IN THE SUPREME COURT OF FLORIDA

JASON BRICE LOONEY,

Appellant,

vs. **Case No. SC05-159**
L.C. No. 97-215-CF

STATE OF FLORIDA,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

ON DIRECT APPEAL FROM A FINAL ORDER OF THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR WAKULLA COUNTY, FLORIDA, DENYING APPELLANT'S AMENDED FLORIDA RULE OF CRIMINAL PROCEDURE 3.850/3.851 MOTION FOR POST CONVICTION RELIEF IN A CAPITAL CASE.

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PRELIMINARY STATEMENT

Appellant, Jason Brice Looney, was a defendant in the lower tribunal. He will be referred to as "the defendant" or "Looney." The State of Florida, plaintiff below, is the appellee. It will be referred to as "the state."

The post conviction record on appeal is in three bound volumes. Volume I contains Looney's complete Florida Rule of Criminal Procedure 3.850/3.851 motion for post-conviction relief and part of the state's response thereto. Volume II contains the remainder of the state's response, additional pleadings and the transcript of the first part of the hearing on the motion. Volume III contains the remainder of the transcript of the hearing on the post conviction motion, written closing arguments submitted by both Looney and the state, the trial court's order denying the motion and subsequent documents pertaining to this appeal.

The Clerk of the Circuit Court for Wakulla County, Florida has provided a page number for each page of the entire post conviction record on appeal in the bottom right-hand corner of each page. Thus, references to the record will be by a volume number and the letter "R" followed by an appropriate page number or numbers. References to the record on appeal in Looney's direct appeal of his judgments and death sentences will be by a

volume number and the letters “OR” (for original record) followed by an appropriate page number or numbers.

STATEMENT OF THE CASE AND OF THE FACTS

A. Nature of the Case

This is a direct appeal to the Supreme Court of Florida from a final order (Vol. III, R. 553-565) rendered by the Circuit Court of the Second Judicial Circuit, in and for Wakulla County, Florida, Honorable N. Sanders Sauls, Circuit Judge, presiding, denying Looney's motion for post-conviction relief, as amended, filed per the provisions of Florida Rules of Criminal Procedure 3.850/3.851.

B. Jurisdiction

This Court has jurisdiction to review the lower court final order denying Looney's Florida Rule of Criminal Procedure 3.850/3.851 motion for post conviction relief, per the provisions of Article V, Section 3(b), Florida Constitution; Florida Rule of Appellate Procedure 9.030(a)(1)(A)(I) and Florida Rule of Criminal Procedure 3.850(g).

C. Course of the Proceedings

On August 26, 1997, Guerry Wayne Hertz, Jason Brice Looney and Jimmy Dewayne Dempsey were indicted for the first-degree murders of Melanie King and Robin Keith Spears, committed on July 27, 1997 in Wakulla County, Florida. They were also indicted for burglary of a dwelling while armed, armed robbery with a firearm, arson of a dwelling

and use of a firearm during the commission of a felony. (Vol. I, R. 49) The defense was notified that the state intended to seek the death penalty. (Vol. I, R. 49) After a series of pretrial motions was filed and disposed of, jury selection and the trial commenced on November 29, 1999, and concluded on December 9, 1999. (Vol. I, R. 49) The jury convicted Looney and co-defendant Hertz of the first degree murders of Melanie King and Robin Keith Spears,[1] burglary of a dwelling while armed with a firearm, armed robbery with a firearm, arson of a dwelling and use of a firearm in the commission of a felony. (Vol. I, R. 49) The penalty phase of the proceedings was held on December 9, 1999 (Vol. I, R. 49, 50) By a majority vote of 10-2, for each murder the jury recommended and advised that the death penalty be imposed against both defendants. (Vol. I, R. 50)

On February 18, 2000, the trial court, in concurrence with the jury's majority recommendation, prepared a sentencing order. (Vol. I, R. 50) As to Looney, the trial court found that the following aggravating factors had been proven beyond a reasonable doubt: (1) He stood convicted of another capital felony or of a felony involving the use or threat of violence to the person (aggravated battery in Volusia County, Florida); (2) the capital felonies were committed while Looney was engaged in the commission of a

[1] Dempsey pled guilty, testified against Hertz and Looney, and was sentenced to life in prison. (Vol. I, R. 51)

burglary, arson and robbery; (3) the capital felonies were committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody (the defendants discussed and determined that they would leave no witnesses); (4) the homicides were committed for financial or pecuniary gain (the court merged this aggravating factor with the capital felonies being committed during the course of a burglary, arson or robbery); (5) the murders were especially heinous, atrocious or cruel; and (6) the murders were cold, calculated and premeditated without any pretense of moral or legal justification. (Vol. I, R. 50) In mitigation, the trial court found (1) Looney was twenty years old at the time of the homicides, which was given only moderate weight; and (2) other non-statutory mitigation that included (a) Looney's difficult childhood, which was given significant weight; (b) Looney had no significant criminal history or no history of violence, and his good behavior since being incarcerated was given marginal weight; (c) he was remorseful, which was given moderate weight; (d) society would be adequately protected if he were to be given a life sentence without the possibility of parole, which was given little weight; and (e) a co-defendant, Dempsey, received a life sentence following a plea, which was given significant weight and substantially considered by the trial court. (Vol. I, R. 51)

A timely notice of appeal was filed. (Vol. I, R. 51)

Looney raised the following issues on direct appeal to the Supreme Court of Florida: (1) The trial court improperly excused for cause a venire member whose opposition to the death penalty did not prevent or substantially impair her ability to perform her obligations as a juror; (2) the details of the collateral crimes in Volusia County became a feature of the trial, causing prejudice that substantially outweighed the probative value of that evidence; (3) the trial court erred by admitting gruesome photographs of the bodies at the crime scene and the autopsy; (4) the trial court erred by refusing to grant a mistrial after a state witness testified about the hearsay statement by a non-testifying co-defendant that incriminated Looney; (5) the evidence was insufficient as a matter of law to sustain the convictions; (6) the trial court erred in denying the defense motion to require a unanimous verdict during the penalty phase; (7) the statute authorizing the admission of victim impact evidence is an unconstitutional usurpation of the Supreme Court's rule-making authority under Article V, Section 2 of the Florida Constitution, making the admissibility of this evidence unconstitutional and reversible error; (8) four of the seven aggravating factors upon which the jury was instructed and which the trial court found, were legally inapplicable

and their consideration was not harmless error; and (9) the death sentences in this case were disproportionate. (Vol. I, R. 51, 52)

On November 1, 2001, the Supreme Court rejected the appeal and affirmed the convictions, judgments and sentences, including the death sentences. *Looney v. State*, 803 So. 2d 656 (Fla. 2001). On December 21, 2001, the mandate was issued.

On March 19, 2002, a petition for writ of certiorari was timely filed in the Supreme Court of the United States. (Vol. I, R. 52) It was docketed on March 20, 2002. The issue presented was whether *Apprendi v. New Jersey*, 530 U.S. 466 (2000) overruled certain Florida cases relative to the imposition of the death penalty. On June 28, 2002, the Supreme Court denied the petition. *Looney v. Florida*, 536 U.S. 966 (2002).

On June 30, 2003, a pleading styled "Motion to Vacate Judgment of Sentence of Death Which Sentence Has Been Affirmed On Direct Appeal" was filed with the lower tribunal, pursuant to Florida Rules of Criminal Procedure 3.850/3.851. (Vol. I, R. 1) On September 15, 2003, the state filed a response. (Vol. I, R. 48)

After an initial *Huff* hearing[2] before the lower tribunal, Looney sought and was granted permission to file an amended motion for post

[2] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

conviction relief. (Vol. II, R. 269-272) The amended motion, styled "Amended Sworn Motion for Post Conviction Relief of Defendant, Jason Brice Looney," was filed on March 9, 2004. (Vol. II, R. 273) The state filed an amended response to the amended motion on April 1, 2004. (Vol. II, R. 295)

On July 28, 2004, an evidentiary hearing was held with Judge Sauls presiding, on the single issue of whether there were mitigating statutory or non-statutory circumstances available to defense counsel at the time of trial that were not presented, and whether prejudice resulted. (Vol. II, R. 386). Dr. Bill Mosman, a forensic psychologist, testified for Looney. (Vol. II. R. 389-400; Vol. III, R. 401- 441) Gregory Cummings, Looney's trial counsel, testified for the state. (Vol. III, R. 442 - 471; Vol. III, R. 492-494) The state also called as a witness Dr. David J. Partyka, a licensed psychologist. (Vol. III, R. 472-491)

Counsel for the parties had previously agreed to submit written closing arguments with regard to the evidentiary hearing. The defendant submitted closing arguments on September 15, 2004. (Vol. III, R. 497-519) The state submitted a "Post-Hearing Memorandum and Closing Argument" on the same date. (Vol. III, R. 523-552)

D. Disposition in the Lower Tribunal

On December 30, 2004, the lower tribunal issued a final order denying Looney's post conviction motion as amended. (Vol. III, R. 553-565) A notice of appeal to this Court was filed on January 27, 2005. (Vol. III, R. 566-567)

E. Statement of the Facts

i. Basic Facts Regarding the Guilt/Innocence Phase

The facts regarding the offense and trial were fully set out by this Court in the opinion arising from Looney's direct appeal. These facts are quoted verbatim from that opinion:

> In the early morning hours of July 27, 1997, the charred bodies of Melanie King and Robin Keith Spears were found in the victims' burning home in Wakulla County, Florida. Looney, Guerry Hertz, and Jimmy Dempsey were each indicted for the first-degree murders of the victims, and each codefendant was also charged with burglary of a dwelling while armed, armed robbery with a firearm, arson of a dwelling, and use of a firearm during the commission of a felony as a result of this incident. Prior to trial, codefendant Dempsey negotiated a plea with the State and was sentenced to consecutive life sentences in return for providing his testimony at Hertz and Looney's joint trial.
>
> The evidence presented at the trial revealed the following facts. At approximately 11 p.m. on July 26, 1997, Looney and his codefendants left an acquaintance's house on foot within walking distance from the victims' home. All three men were armed with guns. A resident who lived about 500 yards from the victims testified that Hertz appeared at her door at about 2 a.m. asking to use her phone because "his truck had broken down." When she refused, the trio continued down the road

towards the victims' home and, upon seeing the victims' black Mustang, Looney said, "There's my car right there. That's the one I want."

Dempsey and Hertz went to the victims' front door as a decoy and asked if they could use the phone. King provided them with a cordless phone, and Dempsey feigned making a phone call. When Dempsey attempted to return the phone, Hertz pointed his gun at King and forced his way in. Looney then entered and pointed his rifle at Spears. Spears and King were bound and gagged with duct tape and placed face down on their bed. Looney and his codefendants removed a significant amount of the victims' property, including a VCR, a television, jewelry, furniture, and CDs, and loaded the victims' belongings into the victims' two vehicles. Looney also found approximately $1500 of the victims' money in an envelope, which was ultimately divided equally among the three.

Looney and Hertz concluded that they could leave no witnesses and informed Dempsey of their decision. Dempsey said Looney and Hertz then poured accelerants throughout the victims' home. All three men, still armed, went to the bedroom where the victims were bound, side-by-side, face down on their bed. When they entered the back bedroom, King said that she would "rather die being burnt up than shot." She stated, "Please, God, don't shoot me in the head." Hertz replied, "Sorry, can't do that," and then he proceeded to open fire; Looney followed and then Dempsey. The victims died as a result of the gunshot wounds.

Subsequent to the shootings, the victims' home was set ablaze. Looney drove away in the victims' white Ford Ranger, and Hertz drove the victims' black Ford Mustang, with Dempsey as a passenger. According to Dempsey, the whole episode at the victims' home lasted about two hours. The trio proceeded to Hertz's house and unloaded the stolen items and divided up the money. Two employees at the Wal-Mart in Tallahassee testified that the three men made purchases at the store at around 5 a.m. the morning of the murders, before "showing off" their new vehicles, i.e., a black Mustang and a white Ford Ranger, to both

of the employees. A Wal-Mart receipt for a clothing purchase was later found in the victims' Mustang, corroborating the employees' testimony.

Looney and his codefendants made their way to Daytona Beach Shores where, later that day, they were involved in a pursuit and shoot-out with police. Looney and Dempsey were arrested after abandoning and fleeing from the victims' black Mustang. Hertz abandoned the victims' Ford Ranger after being shot, and he paid a cabdriver $100 to drive him to his aunt's house in St. Augustine. Hertz was arrested that same day in St. Augustine, and victim Spears' .9 mm gun was recovered from Hertz's bag.

A firearms expert with FDLE testified that one of the bullets recovered from the area of the victims' burned bed was fired from the .380 Lorcin handgun recovered from Looney at the time of his arrest in Daytona Beach, i.e., the same handgun owned by Keith Spears and used, according to Dempsey, by Hertz to shoot the victims. The other bullet was fired from a .30 caliber carbine rifle, not inconsistent with .30 caliber rifle used by Looney to shoot the victims, and later recovered in the victims' Mustang. A roll of duct tape, Looney's wallet with $464, and Dempsey's wallet with $380 were also found in the Mustang. A fingerprint analyst with FDLE analyzed latent fingerprints taken from the Mustang and concluded that Looney and his codefendants had all touched the car. The chemist found evidence of various accelerants on items of clothing found in the Mustang. In addition, a law enforcement investigator with the State Fire Marshal's Office testified that the kind of damage that was done by the fire does not happen unless an accelerant is used.

The state medical examiner testified that the bodies were severely burned. He graphically detailed the condition of the bodies as depicted in the photographs: the legs were burned off below the knees, the hands were burned to nubs, the bones of the arms were fractured by the fire, and the skulls were burned partially away. The victims had to be positively identified by dental records. The medical examiner also testified that there could have been other injuries that were not detected due to the

extensive burns.

King was shot at least two times in the head, which caused her death. However, the medical examiner was not able to trace the path of the bullet because the skull was burned away. He testified that it was possible that other bullets struck the body, which could not be determined because of the fire. King lived one to two minutes after she was shot. However, there was no soot in the trachea, indicating that she was not alive when the fire started. Spears was shot at least one time in the head, which caused his death. The bullet went in the back of the neck and exited above the right eye. Spears also lived one to two minutes after he was shot, and again, no soot was discovered in his trachea, meaning that he was dead at the time of the fire. The defense did not present any evidence.

A jury convicted both Looney and Hertz of the first-degree murders of King and Spears, burglary of a dwelling while armed with a firearm, armed robbery with a firearm, arson of a dwelling, and use of a firearm in the commission of a felony. By a majority vote of ten to two, for each murder, the jury recommended and advised that the death penalty be imposed against Looney and Hertz. By written order, the judge imposed a sentence of death for each murder.

With respect to Looney, the trial court found as aggravating factors that (1) Looney was previously convicted a felony involving the use or threat of violence to the person; (2) the capital felony was committed while Looney was engaged in the commission of a burglary, arson, and robbery; (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (4) the crime was committed for financial or pecuniary gain (the court merged this aggravating factor with the fact that the capital felony was committed during the course of a burglary, arson, or robbery); (5) the murder was especially heinous, atrocious, or cruel, and (6) the murder was cold, calculated, and premeditated without any pretense of moral or legal justification.

In mitigation, the trial court found (1) Looney's age of 20,

> which was given only moderate weight; (2) as to all other nonstatutory mitigation, (a) Looney's difficult childhood was given significant weight; (b) the fact that Looney had no significant criminal history or no history of violence and the fact that he posed no problems since being incarcerated were given marginal weight; (c) that Looney was remorseful was given moderate weight; (d) the fact that society would be adequately protected if he were to be given a life sentence without the possibility of parole was entitled to little weight, and (e) the fact that a codefendant, Dempsey, received a life sentence following a plea, was given significant weight and substantially considered by the trial court.

Looney v. State, 803 So. 2d 656, 662-664 (Fla. 2001).

ii. Evidence Presented during the Penalty Phase

During the penalty phase, the state first called as a witness Reginald Byrd, a probation officer. He testified that Hertz was on felony probation at the time of the homicides, and already in violation status. (Vol. XVIII, OR. 2212)

The state next called Karen King, Melanie King's mother. She prepared a written statement that was published to the jury. (Vol. XVIII, OR. 2215) The statement portrayed Melanie as a strong and serious-minded person who was attending school to become a registered nurse. She was also working full-time. (Vol. XVIII, OR. 2215-2216) Karen emphasized how much the family had looked forward to Melanie and Keith's marriage, and how many lives had been affected by her death. (Vol. XVIII, OR. 2216-2217)

The state then called Janet Spears, Keith Spears' mother. She also prepared a written statement that was published to the jury. (Vol. XVIII, OR. 2218) Keith was their only son, and was the last Spears to carry on the family name. (Vol. XVIII, OR. 2218) He was a hard worker in the family business, which would have been his eventually, and was an important asset to that business. (Vol. XVIII, OR. 2219) She indicated how important he had been to the family and how much he would be missed. (Vol. XVIII, OR. 2219)

The state rested.

The first witness called on Looney's behalf was Robert Kendrick, another probation officer for the Florida Department of Corrections. He testified that Looney was placed on probation in Leon County for forgery, uttering and grand theft. The probation period was for three years, commencing April 22, 1996. Kendrick had been supervising Looney for about a year. Looney was "pretty much" compliant with the terms of his probation during that period and was not in violation status until the time he was arrested for the instant crime. (Vol. XVIII, OR. 2228) He was an average probationer. On cross-examination, Kendrick acknowledged that Looney was not authorized to carry a gun while on probation. (Vol. XVIII, OR. 2227-2229)

The next witness called on Looney's behalf was Andrew Harris. He appeared dressed in "jailhouse orange," and testified that he was presently incarcerated and serving a sentence of twelve years for second-degree murder. (Vol. XVIII, OR. 2230-2231) Harris had never met Looney but was in jail with Looney's co-defendant, Jimmy Dempsey, for about a year. (Vol. XVIII, OR. 2231-2232) Dempsey told Harris that Looney was merely a lookout and did not say anything about him (Looney) shooting anyone. (Vol. XVIII, OR. 2233) Harris added that Dempsey told him that he should have shot Looney because he "was the scariest one out of the bunch." (Vol. XVIII, OR. 2233) Dempsey also told Harris that, during the trip to Daytona Beach (after the homicides had been committed), Looney wanted to get out of the car. Dempsey said that he wasn't going to let Looney out, and that he (Dempsey) would shoot him if he tried to get out. (Vol. XVIII, OR. 2233-2234) When the police in Daytona Beach stopped them, Dempsey was going to shoot it out with the police, but Looney told him to put the gun down. (Vol. XVIII, OR. 2234) On cross-examination, Harris asserted that he was also incarcerated with Looney's co-defendant, Guerry Wayne Hertz, for a few months, and that they had also talked about the case. (Vol. XVIII, OR. 2230-2235)

Looney's next witness was Susan Podgers, his biological mother.[3] She was only 17 years old when Looney was born, but happy to have him. (Vol. XVIII, OR. 2237) Everyone in the family loved him, but she only had custody of him for eighteen months. (Vol. XVIII, OR. 2238) After a fight with her husband (who was not Looney's father), she took the child to her father and left him there, then went to live elsewhere. (Vol. XVIII, OR. 2238-2239) Shortly thereafter, there were allegations and physical evidence that Looney, at the age of 18 months, had been molested. Initially, the allegations were against her husband. Subsequently, her parents did not allow her to see Looney because they had been told by law enforcement not to let her have him. (Vol. XVIII, OR. 2239-2240) There was some supervised visitation with him but it did not work out and eventually she stopped seeing him altogether. (Vol. XVIII, OR. 2240) Later on, there were adoption proceedings, which both she and her parents initially objected to. She eventually agreed to the adoption proceedings, however, and was ordered to stay away from her son. (Vol. XVIII, OR. 2240-2241) After that, she would occasionally get some information about Looney from her mother, but she did not see him again until after the murders were

[3] The reporting of some of the testimony presented at the various proceedings may appear choppy. This is necessary in order to accurately report it.

committed and Looney was in the Wakulla County jail. (Vol. XVIII, OR. 2242) They have maintained contact since that time. (Vol. XVIII, OR. 2243) There was no cross-examination.

Looney's counsel then called Glenda Podgers, Susan Podgers' mother, and Looney's grandmother. (Vol. XVIII, OR. 2246) When Looney was 18 months old, he was raped. Her husband (Looney's grandfather) kept him that day while she was Christmas shopping. When she came home, she discovered that Looney " . . . was black and blue all around his little bottom, including his penis." (Vol. XVIII, OR. 2246, 2247) The next day, Mrs. Podgers took him to the hospital where it was determined that Looney had been sexually molested. (Vol. XVIII, OR. 2248) The following day, he was removed from the Podgers' home by Texas child protection authorities. (Vol. XVIII, OR. 2248) Looney was placed with foster parents, Mr. and Mrs. Looney. These eventually became his adoptive parents. (Vol. XVIII, OR. 2249) Mrs. Podgers retained some grandparent visitation rights and had him every other weekend and on holidays until he was about 16 years old. (Vol. XVIII, OR. 2249) Mrs. Looney was extremely controlling. " . . . she had to control everything." (Vol. XVIII, OR. 2250) Mrs. Podgers had no input about the way he was raised. Mrs. Looney had his life mapped out for him, planning from the time he was about three that Looney was going to

be the next Billy Graham and nothing was going to change that. He had no choice in the matter. Religion was a very big part of their lives, and Looney was in church two or three times a week. He had to follow Mrs. Looney's plan and become what she wanted him to be. (Vol. XVIII, OR. 2250) In 1993, Mrs. Podgers' husband (Looney's grandfather) committed suicide. Looney was 16 at the time, and when his grandfather died " . . . they decided to lay everything on him." (Vol. XVIII, OR. 2251). Mrs. Looney told him that he had been molested, that his grandfather did it, and that his grandfather had committed suicide. "And then they say go do your homework, you've got to go to school tomorrow. They gave him no help, just threw it all at him and just let him go." (Vol. XVIII, OR. 2252) After that, Mrs. Podgers found that weekend visitations were more and more difficult to arrange. (Vol. XVIII, OR. 2252) She sent Looney cards on holidays, provided him with some money, and kept calling and leaving messages, but for the last two years that Looney was in the adoptive home, no one ever called her back. (Vol. XVIII, OR. 53) She was told that they never provided any counseling for Looney during that time. Mrs. Looney's attitude was: "He's old enough to handle it. He's got his faith." (Vol. XVIII, OR. 2254) Mrs. Podgers learned that Looney eventually left home, and she did not know where he was until she learned that he was in the

Wakulla County jail awaiting trial for the subject charges. Mrs. Podgers reestablished contact with Looney, discovering that he had never received the cards she sent, and that he was never told of her telephone calls. (Vol. XVIII, OR. 2255-2258) There was no cross-examination.

In closing arguments, State Attorney Willie Meggs argued to the jury that they needed to weigh aggravating factors that are statutorily defined, against mitigating factors, and that if the aggravating factors outweighed the mitigating factors, they should recommend the imposition of the death penalty. (Vol. XX, OR. 2373) Meggs went through each of the aggravating factors that had been presented. (Vol. XX, OR. 2374-2378) With respect to the mitigators presented, Meggs argued that while Looney's probation officer indicated that he was a good probationer, the officer did not know that he was carrying a firearm. (Vol. XX, OR. 2378-2379) Meggs added, "I think another factor that you may consider was that from the testimony you heard the Looneys tried to raise him in a Christian home. I don't know what weight you give that mitigating factor." (Vol. XX, OR. 2379)

In his closing argument, Cummings argued that all of the aggravators referenced by Mr. Meggs also applied to Jimmy Wayne Dempsey. (Vol. XX, OR. 2380) He pointed out that the aggravator of having a previous conviction for a violent crime referred to the convictions for the crimes

committed in Volusia County, which occurred after the crime for which they were currently being tried, and that they should weigh that aggravator accordingly. (Vol. XX, OR. 2380-2381) Cummings insisted that the aggravator that the crime was committed for the purpose of avoiding lawful arrest did not apply to Looney because the victims did not know who Looney was. (Vol. XX, OR. 2381-2382) He contended that the aggravator of heinous, atrocious and cruel did not apply to the crime. (Vol. XX, OR. 2382-2383) He stated "(o)ne mitigator can outweigh every aggravator the State believes they have proven. I submit to you that mitigator, by itself, is Jimmy Dempsey." (Vol. XX, OR. 2384-2385) He argued that the jury could consider as a mitigator how well Looney could conform to life imprisonment, and that no evidence was presented that Looney had presented any problems since being locked up for more than two years. (Vol. XX, OR. 2385) He mentioned the age mitigator, stating that he did not know how much weight the jury should give it. (Vol. XX, OR. 2385) He stated that some background information on Looney had been presented by having the mother and grandmother testify. (Vol. XX, OR. 2385-2387)

iii. Evidence Presented During The Post Conviction Evidentiary Hearing

On July 28, 2004, an evidentiary hearing was held in Crawfordville, Florida, before Judge Sauls on Looney's post conviction motion as amended. The first witness called on Looney's behalf was Dr. Bill Mosman, a licensed psychologist and member of the Florida Bar. Dr. Mosman advised that he practiced forensic psychology as well as neuropsychology. He was accepted by the court as an expert without objection from the state. (Vol. II, R. 389-393)

Dr. Mosman was retained by Looney's post conviction counsel, Frank E. Sheffield, Esq., to interview and test him. (Vol. II, R. 393) Prior to doing so, he read and reviewed numerous documents, including the Texas Department of Human Resources case file (an extensive file several inches thick), a set of memos from the original case investigator and the transcripts of the penalty phase trial. (Vol. II, R. 394) Dr. Mosman also studied Cummings' sentencing memorandum and the state's memorandum in support of the jury recommendations, the trial court's sentencing order and this Court's November 1, 2001 opinion that affirmed the original judgments

of conviction and sentences.[4] He studied Looney's medical and custody files at Union Correctional Institution as well. (Vol. II, R. 394, 395)

Dr. Mosman met personally with Looney at UCI for about six and one-half hours, interviewing and testing him. (Vol. II, R. 394-395) His purpose was to first obtain information to use in formulating his opinions. He then tested Looney to discover whether additional testing provided clarification of the results of the earlier testing that had been available, along with the other data, at the time of the trial. (Vol. II, R. 395)

Dr. Mosman reviewed the aggravators presented by the state (Vol. II, R. 399) as well as what mitigation was presented on Looney's behalf during the penalty phase. (Vol. II, R. 399) He determined that, to the extent non-statutory mitigating[5] evidence was presented, it was only through family members, a probation officer, and another inmate. (Vol. II, R. 400) He found the presentation of this mitigation testimony to have been peripheral and superficial. (Vol. II, R. 400) "The longest discussion or presentation was from the mother, who basically said I haven't seen my son in 20 years, please give me the opportunity to reacquaint and know. I'm not attempting

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[4] *Looney v. State*, 803 So. 2d 656 (Fla. 2001).

[5] The actual question, at line 9 of Vol. III, R. 400, used the term "non mitigating" but from the context it was obviously meant to inquire regarding mitigating evidence. Counsel apparently meant to say, "non-statutory mitigating," and it was apparently understood that way by the witness.

to minimize. That's basically the sum total of it." (Vol. III, R. 401) Dr. Mosman observed that although other important mitigating information was present in the records, it was not presented to the jury and judge by defense counsel at trial. (Vol. III, R. 401)

Based upon his study of the existing files and his own testing and evaluation, Dr. Mosman found both statutory and non-statutory mitigating factors that were available at the time of trial, but which were not presented. (Vol. III, R. 401-402) The statutory factors not presented were (1) the felony was committed while Looney was under the influence of extreme emotional disturbance, and (2) while there was a finding that the defendant was age 20 at the time of the homicides, there were significant deficits in his emotional and social age. (Vol. III, R. 402)

Dr. Mosman stated that he found some 12 to 13 non-statutory mitigators. (Vol, III, R. 402) This included his findings that the records regarding Looney's natural mother were remarkably different from the testimony that was presented by Mr. Cummings during the penalty phase. She was seriously disturbed. (Vol. III, R. 402) At age 15, she got pregnant, abused drugs and alcohol, and was a teenage runaway who earned money as a stripper. (Vol. III, R. 403) The Texas Department of Human Resources gave up on her and terminated her parental rights. (Vol. III, R. 403) At 18

months of age, Looney was taken away from her and placed with her parents, after which she "dropped out" of his life. (Vol. III, R. 403)

There were significant problems in the Podgers' home as well, and the Texas Department of Human Resources indicated that it was not in Looney's best interests that he remain there. (Vol III, R. 403-404) He was removed from the Podgers' home and placed with the adoptive parents, Mr. and Mrs. Looney.[6] (Vol III, R. 403-404) There were significant records including medical reports, doctors' evaluations, and testimony presented in the family court of sexual and physical abuse that occurred, and not just as a one-time event. (Vol. III, R. 404). Mr. Podgers was an alcoholic, and there were allegations that he also abused one or both of the female children. (Vol. III, R. 405) He ultimately shot and killed himself. (Vol III, R. 405)

The defendant was adopted by Mr. and Mrs. Looney following his removal from the Podgers' home. (Vol. III, R. 405-406) The Looneys had two other adopted children. There were problems with abuse in that home also. (Vol. III, R. 406) They had been investigated on at least one occasion for marks on the little girl. There were allegations concerning abuse with

[6] The defendant's last name became Looney when he was adopted; the record is unclear about what his last name was prior to that time.

firearms and other instruments. (Vol III, R. 406) Dr. Mosman spoke to one of the adoptive children, Mark Looney, about this.[7] (Vol. III, R. 406-407)

In Dr. Mosman's opinion, the environment that Looney was brought up in had a significant, detrimental effect on his development during those 16 years. (Vol. III, R. 407) It led to depression and a lot of self-destructive behavior in later adolescence. (Vol. III, R. 407) The Looney home, externally viewed, was very rigid, and the interviews from the children revealed significant abuse that went beyond rigidity. When Looney was 15, his adoptive mother told him that his grandfather had committed suicide and that there was a possibility that Looney's grandfather was actually his father. At the same time, she told Looney that he was adopted, and that he had been sexually and physically abused. From that time forward, Looney had a personality change. He became withdrawn, uncommunicative, and self-deprecating. He referred to himself as "trash." (Vol, III, R. 407, 408) His adoptive home, while having the potential of being healing and curative for a child who had been abused, turned out to be the very opposite. (Vol, III, R. 408)

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[7] The state objected to Dr. Mosman testifying as to what Mark Looney told him, on the grounds that it was hearsay. The court sustained the objection. The record therefore does not indicate what the conversation with Mark Looney consisted of.

At age 16, Looney began self-medicating with alcohol for his depression, and he had problems at school. Ultimately he ran away from home. (Vol. III, R. 408) All three of the other adoptive children had run away from the home before he did, so that precedent seemed to him to be a reasonable solution. (Vol. III, R. 409-410)

Looney wound up in Florida where he met a girl and eventually was introduced to his two co-defendants. Looney and the co-defendants had known each other for only about three days before the subject offenses of conviction occurred. (Vol. III, R. 410)

Dr. Mosman determined the type of social personality Looney had based upon his own testing and from his review of the testing performed by Dr. Partyka. Looney has no psychoses or bipolar manic-depressive types of psychotic symptomatology, but there was evidence of significant clinical depression, which the data and records suggested has existed untreated since childhood. (Vol. III, R. 411-412) The doctor also noted anxiety and self-destructive tendencies, chronic issues that could be traced back for a number of years. (Vol. III, R. 412-413) The bottom line was that at the time of the homicides, Looney was at a particularly emotionally disturbed point in his life. (Vol. III, R. 413)

Dr. Mosman added that, while Looney's age was offered to the jury as a mitigator, it was not presented in the forensic manner in which it should have been. (Vol. III, R. 413) Only his chronological age was referenced, but "we have to look at physiological age, mental age, emotional age, social age, developmental age." (Vol. III, R. 413) These latter elements of the age mitigator were not discussed by defense counsel. (Vol. III, R. 413)

Dr. Mosman added that, from a forensic point of view, the presentation of the above non-statutory mitigators would have accomplished a significant amount to flesh out for the jury the truth about Looney's development, his childhood, his early years, his relationships with his adoptive siblings, the abuse and " . . . all the context that was going on in that entire area." (Vol. III, R. 414) It would also have given the jury a more complete understanding of Looney's mental condition and his inability to make appropriate decisions. (Vol. III, R. 414)

Dr. Mosman concluded by stating that there were statutory as well as non-statutory mental health mitigators in existence at the time of trial, but that they were not presented "through a mental health lens." (Vol. III, R. 416) He could find no reason why such information should not have been presented during the penalty phase, given the amount of information and data available. (Vol. III, R. 416)

On cross-examination, Dr. Mosman said that he had not felt it necessary to talk to Gregory Cummings, Looney's trial counsel, inasmuch as Mr. Cummings' reasons for not presenting the mitigating information to the jury would not have changed his view. (Vol. III, R. 417) Dr. Mosman did talk to Dr. Partyka, the psychologist who had been retained by Looney's first defense counsel (Bernard Daley). (Vol. III, R. 417; Vol. III, 440) The discussion with Dr. Partyka took place the day prior to the evidentiary hearing because, until that time, he had not realized that Dr. Partyka had worked on the case. (Vol. III, R. 417-418) Dr. Mosman had read the transcript of the penalty phase but had not read the transcript of the guilt phase of the trial because he had never found that to be helpful. (Vol. III, R. 419). He was not aware of the interaction between the co-defendants in the transport van during the trip from Daytona Beach and St. Johns County back to Wakulla County. (Vol. III, R. 420)

Dr. Mosman conceded that IQ tests indicated that Looney scored above average in intelligence. (Vol. III, R. 420) However, while he was approximately 20 years and two months old when the crime occurred, his social and emotional age was only that of someone in his early teen years. (Vol. III, R. 421) Dr. Mosman could not put an exact number on the social and emotional age, but indicated that Looney would function at mid-

adolescence or earlier in those areas. (Vol. III, R. 422) He agreed that many of the non-statutory mitigators he found were brought out during the testimony of Looney's family members, his mother and his grandmother. (Vol. III, R. 425-427. Dr. Mosman also agreed that Looney's probation officer testified during the penalty phase that while on probation, Loony did not use alcohol or illegal drugs. (Vol. III, R. 428-429)

Dr. Mosman maintained that although some material was presented during the penalty phase as mitigating evidence, that material needed to be explained to the jury by a mental health expert so that the jury would understand its significance and use it in making its decision. (Vol. III, R. 436)

On re-direct examination, Dr. Mosman reiterated that he had talked to Dr. Partyka, who discussed his interviews and testing of Looney. (Vol. III, R. 441) "Did anything that Dr. Partyka told you or show you change your opinion today that this mental health statutory mitigation and non-statutory mitigation was available and not explored and presented?" Dr. Mosman answered, "(n)o, it did not." (Vol III, R. 441)

The defense rested.

The state called as its first witness Gregory Cummings, Looney's trial counsel. He had been an attorney since 1980, and had tried twelve capital

cases, seven or eight of which were death penalty cases.[8] (Vol. III, R. 445) He attended CLE courses on how to conduct death penalty cases. (Vol. III, R. 446) Bernard Daley, Esq., was the original attorney of record for Looney, but "there was some difficulty there," and Cummings was brought in "pretty much under short notice," only about six months before trial. (Vol. III, R. 446, 447) Depositions had already been taken and Mr. Danny Johnson had done the investigation. (Vol. III, R. 447) Cummings was offered an opportunity to re-take the depositions if he wished, because apparently Daley did not attend most of the out-of-town depositions. Cummings was "given a free hand" by the State Attorney's Office to do what was necessary. (Vol. III, R. 447) When Cummings came on the case, there were two volumes, three or four inches thick, full of investigative work that had already been done, and he reviewed those. (Vol. III, R. 447)

Cummings did not remember with specificity what he had done to prepare for the guilt phase of the trial. (Vol. III, R. 447) He recalled talking to Danny Johnson (the investigator), reviewing his notes, and talking to the

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[8] According to the written closing argument filed by the state in the post conviction evidentiary hearing proceedings (Vol. III, R. 523-552), Cummings was an experienced trial attorney who had handled twelve capital cases before the Looney case, seven that went to a penalty phase and one, the Chadwick Banks case, where the death sentence was imposed. (Vol. III, R. 533). That appears to be an error. Steven Seliger, Esq., was the attorney of record at trial in that case. See *Banks v. State*, 842 So. 2d 788 (Fla. 2003).

adoptive mother, Mrs. Looney, to encourage her to testify and to cooperate. However, she was very hostile and did not care what happened to Looney. She made it clear that her family was not going to assist in his defense. (Vol. III, R. 448) Looney's biological mother and grandmother were able to provide some background as to the adoptive situation. (Vol. III, R. 448) Cummings also did not recall specifically if the school records had been available, but there was a "whole bunch of stuff from Texas" that was available for him to review. (Vol. III, R. 449)

A mental health professional had been appointed by the court. "By the time I got on the case, Dr. David Partyka had already done his thing . . ." (Vol. III, R. 449) Cummings had never worked with Dr. Partyka, but knew him by reputation. (Vol. III, R. 449-450) Cummings talked to the doctor but did not take notes. (Vol. III, R. 450) He specifically asked Dr. Partyka not to write a report because he did not want it to be discoverable at any point before trial, since the information Dr. Partyka provided him "wasn't good." (Vol. III, R. 450, 451)

Based upon what Dr. Partyka told him, Cummings elected not to put mental health mitigation testimony on during the penalty phase. (Vol. III, R. 451) In fact, Dr. Partyka advised Cummings not to call him as a witness and said that he believed Looney was psychopathic. (Vol. III, R. 452) "But his

reasons for not asking to be called and my not calling him dealt with the psychopathic diagnosis." (Vol III, R. 452) In other words, Cummings thought that Dr. Partyka's testimony, as far as mental health mitigation was concerned, could backfire. (Vol. III, R. 453) There was really no one for him to talk to regarding such a decision -- there was not a second chair lawyer. "That wasn't standard around here at the time." (Vol. III, R. 454) Cummings said that he may have discussed it with some of his colleagues, "individuals that you just end up talking to," but didn't recall whether the issue ever came up. (Vol. III, R. 454) "It seemed like a no-brainer to me not to call Dr. Partyka." (Vol. III, R. 454)[9] Cummings did not get another psychologist, and did not even consider it because it was his understanding that, even if he got another opinion that differed, that would " . . . open the door to any other opinions you may have gotten." (Vol. III, R. 455)

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[9] Neither the state's written closing argument nor the court's order denying the post conviction motion fully capture the essence of Mr. Cummings' testimony in this regard. The state asserted that "Cummings discussed this strategy with other colleagues and everyone agreed, it was a 'no-brainer' that Dr. Partyka should not be called.' " (Vol. III, R. 534) The court's order stated: "After discussion of Dr. Partyka's findings and diagnosis with other experienced colleagues, Cummings made the decision that Dr. Partyka should not testify." (Vol. III, R. 560-561) However, the actual testimony of Mr. Cummings was, as noted above: "I may have discussed it with some of my colleagues . . . (t)here's several individuals you just end up talking to, but I don't recall whether that issue came up. It seemed like a no-brainer to me not to call Dr. Partyka, when your doctor, your expert, tells you you don't want to call me." (Vol. III, R. 454)

Cummings discussed his decision not to call a psychologist with Looney, but did not remember if Looney concurred or not. "I honestly feel back four or five years ago that the lawyers sort of ran the show . . ." (Vol. III, R. 455)

Cummings elected to put on the evidence that he did present because he wanted to "(p)aint a picture of who he (Looney) is, who he was. Unfortunately when you have evidence of an individual who was abused as a baby, I'm told that they don't remember that stuff." (Vol. III, R. 456) Looney never indicated to Cummings that he remembered abuse that happened before he was 18 months old. (Vol. III, R. 456)

Cummings called Looney's probation officer to testify during the penalty phase, and at some point Looney's birth mother appeared; she was very cooperative and wanted to do whatever she could. (Vol. III, R. 457) The adoptive mother, Mrs. Looney, made it clear that her family was not going to help. However, Cummings only spoke to Mrs. Looney; he did not contact any of the other adoptive children. (Vol. III, R. 457-458) Cummings did not remember if Looney gave any indication whether there was physical abuse that occurred in the adoptive home. (Vol. III, R. 458) When Cummings spoke to Mrs. Looney, she sounded hateful. She "didn't give a darn about what happened to Jason from that point on." (Vol. III, R,

458) Cummings was not aware of any helpful testimony that might be provided by Mark Looney, the adoptive brother. (Vol. III, R. 459)

On cross-examination, Cummings stated that he had no reason to believe that the state would have opposed it if he had wanted to hire a mental health expert. "They have no choice in it anyway." (Vol. III, R. 463) But he did not think about getting another mental health expert. (Vol. III, R. 463) He admitted that, in his experience in death penalty work, one of the most important aspects of the defense lawyer's obligation to the client is to present evidence of mental health concerns to the jury. (Vol. III, R. 464) Cummings also admitted that he had heard that the term "psychopathic personality" is more descriptive of whether someone would be apt to become a recidivist, or cause trouble upon release, and that in Looney's case, there was no issue of release – it was either death or life without parole. Nevertheless, he chose not to hire or call a second mental health expert. (Vol. III, R. 464)

The state then called Dr. David J. Partyka as a witness. He is a licensed psychologist. (Vol. III, R. 472) He began working on the Looney case with the first attorney who was appointed, Bernard Daley. (Vol. III, R. 474) He was provided with all of the memos that the investigator, Danny Johnson, had prepared, including the records from Texas. (Vol. III, R. 475)

He met with Looney on two or three occasions, for about three hours each time. (Vol. III, R. 476) He administered several tests, finding that Looney scored above average in reading ability. (Vol. III, R. 477-478) He determined that Looney did not suffer from schizophrenia or any other type of psychotic illness, but that he had some antisocial tendencies and might have some difficulty adjusting in a prison setting. (Vol. III, R. 479) He administered the Haire Psychotic Checklist, Revised, which is a general predictor of recidivism. (Vol. III, R. 480) Looney produced a raw score of 30.5. A score of 30 or above is the cutoff for individuals who are considered to be psychopaths. (Vol. III, R. 481) Dr. Partyka said that the homicides were more impulsive than anything else. (Vol. III, R. 483)

Dr. Partyka had a lengthy discussion with Mr. Cummings regarding whether it would be advisable to call him as a witness. His recommendation to Cummings was that, while Looney had experienced a very difficult life, it was going to be hard for him to make that point without also bringing out information that might hurt Looney, including his view that Looney was a psychopath. (Vol. III, R. 483-484)

Dr. Partyka added that he did not recall any indication from Looney that his adoptive family abused him. (Vol. III, R. 484) It appeared to Dr. Partyka that Looney's running away from the adoptive family was

attributable to impulsiveness caused by boredom rather than an abusive household. (Vol. III, R. 485)

On cross-examination, Dr. Partyka, while maintaining that he could make certain conclusions regarding the likelihood of future behavior based upon the Haire test, admitted that the term "psychopath" is not a diagnosis that is provided in the DSM-IV. (Vol. III, R. 488) He conceded that if Looney had only had one DR since incarceration (for having too many stamps), that would not be in character with what he had concluded earlier. (Vol. III, R. 488) He admitted that the expected deviation on the Haire test could be more than 0.5 and that there was a possibility that Looney actually did not score above 30, the cutoff point. (Vol. III, R. 490)

On re-direct examination Dr. Partyka stated that he never made a recommendation to Cummings as to whether he should hire another psychologist because he felt that was a decision for the attorney to make. (Vol. III, R. 491).

SUMMARY OF THE ARGUMENT

The trial court erred in finding that Looney's trial counsel was not ineffective during the penalty phase of the trial for three reasons: (1) Trial counsel failed to present all extant statutory and non-statutory mitigating evidence to the jury and judge; (2) trial counsel failed to utilize a mental health expert to effectively explain how the mitigating circumstances affected Looney's actions regarding the homicides; and (3) the few mitigating circumstances that were offered were presented unconvincingly and argued collectively instead of individually, thereby significantly minimizing their importance.

In seeking the death penalty, the state submitted evidence of the existence of six separate and distinct statutory aggravating factors. In this case where the evidence of guilt was overwhelming, it was crucial that defense counsel be prepared to respond during the penalty phase with an aggressive and well-planned presentation of all available mitigating circumstances under Section 921.141(6), Florida Statutes. This would have included establishing that the homicides were committed while Looney was under the influence of extreme emotional disturbance within the context of Section 921.141(6)(b), Florida Statutes, and at a time when there were significant deficits in his emotional and social age sufficient to prove the age

mitigator under Section 921.141(6)(g), Florida Statutes. (Vol. III, R. 402). Evidence to establish these two mitigators was available to him.

There was also an abundance of non-statutory mitigating circumstances available to Cummings that were not made known to the jury within the context of Section 921.141(6)(h), Florida Statutes. This included Looney's history of being sexually abused as a child and being placed in various and sundry depressing, abusive and dysfunctional living situations.

Given the readily available evidence regarding Looney's traumatic childhood and upbringing, it was imperative for defense counsel to utilize the services of a qualified mental health expert to interpret and explain to the jurors how it affected Looney's actions related to the homicides. This would necessarily include demonstrating that the mitigating circumstances outweighed the aggravating factors within the context of Section 921.141(2)(b), Florida Statutes, and persuading them that life sentences were appropriate and the death penalty was not. Defense counsel failed to do this, and thus was ineffective.

The cursory presentation made during the penalty phase failed to present a true picture of Looney based upon the records available to defense counsel. Crucial information either was not presented or was offered in such a glancing way that it is doubtful that the jury could grasp its significance.

Looney suffered prejudice as a result of his counsel's ineffectiveness. Had all of the extant mitigation been presented, had it been interpreted for the jury by a mental health expert, and had it been argued in an effective manner -- in part by individualizing and emphasizing each mitigator -- there is a distinct likelihood and reasonable probability that the outcome of the proceedings would have been different in that the jury would have determined that the statutory and non-statutory mitigating circumstances outweighed the aggravating factors. This is so in part because defense counsel would have been able to establish the existence of two statutory mitigators and a host of non-statutory mitigators. Had this occurred, the jury would most certainly have recommended against imposition of the death penalty. Under those circumstances, the trial court would have had no choice but to sentence Looney to life in prison rather than to death. In the event the trial court overrode the life recommendations, any resulting death sentence(s) would have been reversed on appeal.

ARGUMENT

Issue I.

The trial court erred in not finding that defense counsel was ineffective for failing to present all extant evidence of statutory and non-statutory mitigation during the penalty phase of the state court trial in a convincing manner, failing to utilize the services of a mental health expert and failing to properly present mitigation factors to the jury, and that prejudice resulted. Therefore Looney's right to counsel, as protected by Amendments VI and XIV, United States Constitution and Article I, Section 16, Florida Constitution, was violated.

A. Standard of Appellate Review

This is a post conviction capital case involving mixed questions of fact and law. As such, the final order of the circuit court denying Looney's Florida Rule of Criminal Procedure 3.850/3.851 motion for post conviction relief, as amended (Vol. III, R. 553-565), is entitled to plenary, *de novo* review, except that findings of fact by the trial court are entitled to deference so long as there is competent and substantial evidence in the record to support same. *Johnson v. State*, 789 So. 2d 262 (Fla. 2001); *Rose v. State*, 675 So. 2d 567 (Fla. 1996). As this Court stated in *State v. Lewis*, 838 So. 2d 1102, 1112 (Fla. 2002):

> The standard of review we apply in reviewing the trial court's ruling on this issue (of alleged ineffective assistance of counsel in a post conviction capital case) is two-pronged: "The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the

> deficiency and prejudice prongs de novo." Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001).

B. Merits

Looney acknowledges that a defendant in a capital case in Florida bears a heavy burden when seeking to set aside a death sentence claiming ineffective assistance of trial counsel for the alleged failure to properly present available mitigating evidence during the penalty phase. In *Rivera v. State*, 859 So. 2d 495 (Fla. 2003) this Court, citing language from *Middleton v. Dugger*, 849 F.2d 491, 493 (11th Cir. 1988), stated:

> First, it must be determined whether a reasonable investigation should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a tactical choice by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end. If, however, the failure to present the mitigating evidence was an oversight, and not a tactical decision, then a harmlessness review must be made to determine if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Thus, it must be determined that defendant suffered actual prejudice due to the ineffectiveness of his trial counsel before relief will be granted.

On the other hand, this Court has not hesitated to grant a death-sentenced inmate post conviction relief where the evidence demonstrates that defense counsel presented no mitigating evidence, presented some but not all that was available, or did not present what was available in a skillful

manner. This is especially true where the evidence of mitigation was readily accessible to defense counsel.

In *Heiney v. State*, 620 So. 2d 171 (Fla. 1993), the defendant was convicted of first-degree murder and robbery. The trial court overrode the jury's life recommendation and sentenced Heiney to death. The conviction and sentence were affirmed on direct appeal. After this Court ordered that an evidentiary hearing be held regarding Heiney's motion to vacate the sentence on ineffective assistance of counsel grounds, the trial court found that counsel was deficient but the deficient performance did not prejudice Heiney. The defendant again appealed. This Court vacated Heiney's death sentence and remanded, finding that the trial court erred in determining that he did not suffer prejudice. In so doing, this Court determined that if Heiney's counsel had conducted a proper background investigation in preparing for the penalty phase, he would have discovered several mitigating circumstances. Furthermore, if these mitigating circumstances had been discovered and effectively presented, the jury override might have been improper or the trial judge may have had a reasonable basis to uphold the jury's life recommendation. *Heiney*, supra, 620 So. 2d at 173-174.

Likewise in the case at bar, Looney's defense counsel, according to Dr. Mosman, failed to discover and present a host of available mitigating

evidence especially related to Looney's severely compromised mental condition at the time of the homicides. (Vol. III, R. 416) This information was in the files and records uncovered by prior defense counsel's investigator, Danny Johnson, and turned over to Cummings. (Vol. III, R. 416) The failure to present this mitigating evidence could not be attributed to trial tactics, according to Dr. Mosman, a foresensic psychologist and lawyer. (Vol. III, R. 416) Therefore, Cummings' deficient performance reached the level of constitutionally ineffective assistance of counsel. As stated by Dr. Mosman, on direct examination:

> Q. And do you know of any strategic or tactical reason, from your review in this case, as to why the information you make reference to should not have been presented in the penalty phase?
>
> A. No. I can understand and I can imagine argument, but when you look at it like an onion and you peel the layers down and get to the center of it, no, I cannot imagine any ultimate reason why that decision would not be made, not when you have the amount of records and data that we have available here.

(Vol. III, R. 416)

Cummings had a duty to present that mitigating evidence to the jury, and his failure to do so cannot be sanitized by labeling it "strategic." It was ineffective assistance. As this Court stated in *Heiney*, *supra*, at 173:

> The State argues that the defense lawyer decided not to present any mitigation at Heiney's sentencing for "strategic" reasons

> and, therefore, his actions are not subject to review under Strickland. We disagree. Heiney's lawyer in this case did not make decisions regarding mitigation for tactical reasons. Heiney's lawyer did not even know that mitigating evidence existed.

In *Hildwin v. State*, 654 So. 2d 107 (Fla. 1995), this Court vacated the defendant's death sentence and remanded because trial counsel's errors deprived Hildwin of a reliable penalty phase proceeding. In *Hildwin,* just as in the instant case, "(t)rial counsel's sentencing investigation was woefully inadequate. As a consequence, trial counsel failed to unearth a large amount of mitigating evidence which could have been presented at sentencing." *Hildwin*, *supr*a, 654 So. 2d at 109. Furthermore, again as in the instant case, several lay witnesses were called to testify that Hildwin was, generally speaking, a nice person and had experienced a difficult childhood. *Hildwin, supra*, 654 So. 2d at 110. This Court recognized that the presentation of this testimony was not enough to fulfill counsel's obligation to his client, stating on page 110 (footnote 7) of its opinion that:

> We recognize that Hildwin's trial counsel did present some evidence in mitigation at sentencing. The defense called five lay witnesses--including Hildwin's father, a couple who periodically cared for Hildwin when he was abandoned by his father, a friend of Hildwin, and Hildwin himself. The testimony of these witnesses was quite limited. In short, they revealed that Hildwin's mother died before he was three, that his father abandoned him on several occasions, that Hildwin had a substance abuse problem, and that Hildwin was a pleasant child and is a nice person.

In *State v. Lewis*, 838 So. 2d 1102 (Fla. 2002), this Court again found trial counsel ineffective. Just as in the instant case (Vol. III, R. 459), counsel failed to contact important family members regarding available mitigating information. As the Court stated at 1109: "Counsel never contacted any of Lewis' other family members in an attempt to discover potential mitigation, nor did counsel attempt to obtain mitigating evidence that was contained in Lewis' background records, including Lewis' hospitalization records, school records, and foster care information." See also *Rose v. State*, 675 So. 2d 567 (Fla. 1996). (Counsel ineffective for failure to develop and present all available mitigating evidence.)

Thus there is ample precedent for this Court to take appropriate action where defense counsel is proven to be ineffective for failure to properly present all available mitigating evidence during the penalty phase of a capital case. Such is the case in Mr. Cummings' representation of Mr. Looney. Defense counsel was appointed only about six months before the trial commenced. (Vol. III, R. 446) Previous counsel, Bernard Daley, had to withdraw for unspecified reasons. Cummings was fortunate in that a significant investigation into Looney's past and matters of mitigation had already been conducted and documented by Danny Johnson, the

investigator, when he took over. (Vol. III, R. 447) The problem is that, as Looney demonstrates herein, Cummings failed to marshal and present the information that the investigator had unearthed.

The Failure To Present All Extant Mitigating Evidence

A. The Adoptive Home

Cummings failed to investigate, develop and properly present to the jury the readily available information regarding the very serious dysfunction in Looney's adoptive home. As referenced in detail above, Dr. Mosman's unrebutted testimony indicated that there were significant problems in that environment including physical abuse of more than one child and resulting depression. (Vol. III, R. 406-407)

At the age of 18 months, after being essentially abandoned by his mother, suffering sexual abuse, and being shuttled from one home to another, the defendant was adopted by the Looneys. (Vol. III, R. 403-404) Dr. Mosman reviewed documentation regarding Mr. and Mrs. Looney's fitness as adoptive parents and the home they provided. He stated during direct examination that:

> A. I discovered there that they were a multiple adoptive home. There were ultimately, I think, three children adopted. Mr. Looney, I believe was the first or second, but not the third. There were some problems in that home with abuse. The

> adoptive home had been investigated on at least one occasion for marks on the little girl, and then they were either – whatever decision was made, that was not pursued. And then the children in the home – that's basically what the records themselves reflect.
>
> Q. Were there any allegations concerning abuse with firearms or other types of instruments?
>
> A. There were. The instruments, the cords, irons, but you asked me earlier just document review. I also have spoken to one of the adoptive children.
>
> Q. Who was that?
>
> A. Mark Looney.

(Vol. III, R. 406-407)

At this point in the testimony, the state objected to Dr. Mosman stating what Mark Looney said, and the court sustained the objection. (Vol. III, R. 406-407) It is not possible, therefore, to present on the record just what Mark Looney said to Dr. Mosman. However, the record reflects that Dr. Mosman went on to testify on direct examination:

> Q. From your determination of the environment that you described that Mr. Looney was brought up in, how did it affect him, in your opinion?
>
> A. I think it had a significant and major effect on his development for those 16 years. It led to significant depression, a lot of self-destructive behavior in later adolescence. What the records indicate, to help put this in perspective, is that not only was the home externally viewed as very rigid, and the interviews with the children talked about a lot of abuse which went beyond rigidity . . .

(Vol. III, R. 407)

This was crucial information to present to the jury, and defense counsel's failure to investigate and present this information was inexcusably ineffective. The only background information he presented came from the mother and grandmother. In his closing argument, Cummings told the jury:

> Some background information, that's what we brought the mother and the grandmother for. Somewhere along the line we lost 16 years of Jason's life because of a stepmother who doesn't care any more at all, not even caring enough to show up. So you've got bits and pieces from a grandmother . . ."

(Vol. XIX, OR. 2385-2386) But there was no need to only present "bits and pieces from a grandmother." The background information was all there in the records. (Vol. III, R. 401) Dr. Mosman made that clear in his testimony:

> Q. Was there a period of time that basically was lost in his background, that there was nothing presented?
>
> A. Well, that's two different questions. First of all, yes, there was a period of time where nothing was presented: but no, that information was not lost. That information was in the records.
>
> Q. It just was not presented?
>
> A. It was just not presented or followed up on.

(Vol. III, R. 401)

While it is true that the grandmother's testimony made some reference to the adoptive home, this reference was shallow and cursory. Dr. Mosman characterized it in his testimony as follows:

> Q. And what was the gist, basically, of their testimony that they presented, do you recall?
>
> A. Well, the gist was very peripheral and very surface. In essence talked about the birth mother having some difficulty, Mr. Looney as a child taken away and adopted into a home, which was strict with not much information available about that home. And basically that was it. I mean, the longest discussion or presentation was from the mother, who basically said I haven't seen my son in 20 years, please give me the opportunity to reacquaint and know. I'm not attempting to minimize. That's basically the sum total of it.

(Vol. II, R. 400; Vol. III, R. 401)

To give counsel credit, Cummings did attempt to contact the adoptive mother, Mrs. Looney, to see if she would participate. He testified on direct examination by the prosecutor:

> Q. When you talked to Ms. Looney, did she give any indication why she nor the family wanted to cooperate?
>
> A. She sounded very hateful. She was very angry at what he had done and been charged with, and almost seemed like a reflection upon her. She didn't give a darn about what happened to Jason from that point on.

(Vol. III, R. 458)

Cummings cannot, of course, be faulted for the fact that the adoptive mother did not want to cooperate. He could not force her to do so. Where

he was ineffective in this regard, however, was in not following up with the available records and in not interviewing the other adoptive children. (Vol. III, R. 458-459) He could easily have developed and presented a full background on Looney to the jury. But he did not. Dr. Mosman testified that the available records -- records that were present when Cummings was appointed to the case -- reflected that all three adoptive children had run away from the adoptive home. (Vol. III, R. 409) As indicated, Dr. Mosman talked to at least one of the other adoptive children, Mark Looney. (Vol. III, R. 406) His assessment of the effect of the adoptive home, from interviews with the other children and from the records themselves, was that:

> I think it had a significant and major effect on his development for those 16 years . . . what the records indicate, to help put this in perspective, is that not only was the home externally viewed as very rigid, and the interviews from the children talked about a lot of abuse which went beyond rigidity . . . while it had the potential of being healing and curative for a child who had been abused and placed, in this particular case it did just the opposite . . .

(Vol. III, R. 407, 408, emphasis added)

This was touched on in a peripheral fashion by the maternal grandmother, who referred to Mrs. Looney in her testimony:

> Well, she was extremely controlling. She had to control everything . . . she had it planned from the time he was about three that he was going to be the next Billy Graham and nothing, nothing, was going to change that. But he was going to be the next Billy Graham."

(Vol. XVIII, R. 2250) This passing reference by the grandmother did not have the impact on the jury that it could and should have however, had this material had been properly organized, developed and presented. Cummings had a duty to investigate and present this background material so that the jurors would understand the strong, controlling adult forces that had shaped an 18-month old abused child placed in their care for some 15 years. But when the adoptive mother said she would not cooperate, Cummings essentially gave up. As a result, the jury knew nothing of the rigid home environment that all three adoptive children had run away from. (Vol. III, R. 409) Instead, the jury was merely told by defense counsel that "somewhere along the line we lost 16 years of Jason's life because of a stepmother who doesn't care any more at all, not even caring enough to show up." (Vol. XIX, R. 2386). The only reference to the environment of the adoptive home as a mitigating factor was, ironically enough, made by the prosecutor in his closing argument. Mr. Meggs told the jury:

> I think another factor that you may consider was that from the testimony you heard the Looneys tried to raise him in a Christian home. I don't know what weight you give that mitigating factor.

(Vol. XIX, R. 2379).

It did not have to be that way, and it should not have been that way. Dr. Mosman had no trouble finding the information in the records. (Vol. III, R. 401) He had no trouble contacting and talking with Mark Looney, one of the adoptive children who ran away. (Vol. III, R. 406) Defense counsel would have had no trouble doing the same thing. To not do so was ineffective assistance of counsel, and Looney suffered prejudice as a result.

This is similar to the situation in *State v. Lewis*, 838 So. 2d 1102 (Fla. 2002), where this Court stated at page 1111:

> Dr. Faye Sultan, a clinical psychologist, reached a similar diagnosis of the defendant. After evaluating Lewis and reviewing his records, she stated that it was clear that Lewis suffers from "multiple psychological and organic disabilities and that he is the product of an environment in which he was severely psychologically and physically damaged." Specifically, she testified: "If you exposed any child to the series of events to which he was exposed, I think the guaranteed outcome would be extraordinary dysfunction. It might look different ways, but this would be a truly damaged individual . . . We're talking about a severity of physical and psychological torture that would destroy any child."

Since Dr. Mosman's testimony was not contested on these points, the Court is also referred to its decision in *Rose v. State*, 675 So. 2d 567 (Fla. 1996), where testimony at the post conviction evidentiary hearing by a forensic psychologist, Dr. Toomer, established mitigating factors that had not been brought out by Rose's trial counsel.

> Dr. Toomer's opinion was based on a psychosocial evaluation of Rose in which he administered a battery of psychological tests and reviewed Rose's school, hospital, medical and prison records. His testimony was essentially uncontested.

Rose, supra, 675 So. 2d at 571. See also *State v. Riechmann,* 777 So. 2d 342 (Fla. 2000) in which this Court upheld the trial court's decision ordering a new sentencing proceeding where, just as in Looney's case, defense counsel failed to properly investigate existing mitigating evidence. This Court stated: "It seems apparent that there would be few cases, if any, where defense counsel would be justified in failing to investigate and present a case for the defendant in the penalty phase of a capital case." *Id*., at 351.

B. The Failure to Properly Present The Statutory Age Mitigator

Section 921.141(6)(g), Florida Statutes, provides that a mitigating circumstance shall be: "The age of the defendant at the time of the crime." The trial court gave only moderate weight to this statutory age mitigator (Vol. I, R. 51) because defense counsel presented it only in the context of Looney's chronological age. (Vol. XIX, OR. 2385) Dr. Mosman pointed out that there was ample evidence that could have been presented to the effect that Looney's mental and emotional age was in the range of early to mid-teens. (Vol. III, R. 421-422) The state did not rebut this.

The state asserted in its closing argument after the post conviction evidentiary hearing that no credibility should be given to Dr. Mosman's observation regarding emotional and social age because this Court had affirmed the trial court's denial of post-conviction relief which involved a similar finding by Dr. Mosman in *Kimbrough v. State*, 886 So. 2d 965 (Fla. 2004). However, in *Kimbrough*, unlike the instant case, Dr. Mosman had not had the opportunity to interview or test the defendant. *Kimbrough*, at 974. And in rebuttal to Dr. Mosman's testimony, the prosecution in *Kimbrough* called an expert, Dr. Sidney Marin, who had conducted a neurological and psychological examination of the defendant. *Kimbrough*, at 976. Dr. Marin testified that he would not have found any statutory mitigators. *Kimbrough*, at 977. By contrast, although in the instant case the state called an expert, Dr. Partyka, as a witness, they offered no such conflicting testimony regarding the statutory mitigators that Dr. Mosman found. (Vol. III, R. 474-492)

The Supreme Court, in its recent opinion in *Roper v. Simmons*, 543 U.S. ____ (2005), Case No. 03-633, decided March 1, 2005, held that the Eighth and Fourteenth Amendments forbid imposition of the death penalty upon offenders who were under the age of 18 years when their crimes were

committed.[10] In explaining the rationale behind the decision, the Court found, at page 14:

> The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime. *Thompson* v. *Oklahoma*, *supra; Ford* v. *Wainwright,* 477 U.S. 399 (1986); *Atkins, supra.* These rules vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders.

The Court added, at pages 15 and 16:

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Johnson*, *supra*, at 367; see also *Eddings*, *supra*, at 115-116 ("Even the normal 16-year-old customarily lacks the maturity of an adult"). It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Review 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. See Appendixes B-D, *infra*.

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[10] *Roper* holds that it is unconstitutional to execute anyone who committed a crime while under the age of 18, without specifying whether this refers to the defendant's chronological age. It seems clear from that opinion, however, that the Supreme Court meant chronological age rather than social or emotional age. Looney discusses it here only because of the rationale expressed in the opinion.

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings, supra*, at 115 (“[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage”). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. See Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003) (hereinafter Steinberg & Scott) ("[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting").

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E. Erikson, Identity: Youth and Crisis (1968).

These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." *Thompson, supra,* at 835 (plurality opinion). Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. See *Stanford*, 492 U.S., at 395 (Brennan, J., dissenting). The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Johnson, supra,* at 368; see also

> Steinberg & Scott 1014 ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood").

Had Looney had a chronological age of less than 18 years at the time of crime, then under the *Roper v. Simmons* decision he would not today be on death row. His chronological age, however, was something over 20 years, thus, he does not get the benefit of that decision. The Supreme Court's rationale, however, as quoted above, very clearly applies to a young adult like Looney with a social and/or emotional age in the early to mid teen years as Dr. Mosman attested. (Vol. III, R. 421) Thus, that same rationale could have been used by Cummings in arguing the age mitigator during the penalty phase of the trial.

This Court has recognized that the age mitigator authorized by Section 921.141(6)(g) is meaningless without being tied to the emotional or social age of the individual concerned. In *Foster v. State*, 778 So. 2d 906 (Fla. 2000), this Court stated, at 920:

> Section 921.141(6)(g), Florida Statutes (1996), expressly includes the age of the defendant at the time of the crime as a mitigating circumstance. We have recognized, however, that there is no bright-line rule for applying this provision. See Campbell v. State, 679 So. 2d 720, 726 (1996). The appropriate application of this mitigator goes well beyond the mere consideration of the defendant's chronological age. See id.

> Rather, it entails an analysis of factors which, when placed against the chronological age of the defendant, might reveal a much more immature individual than the age might have initially indicated.

Clearly, the information regarding Looney's emotional and social age was of critical importance in attempting to persuade the jury to recommend life in prison without parole. Yet, counsel did not present it. Counsel's entire presentation regarding age was short and cursory, mentioned only during his closing argument. "Age? Well, 20 years old, I don't know what weight to give that, either." (Vol. XIX, OR. 2385) This was ineffective assistance of counsel, and Looney was prejudiced by it.

C. The Statutory Mitigator of Being Under Extreme Emotional Disturbance

Section 921.141(6)(b), Florida Statutes, provides that a mitigating circumstance shall be: "The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." Dr. Mosman testified that such a statutory mitigator could have been presented by defense counsel based upon existing medical and mental health records and reports. (Vol. III, R. 401-402) The state did not rebut Mosman's testimony (Vol. III, R. 417-441, 472-492), thus it should have been accepted as true. If Cummings had used the testimony of an expert such as Dr. Mosman, he would have established the fact that Looney

was emotionally disturbed at the time of the homicides. Dr. Mosman testified in this regard that there was certainly data that could have been presented to the jury on the "extreme emotional disturbance as part of the context of that particular crime, that particular day, in that particular manner." (Vol. III, R. 401-402) He added that, at the time of the homicides, Looney had a small job, had met a girl, and eventually was introduced to the two co-defendants. (Vol. III, R. 410) ". . . and so I think that's the context and the relationship. The interrelationship would be the depression, the feeling more or less adrift, the loneliness, the anger continued over the way he was raised, and all these other issues." (Vol. III, R. 410-411)

D. Non-Statutory Mitigators

In addition to the three statutory mitigators referenced by Dr. Mosman in his post conviction hearing testimony, Dr. Mosman noted that there were twelve or thirteen non-statutory mitigators that were not effectively presented to the judge or jury in the context of Section 921.141(6)(h), Florida Statutes. (Vol. III, R. 402) Without quoting directly from the testimony, they are summarized as follows:

1. The defendant's natural mother was only about 15 years and 10 months old when she became pregnant. She was a runaway, abused drugs and alcohol, and earned money as a stripper. Mr. Looney was taken away

from her at age 18 months and placed with his grandparents. (Vol. III, R. 402-403).

2. Looney was taken from the grandparents because of abuse and placed into an adoptive home with Mr. and Mrs. Looney. (Vol. III, R. 404)

3. The grandparents were rejected as a placement source because there were significant problems in that home which had been investigated several times. The grandfather was an alcoholic, and there were allegations that he abused one or both of the other female siblings. The grandfather ultimately committed suicide. (Vol. III, R. 404-405)

4. In the adoptive home, there were also problems with abuse. The adoptive home had been investigated on at least one occasion for marks on the little girl, and there were allegations concerning abuse with firearms and other instruments. (Vol. III, R. 405, 406)

5. The environment that Looney was brought up in had a significant and negative effect on his development for those 16 years. It led to depression and self-destructive behavior in later adolescence. (Vol. III, R. 405)

6. When Looney was 15, his adoptive mother told him that his natural grandfather had killed himself. He also learned that there was some confusion regarding whether the grandfather was actually his father and

whether he (Looney) had been sexually and physically abused. In any event, from that point on, Mr. Looney had a "personality change," became withdrawn, was uncommunicative and very self-deprecating, and would refer to himself as trash. (Vol. III, R. 407, 408)

7. What followed then, at age 16, was Looney's misuse of alcohol as self-medication for severe depression. (Vol. III, R. 408)

8. The only treatment he received for his emotional problems was a very short period in an alcohol rehabilitation program, which was un-successful. (Vol. III, R. 408)

9. To escape the environment of his adoptive home, Looney ran away, as did all three of the adoptive children. (Vol. III, R. 409, 410)

10. At the time of the offenses of conviction, Looney was out on his own, depressed, feeling more or less adrift, lonely, and angry over the way he had been raised. (Vol. III, R. 410, 411)

11. Clinical testing indicated that Looney did not have an antisocial personality but, instead, suffered from significant clinical depressive, anxiety, and self-destructive tendencies of long standing. (Vol. III, R. 412, 413)

12. The crimes for which Looney was convicted occurred in the context of a great deal of stress. (Vol. III, R. 413)

E. The Failure To Utilize The Services Of A Mental Health Expert

Trial counsel was also ineffective because he failed to utilize a mental health expert to present, explain and interpret existing mitigating evidence to the penalty phase jury. When Cummings was appointed to take over Looney's case from Bernard Daley (some six months before trial), Dr. Partyka had already been retained by previous counsel. "By the time I got on the case, Dr. David Partyka had already done his thing." (Vol. III, R. 449) Cummings talked to Dr. Partyka and, based upon what he was told, elected not to put on mental health mitigation. (Vol. III, R. 451). This included being advised that Dr. Partyka had previously diagnosed Looney as psychopathic and, therefore, he could be expected to have problems with his conduct in the future. (Vol. III, R. 452-453) Thus, Dr. Partyka felt that it would have been harmful to Looney to have this brought out, and recommended to Mr. Cummings that he (Partyka) not be called as a witness. (Vol. III, R. 484) However, on cross examination, Dr. Partyka acknowledged that his predictions regarding Looney's future behavior were not necessarily accurate:

> Q. Would it surprise you that since incarceration, Mr. Looney has only had one DR for having too many stamps?
>
> A. It would certainly not be in character with what I had concluded.

(Vol. III, R. 488)

Cummings stated that he did not recall thinking about getting another mental health expert because, if he got a second opinion that differed from Dr. Partyka's, that might open the door to allow the information regarding Looney's diagnosis as psychopathic to be introduced in evidence. (Vol. III, R. 454, 455) Not calling Dr. Partyka would have been wise. But this did not mean that another expert would have been put in a position of revealing Dr. Partyka's findings. On the contrary, another expert could have testified to the significance of Looney's traumatic history of child abuse and abandonment as noted by Dr. Mosman. From the publication, "American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" (revised Edition, February 2003), found *inter alia* in the Hofstra Law Review (Vol. 39:913), we quote the following:

> In particular, mental health experts are essential to defending capital cases. Neurological and psychiatric impairment, combined with a history of physical and sexual abuse, are common among persons convicted of violent offenses on death row . . . the defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase. (Emphasis added).

Dr. Mosman testified as follows in this regard:

Q. And in this case, was a neuro psychologist or psychiatrist consulted, to your knowledge?

A. To my knowledge, no.

Q. And in your opinion, should that have been followed up on?

A. I think it would have been essential, because it's only from that mental health development perspective that you get access to tying all of these disparate pieces of information together through that mental health lens. I'm not really convinced that other individuals would be able to tie those things together to see how those facts and events would have affected the development, the thinking and the emotional makeup of a child, pre adolescent, adolescent and young adult.

Q. And Dr. Mosman, based upon your review of records and what you have done, testing and investigation and interviews in this case, do you have an opinion based upon a reasonable degree of forensic psychological certainty as to whether the matters of mental health mitigation, statutory as well as nonstatutory that you have referenced, were in existence at the time this case went to trial?

A. Yes, I do.

Q. And they were not presented?

A. They were clearly present. I mean, they were just – they're all over the records. They were clearly there, number one. Number two, they were not looked at through a mental health lens. And number three, ergo, they were not presented.

Q. And do you know of any strategic or tactical reason, from your review in this case, as to why the information you make reference to should not have been presented in the penalty phase?

> A. No. I can understand and I can imagine argument, but when you look at it like an onion and you peel the layers down and get to the center of it, no, I cannot imagine any ultimate reason why that decision would not be made, not when you have the amount of records and data that we have available here.

(Vol. III, R. 415-416)

F. The Failure To Present Mitigating Evidence Effectively

Counsel's ineffectiveness included the failure to develop and offer what was presented in an effective manner.

State Attorney Meggs, an aggressive, experienced and very able prosecutor, used his opening statement to set forth in detail each of the aggravating factors that he would be using for the penalty phase. He was meticulous in describing each aggravating factor, and the jury was given a crisp, clear picture of exactly how each aggravating factor related to these particular crimes. (Vol. XVIII, OR. 2202-2205) Cummings, by contrast, made a four-page opening statement in which he barely mentioned the word "mitigation" or "mitigator." (Vol. XVIII, OR. 2205-2209) He never educated the jury as to what the terms meant, or how they applied to the case. There was no way the jury could possibly know, from his opening statement, how to recognize what mitigating factors they were supposed to consider. This is best illustrated by comparing excerpts from the two

opening statements. The prosecutor, Mr. Meggs lists each aggravating factor that the jury was to consider, for example:

> A third aggravating circumstance that you can consider is that this crime was committed during the commission of a burglary or of a robbery or of the crime of arson. If a person is killed during the commission of either of those three crimes, that is an aggravating circumstance that you will be called upon to weigh.
>
> A fourth aggravating factor that you will be entitled to look at and the Judge will instruct you on is these crimes were committed – these murders were committed to avoid arrest in this case, and you will be able to consider evidence of avoiding arrest.
>
> A fifth aggravating factor that you will be authorized to consider is that these murders were committed for a financial gain to the defendants.

(Vol. XVIII, OR. 2204)

By contrast, the following is an excerpt of Mr. Cummings' opening statement:

> The defense hopes to call Mr. David Crum, who was an employer of Mr. Looney. He was supposed to be here at 11:00 but he's not here yet, so we will hopefully be able to call him.[11] After that we will call a probation officer – Jason was on probation at the time this offense occurred – to tell you that he was doing okay, he wasn't in violation of probation. And there's a reason for that. In the closing argument I'll explain to you why we're telling you he was on probation.
>
> We'll call in Mr. Andrew Harris. He's an individual from prison, a convicted murderer, someone who was in the cell with Mr. Jimmy Dempsey. You may recall his name being brought

[11] Mr. Crum never appeared. (Vol. XIX, OR. 2387)

> up during the cross examination of Mr. Dempsey, and there was a reason.
>
> You'll also hear about the life of Jason Looney from his mother, who was 17 years old, I believe, when she had him, and about 18 months later lost him through no fault of her own. And she didn't see him again until 20 years later, the day before Mother's Day, this year.

(Vol. XVIII, OR. 2206-2207)

Following this, Cummings went on to tell the jury that he would be calling the defendant's grandmother, " . . . you get a little family background and you get a little history approaching the time of this event, and you get a little law, also." (Vol. III, OR. 2207-2208) During all of his opening statement, Cummings does not mention mitigation to the jury until the end.[12] When he does finally mention it, it is in a very cursory fashion, and does nothing to educate the jury:

> However, the defense, the law is very clear, doesn't have to prove the mitigation beyond and to the exclusion of a reasonable doubt. All you have to do is to believe they exist, just believe they exist. It's very simple.
>
> And although it's a weighing process, one mitigator can outweigh dozens of aggravators, if there were that many. But there's a statutorily limited matter. I think Mr. Meggs may have said seven.[13]

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[12] The complete opening statement takes up 90 lines in the transcript. He does not mention mitigation until the 74th line.

[13] There were six statutory aggravators, not seven. (Vol. XVIII, OR. 2203) Cummings should have known that.

> One mitigator can outweigh one aggravator, as many aggravators as the State puts on. That's your decision. All you have to do is believe it, nothing more, just believe it.
>
> We'll get another chance to talk to you at closing argument. Mr. Rand will have a chance to talk to you, and on behalf of Mr. Looney, thank you for your patience.

(Vol. XVIII, OR. 2208-2209)

Under *Ring v. Arizona*, 536 U.S. 584 (2002), the jury should be a participating part of the penalty process, and defense counsel has a positive duty to properly educate them as to what this entails.[14] Cummings did not do this, and was therefore ineffective.

It should be noted in this regard that Cummings did not ask that the mitigator found in Section 921.141(6)(b), Florida Statutes (capital felony committed while defendant under the influence of extreme mental or emotional disturbance), be included in the jury instructions. Nor did he request that the jury be advised that it could consider Looney's mental or emotional age, as opposed only to his chronological age in the context of Section 921.141(6)(g), Florida Statutes. (Vol. XVIII, OR. 2182-2202) In fact, he never once, either in his opening statement (Vol. XVIII, OR. 2205-2209) or brief closing argument (Vol. XIX, OR. 2380-2394), mentioned any specific statutory mitigator found in Section 921.141(6), Florida Statutes,

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[14] The *Ring* decision applies to Looney. (Vol. III, R. 520-522)

other than a brief, almost casual reference to age in his closing argument.[15] As a result, the trial court instructed the jurors that they could consider six[16] separate aggravating factors. (Vol. XIX, OR. 2402-2411) However, in terms of mitigation, the trial court advised the jury only that:

> Among the mitigating circumstances you may consider, if established by the evidence, are the following. The first mitigating circumstance is applicable only to the Defendant Hertz, and is as follows: The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> The remaining circumstances are applicable to both of the defendants (referring to Hertz and Looney) and are as follows: First, the age of the defendant at the time of the crime and any of the following circumstances that would mitigate against the imposition of the death penalty. A. any other aspect of the defendant's character, record on background; and B, any other circumstance of the offense.

(Vol. XIX, OR. 2407)

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[15] "Age? Well, 20 years old. I don't know what weight to give that, either." (Vol. XIX, R. 2385)

[16] Looney (1) had previously been convicted of felony involving violence, (2) committed the capital felonies in the course of burglary, arson and robbery, (3) committed the capital felonies for pecuniary gain, and (4) committed the crimes in order to avoid arrest. Furthermore, the capital felonies were (5) especially heinous, atrocious or cruel and (6) involved heightened premeditation. (Vol. XIX, OR. 2405)

Cummings' closing argument (OR Vol. XX, pp-2380-2394) consists of less than fifteen pages of the trial transcript. His discussion of life in the Looney home is very brief:

> The Looneys apparently were strict. There's really nothing wrong with that. But we don't know how strict. We don't know. We've lost many years because of a failure of a parent for 16 years to come forward.

(Vol. XIX, OR. 2386-2387)

In essence, Cummings' closing argument was simply an appeal to the jury for sympathy, and that Looney should get life because his co-defendant, Jimmy Wayne Dempsey, got life. "Let's talk about the mitigator that outweighs every aggravator that the State has, and it's Jimmy Dempsey." (Vol. XIX, OR. 2387) The argument evaporates under the weight of the six aggravators that were methodically presented by the state. It did not have to be that way, and Looney suffered prejudice as a result.

Looney's case is very similar to the facts in *Wiggins v. Smith*, 539 U.S. 510 (2003) In *Wiggins*, the defendant was sentenced to death. Represented by new counsel, Wiggins sought post conviction relief arguing that his trial counsel had rendered ineffective assistance by failing to investigate and present mitigating evidence of his dysfunctional back-ground. He presented expert testimony by a forensic social worker about the severe physical and sexual abuse he had suffered at the hands of his mother

and while under the care of a series of foster parents. The trial court denied the petition, and the state court of appeals affirmed, concluding that trial counsel had made a reasoned choice to proceed with what they considered their best defense. Subsequently, the federal district court granted Wiggins relief on his federal habeas petition, holding that the Maryland court's rejection of his ineffective assistance claim involved an unreasonable application of clearly established federal law. In reversing, the Fourth Circuit found counsel's strategic decision to focus on the guilt/innocence phase of the trial to be reasonable. The U.S. Supreme Court reversed, holding:

> Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)—standards to which we long have referred as "guides to determining what is reasonable." *Strickland*, *supra*, at 688; *Williams* v. *Taylor*, *supra*, at 396. 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." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. Cf. *id.*, 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences) (emphasis added); 1 ABA Standards for Criminal Justice 4-4.1,

> commentary, p. 4-55 (2d ed. 1982)("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing . . . Investigation is essential to fulfillment of these functions").

Wiggins v. Smith, 539 U.S. 510 (2003) at 524-525.

This description by the Supreme Court of the failure of Wiggins' counsel coincides squarely with the failure of Looney's counsel to discover all reasonably available mitigating evidence related to Looney's background and present it to the jury. The evidence was not only reasonably available, but as Dr. Mosman testified, "(t)hey were clearly present. I mean, they were just – they're all over the records." (Vol. III, R. 416). Such a presentation was crucial in order to allow the jury to make an informed judgment regarding Looney's moral culpability, exactly as the *Wiggins* opinion further stated:

> Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability. *Penry v. Lynaugh*, 492 U. S. 302, 319 (1989) ("'[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse'"); see also *Eddings* v. *Oklahoma*, 455 U. S. 104, 112 (1982) (noting that consideration of the offender's life history is a "'part of the process of inflicting the penalty of death'"); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (invalidating Ohio law that did not permit consideration of aspects of a defendant's background).

Wiggins v. Smith, 539 U.S. 510, 535 (2003)

G. Prejudice

As noted above, in *Rivera v. State*, 859 So. 2d 495 (Fla. 2003) this Court, quoting from *Middleton v. Dugger*, 849 F.2d 491, 493 (11th Cir. 1988), held that it is not enough to demonstrate that trial counsel was ineffective. In addition, the Court must be convinced that

> . . . but for counsel's unprofessional errors, the result of the proceeding would have been different. Thus, it must be determined that defendant suffered actual prejudice due to the ineffectiveness of his trial counsel before relief will be granted.

Rivera, supra, 859 So. 2d at 502. Looney has shown that a reasonable investigation by Mr. Cummings would have uncovered the mitigation evidence, most of it already available, that he did not present. Indeed, as Dr. Mosman testified, "(t)hat information was in the records." (Vol. III, R. 401) Looney has also shown that this failure was not a tactical decision on the part of Mr. Cummings. There only remains as to whether " . . . there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . (since) it must be determined that defendant suffered actual prejudice due to the ineffectiveness of his trial counsel before relief will be granted." *Rivera, supra,* 859 So. 2d at 502.

To begin with, had defense counsel properly investigated and presented the mitigation evidence that was available, the jury would have had a much more sympathetic picture of Looney as an abused, sexually-battered small child, thrust at only 18 months into a very rigid adoptive home. (Vol. III, R. 404, 406-407) The jurors also would have had a mental picture of a young man with an emotional age in the mid-teens at the time the crimes was committed, in the context of Section 921.141(6)(g). (Vol. III, R. 421) Next, had defense counsel utilized the services of a mental health expert to explain just how Looney's traumatic background affected his actions and his ability to act in a mature, responsible fashion, the jurors and judge would have understood that, at the time of the homicides, Looney was under the influence of extreme emotional disturbance in the context of Section 921.141(6)(b), Florida Statutes. Last, had defense counsel carefully planned the penalty phase presentation to the jury, utilizing all the data which was readily available to him, and presented the mitigating circumstances in a methodical, explanatory fashion, then there is a distinct likelihood and reasonable probability that the jury would have found that the weight of the mitigating circumstances outweighed the weight of the aggravating factors, notwithstanding the very able presentation by the prosecution.

Defense counsel did not do these things, Looney was prejudiced, and he was sentenced to death as a result.

CONCLUSION

For the reasons set forth above, the Court is requested to reverse the final order of the lower tribunal rendered on December 30, 2004, find that Looney was denied effective assistance of counsel during the penalty phase of his state court trial for the failure of counsel to present all extant mental health mitigation, remand the cause to the lower tribunal for a new penalty phase trial and grant Looney such other relief as is deemed appropriate in the premises.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing initial brief of appellant has been furnished to counsel for appellee, the State of Florida, Carolyn Snurkowski, Esq., Chief of Criminal Law, the Office of the Attorney General of Florida, the Florida Capitol, Plaza Level One, Tallahassee, Florida 32399-1050, and

to Eddie Evans, Esq., Assistant State Attorney, the Office of the State Attorney, Second Judicial Circuit of Florida, 4th Floor, Leon County Courthouse, 301 South Monroe Street, Tallahassee, FL 32301, by U.S. mail delivery, this _____ day of July, 2005.

CERTIFICATE OF COMPLIANCE

I certify that this initial brief of appellant was prepared using a Times New Roman font, 14 pitch, in compliance with the provisions of Florida Rule of Appellate Procedure 9.210.

_____
Frank E. Sheffield, Esq.