IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1559
LT No. 87-1775CFAWS

SAMUEL JASON DERRICK,

Appellant,

v.

STATE OF FLORIDA,

Appellee

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PASCO COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

Harry P. Brody
Florida Bar No. 0977860

Jeffrey M. Hazen
Florida Bar No. 0153060

Brody & Hazen, PA
P. O. Box 16515
Tallahassee, Florida 32317
850.942.0005
Counsel for Appellant

TABLE OF CONTENTS

INITIAL BRIEF OF THE APPELLANT PAGE

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND OF THE FACTS

1. Procedural History

Appellant was indicted by the grand jury in Pasco County, Florida on July 14, 1987 (R. 862-863). He was charged with the first-degree murder of Rama Sharma. (R. 994-996) Trial commenced on May 9, 1988 and lasted four days. (R. 944) Appellant was found guilty, and the penalty phase commenced on May 13, 1988, in which the jury recommended death by an 8-4 vote. (R. 955) A "Spencer" hearing, or at least further argument, was held on July 25, 1988 and the trial court, the Honorable Edward H. Bergstrom presiding, sentenced Appellant to death. (R. 994-996). However, on direct appeal, the Florida Supreme Court, affirming the conviction, overturned the sentence and remanded the case for a new penalty phase. Derrick v. State, 581 So. 2d 31 (Fla. 1991).

On remand, the Honorable Stanley Mills presided over a three-day trial from November 4, 1991 until November 7, 1991 (testimony was completed on November 5, 1991). During deliberation, the jury advised that it was divided 6-6 (R2. 383). On December 10, 1991, the court heard argument and entered its written findings in support of a death sentence (R2. 452-455). The Florida Supreme Court affirmed the sentence. Derrick v. State, 641 So 2d 378 (Fla. 1994).

After the United States Supreme Court denied certiorari on January 23, 1995, post-conviction proceedings commenced. Eventually, the Second Amended Rule 3.850 motion, which is the subject to this appeal was filed.

On March 7, 2002, a "Huff" hearing was held before Judge Mills. He denied an evidentiary hearing on the majority of claims but ordered a hearing on the Claim that another person (Michael Kiesling)had made inculpatory statements and on the claim that, at the second penalty phase, counsel provided ineffective assistance of counsel (PCR. 568-637).

On June 30, 2005, an evidentiary hearing was held pursuant to the Court's Order. (PCR. 1008-1114) Subsequently, on July 15, 2005, the lower court entered its "Final Order," denying Appellant's Motion for Post-Conviction Relief (PCR. 804-809)

Notice of Appeal of that Order was timely taken and is prosecuted herein.

2. Evidentiary Hearing Testimony

At the Evidentiary Hearing held on June 29, 2005, Carolyn Haney testified that she is Samuel Jason Derrick's ("Jason Derrick") younger sister (PCR 833). When she was growing up, the Derrick family consisted of their mother, father, three sons, and her, the only girl (PCR 834). They lived in a trailer in the Moon Lake section of Pasco County (PCR 685). In that environment, Appellant, "Jason" Derrick, was her

protector (PCR 835). He made the neighborhood boys leave her alone and protected her with everything that he had. Id. In fact, Jason was more like her dad than was her dad. (PCR 836) Her own father did not watch out for her, so Jason did. Id.

In the Derrick family, Jason assumed both the father's and mother's responsibilities for caring for his little sister. (PCR 837) She could talk to him about anything and he became a father figure as best he could. Id. The family was hand-me-down poor, so she was handed down boy's clothes, as she only had brothers. (PCR 838) The family never had money. Id. Nevertheless, Jason played with her and included her in games. Id. Carolyn also recalled the time that they were riding a motorcycle in rainy weather. Id. The bike slipped out beneath them but he inserted himself between her and the ground before she hit the ground. Id. As a result, he was badly scraped up, but she was safe (PCR 838-839)

Carolyn described the Moon Lake neighborhood where they lived as dirty, rough, and violent. Id. Their father was a drinker (PCR 839). He was controlling, and he administered discipline with a belt. (PCR 840) Their mom was not much of a "home maker". Id. Therefore if the kids wanted clean clothes, they had to wash the clothes, Id. If they wanted to bathe in a clean tub, they had to clean the tub. Id. Generally the house was dirty, and the floors were literally

falling through. (PCR 841) Often, there wasn't any food in the place, so, if the chicken didn't lay an egg, there'd be no breakfast. (PCR 841) However, when Jason was around, he'd see that the children would eat. Id. He took care of his brothers as well as looking after his sister. (PCR 842)

The kids wouldn't talk to the mother about much of anything – her mind was pretty much on soap operas. (PCR 842) Carolyn's closest relationship was with Jason. They'd play cards and go fishing in the creek. Id.

Their father's main interest was hunting. (PCR 843) He and their mom were married for twenty years, but mom turned wild and divorced the father when Carolyn was twelve. Id. The divorce was "unfriendly". (PCR 844) Their mother turned to drugs and alcohol. Id.

Vicky, Carolyn and Jason's mother, used and abused cocaine, crack and marijuana. (PCR 845) She used these drugs regularly and used them in front of the children. Id.

When she got divorced, her father, Carolyn's mother's father and the Derrick's children's grandfather, gave Vicky a large sum of money. She used it on herself, and blew most of it on a gambling junket to Reno. Id. Carolyn remembers her mother being gone, but doesn't recall what happened to her in that time. Id. When her mother came back from Reno broke,

Vicky was a different person. Id. Carolyn was only twelve or thirteen at that time. Id.

When Vicky came back from Reno, she didn't want Carolyn around, and she would often leave Carolyn alone with no food or anything. (PCR 846) It was at this time that Vicky Derrick would go around with Michael Kiesling ("Craze"). Id. She even brought Kiesling back to the house. Id. Tellingly, perhaps, Kisling's nickname is "Craze". Id.

Carolyn isn't certain what the precise nature of Vicky Derrick's and Craze's relationship was, although she believes that they were sleeping together. Id. However, she professed no such ambiguity about the precise nature of her own relationship with Craze: she was Craze's "sex slave". (PCR 846)

When Carolyn was around fourteen years old, she was in the room when Craze told Vicky that if Vicky didn't let him "be with" Carolyn he would take Carolyn and she'd never see Carolyn again. (PCR 847) Thereafter, Craze was permitted to have sexual relationships with Carolyn at his will in the Derrick house. (PRC 848) Not surprisingly, Carolyn became pregnant at fifteen and had his child. Id. (Sadly, it also is not surprising that, despite court orders, Craze has never supported either Carolyn or the child. Id.)

The sexual abuse of Carolyn by Craze went on for four years. When Jason found out, he confronted Craze, but Craze threatened to kill the whole family. (PCR 849)

During these years, there was drinking going on "24/7" at the Derrick trailer. (PCR. 850) The drinking and drugging were constant in and outside the trailer, which was by now "falling down" around them. Id. By now, Jason had dropped out of high school and the children had no financial support Id. Craze was in control. (PCR 851) Vicki's weight ballooned up to 400 pounds, and she even told Carolyn that she didn't want her. Carolyn was young and beautiful, so Vicki "gave" her to Craze, so Vicky could have a life as though by proxy. (PCR 851)

When Mr. Derrick found out about Craze, he called the Child Protection Agency. (PCR 851-2) However, Craze threatened Carolyn's life if she told the Agency the truth. Id.

At the trial, in 1991, Jason's attorneys did not talk to Carolyn or ask her about any of the facts that she testified to at the evidentiary hearing. (PCR 853) She would have told them and would have testified to them if they had. Id.

On cross-examination, Carolyn repeated that Jason tried to help out with the situation with Craze. (PCR 857) She stated that her father knew about the squalid conditions at the

trailer, and that there was a time that she found maggots in the bottom of the refrigerator. (PCR 858)

At the evidentiary hearing, Travis Derrick testified that he is Appellant's brother. (PCR 861) Like Jason, Travis' mother is Victoria Derrick and his father is now deceased. Id. Travis is a year and a half older than Jason. Id.

Travis testified that their childhood conditions were "about average," meaning "dirt roads, single-wide trailer in Moon Lake. Id.

When he was fourteen (Jason would have been 12 ½ - 13), Travis and Jason went to live with Harry Joe Martin as foster kids. (PCR 862-863) Mr. Martin was a pedophile who abused both Travis and Jason. (PCR 863) Jason was abused more than Travis and stayed with Mr. Martin longer, from eighteen months to two years. (PCR 864) This period of his life is painful. Id. The abuse was sexual. Id. Martin slept with Jason. (PCR 865)

Travis and Jason had been put into Martin's custody by the state. (PCR 865) When Vicky dropped the boys off at Martin's "doorstep," she said, "Here's the boys, keep them, do whatever you want to do with them. They're yours." (PCR 866) Mr. Martin did. Id. Thus, the sexual abuse was "pretty much" constant for the duration of the stay. Id.

On cross-examination, Travis Derrick testified that he testified at the second penalty phase trial in 1991. (PCR 867) He recalled telling the public defender that he thought Jason was innocent and recalled something about the defense "going positive". (PCR 868)

At the 1991 trial, Travis testified that Jason would defend him at school and would help him with his homework. Id.

On redirect examination, Travis testified that, had he been asked, he would have told the jury about Mr. Martin's sexual abuse of him and Jason Derrick, as he had described it at the evidentiary hearing. (PCR 869) He did not recall Jason's attorney coming and speaking to him face to face prior to testifying. (PCR 870)

Jason Derrick's other brother, Samuel Derrick (note that Jason Derrick's legal name is Samuel also, after his father, so he goes by "Jason") testified at the evidentiary hearing that he is the family's youngest child. (PCR 871) Of the family members, Samuel was closest with Jason, who saved him from drowning once. (PCR 872) Jason was the brother Samuel could go to with a problem. (PCR 873) He cares "very deeply" for Jason, as Jason was "important" to him in his childhood. The father was not very involved. (PCR 874) Whenever Samuel needed Jason, Jason was there for him. He loved, and loves,

Jason very much. Id. He wasn't asked to testify in 1991, but would have. (PCR 875)

On cross-examination, Samuel testified that he was thirteen when Jason was convicted. Id. He would have testified that he loved his brother. (PCR 876)

Cherie Derrick, Jason Derrick's ex-wife, testified at the evidentiary hearing that she married Jason in 1987 and had a son by him who is now 18 – Manuel Sean Jason Derrick. (PCR 878) She met Jason when she was sixteen. Id. Jason was loving and kind. (PCR. 879)

Cherie testified that Jason's home life was "shabby." (PCR 880) Jason was "very" poor. Id. Activity in the Derrick trailer consisted of "just watching TV or playing cards." Id. There were holes in the floor of the trailer through which the ground was visible. (PCR 880-81) There were lots of animals. Id. Jason seemed more concerned with his appearance than the others. Id. The children were not taken care of the way Cherie had been. (PCR 881) Nevertheless, Jason was always responsive to her problems and ready to talk things over with her. (PCR 882) He would always listen. Id. No one had ever listened to her like he did. Id. He was always gentle with her and with their son, and he loved his son very much. (PCR 882) The boy was "his pride and joy." Id.

Cherie Derrick testified at both of the trials and would have testified to the things she described at the evidentiary hearing as well. Id. However, before the second penalty phase, the lawyers did not even talk to her before she testified. (PCR 883) At that time, on cross-examination, Cherie agreed that their son was only a month old at the time of the crime. Id. She agreed that she testified that Jason would "help people", and that he accompanied her to Lamaze classes. (PCR 885)

Victoria Derrick testified that she is Jason's mother and that Samuel Derrick was the father. (PCR 887-888) She was twenty when she had him. Id. She said she learned of the sexual abuse when Travis escaped Martin's house and told her Jason was being abused. Nevertheless, Jason remained with Martin. (PCR 890) She said, "As far as we know, he did not want to come back at that point." Id. Jason would have just turned thirteen at the time. (PCR 891)

Mrs. Derrick testified that she would have testified that Jason had been sexually molested by his "foster father" Martin the entire time he was placed in Martin's custody. (PCR 891) However, nobody asked her "about anything" in 1991. Id. Nobody put her on the stand and nobody questioned her. Id.

Mrs. Derrick also testified frankly that, when her kids were young, conditions in the house were "deplorable".

(PCR 894) She admitted drinking and using drugs back then on a pretty much a daily basis. (PCR 895)

Mrs. Derrick, on cross-examination, agreed that Joe Martin had testified in 1988 and had been arrested for the sexual molestation. (PCR 897) She also recalled testifying that HRS okayed the Martin foster placement, that Jason was mechanically inclined, and that the boys were “ungovernable”. (PCR 898)

Ultimately, Mrs. Derrick maintained that she’s always had a loving relationship with Jason. (PCR 899)

Clinical neurophysiologist Henry Dee testified as an expert that Jason Derrick completed ten years of education and got a GED in prison. (PCR 920) His father died of an aneurysm.

Dr. Dee described the barren atmosphere that held sway in the Derrick trailer when Jason Derrick was growing up and reported the developmental impediments of chaos, poverty, and parental obliviousness to the children’s needs and nurture. In such a place, Jason assumed responsibility for the cooking and cleaning when he was twelve. However, roughly commensurate with the Martin placement, his academics began to deteriorate, and he began using drugs and skipping school. (PCR 923) (Ironically, and sadly, Mrs. Derrick had initiated him into drug abuse. Id. At first, she would have him roll her

marijuana cigarettes and, eventually, have him light them. (PCR 924) Soon he was using drugs around the trailer regularly as well as swilling alcohol. Id. He added cocaine to the cuisine when he'd get it from his mother's "stash". Id. Meanwhile, the father was essentially negative space: he had his own little travel trailer behind the family trailer where he'd basically live. Id. He spent what money he made on himself, updating his arsenal. (PCR 924-925) Rarely, he would take the children hunting or fishing. (PCR 925) Because of his preoccupation with his own pursuits, the children grew up poor in tattered clothes. As Mrs. Derrick explained to Dr. Dee, Jason, who was neat and sensitive about his appearance, became depressed by the raggedy clothes and, when he could, would try to buy his own. Id. As Mrs. Derrick detailed the nature of her husband's absence of participation in the children' lives, Dr. Dee realized that, in fact, neither parent dedicated much time or energy on the children. (PCR 925) Thus, Jason's childhood was characterized by fairly extreme neglect in every sense, both culturally and physically. Id. Further, the mundane neglect was punctuated with episodes of severe abuse. Both parents drank deeply and, not surprisingly, as the drinks mounted, their relationship deteriorated. Both parents became aggressive and visited this drunken aggressiveness on the children. (PCR 926) The father

in particular, would beat the kids with anything he could get a hold of – household objects, extension cords, rubber hoses… Id. The mother, who was also afraid, tried to ignore the violence. Id. Thus, even the occasional family camping trip would be transformed into a forum for fear, as pleading and crying took turns in the ear. Id. Around puberty, the boys were forced by their father to fight each other. (PCR 927)

The marriage was not happy and, progressively worsened. Id. Thus, when her father gifted her $10,000, Mrs. Derrick got our of town and got a divorce. Id. Although Jason was only a teenager, Mrs. Derrick left home and moved to Vegas. (PCR 927-928) Of course, Jason had lived apart from his mother before, as she had collected him and his brother, in response to the HRS investigation, and delivered them to Joe Martin, who proceeded to molest Jason for a year and a half. Ultimately, Mr. Martin was imprisoned for this sexual abuse of children. (PCR 928) This sexual abuse coincided with the time when Jason began to get in trouble for petty crimes. (PCR 928 - 929) Once, he was incarcerated in the Hillsborough County jail. Id. His crimes were not violent but, rather, tended to be small scale property offenses. Id.

In Dr. Dee's opinion, the sexual abuse suffered by Jason at such a young age would have been traumatic, a horrible experience. (PCR 980)

In the days before the crime of which he was convicted, Jason was, according to Mrs. Derrick, suffering from a "major mental episode". (PCR 981) Mrs. Derrick, arriving at his in-law's house, where Jason, Cherie and Sean, their baby, were staying, found Jason in a panic, holding the baby, running around the deck in circles and behaving strangely. Id. He seemed confused and panicked and thought that he was going to be denied access to his son. (PCR 932) Mrs. Derrick took him back to the trailer with her to calm down. Id.

Dr. Dee testified that his testing showed that Mr. Derrick suffers from an impairment in memory, due, apparently, to a cerebral dysfunction. (PCR 933-934). Thus, in Dr. Dee's opinion, Mr. Derrick suffers from a major mental disturbance from brain damage "with mixed fractures". (PCR 934) Consistent with this impairment, he would have difficulty inhibiting responses, causing impulsiveness and action without sufficient thought or deliberation. (PCR 935) Although, Dr. Dee could not pin-point a definite trauma to Mr. Derrick's head which may have caused the impairment, although he noted several possibilities. (PCR 936) Regardless, Dr. Dee testified that Mr. Derrick would have difficulty conforming his conduct to the dictates of the law because of his extreme impulsivity and that Mr. Derrick suffers from a major medical disturbance. (PCR 940-941) Specifically, Dr. Dee found that

both statutory mental health mitigation applied and would have so testified in 1991 had he been consulted and called as a witness. (PCR 941)

Joe Martin, who testified at the first trial but not at the 1991 trial, did not respond to his subpoena, so the parties stipulated to the admission of his testimony at the evidentiary hearing.

Douglas Leffler, a public defender, represented Mr. Derrick at the 1991 penalty phase. (PCR 970) He handled issues related to the "guilt phase," although there was not a new "guilt-phase" trial. (PCR 971) Robin Kester, also a public defender, handled the penalty-phase. Id. As far as Attorney Leffler could recall, this was the first "penalty-phase" trial he had participated in. (PCR 981-982). He also did not specifically recall discussing strategy with Ms. Kester. (PCR 982-983) He did prepare a memorandum for Ms. Kester of witnesses used in the previous penalty-phase, wherein he expressed concern Joe Martin's credibility because of his pedophilia. (PCR 983)

On cross-examination, attorney Leffler agreed that the extent of the defense's mitigation evidence was that Jason helped people read, that he helped at the jail "pod," that he stopped fights at the jail, that he was a good person, and that his life was worth saving. (PCR 985-986)

Robin Kester testified that she was the trial attorney representing Mr. Derrick in 1991 with primary responsibility for the presentation of mitigation. (PCR 989) Her strategy was to put on witnesses who would convince the jury to save his life. (PCR 990) Jason had told her he wanted to put on a "positive" case. Id. Ms. Kester testified she had no memory when she spoke to Jason about the sexual abuse inflicted on him. (PCR 992) She also acknowledged that she never spoke to or retained a mental health expert. (PCR 1004-1005)

Ms. Kester stated that she reviewed the first penalty phase as a starting point. (PCR 1020) She also spoke to David Derrick. Id. (Although understandably confused about David going by the name of Travis, Ms. Kester confirms that he was the brother who was also abused by Joe Martin, so he must have been Travis. (PCR 1022))

Attorney Kester she wanted to bring out Jason's protectiveness, his reading lessons, and his keeping an eye out for Travis/David. (PCR 1022) She did not want the sexual molestation to come in, although she says that her judgment on that "might be different now." (PCR 1023) The fact that Jason was placed by the state, because of problems at home, under the care, custody, and control of a pedophile who sexually molested him for a year and a half when he was thirteen and fourteen was not, according to Kester, "positive". (PCR 1023)

She didn't want to introduce "bad things" or "ugly things". However, she didn't consult any experts regarding pedophilia. She further acknowledged that, in death cases, an attorney "always" wants a mental-health expert to talk to the defendant to, among other things, consider and develop "mental mitigation." Id.

Finally, Attorney Kester acknowledged that there was no reason that she could not have both presented evidence that Jason was sexually abused by his foster father and that he taught inmates in jail to read. (PCR 1031-1032) Further, she had no specific reason for not seeking the opinion of a mental-health provider to establish the statutory mitigators.

Finally, attorney Kester testified that she considered evidence about Jason's home life and up-bringing "negative" and, thus, didn't use it. (PCR 1043)

3. THE HEARING COURT'S ORDER

On July 15, 2005, the hearing court issued its Final Order denying relief. (PCR 804) However, the court's findings of fact consist of substantial findings of the credibility of powerful mitigation presented at the hearing, none of which was presented to the jury. Specifically, the court found that the defendant was raised in deplorable circumstances. (PCR 804) The family suffered the weight of crushing poverty, lived in unkempt substandard housing, with too little food and

clothes. Id. The father didn't provide for the family financially or emotionally. Id. The father was violent. Id. Charitably put, the mother was overcome by circumstances and turned to drugs, eventually abandoning the family. (PCR 804-805) Then, as if these hardships were not bad enough, attempts to move Mr. Derrick to better circumstances landed him in the villainous clutches of a pedophile who sexually abused both Mr. Derrick and his older brother, Mr. Derrick was abused for a longer time then his brother. Id.

The Court noted the power of Carolyn Derrick's testimony, but considered that an allegation of Jason' own behavior with her might limit her ability to testify. Most of her testimony would not be effected, however. (PCR 805 - 806) Further, the Court focused on Dr. Dee's failure to pin-point a cause for the brain damage. (PCR 806)

The Court concluded as a matter of law that counsel's performance in the penalty phase satisfied both prongs of the Strickland Standard.

4. THE HUFF ORDER

Mr. Derrick was summarily denied a hearing on most of his claims by Order of the Court dated June 28, 2002. In his second Argument, he contends that this Court should remand the case for a full evidentiary hearing on certain of these claims

of ineffective assistance of counsel in the guilt-phase and of a claim of a Giglio violation by the prosecutor.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests that he be granted Oral Argument on his claims. He is unconstitutionally incarcerated under a sentence of death, and as his convictions are tainted with Constitutional error. Thus, this Court should hear Appellant's contentions fully set forth and argued.

Reference Key

Reference to the Record will be identified by the following abbreviations:

"R" -- Record in Direct Appeal

"R2" -- Record in Direct Appeal following remand;

"T" -- Transcript of Trial

"T" -- Transcript of second penalty phase;

"PCR" -- Post-conviction record;

"EX" -- Post-conviction evidentiary hearing exhibt;

"P" -- page; and

"pp" -- pages

Summary of Arguments

Argument 1. The lower court erred in denying appellant relief, after an evidentiary hearing, on his claim that he was denied effective assistance of counsel in the penalty phase of his trial.

The Hearing Court failed to properly conclude that a jury, which should have been presented with the mountain of moving, credible mitigation from the hearing, would, almost surely, have recommended that the defendant receive a life sentence, and the court would have been compelled to sentence him to life.

Argument 2: the lower court erred in summarily denying appellant's claims, in his 3.850 motion, that he was entitled to an evidentiary hearing on his claims regarding the effectiveness of counsel's representation in the guilt phase of his trial.

Appellant's allegations, when considered as true and unrebutted by the record, give rise to constitutional claims which require an evidentiary hearing.

ARGUMENT I

The Lower Court Erred In Denying Appellant Relief On His Claim That Trial Counsel Provided Prejudicially Ineffective Assistance of Counsel In the Penalty Phase of His Trial

1. STANDARD OF REVIEW

Because an evidentiary hearing was held on Appellant's claim[1] that trial counsel at the second penalty phase was ineffective, this Court must defer to the hearing court's factual findings to the extent that they are supported by competent, substantial evidence but review de novo the hearing court's application of the law to those facts. Stephens v. State, 748 So. 2d 1028, 1031-32 (Fla. 1999); Philmore v. State, No. SC04-1036, pp. 7-8 (Fla. 2006). In sum, this Court conducts an independent de novo review of the trial court's legal conclusions, while giving deference to the trial court' factual findings. State v. Reichmann, 777 So. 2d 342, 350 (Fla. 2000); Cherry v. State, 781 So. 2d 1040 (Fla. 2000); and Cave v. State, 899 So. 2d 1042, 1052 (Fla. 2005)

To obtain relief on his claim that penalty phase trial counsel provided ineffective assistance, Appellant must establish that deficient performance of counsel and the prejudice he suffered as a result of that deficient performance.

[1] An evidentiary hearing was also granted on Appellant's claim that he would present evidence of inculpatory statements made by Mr. Keisling ("Craze"), but Appellant did not present evidence on this claim.

Strickland v. Washington, 466 U.S. 668 (1984); Rutherford v. State, 727 So. 2d 216, 218 (Fla. 1998).

To establish deficient performance, Appellant must show that counsel's conduct was outside the broad range of competent performance required under prevailing professional standards. Strickland, 466 U.S. at 688. Secondly, Appellant must show that this deficient performance prejudiced him by so effecting the fairness and reliability of the proceedings that confidence in the reliability of the outcome is undermined. Id. At 694; Rutherford, at 727 So. 2d at 220; Gore v. State, 846 So. 2d. 461, 467 (Fla. 2003). Further, Appellant must satisfy the evidentiary requirements of both "prongs" of Strickland to prevail, and, if a court holds that the Defendant has failed to meet his burden in his showing regarding either prong, the court does not need to make a determination on the merits of his case as to the remaining prong. Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001).

Finally, Strickland emphasized that the exacting nature of Appellant's burden requires the Court to be "highly deferential" when assessing the quality of trial counsel's performance. Strickland, 466 U.S. at 689. Thus, Strickland counsels the court to beware "the distorting effects of hindsight," to "reconstruct" the circumstances of counsel's challenged conduct, "and consider" counsel's perspective at the time. Id. Because

of the difficulty "inherent in making the evaluation," the court must "indulge a strong presumption" that counsel's performance is constitutionally adequate. Id.; Philmore v. State, supra.

In assessing the second prong, or "the prejudice prong, both Strickland and this Court's repeated application of the Strickland standard emphasize the importance of determining whether or not there was a genuine adversarial testing of the issue to be resolved. Strickland, 466 U.S. at 695. Thus, Appellant suggests that, in the instant case, the determinative touchtone is, whether there was, in fact, a genuine adversarial testing of the question of whether the appropriate penalty to be imposed in this case is Death? See, Harvey v. State, No. SC-75075, P. 26-27, revised opinion (Fla. 2006) (Judge Anstead dissenting)

2. THE LAW AND FACTS OF THE INSTANT CASE

The hearing court held that, "it is impossible for the Court to find that counsel in the second penalty phase made any errors of significance, let alone errors that came to a level that deprived the defendant of his constitutional rights to effective counsel." (PCR 808-809) The court continued, "Furthermore, the evidence presented at the hearing in no way undermines the court's confidence in the outcome of the proceedings." (PCR 809) The court's rationale, only slightly condensed, appears to be that, because, counsel in the second

penalty phase got a 7-5 death recommendation, whereas counsel in the first penalty phase got an 8-4 death recommendation, counsel's performance could not have been deficient. Furthermore, counsel was honoring the defendant's wishes.[2]

Importantly, the lower court finds credible a tremendous amount of persuasive and moving mitigation. In fact, the Hearing Court finds that almost all of the lay testimony which was presented at the Evidentiary Hearing was credible and was readily discoverable, and, thus, should have been revealed by any acceptable investigation. Most of this testimony could have been presented to the jury.

However, because appellant remarked to counsel, when he was first returned for the second penalty phase, that, perhaps, the defense should "go positive," counsel apparently concluded that such a viable strategy obviated the need for investigation or for speaking to the witnesses from the first trial, or for any subsequent reassessment, after the completion of a full investigation, by counsel of the bounds of such a "strategy." Notably, Appellant's review of the record has turned up no satisfying explanation of the legal contours of the "go positive" strategy.

[2] The Court writes that counsel "may well have been severely undermined both ethically and legally for having ignored the defendant's decision."

For instance, at the hearing, counsel did not explain how growing up "under the weight of crushing poverty," without decent clothing or enough to eat, without the love a child needs, under constant threat of or in the wake of violence, with a drunk and drugged mother who, with the help of the state, when he was twelve or, maybe thirteen, gave a boy to a pedophile, in whose custody and bed he spent the next two years, and who gave her daughter and appellant's sister to a man named "Craze" as a "sex slave" when the girl was also still a child, was "negative" as it applied to the character of the child who suffered these horrors. Counsel repeatedly states that "now" she'd do things differently, implying either that "then" her inexperience was a factor or that some change in the law regarding the definition of mitigation has occurred in the interim. However, there has been no time when counsel would not have wanted to present such powerful mitigation to a jury, so appellant concludes that counsel is indicating that her lack of experience may have impeded her judgment at the time of trial However, such an explanation does not fully account for the fact that counsel's deficiency is also rooted in her failure to investigate and, thus, perhaps, although it would be difficult to sanction a "strategy" which essentially paints a false and inadequate portrait of appellant for the jury, discuss with her client the merits of a strategy which emphasizes the "positive" while

drastically minimizing, if not completely obliterating, the reality of appellant's past.

For instance, however, no evidence that any investigation was undertaken by the penalty phase counsel. Certainly, the witnesses from the evidentiary hearing were not re-interviewed. In fact, counsel fails to specify what exactly she did do to prepare for the second penalty phase.

Both Counsel and the Hearing Court found some justification for the "go positive" strategy in the fact that, at the second trail, the jury was deadlocked at six to six before recommending death by a seven to five vote, while the first jury, which had heard some of the evidence counsel could have presented, recommended death by an eight to four vote. A causal nexus is, however Appellant suggests, mere conjucture, and Appellant urges this Court to determine, as is both more probable and palpable, that, had the second jury heard the full story of Appellant's life, there is more than a reasonable likelihood that jury would have voted for Life. Surely, that is the more reasonable conclusion – not the unsupported supposition that counsel was better. The Hearing Court's conclusion that confidence in the outcome of the second penalty phase is not undermined by the presentation of the powerful mitigation readily available to counsel is erroneous. Further, the probative value of the respective jury votes is not supported by either logic or by the

record. The record does support a finding that the jury was very close to recommending life and that there was a massive amount of credible mitigation which would have been introduced without portraying the defendant in any more of a "negative" light than the murder conviction carried itself.

Even granting some substantive weight to the pop psychology terminology relied upon by trial counsel, it is difficult to comprehend how it could be considered a negative characteristic of the defendant to grow up impoverished, unloved, and sexually abused. In this context, the meager mitigation presented is actually magnified and made meaningful but in no sense does the horror of his story reflect negatively on him. There was no justification for counsel or the court to assume that the jury, already close to recommending life, would have heard the full truth of the defendant's life and still recommended death. To so conclude is to assume that the jury would somehow blame the rape victim for the rape. Surely any effort by the State to blame Mr. Derrick for the pedophile's retched conduct would have backfired.

Had counsel's decision to "go positive" been made after she had thoroughly investigated the case and talked to the witnesses, she might have crafted a presentation that would have been positive, but also would have utilized the moving mitigation readily available. Instead, for her to rely on the

defendant's statement, made in their initial conference, to, in effect, relieve her of her obligations to investigate and prepare would seen an abdication of responsibility. The record and her testimony do not reveal what else she did do. Nor is there anything in the record to indicate that her client was forbidding her to present any witnesses. She seems to have accepted his vague suggestion without bringing nay legal counsel or judgment to bear on the parameter of the suggestion or on the wisdom of the strategy. However, nothing her client said relieved her of her obligation to investigate and prepare and to provide effective assistance of counsel.

As with her failure to speak to her witnesses before trial, counsel's decision not to consult an expert witness seems to be another ad hoc concession to taking the most expeditious approach if it meets with her client's approval. Counsel does explain that the lawyers on the first case obtained evidence which she did not wish to use. However, she does not say why she did nothing further to personally familiarize herself with those potential witnesses, instead of relying exclusively upon the previous lawyers' impressions.

The hearing court concludes that, because Dr. Dee was unable to say where or when the defendant suffered a brain injury, his testimony is not probative. The court, however, ignores Dr. Dee's explicit testimony finding the applicability

of the Statutory Mental Health Mitigators and forgoes any analysis of the non-statutory mitigation which he provides. (PCR. 920-941)

At trial, the defense team consisted of Douglas Leffler and Robin Kester. (PCR. 970) He was responsible for guilt phase issues, which were minimal upon remand. Thus, primarily responsibility for preparation of the mitigation was left up to Attorney Kester. (PCR. 971) Attorney Leffler had no recollection of specifically discussing strategy with Ms. Kester, although he did prepare a memorandum regarding witnesses in the first penalty phase. (PCR 981-983) (Notably, he was not counsel in that case, so neither lawyer met the witnesses.) Leffler agreed that the penalty phase presentation of the defense consisted of the fact that the defendant helped inmates read, that Mr. Derrick helped in the jail "pod," that he stopped fights, that he was a good person and that his life was worth saving. (PCR. 985-986) Nothing regarding appellant's family history, his being sexually abused, or the circumstances of his early life was presented despite the fact that Attorney Kester testified that her strategy was to put on witnesses who would convince the jury to save his life. (PCR. 998)

His attorney could not recall speaking with Jason about the sexual abuse inflicted on him and admitted that she did not consult any mental health expert regarding this year and a half

of abuse. (PCR. 1004-1005) Apparently, Attorney Kester's preparation consisted of a review of the record and, perhaps, a conversation with David (Travis) Derrick. (PCR. 1022)

At the trial, Attorney Kester called David (Travis) Derrick, who testified that Jason helped him out when he was picked on and helped him with school work. (T2 169-175) Travis also provides some testimony about the time the two brothers "were apart." (T2-181) (This is apparently a reference to the time Jason was on death row prior to the remand.)

Next, Attorney Kester called Deputy Sheriff D'Antonio, who testified that Jason was Pod Representative in jail, where he was a reading tutor for inmates. (T2 183-188) Nancy Denaman testified she met Jason once and trained him to be a tutor. A neighbor, Sethia Hardesty, testified that she trusted Jason with her son "Horse". (T2 209-215) Cherie Derrick, Jason's wife, testified that he was a good husband and fathered their son, Sean, and that she still loved Jason. (T2 220-226)

A neighbor named Evelyn Deal testified that Jason did kind things for her. (T2 244-247)

Finally, Charlotte and Christina Wise, Evelyn Deal's daughter and granddaughter, respectively, testified that Jason protected them once when a man with a snow shovel attacked their car. (T2 253-286)

In closing argument, the prosecutor asked the jury, "Is that a person we should look at say, hey, let's spare his life because look what happened to him while he was growing up. Was this person abused by his parents?" (T2 341) The Prosecution, fully aware of the first trial, noticed the gap in the defense's story.

In her summation of the mitigation presented, Attorney Kester argued that Jason was only 20 at the time of the crime, that he was a good brother, that he is a pod representative at the jail, and that he is a literacy tutor. (T2 367) This does not begin to educate the jury on the young man whose life is in its hands.

In stark contrast to the paucity of evidence presented by the defense in the one-day evidentiary portion of the trial, the evidentiary hearing revealed much available mitigation not investigated or presented yet readily available, either from the record or from people easily identifiable.

The mitigation not presented is, in both quantity and quality, startling. Carolyn Haney testified that Jason Derrick, was her protector (PCR 835). Jason made all the boys leave her alone and protected her with everything that he had. Id. In fact, Jason was more like her dad than was her dad. (PCR 836) Ms. Haney's own father did not watch out for her, so Jason did. Jason assumed both the father's and mother's responsibilities

for caring for his little sister. (PCR 837) She could talk to him about anything and he became a father figure as best he could. Id. The family was hand-me-down poor. (PCR 838) The family never had money. Id. Nevertheless, Jason played with her and included her in the family games. Id. Carolyn recalled the time that Jason and her were riding a motorcycle in rainy weather. Id. The bike slipped out beneath them he put himself between her and the ground before she hit the ground. Id. As a result, he was badly scraped up, but she was not hurt (PCR 838-839) She conjured up the Moon Lake neighborhood where they lived as dirty, rough, and violent with a drunken father (PCR 839). He was controlling, and beat them with a belt, or worse. (PCR 840) Their mom was not much of one. Id. If the kids wanted clean clothes, they had to wash them, Id. If they wanted to bathe in a clean tub, they had to clean the tub. Id. The house was dirty, and the floors were full of holes. (PCR 841) There wasn't any food in the place. If the chicken didn't lay an egg, "no breakfast." (PCR 841) However, when Jason was there, he'd see that the children would eat. Id. He took care of his brothers as well as looking after his sister. (PCR 842)

The kids wouldn't talk to the mother – her mind was on soap operas. (PCR 842) Carolyn's closest relationship was with Jason. Their father's main interest was hunting. (PCR 843) When Carolyn was twelve, the mom turned wild and divorced the

father. Id. The divorce was "unfriendly". (PCR 844) Their mother turned to drugs and alcohol. Id. Vicky, Carolyn and Jason's mother, used and abused cocaine, crack and marijuana. (PCR 845) She used these drugs regularly in front of the children. Id.

When she got divorced, Vicky got a chunk of money. She used it on herself, and blew most of it on a gambling junket to Reno. Id. When she came back from Reno broke, she was a different person. She didn't want Carolyn around, and would leave Carolyn alone with no food or anything. (PCR 846) Mom began to run around with Michael Kiesling. Id. Vicky gave Carolyn to Craze at fourteen she was Craze's "sex slave". (PCR 846) At fifteen, Carolyn and had his child. The sexual abuse of Carolyn by Craze went on for four years.

During these years, there was drinking and drugging around the clock. The trailer was falling apart.

Jason had dropped out of high school. The children had no financial support Id. Craze was in control. (PCR 851) Vicki's weight went up to 400 pounds, and she told Carolyn that she didn't want her. Carolyn was young and beautiful, so Vicki "gave" her to Craze, so Vicky could have a life. (PCR 851)

Travis could have testified that their childhood conditions were "about average," meaning "dirt roads, single-wide trailer in Moon Lake. Id. He could have told the jury about life with

Mr. Martin. He could have told the jury that Jason was abused more thanhim and, for him, this period of his life is so painful that he has tried to suppress and forget it. Id. He could have told the jury that Martin slept with Jason nightly.

Travis could have told the jury that his mom dropped the boys off at Martin's "doorstep," and said, "Here's the boys, keep them, do whatever you want to do with them. They're yours." (PCR 866) Mr. Martin did. Id. Thus, the sexual abuse was "pretty much" constant for the duration of the stay. Id.

On cross-examination, Travis Derrick testified that he testified at the second penalty phase trial in 1991. (PCR 867) He recalled telling the public defender that he thought Jason was innocent and something about the defense "going positive". (PCR 868) No one mentioned Martin.

So Travis testified that Jason would defend him at school and would help him with his homework. Id. That was it.

Travis Derrick testified that he would have told the jury about Mr. Martin's sexual abuse of Jason Derrick as he had described at the evidentiary hearing. (PCR 869) He did not recall Jason's attorney coming and speaking to him face to face. (PCR 870) He just wasn't asked.

Jason Derrick's other brother, Samuel Derrick, thought he was closest to Jason. (PCR 872) Jason was the brother Samuel could go to with a problem. (PCR 873) He cares "very deeply"

for Jason, as Jason was "important" to him in his childhood. The father was not very involved. (PCR 874) Whenever Samuel needed Jason, Jason was there for him. He loved, and loves Jason very much. Id. He wasn't asked to testify in 1991, but would have. (PCR 875)

Cherie Derrick, Jason Derrick's ex-wife, testified at the evidentiary hearing that she married Jason in 1987 and had a son by him who is now 18. (PCR 878) She met Jason when she was sixteen. Id. Jason was loving and kind. (PCR. 879)

Cherie testified that Jason's home life was "shabby." (PCR 880) Jason was "very" poor. Id. Activity in the trailer consisted of "just watching TV or playing cards." Id. There were holes in the floor of the trailer through which the ground was visible. (PCR 880-81) There were lots of animals. Id. Jason seemed more concerned with his appearance than the others. Id. The children were not taken care of the way Cherie Derrick had been. (PCR 881) Nevertheless, Jason was always responsive to her problems and ready to talk things over with her. (PCR 882) He would always listen. Id. No one had ever listened to her like he did. Id. He was always gentle with her and with their son, and he loved his son very much. (PCR 882) The boy was "his pride and joy." Id.

Cherie Derrick testified at Appellant's two trials and would have testified to these qualities of Jason as well. Id.

However, before the second penalty phase, the lawyer's did not talk to her before she testified. (PCR 883) Cherrie's 1991 testimony, however, was limited to the fact that he would "help people", and went to Lamaze classes. (PCR 885)

Victoria Derrick testified that she is Jason's mother. (PCR 887-888) She was twenty when she had him. Id. She said she learned of the sexual abuse when Travis left and told her Jason was being abused. Nevertheless, Jason was left with Martin. (PCR 890) She said, "As far as we know, he did not want to come back at that point." Id. Jason would have just turned thirteen at the time. (PCR 891) Mrs. Derrick testified that she would have testified that Jason had been sexually molested by "foster father" Martin the entire time he was placed in Martin's custody. (PCR 891) However, nobody asked her "about anything" in 1991. Id. Nobody put her on the stand and nobody questioned her. Id.

Mrs. Derrick also testified frankly that, when her kids were young, conditions in the house were "deplorable". (PCR 894) She admitted drinking and using drugs in those days on a pretty much a daily basis. (PCR 895)

In 1991, counsel did not consult an expert. However, clinical neurophysiologist Henry Dee testified at the hearing that Jason Derrick completed ten years of education and got a GED in prison. (PCR 920) His father died of an aneurysm. Dr.

Dee confirmed the chaos, poverty, and parental obliviousness to the children's needs and nurture that marked Jason's childhood. Dr. Dee showed how, in the seventh grade, Jason's academics began to deteriorate, and that he began using drugs and skipping school. (PCR 923) Dr. Dee testified that Mrs. Derrick initiated him into drug abuse. (PCR 924) Soon he was using drugs around the trailer regularly as well as drinking. Id. Jason added cocaine to his cocktails when he'd get it from his mother's "stash". Id. Meanwhile, the father was essentially a negative space: he had a little travel trailer behind the family trailer where he'd basically live. Id. He spent what money he made on himself and his collection of guns. (PCR 924-925) Rarely he'd take the children hunting or fishing. (PCR 925) Because of his preoccupation with his own pursuits, the children grew up poor in tattered clothes. Id. Dr. Dee noted that Jason, who was neat and sensitive about his appearance, became depressed by the raggedy clothes and, when he could, would try to buy his own clothes. Id. Dr. Dee testified that, in fact, neither parent really spent much time on the children. (PCR 925) Thus, Jason's childhood was characterized by fairly extreme neglect in every sense, both culturally and physically. Id. Both parents drank a lot and, not surprisingly, as they drank their relationship would deteriorate. Both became aggressive and visited this drunken aggressiveness on the

children. (PCR 926) The father would beat the kids with anything he could get a hold of – household objects, extension cords, and even rubber hoses. Id. The mother was also afraid and tried to ignore it. Id. Thus, even the rare family camping trip would be marred by heavy drinking and the heavy violence which accompanied it. Id.

Dr. Dee could have told the jury that Jason was a teenager when Mrs. Derrick left home, went to Vegas, and lived there. (PCR 927-9287) Previously, Jason had lived apart from the mother before, as she delivered him and his brother, in response to the pedophile, Mr. Martin (PCR 928) Dr. Dee noted that this was when Jason began to get in trouble with the law for petty crimes. (PCR 928 - 929) Thus, Dee connected Jason's petty crimes to the horrible abuse. Jason was incarcerated in the Hillsborough County jail for burglary. Id. His crimes were not violent but, rather, were small scale property offenses. Id.

In Dr. Dee's opinion, the sexual abuse suffered by James at such a young age would have been traumatic, a horrible experience. (PCR 980)

Dr. Dee could have told the jury that, in the days before the crime of which was convicted, Jason was, according to Mrs. Derrick, suffering from a "major mental episode". (PCR 981) Mrs. Derrick, arriving at his in-law's house, where Jason, Cherie and Sean, their baby, were staying, found Jason in a

panic, holding the baby, running around the deck in circles and behaving strangely. Id. He just seemed confused and panicked and felt like he was going to be denied access to his son. (PCR 932) Mrs. Derrick took him back to the trailer with her to calm down. Id.

Dr. Dee testified that his testing showed that Mr. Derrick suffers from an impairment in memory, due, apparently, to a cerebral dysfunction. (PCR 933-934). Thus, in Dr. Dee's opinion, Mr. Derrick suffers from a major mental disturbance from brain damage "with mixed fractures". (PCR 934) Consistent with this impairment, he would have difficulty inhibiting responses, causing impulsiveness and action without sufficient thought or deliberation. (PCR 935) Thus, Dr. Dee testified, Mr. Derrick would have difficulty conforming his conduct to the dictation of the law because of his extreme impulsivity and that Mr. Derrick suffers from a major medical disturbance. (PCR 940-941) Dr. Dee found that both statutory mental health mitigators applied and testified that he would have so testified in 1991 had he been consulted and called as a witness. (PCR 941)

The mitigation not presented is, by the measures of both quantity and quality, surely enough to move a single juror to Life…

Though Strickland has long been, and remains, the touchstone of an effective assistance of counsel claim, the

Supreme Court, in Wiggins v. Smith, 539 U.S. 510 (2003), has "further fleshed the perimeters for finding an ineffective assistance of counsel regarding the presentation of mitigation in capital cases." Henry v. Florida, No. SC3-1312, 8 (Fla. 2006) In Henry, this Court reads Wiggins thusly:

> In Wiggins, the Defendant sought postconviction relief, arguing that his trial counsel rendered constitutionally ineffective assistance by failing to comply and present mitigating evidence of his dysfunctional background. 539 US at 516 Counsel claimed that the decision not to present mitigating evidence was a tactical one since counsel decided to concentrate on an alternative strategy in the guilt phase. Id at 521. In upholding the lower court's decision finding ineffective assistance, the Supreme Court held that the "principal concern…is not whether counsel should have presented a mitigation case. Rather we focus on rather the investigation supporting counsel's decision not to introduce mitigating evidence of [defendant's] background was itself reasonable." Id. at 522-523. The Court noted that the proper inquiry involved "an objective view of [trial counsel's] performance measured for "reasonableness under prevailing professional norms," which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time. Id. at 523 (Citation omitted) (Quoting Strickland, 466 US at 688-89). Given the overwhelming evidence of a severely dysfunctional childhood the Supreme Court concluded that "[T]he record of the actual sentencing proceedings underscores the unreasonableness of

> counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." Id. at 526.

Henry, SC 03-1312, at 8-9. Thus, applying Wiggins in Henry, this Court has evaluated the claim that Counsel was ineffective for failing to investigate or present mitigating evidence by considering whether the Defendant had shown that Counsel's ineffectiveness had deprived the Defendant of a reliable penalty phase proceeding. Henry, SCO3-1312 at 9, quoting Asay v. State, 769 So. 2d 974,985 (Fla. 2000) (Quoting Rutherford v State, 727 So. 2d 216, 223) (Fla. 1998)).

Further, even despite a waiver of mitigation, this Court has held that the total lack of preparation for the penalty phase by Counsel vitiated the "knowingly" component of the waiver of mitigation. Deaton v. Dugger, 634 So. 2d 4, 8 (Fla. 1993)

While the instant case does not involve a waiver, counsel does, similarly, seem to have determined that her initial conversation with Mr. Derrick, in which he suggested that they "go positive," relieve her of the duty to investigate and prepare mitigation or to provide a rationale and logical strategic framework for determining what evidence to present at trial. To reject all "ugly things," in the context of a murder trial and in the context of Mr. Derrick's horrible and hard life

story, would seem to be, at least, naïve. Nevertheless, there is nothing in the testimony or in the record to indicate that counsel went beyond her initial review of the record and discussion with Mr. Derrick in preparing the case. Certainly, the effect on counsel of that discussion seems to have created a constructive waiver and, when one compares the relatively few tidbits of mitigation presented to the jury to the great of powerful mitigation readily available, it is difficult to doubt the impact of her inaction on the reliability of the outcome.

In State v. Lewis, 838 So. 2d 1102 (Fla. 2002) this Court plainly reiterated the requirement that the counsel investigate and prepare for the penalty phase before the defendant can knowingly waive mitigation. Id. at 1113. Analogously, counsel should investigate and prepare for the penalty phase before deferring to an observation made by the Defendant in his initial conference with counsel. Frankly, as a strategy, "going positive" seems more pop psychology than a strategy for capital litigation. In fact, there is scant record evidence that trial counsel did any further preparation for the day-long trial. As the hearing court found, there had been a nearly unbroken chain of "ugly things" inflicted upon Mr. Derrick from birth to the time of the crime, when he was only twenty. Nevertheless, there is no record of counsel actually contacting or meeting with most, if not all, of the potential witnesses, or of even having

an investigator or an assistant contact them. Instead, she proceeded as though Defendant's comment had limited her duty to investigate and prepare.

The lower court and counsel contend that counsel's actions were based on tactical considerations. However, Appellant does not concur that "going positive" alleviated her of her burden to talk to potential witnesses and assess their credibility. Further, "going positive" might influence the general theme of a trial but it should not allow counsel to ignore the truth of what has happened to the defendant. Furthermore, virtually none of the mountain of mitigation available reflects negatively on the defendant, unless this court is prepared to accept the prosperous notion that somehow the boy was asking for the abuse he received. To the extent that the State would say there was any impeachment value in such a position or that the jury would hold it against the boy, this Court should reject such a position out-of-hand.

The lower court properly found that the defendant suffered a childhood of crushing poverty, of parental abuse, neglect and the utter abdication of any semblance of love and nurture, and the ultimate hard and cruel irony of being removed by the State for his own protection from such a home only to be placed for the first years of his puberty in the custody, control and clutches of a practicing pedophile. This is, indeed, sad,

horrible, and outrageous but it is not a negative comment upon Mr. Derrick. This is classic mitigation which would have caused the jury to let him live. There is no way to credibly find as a fact or to conclude as a matter of law that the presentation of such mitigation would have caused the jury, divided at one point 6 to 6, to move toward death. In fact, there is more than a reasonable likelihood that the opposite is true.

The Lower Court's comparison of the votes between the two trials as evidence of either the quality of Counsel's work or of a lack of prejudice due to Counsel's ineffectiveness, is speculative and not supported by the record. The most that the closeness of both verdicts can suggest is that this, if it is truly a death case, is a very close case. Further, as cases are analyzed by this Court for purposes of proportionality, the concurrence of these two courts, and the new mitigation now available, perhaps requires that his court review the proportionality analysis that it has undertaken and, Appellant urges, determine that this, in fact is not a death case when considered in proportion to the other cases in which the Court has upheld the death penalty.

Similarly to counsel's failure to present the extraordinary lay witness mitigation, counsel's failure to present a mental health expert constitutes ineffective assistance as well, thereby further undermining the reliability of the death

recommendation. A summary of Dr. Dee's testimony has been set forth, and it is un-refuted that he could have provided both an abundance of confirming background information and have found the applicability of the mental health mitigators. The trial court seemed to limit its consideration of Dr. Dee to the strength of his testimony on the issue of brain damage. However, the trial court does not give adequate (or any) weight to the strength of the mitigation which is uncontested.

Trial counsel took no steps whatever to consult an expert, although she indicated that this is something that is always done. Again, she took the case as she found it and left it there. The Lower Court wrote that she had no reason to think that further efforts to develop mitigation would have had any better chance of succeeding than those undertaken by previous counsel. Dr. Dee's testimony shows that, while he could not confirm brain damage, there was in fact a great deal of mitigation an expert could have testified to. In fact, strategic use of expert testimony could have, perhaps, been used to soften the "ugliness" which Counsel sought to avoid without distorting the truth by minimizing the impact of what the defendant had endured. In any event, Counsel could and should have consulted an expert and would have been able to present powerful mitigation if she had. There was nothing in the previous work done that ruled this out.

3. CONCLUSION AND RELIEF SOUGHT.

Based upon the foregoing, Appellant respectfully asks that this Court reverse the Lower Court, and find that Appellant's Constitutional right to effective assistance of counsel at the penalty phase of his trial was violated, requiring that his death sentence be vacated and a life sentence be imposed in the case remanded for another trial.

ARGUMENT II

. The Lower Court Erred In Summarily Denying
. Appellant An Evidentiary hearing on Properly
. Plead Claims

1. Standard Of Review.

Generally, a Defendant is entitled to an Evidentiary Hearing unless the post-conviction motion and any particular claim in the motion is legally insufficient or the allegations in the motion are conclusively refuted by the record. See, Freeman v. State, 761 So. 2d 1055 (Fla. 2000) In order to support Summary Denial the trial court must either state its rationale in denying relief or attach portions of the record that refute the claim. See, Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993) Additionally, where no evidentiary hearing has been held an Appellant Court must accept the Defendant's factual allegations as true to the extent that such allegations are not refuted by the record. See Peede v. State, 748 So. 2d 253, 257

(Fla. 1999) The burden is on the Defendant to establish a legally sufficient claim period. Freeman, 761 So 2d at 1061

2. Allegations Regarding Failure To Challenge Evidence

Appellant alleged that Defense Counsel failed to call witnesses, impeach the state's witnesses, or to retain experts to present testimony or challenge testimony at the 1988 Motion to suppress hearing. A Confessionologist would have testified that the statements to police to Mr. Derrick were suspect, that they were inconsistent with the physical and forensic evidence, that standard techniques for eliminating false confessions were not employed, and that the techniques that were employed, such as providing information to the interviewee, can lead to false confessions. Had counsel properly prepared for and presented evidence at the suppression hearing, there is a reasonable probability that the confessions would have been suppressed. (Footnote omitted)

Appellant alleged that no documentation or memorialization of Mr. Derrick's alleged confession to law enforcement was ever made. Instead, Mr. Derrick was convicted based upon uncorroborated testimony that Mr. Derrick confessed to law enforcement. Trial counsel was ineffective for failing to properly investigate the interrogation practices of Detective Vaughn and to show that Detective Vaughn commonly used recording devices despite his testimony to the contrary. Furthermore,

trial counsel failed to impeach pertinent state witnesses by cross-examining them regarding their actions in the State v. Jeffrey Crouch case, wherein improper interrogation by Vaughn and Alland had led to a dismissal. Mr. Crouch was arrested and interrogated on January 29, 1987. The circuit judge threw out Mr. Crouch's confession in August in 1987, just two months after Mr. Derrick's alleged confession to Vaughn.

Appellant alleged that Defense Counsel failed to present any witnesses at their own Motion to Suppress. Detective Clinton Vaughn, called by the State, was the only witness at the hearing. Available relevant witnesses at the time include Cherie Derrick, David Lowery, and Detectives Fairbanks, Carpenter, Johnson, and the defendant himself. In fact, Mr. Derrick was never advised by trial counsel or the court that he could testify at the suppression hearing to contradict Detective Vaughn's version of the event, nor was he informed that such testimony would not prejudice his ability to testify at trial.

Appellant alleged that Detective Vaughn's testimony at the Motion to Suppress was inconsistent with his own investigative report and deposition, and inconsistent with his later testimony at the trial. At the suppression hearing, Vaughn gives a verbatim version of Jason's alleged confession that was never preserved in a written report or in any notes turned over to post-conviction counsel. Further, this version is inconsistent

with Vaughn's version at his August 21, 1987, deposition. At the suppression hearing, Vaughn testified as follows:

> I kept telling [Derrick] that we know that he did it, we know where he did it and how he did it, and even why he did it. And then I asked him – I told him we had this information. He said, "You don't have anything." And I said, "Yes, I do. We have a witness." And he said, "No, you don't." And I said, "Yes, we do; David Lowery." He said, "He didn't tell you anything." I said, "Yes, he did." He said, "I'd like to have him in front of me, let him tell me." I said, "Fine, we can arrange that." And so then I had David and Jason sit in my sergeant's office together…
>
> David looked at him and David kind of broke down and started crying, and he said, "I can't handle this," and at that point Jason said, "All right, I did it." He said, "You did what?" I said, "You did what?" "I killed him." I said, "How?" He said, "I stabbed him." (R. 1102-3).

Compare this to Vaughn's account during his deposition:

> I said: Well, I got a witness. And I said: You know, you stabbed him to death. And he said: No, no, no. And I said, Well I'm charging you with first degree murder. And I wanted to try one more thing with him to see if he would talk. I said: I'll put the person in front of you that said you did it? He said: Go ahead and do it. So, I did it. Myself and Jim Carpenter were with Jason, and I bought David in and sat him down. And I looked at Jason. And Jason said he had nothing to do with it. I said" He had nothing to with what?

> And he said: Killing Rama. (P. 37-38)

The suppression version of Mr. Derrick's breakdown is much more consistent with the attitude one would expect a guilty person to have. Mr. Derrick is denying that Lowery told Vaughn anything, presupposing that Lowery has knowledge. In the suppression hearing, it's also Mr. Derrick's idea to bring Lowery in, whereas during deposition it was part of Vaughn's interrogation tactics. More importantly, in the deposition version, it was the detective who first supplies information about the method of death, which the police had withheld up to this point in the investigation.

Appellant alleged that as for Mr. Derrick's state of mind, in Vaughn's deposition he says that Mr. Derrick was crying when he broke down and allegedly confessed. In the suppression version, there is no indication of the emotional distress by anyone except poor Mr. Lowery. In fact, Mr. Derrick was under great emotional distress at the time, distress as a result of police coercion that should have been taken into account in judging the voluntariness of his alleged confession. His wife, Cherie Derrick, was brought into the interrogation room after Mr. Derrick's alleged confession. According to Cherie's deposition on April 22, 1988.

> Ms. Derrick: [Jason] said, "I can't believe it," that [sic] he

told me that they told him he would never see [our son] Sean again, he would never see me again.

Mr. Halkitis: You heard that?
Ms. Derrick: Yeah.
Mr. Halikitis: Who said that?
Ms. Derrick: No. Jason said that to me.
Mr. Halkitis: In the presence of the detectives?
Ms. Derrick: Yeah.
Mr. Halkitis: Yes?
Ms. Derrick: Yes, but we were whispering.
Mr. Halkitis: What did he say?
Ms. Derrick: He told me that, “I would never see Sean again, I would never see you again.” And that’s all he said.

(P. 25)

This testimony corroborates Mr. Derrick’s own statements to his trial counsel, and should have been presented at the Motion to Suppress, both by cross-examination of Vaughn and calling Cherie Derrick as a witness. Instead, the only questions defense counsel asked of Vaughn during the Suppression Hearing relating to the questioning of their client concerned the time of the confession. There was no cross-examination at all on Mr. Vaughn’s interrogation techniques.

Appellant also alleged that defense counsel also failed to ask Vaughn any questions about the Mirandizing of their client. According to Vaughn’s report of June 30, 1987, Detectives Fairbanks and Carpenter were present for the reading of Miranda. In Vaughn’s 1987 deposition, when asked who was in the room at

the time, he replied, “I believe it was either Harold Johnson or Gary Fairbanks, either or.” (P. 38) However, Fairbanks says in his deposition that he never heard Miranda read to Mr. Derrick. (Deposition on August 21, 1987, p. 20) Mr. Carpenter said during his deposition that he was present for very little of the interrogation, knew no specifics of Mr. Derrick’s alleged confession, and specifically was not present at the beginning when Miranda supposedly took place. (Deposition on February 12, 1988, pp. 5-6) Harold Johnson’s report of July 1, 1987, reflects in general terms that he and Carpenter were present with Vaughn when the defendant allegedly confessed, but has no mention of Miranda. (Johnson does, however note that he Mirandized Mr. Derrick’s wife while questioning her.) Johnson’s August 21, 1987, deposition is equivocal at best on the subject of Miranda. At one point he says that he did not hear anyone read Mr. Derrick Miranda prior to him being taken to the Sheriff’s office. Then the following exchange occurred:

Mr. Dehnart:	What happened once you got to the sheriff’s office?
Mr. Johnson:	I believe he was read Miranda again.
Mr. Dehnart:	Do you know who did that?
Mr. Johnson:	I think Clint Vaughn did. I may have it in my report, I briefed my report but I don’t remember from seeing that. A lot of times I write that down.
Mr. Dehnart:	Did you hear what his response was to that?

Mr. Johnson: He understood Miranda
…..
Mr. Dehnart: Where was that read?
Mr. Johnson: That was in our office at the Sheriff's Office.
Mr. Dehnart: Who was there with him? You and Vaughn and who else?
Mr. Johnson: Could be Carpenter, I'm not sure. (P. 11-12)

Then Appellant alleged that the most damning piece of evidence against Vaughn's version of events is Mr. Derrick's Waiver of Search. During his interrogation, Mr. Derrick agreed to allow the sheriff's office to seize his personal belongings, particularly his shoes, from his mother's house, and signed a Wavier of Search, witnessed by Detective Vaughn and Detective Fairbanks. The Waiver of Search was the first of five sections on a single form on a single sheet of paper. The last section of this form includes a Statement of and Waiver of Miranda Rights. *Although give the opportunity to waive his Miranda rights at the time he waived his search rights, Mr. Derrick refused to do so.* He did not sign the Miranda waiver section of the form. Recall that Mr. Fairbanks, the second witness to the Waiver of Search, stated under oath that he never saw Detective Vaughn administer Miranda to Mr. Derrick. Thus, the unsigned Waiver of Miranda Rights substantiated Mr. Derrick's claim that, in fact, he never waived his Miranda rights and that any statements he gave to Mr. Vaughn should have suppressed. Counsel was ineffective in failing to present evidence that Mr.

Derrick did not waive Miranda, and the finding of prejudice is inescapable.

Appellant also alleged that, as to the paltry evidence actually presented by the defense at the hearing, counsel could have benefited from Johnson's testimony even as to their meager cross-examination of Detective Vaughn. In response to trial counsel's questions, Vaughn says that he got Mr. Derrick to the sheriff's office between 10:00 p.m. and 11:00 p.m., that Mr. Derrick was interviewed for "maybe thirty minutes to an hour" before allegedly confession around 11:30 p.m. or 12:30 a.m., and that Mr. Derrick was still being questioned at around 2:00 a.m. when he was taken for a drive to the crime scene. Vaughn's report reflects that Mr. Derrick confessed at 12:20 a.m. According to Johnson's deposition, Johnson was present for the beginning of the interrogation, and Mr. Derrick was denying everything. Later "they" moved Mr. Derrick to Carpenter's office and Johnson remained in his own office. Johnson said Mr. Derrick was being questioned and denying everything for "probably an hour, hour and a half." (Deposition, p 12-13.) Johnson says he wasn't there when Mr. Derrick changed his story, but at some point Carpenter and Vaughn opened the door between the offices and Johnson could hear Mr. Derrick allegedly confessing. Lowery was there as well. Johnson said the door was closed for about ten minutes, and they continued the

interrogation for another 10-15 minutes after Mr. Derrick allegedly confessed. (Deposition, p. 14-15)

Appellant alleged that David Lowery's deposition is also inconsistent with Vaughn's suppression testimony. According to Lowery, he and Mr. Derrick were placed in a room together twice. The first time they were alone, and the officers told Lowery that they were being taped. When nether party made any incriminating statements, they were separated again. Then Lowery was allowed to see his own wife, and he thought he could hear Jason's wife. Lowery and his wife waited in an office for an hour or so. At around 2:00 or 2:30 a.m. a detective said he was putting Lowery and his wife up in a motel for the night because it was late. Before they could leave, Carpenter came out and got Lowery and asked him to try to get Mr. Derrick to "open up" one more time. Lowery then went in and told Mr. Derrick he couldn't lie for him anymore, and Mr. Derrick said that he did it. (Deposition from January 14, 1988, pp. 33-36) This clearly puts the moment of Mr. Derrick's breakdown at two hours later than Mr. Vaughn's suppression testimony.

Subsequently, Appellant alleged that Mr. Lowery describes the defendant's statement as follows:

> [Jason] said, yes, I did it. And then the detectives proceeded and asked him how many times he had done it and he told them that he had stabbed him thirteen times. And then they asked him where and he told him that he

> was stabbed in the side, that he grabbed him from behind and stabbed him in the side. (Deposition, p. 35)

Here again the implication that the officers told Mr. Derrick initially that the victim was stabbed, not the other way around. This admission is also completely inconsistent with the evidence. Mr. Sharma was stabbed 34 times, not 13 times, and he was not stabbed in the side. The majority of the wounds were to Mr. Sharma's back, and were probably inflicted while Mr. Sharma was on the ground and the perpetrator sat on his buttocks.

Appellant alleged that Defense counsel was ineffective for failing to call these witnesses and for failing to challenge the inconsistencies in Vaughn's testimony. In fact, at a Motion to Suppress a confession, defense counsel didn't even argue against the reliability of voluntariness of defendant's confession. Defense counsel's legal argument at the Motion to Suppress was that David Lowery's statement to the police did not constitute sufficient probably cause to arrest Mr. Derrick. It was defense counsel's duty to do everything possible to challenge what was both the most damning and the most questionable piece of evidence against Mr. Derrick. Without Vaughn's confession testimony, the only remaining evidence against Mr. Derrick is his supposed confession to David Lowery, a convicted felon who was at one time suspected of involvement in the crime until he pointed the finger at Mr. Derrick. There was no physical

evidence connecting Mr. Derrick to the crime, and there were no witnesses. Without Vaughn's testimony, Mr. Derrick would likely have been acquitted.

Appellant alleged that Defense counsel was ineffective for failing to use the information and materials at their disposal, and that ineffective performance prejudiced Mr. Derrick. However, defense counsel was also rendered ineffective by state misconduct. Defense counsel received a grand total of five (5) pages of excerpted police reports: the second page of Johnson's 3-page July 1, 1987 report, and a garbled copy Detective Vaughn's 5-page report dated June 30, 1987, which was missing the third page. (The third page details the time, place, and substance of Mr. Derrick's alleged confession to David Lowery.) In fact, it appears that defense counsel didn't even receive the four pages of Vaughn's report until the middle of Mr. Derrick's trial. During the cross-examination of Vaughn in Mr. Derrick's trial, defense counsel makes reference to a one-page report by Vaughn. (R. 393). On redirect, Mr. Halkitis implies that defense counsel Dehnart has been making improper and misleading comments about the report.

> Mr. Halkitis: And when counsel was holding up a page, he may have been referring to a page which indicates what the defendant told you?
> Mr. Vaughn: Yes, sir.

Mr. Halkitis: Does that page indicate what the defendant told you in synopsis form?
Mr. Vaughn: Yes, sir. It does.
Mr. Halkitis: And did you put that in your police report, what the defendant told you, in substance?
Mr. Vaughn: yes, sir. I did.
Mr. Halkitis: Judge, I would offer this into evidence, since counsel didn't want to.
Mr. Dehnart: Judge, I'm going to object. I've never been afforded that police report, other than the page I referred to.
Mr. Halkitis: Then, I'll introduce the page that I referred to. (R 403.)

As alleged, one of the missing pages from Johnson's report indicates that he Mirandized Mr. Derrick's wife before questioning her. Johnson made this note despite the fact that she was able to give him no information about the homicide or her husband's involvement. That makes the fact that Johnson did not note being present for Vaughn Mirandizing Mr. Derrick even more questionable. These allegations are not rebutted by the record and, taken as true, would entitle Appellant to the vacation of his convictions. Therefore, the lower court should be reversed.

3. Allegations Regarding Randall James

Appellant alleged that, at Mr. Derrick's guilt phase trial, immediately following defense counsel's announcement in front of the jury that defendant was the next witness, the state suddenly

announced it would call jailhouse informant Randall James in rebuttal of Mr. Derrick's testimony.[3]

Appellant alleged that The State made this dramatic announcement, which amounted to the prosecutor testifying by proxy, even though the State knew that James was not credible and was working with the State to get a deal regarding his pending charges of attempted murder, arson, and being a felon in possession of a firearm, even though James had not been listed as a witness, and even though James was represented by the Public Defender, like Mr. Derrick, creating a conflict of interest which Mr. Derrick did not waive. See Guzman v. State, 644 So. 2d 996 (1994).

As Appellant alleged, the prosecutor's pronouncement took place at a bench conference and was loud enough to be overhead throughout the courtroom. The prosecutor proclaimed that Randall James would testify that Mr. Derrick had made incriminating statements to James. The state also represented that Mr. James did not want any deal, that he was scared, and that he thought it would be in his best interest to contact Detective Vaughn, who had handed the prosecutor a note regarding Mr. James at least an hour before the prosecutor timed his

[3] Mr. Derrick's case was ultimately remanded because of Randall James' improper testimony at the penalty phase. State v. Derrick, 581 So. 2d 31 Fla. 1991).

announcement to coincide with the calling of Mr. Derrick as a witness in his defense.

Appellant's allegation specified that, rather than deposing Mr. James, as the State suggested, to determine his credibility and the substance of his potential testimony, counsel unreasonably relied upon the representations of the prosecutor in making the diction that Mr. Derrick would not testify.

Appellant alleged that, had counsel taken Mr. James' deposition before making this decision and resting the defense case, counsel would have learned, as they did when they eventually took the deposition prior to the penalty phase, that Mr. James was an utterly incredible witness. He had a history of treatment for mental illness and had been moved to the psychiatric ward shortly after supposedly receiving incriminating statements from Mr. Derrick. Mr. James was paranoid and suicidal prior to supposedly receiving these incriminating statements, and he had failed to come forward with the alleged information until Mr. Derrick's trial was under way six months later.

The allegation plainly stated that counsel failed to advise Mr. Derrick that Mr. James should not be able to testify while counsel represented Mr. Derrick because of the conflict. See, Guzman, supra. Further, counsel failed to advise Mr. Derrick or the court that the prosecutor's representation that James was

willing to waive the conflict was irrelevant because the only proper waiver under these circumstances would be Mr. Derrick's. Thus, Mr. James would not have been able to properly testify in rebuttal and counsel's advice to Mr. Derrick not to testify so as to keep Mr. James from being called in rebuttal was based on a failure to understand the law. In fact, counsel should have moved to disqualify himself because the conflict tainted the trial and Mr. Derrick's Constitutional right to testify.

As Appellant explicitly alleged, counsel further failed to correct the Court's stated misconception that removing the public defender from representing James would cure the problem. (R. 526-528); Guzman at 998. As the Florida Supreme Court wrote:

> We can think of few instances where a conflict is more prejudicial than when one client is being called to testify against another. As seen by the facts set forth earlier in this opinion. Boyne was a key witness against Guzman. The State contends that Boyne's waiver of the attorney-client relationship was sufficient to cure any prejudice that might have been caused by the public defender's representation of both Boyne and Guzman. While such a waiver might have cured any conflict the public defender had in so far as its representation of Boyne was concerned, that waiver does not waive *Guzman's right* to conflict-free counsel. *See also R.* Regulating Fla. Bar 4-1.7(a)…

State v. Guzman, 644 So. 2d 996, 998 (Fla. 1994) The conflict and the need for the public defender to withdraw attached when

the prosecutor announced that he would call James after it became clear that Mr. Derrick was going to testify. Therefore, whether the prosecutor was seeking to intimidate Mr. Derrick or to make the announcement so loudly as to effectively testify by proxy, Mr. Derrick's counsel could not properly advise Mr. Derrick because of the conflict. Finally, Appellant alleged that because the prosecutor created this untenable situation while aware of the conflict. The prosecutor even advises that James is represented by the public defender but that this is no problem in the State cross-examining him if he has to take the stand (R. 510).

Unfortunately, as Appellant alleged, Mr. Derrick's counsel did not properly advise either Mr. Derrick or the Court of the ramifications of the prosecutor's actions in springing this witness on the court at the end of the trial. Because the prosecutor's actions, had Mr. Derrick's counsel performed effectively, his action should have led to the court declaring a mistrial. Thus, Appellant alleged, the prejudice caused by the failure of counsel to protect Mr. Derrick's interests is clear, and arguably, double jeopardy should attach, barring re-trial. Certainly, Appellant alleged that, at a minimum, the circuit court should vacate the judgment and order a new trial. None of these allegations are barred by the record and, taken as true,

require the vacation of Mr. Derrick's convictions and sentences and to Mr. Derrick's release.

4. Allegations Regarding Improper Argument

Appellate alleged that, in closing arguments at the guilt phase, the state argued improperly that the expert opinion of the medical examiner, Dr. Corcoran, the State's own witness, that the murder weapon was a single-edged knife, was a mistake.

Appellant further alleged that, without evidence to support this argument, the State further improperly argued to the judge that the jurors should ignore the expert opinion of record and subsequently, the prosecutor effectively gave his own unqualified opinion that the wounds on the victim were not from a singled-edge knife. Appellant alleged that trial counsel failed to properly object to this improper argument and that the prejudicial impact of counsel's failure is established by the fact that the jury requested that the medical examiner's testimony be provided to it during deliberation (R. 669-671). Appellant alleged that, further, with no curative instruction requested, the court instructed the jury to rely upon the juror's memory, which had been tarnished by the prosecutor's machination of the evidence. Id.

Appellant alleged that, During Mr. Derrick's guilt phase, the prosecutor elicited prejudicial and damaging opinion testimony from police crime scene technicians Magdelina Ellie

Calhoun and Curtis Page. However, it was alleged, neither of these individuals possessed the requisite credentials and qualifications to provide expert testimony regarding blood stain splatter analysis. In addition, those witnesses testified that no fingerprinting, blood-typing, or tire track plaster casting was done at the crime scene. (R. 258-260, 266, 274).

Appellant explicitly alleged that defense counsel should not have allowed these witnesses to offer expert opinions regarding bloodstain evidence. Further, it was alleged that the prosecutor committed misconduct by eliciting this misleading and prejudicial testimony and commenting upon it. (R. 258-265).

Thus, Appellant properly alleged that, Defense counsel was rendered ineffective by the state's presentation of blood evidence. During the guilt phase, trial counsel put the state and the trial court on notice that defense counsel lacked any knowledge of blood trail analysis and interpretation (R. 257-258). One technician made a videotape of the crime scene between 8:30 and 9:00 a.m. on June 25, 2987 (R. 267). The tape included visual representation of the blood trail evidence. However, the defense provided no independent analysis of the videotape or the actual blood evidence.

Further, Appellant alleged that no effort was made to preserve or to type the found blood to the victim or as exculpatory evidence as to Mr. Derrick. As a consequence,

counsel was unable to provide effective assistance of counsel during cross examination, investigation, and preparation. Counsel also lacked notice that blood evidence would be used during the trial and failed to hire a defense expert to examine a bloody t-shirt found at the crime scene (R. 266).

Furthermore, Appellant alleged that guilt-phase failings effected the 1991 trial as well. Mr. Page, the technician who made a videotape of the crime scene between 8:30 and 9:00 a.m. on June 25, 1987, narrated the videotape as it was shown to the jury at the 1991 re-sentencing. In sum, Appellant's allegations, not refuted, must be taken as true and, considered in that light, entitle Appellant to a full evidentiary hearing on his ineffective assistance of counsel claim.

5. Allegations Regarding Cumulative Impact of Counsel's Errors

Appellant alleged that the court can take into consideration that counsel's errors at Mr. Derrick's guilt/innocent proceedings had a cumulative prejudicial impact. Ellis v. State 622 So. 2d 991 (Fla. 1993) and Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555 (1995)

Further, he alleged that he did not receive the fundamentally fair trial to which he was entitled under the Eight and Fourteenth amendments. See Derden v. McNeel, 938 F. 2d 605 (5th Cir. 1991). The sheer number and types of errors involved in his trial, when considered as a whole, resulted in

the unreliable conviction and sentence that he received. See, State v. Gunsby, 670 So. 2d 190 (Fla. 1996). Therefore, on remand the court must consider the number and types of error as a whole upon completion of a full and fair evidentiary hearing.

6. Allegation Regarding Prosecutorial Misconduct (Giglio)

Appellant alleged that at Mr. Derrick's guilt phase proceedings, immediately after the defense called Mr. Derrick to the stand, the state for the first time disclosed it would call jailhouse informant Randall James to testify in the event Mr. Derrick took the stand on his behalf.

Appellant alleged that this discussion took place at a bench conference and was loud enough to be overhead by others. The state alleged that Randall James would testify that Mr. Derrick told James "Yeah, I killed the motherfucker and I may kill again." Subsequently, Appellant alleged that the State represented that Mr. James did not want any deal, and that Mr. Derrick did not testify as result of the State's representations.

Finally, Appellant explicitly alleged that the guilt phase jury was tainted by the loud bench conference and that the State withheld evidence regarding Mr. James in violation of Brady v. Maryland, 373 U.S. (1963) and elicited, by proxy, false statements in violation of Giglio v. U.S. 180 (1972)

Thus, Appellant clearly alleged the factual basis for his claim that the State knowingly made false statements in violation of Giglio v. United States, 405 U.S. 150 (1972).

The trial court erred in failing to give Appellant a hearing on this claim.

7. Conclusion

The lower court erred in failing to grant Appellant an evidentiary hearing on the foregoing claims, the allegations of which are legally sufficient and not refuted by the record.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing, the lower court improperly denied Appellant's Motion for Rule 3.850/1 relief. Therefore, this Court should order that the death sentence be vacated and the case remanded to the circuit court for an evidentiary hearing on Sixth and Fourteenth Amendment Claims of ineffective assistance of counsel and prosecutorial misconduct.

Certificate of Font and Service

Below signed counsel certifies that this brief was generated in Courier New 12 point font pursuant to Fla. R. App. P. 9.210 and served on all parties hereto by first-class U.S. mail on this __ day of July, 2006.

Harry P. Brody
Fla. Bar No. 0977860
Jeffrey M. Hazen
Fla. Bar No. 0153060
Brody & Hazen, PA
P. O. Box 16515
Tallahassee, FL 32317
850.942.0005