the evidentiary hearing, the Defendant has failed **to** meet his burden of proving this claim" (PC-R. 1290)(footnote omitted).

**MR. COLEMAN WAS IMPROPERLY CHARGED WITH AND CONVICTED OF ATTEMPTED FELONY MURDER, AND THE JURY WAS IMPROPERLY INSTRUCTED ON THIS NONEXISTENT OFFENSE.**

Count Five of the indictment against Mr. Coleman charged him with attempted felony murder of Amanda Merrill:

> FIFTH COUNT: The Grand Jurors of the State of Florida, lawfully selected, impaneled and sworn, inquiring in and for the body of the County of Escambia upon their oaths as Grand Jurors, do present that on or about the twentieth day of September in the year of our Lord, One Thousand, Nine Hundred and Eighty-Eight at and in the County of Escambia, State of Florida, . . . MICHAEL COLEMAN did unlawfully attempt to kill and murder Amanda Merrell by shooting and cutting Amanda Merrell from a premeditated design to effect the death of Amanda Merrell **or while engaged in the perpetration of or attempt to perpetrate a felony to-wit: kidnaping, burglary, robbery and/or sexual battery in violations of Sections 777.04 and 782.04, Florida Statutes.**

(R. 2108)(Emphasis added).

The jury was also instructed such that Mr. Coleman could be convicted of attempted felony-murder, the jury not being required to decide whether they found evidence of premeditated murder or felony murder. The jury was instructed as follows:

> Before you can find [Michael Coleman] guilty of Attempted First Degree Murder, the State must prove the following two elements beyond a reasonable doubt:
>
> 1. . . . MICHAEL COLEMAN did some act toward committing the crime of First Degree Murder that went beyond just thinking or talking about it.
>
> 2. . . . MICHAEL COLEMAN would have committed the crime except that they failed.
>
> It is not an attempt to commit First Degree Murder if the defendant abandoned his attempt to commit the offense or otherwise prevented its commission, under circumstances indicating a complete and voluntary renunciation of his criminal purpose.

(R. 2376).

The verdict form did not require the jury to specify whether they found evidence of premeditated murder or felony murder. The verdict form read, in pertinent part,

> VERDICT
>
> WE, THE JURY, FIND AS TO THE DEFENDANT, MICHAEL COLEMAN, AS FOLLOWS:
>
> AS TO COUNT 5:
>
> THE DEFENDANT IS GUILTY OF ATTEMPTED FIRST DEGREE MURDER OF AMANDA MERRELL AS CHARGED IN COUNT FIVE OF THE INDICTMENT.

(R. 2416).

In State v. Gray, 654 So. 2d 552 (Fla. 1995), this Court held that there is no criminal offense of attempted felony-murder in Florida. In Mr. Coleman's case, it was error to (1) charge Mr. Coleman with attempted felony-murder; (2) instruct the jury such that it permitted a finding of attempted felony-murder, and (3) convict Mr. Coleman of count five without requiring the jury to specify whether the basis for the verdict was attempted premeditated murder or attempted felony-murder. Mr. Coleman's conviction on count five must be reversed. Additionally, because Mr. Coleman's death sentence rests, in part, upon this unlawful conviction for attempted first degree murder, his death sentence is rendered unreliable and unconstitutional. As a result, Mr. Coleman is entitled to a new penalty phase, or in the alternative, the imposition of a life sentence.

To the extent trial counsel did not preserve this claim, Mr. Coleman received ineffective assistance. To the extent Mr. Coleman does not receive the benefit of the holding in Gray, he is denied due process and equal protection of the law and his convictions and death sentence are arbitrary and capricious.

## CONCLUSION

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 initial 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 January, 2009.


_____
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## CERTIFICATE OF FONT

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

_____
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