IN THE SUPREME COURT OF FLORIDA

LEROY POOLER,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	CASE NO. SC 05-2191
STATE OF FLORIDA,	)	L.T. No. 95-1117 CF A02
	)	
Appellee.	)	
	)	

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the
Fifteenth Judicial Circuit in and
for Palm Beach County, Florida

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STANDARD OF REVIEW

On Claims I, II, and VI of Defendant's Amended Motion to Vacate Judgment and Sentence, on which the court held an evidentiary hearing, there are mixed questions of law and fact, thus they are subject to plenary review. Stephens v. State, 748 So.2d 1028 (1999).

On the remaining claims where no evidentiary hearing was granted "the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing [was] held below, [the court] must accept the defendant's factual allegations to the extent they are not refuted by the record. Kimbrough v. State, 886 So.2d 965 (2004).

STATEMENT OF THE CASE

Mr. Pooler was charged with first degree murder, attempted first degree murder, and armed burglary in the lower court. He was subsequently convicted of all counts and sentenced to death on the first degree murder count. On direct appeal, his convictions and sentences were affirmed. Pooler v. State, 704 So.2d 1375 (Fla. 1997). On September 17, 1999, Defendant filed a Motion to Vacate Judgment of Conviction and Sentence With Special Request for Leave to Amend in the lower court. (R. 1-22). The Attorney General's Office filed a response to that motion, and on November 1, 1999, the court ultimately denied Defendant's motion without conducting a hearing to determine whether an evidentiary hearing was required. (R. 47-59). The Attorney General's Office conceded that the trial court erred in denying post-conviction relief at that time, and the trial court entered an agreed order vacating the denial of post-conviction relief and granted counsel 60 days in which to file an amended motion. (R. 65). Defendant's Amended Motion to Vacate Judgment and Sentence with all of the substantive arguments was filed on March 13, 2000. (R. 72-237). The State filed its Response to Defendant's Motion to Vacate Judgment and Sentence on May 5, 2000. (R. 229 - 553). The parties agreed that a hearing pursuant to Huff v. State, 622 So.2d 982 (Fla. 1983) was required to determine which,

if any, of the claims raised by Defendant required an evidentiary hearing. (R. 598 -599). The State conceded the need for an evidentiary hearing on Defendant's first, second, and sixth claim, and denied Defendant's request for an evidentiary hearing on all other claims asserted.

Defendant filed a Supplemental Motion to Vacate Judgment and Sentence on November 8, 2002 based upon the then recent U.S. Supreme Court case of Ring v. Arizona, 536 US. 584 (2002). (R.671 - 676). The State filed its response to this motion on June 4, 2003. (R. 679 - 671).

On May 16, 2006, the trial court held the evidentiary hearing on Claims One, Two, and Six of Defendant's 3.850 motion. (R. 957-1199). The court ultimately denied Defendant's Amended Motion to Vacate Judgment and Sentence on November 4, 2005. (R. 1961 - 2055). This appeal follows.

STATEMENT OF FACTS

A. Competency Hearing

On September 15, 1995, the trial court began a hearing to determine whether Mr. Pooler was competent to stand trial. Dr. Stephen Alexander was one of the doctors who testified at the competency hearing. Dr. Alexander saw Mr. Pooler for two hours at the Palm Beach County Jail. (TR10, p. 71). He questioned Mr. Pooler's capacity to challenge witnesses, his

understanding of courtroom procedures, and found that the deficits were serious enough to find him incompetent to proceed. (TR10, p. 71-72). He further found that Mr. Pooler's ability to consult with counsel was "extremely limited" and that conversations with defense counsel would be flawed. (TR10, p. 72). Defense counsel was likely to get misconceptions about Mr. Pooler's statements. (TR10, p. 72). Further, Mr. Pooler's misunderstandings would hamper defense counsel's ability to prepare and present an adequate defense. (TR10, p. 73).

At that hearing, defense counsel presented argument to the trial court regarding Mr. Pooler's competence. He stated, "I explained things to [Mr. Pooler]. My investigator explained things to him and the other attorney in my office explained things to him and we come back scratching our heads. We are not sure we are getting through." (TR10, p. 77). At that point, the court appointed two other experts to examine Mr. Pooler.

On November 15, 1995, the trial court heard testimony from Dr. Laurence Levine and Dr. Norman Silversmith regarding Mr. Pooler's competence. Dr. Levine, a neuropsychologist, testified first at this hearing. He saw Mr. Pooler on two occasions for a total of six hours. (TR10, p. 99-100). He testified that defense counsel "made it very difficult" for him because he did not provide him with any documentation for the assessment,

nor did he speak with Dr. Levine about prior to the assessment. (TR10, p. 101). Dr. Levine found Mr. Pooler's intelligence to be borderline. (TR10, p. 107). Dr. Levine found the test results to be "somewhat less effective" based upon what he believed was Mr. Pooler's educational background, military service, vocational history and vocation. (TR10, p. 110). However, Dr. Levine did not do a psychological evaluation of Mr. Pooler. (TR10, p. 114). Dr. Levine's two main concerns for Mr. Pooler were his ability to assist his attorney in planning a defense and in challenging the State's witnesses. (TR10, p. 115). During cross-examination, Dr. Levine testified that Mr. Pooler told him that he was an average student in school and that he was honorably discharged from the military as a sergeant. (TR10, p. 121).

The trial court then heard the testimony of the State's expert psychiatrist, Dr. Norman Silversmith. Dr. Silversmith evaluated Mr. Pooler for competence and found him to be competent to proceed. (TR10, p. 134, 137). His evaluation of Mr. Pooler lasted for one hour. (TR10, p. 139). Dr. Silversmith did not perform any psychological tests on Mr. Pooler. (TR10, p. 140). However, based upon his evaluation of Mr. Pooler, Dr. Silversmith found that Mr. Pooler suffers from a personality or character disorder. TR10, p. 140)

B. Guilt Phase

The testimony for the guilt phase began on January 11, 1996. The first witness to testify was Alvonza Colson. He testified that on January 30, 1995, he was at his house when he heard a knock at the door. (TR15, p. 794). It was Leroy Pooler and he was demanding to speak with his sister, Kim Wright. (TR15, p. 794). After Mr. Colson denied Mr. Pooler entry into the house, Mr. Pooler pulled out a gun and shot him in the back. (TR15, p. 795). Ms. Wright then fled the house. (TR15, p. 797). Mr. Colson then testified that Mr. Pooler chased Ms. Wright, and then he heard gunshots and saw Mr. Pooler dragging Ms. Wright. (TR15, p. 799).

The next witness to testify was W.C. Burgess. Mr. Burgess testified that he saw Ms. Wright running and Mr. Pooler chasing her. (TR15, p. 840). Mr. Burgess then testified that he saw Mr. Pooler shoot Ms. Wright a number of times. (TR15, p. 841). The third witness to testify was Ruby Thomas. She testified that she heard six gunshots, and when she looked outside, she saw Mr. Pooler shooting Ms. Wright. (TR15, p. 881). The fourth eyewitness to testify was Charlie Ware, Jr. He also testified that he saw Mr. Pooler shooting Ms. Wright. (TR15, p. 910). Another eyewitness to testify was Freddie Jackson. Mr. Jackson testified that he also saw Mr. Pooler shooting Ms. Wright. (TR16, p. 982-983). The last eyewitness to testify was Fannie Rolle, who also testified that she saw Mr. Pooler shooting Ms.

Wright. (TR17, p. 1117).

The last witness to testify in the State's case in chief was Carolyn Glass. She testified that Mr. Pooler told her that he was going to kill Ms. Wright and that he loved her. (TR17, p. 1130). Ms. Glass further testified that Mr. Pooler had been drinking all day the Sunday before the murder. (TR17, p. 1145). The murder occurred the next day, Monday, January 30, 1995.

The defense did not present any witnesses or evidence and rested. Mr. Pooler was ultimately found guilty as charged as to all counts alleged in the indictment. The case then proceeded to the penalty phase.

C. Penalty Phase

The State did not call any witnesses in the penalty phase of the trial and relied on the testimony that was presented in the guilt phase. Defense counsel presented testimony as follows.

The first defense witness to be called was Dr. Laurence Levine, a nueropsychologist. Dr. Levine testified that he was appointed by the trial court for the purpose of performing a competency evaluation on Mr. Pooler. (TR19, p. 1379). During his testing, he found that Mr. Pooler's performances were below average, most of them being in the low average to mildly impaired range. (TR19, p. 1381). Dr. Levine also testified that there

were inconsistencies in the information that he received from Mr. Pooler versus the test results. (TR19, p. 1388-9). Mr. Pooler told him that he graduated high school, was a sergeant in the military, and that he was able to hold a job for an extended period of time. However, the test results painted a different picture and there were discrepancies that should not have been there. (TR19, p. 1390). Dr. Levine, although he found Mr. Pooler competent, had reservations regarding Mr. Pooler's ability to assist his attorney in preparing a defense and in Mr. Pooler's ability to challenge prosecution witnesses. (TR19, p. 1396).

On cross-examination, Dr. Levine testified that he did not have Mr. Pooler's medical records. (TR19, p. 1398). Dr. Levine testified that Mr. Pooler reported to him that he was able to maintain a job, that he was honorable discharged as an E-5 sergeant, however, he had no independent source for verifying the information. (TR19, p. 1441).

The next defense witness to testify was Dr. Jude Desormeau, who was a psychiatrist at the Palm Beach County Jail. (TR19, p. 1412). He testified that he evaluated Mr. Pooler in the jail one time because he was a suicide threat. (TR19, p. 1413). Defense counsel asked Dr. Desormeau if Mr. Pooler told him that he was hearing voices, however, the doctor answered that he did not hear that. (TR19, p. 1417). On cross-examination, the doctor

testified that the depression he was suffering from was as a result of him being charged with first degree murder. (TR19, p. 1419).

Deputy Arthur Rock from the Palm Beach County Jail was the next defense witness. He testified that based upon his review of the file, Mr. Pooler only has one violation while he was in custody awaiting trial. (TR20 p. 1446-1454).

The next witness was Dr. Michael Armstrong, another jail psychiatrist. He testified that he had brief contact with Mr. Pooler while he was in the crisis center at the jail. (TR20, p. 1455). The crisis center nurses' evaluation showed that Mr. Pooler stated that he was very depressed, that he had no reason to live, and that he felt like he was going to explode. (TR20, p. 1458). Another note in the file shows that Mr. Pooler complained of hearing a voice in his head. (TR20, p. 1456). Mr. Pooler's discharge diagnosis was that he suffered from judgment disorder with emotional features. (TR20, p. 1460). On cross-examination, the doctor testified that there was a note in the file that Mr. Pooler denied sadness related to events that preceded incarceration. (TR20, p. 1465).

A co-worker of Mr. Pooler, Alice Bradford was the next to testify. Her testimony was that Mr. Pooler worked for U & Me Storage for approximately seven years before he got injured on the job. (TR20, p.

1475). Ms. Wright would come by the business at times and demand to speak with Mr. Pooler. (TR20, p. 1477). She would also call Mr. Pooler on the telephone at work. (TR20, p. 1478). Mr. Pooler also did work for her around the house. (TR20, p. 1479). She trusted him around the house and around her children. (TR20, p. 1479).

The next witness to testify was Dr. Stephen Alexander. He was initially contacted by defense counsel, then appointed by the court. (TR20, p. 1486). He testified that defense counsel "became concerned that he did not seem to be catching onto all of the information or did not retain it, and [he] wanted him evaluated to determine if he was competent to proceed to trial." (TR20, p. 1486). It was his opinion that Mr. Pooler was not competent to proceed after a two hour evaluation. (TR20, p. 1487). Mr. Pooler did not have the capacity to relate pertinent information to his attorney. (TR20, p. 1487). Mr. Pooler was confused as to what his role in the proceedings were and what appropriate court procedure was. (TR20, p. 1487). He also found that Mr. Pooler was not malingering. (TR20, p. 1491). Dr. Alexander did not give Mr. Pooler an intelligence test, but estimated his IQ to be between 75 and 85. (TR20, p. 1492). Dr. Alexander then testified that Mr. Pooler completed high school and spent six years in the military. (TR20, p. 1492). On cross examination, the doctor testified that Mr.

Pooler's capacity to appreciate the criminality of his conduct or to conform his requirement of law was not impaired. (TR20, p. 1500). The doctor also testified that Mr. Pooler was not suffering from any undue stress, nor did he find any "indications of any long-term mental illnesses or personality disorder or disturbance that would have existed at the time of the shooting." (TR20, p. 1501).

Mr. Pooler's brother, Henry Pooler, Jr., testified next. He basically testified that Mr. Pooler was a good brother, served in Vietnam, went to church, and has four daughters. (TR20, p. 1506-1511). Mr. Pooler's sister, Carolyn Pooler, testified that their family was a religious Baptist family. (TR20, p. 1514). The last witness was Henry Pooler, Sr., Mr. Pooler's father, who testified that he did the best job he could raising his kids and that they did not give him any trouble. (TR20, p. 1521).

The jury ultimately recommended death for Mr. Pooler by a vote of nine to three, and the trial court ultimately sentenced Mr. Pooler to die. The trial court found three aggravating factors in the sentencing order, to wit: Mr. Pooler was previously convicted of a felony involving the use of force, the murder was committed while Mr. Pooler was engaged in the commission of a burglary, and the murder was especially heinous, atrocious, and cruel.

For mitigation, the court founds as follows:

a. The crime for which Mr. Pooler was to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance. The Court gave this finding little weight.

b. The capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. The court did not find this mitigator to be established based on the court's findings that Mr. Pooler graduated from high school, and was a good student, that he was honorably discharged from the Marine Corps as a non-commissioned officer, that he was "fairly smart", and that he had a driver's license.

c. The Defendant acted under extreme duress or under the substantial domination of another person. The trial court did not find this mitigator to be established.

d. The Defendant's age. The trial court denied this mitigating factor based upon his service in the Marine Corps, that he was an experienced and mature person, and that he was competent and not mentally ill.

e. The Defendant has a good jail record and has shown an

ability to adapt to prison life. The trial court found that this was not established, however, the Florida Supreme Court found that the trial court erred in this regard.

f. The Defendant's honorable service in the military. The court gave this mitigating factor considerable weight.

g. The Defendant's low normal intelligence. The trial court did not find this mitigating factor was established based upon the court's finds that although Mr. Pooler's IQ tested at 80, he functioned at a higher level as evidenced by his high school, service, and job record.

h. The Defendant's good employment record. The court gave this mitigating factor some weight.

i. The Defendant's mental problems. The trial court found that this mitigating factor was not established.

j. The Defendant was a good parent. This mitigator was established and the trial court gave it some weight.

k. The Defendant is rehabilitable. The trial court found that this mitigating factor was not established.

l. The Defendant has done specific good deeds and possess certain good characteristics. The trial court found that

this mitigating factor was established, but gave it little weight.

m. The homicide was the result of a heated domestic dispute. The trial court found that this mitigating factor was not established.

n. The Defendant is unlikely to endanger others and will adapt well in prison. The trial court found that this mitigating factor was not established.

o. The murder was not committed for pecuniary gain. The court found that this aggravating factor is irrelevant to this case.

p. The Court has the option of a sentence of life without parole, or consecutive life sentences. The trial court gave this mitigating factor some weight.

D. Rule 3.850 Evidentiary Hearing

On May 16, 2005, the trial court held an evidentiary hearing on Defendant's Amended Motion to Vacate Judgment and Sentence. The first witness to testify was Don Carpenter, the investigator hired by the undersigned for the Rule 3.850 proceedings. Mr. Carpenter testified that he personally obtained Mr. Pooler's military and his school records. (T 164-

166). These records were introduced into evidence as Exhibits 1 and 2, respectively.

Mr. Pooler's trial counsel, Mr. Michael Salnick was called to testify. Mr. Salnick was appointed as a special public defender to represent Mr. Pooler. (T. 175). He handled first degree murder cases before Mr. Pooler's case, as well as penalty phase proceedings. (T. 175). On May 15, 1995, Mr. Salnick took the deposition of Carolyn Glass, whose trial testimony was described previously. (T. 178). In that deposition, Mr. Salnick learned that Mr. Pooler had a drink in his hand the day before the murder.[1] (T. 179) At that time, voluntary intoxication was a valid defense and Mr. Salnick had used it successfully to win another trial. (T. 179). Such testimony would have been enough to spark an interest to explore a voluntary intoxication defense. (T. 180). Defense counsel never explored this defense. The reason given was that Mr. Pooler would not allow him to admit that he committed the crime. (T. 180). On September 9, 1995, Mr. Salnick wrote a memorandum to Mr. Pooler detailing his finding of the case. This memorandum was admitted as Exhibit 6. A memorandum from Mr. Salnick's investigator, Marvin Jenne, was admitted into evidence as Exhibit

[1] At trial, Ms. Glass testified that Mr. Pooler had been drinking all day, the day before the murder, however, trial counsel did not explore this at deposition after learning that Mr. Pooler had a drink in his hand the day before the murder.

5. In that memorandum, Mr. Jenne wrote that "Leroy told me at this time that he thinks Michael [Salnick] should argue that Kim's death was manslaughter or second degree. He said that he doesn't believe the jury would believe him over five eye witnesses (sic)." Mr. Salnick testified that one of the ways to get a second degree murder conviction instead of first degree murder was to argue voluntary intoxication. (T. 181).

Mr. Salnick testified that he received the State's witness list, which included the name of Officer Frank Alonso. (T. 183). Mr. Salnick did not take Officer Alonso's deposition. (T. 183). Officer Alonso was one of the first officers on the scene of the murder, and also had contact with Mr. Pooler hours before the murder. (T. 184). Officer Alonso prepared a report hours before the murder where Mr. Pooler was robbed and fell asleep in his car due to intoxication. (T. 184). This report was moved into evidence as Exhibit 4. Mr. Salnick testified that he was aware that the eyewitnesses pointed to Mr. Pooler as the shooter and that it wasn't much of an "it's not me" case. (T. 196).

In regards to the penalty phase, Mr. Salnick never hired any experts to do a psychological workup on Mr. Pooler. (T. 215). The rationale was because Mr. Pooler was already evaluated for competency and there were two jail doctors who saw him. (T. 215). Mr. Salnick testified that he never

obtained Mr. Pooler's military records. (T. 217). Once Mr. Salnick reviewed the records, he agreed that the military records showed that Mr. Pooler did not have a great military career. (T. 219). Mr. Salnick further testified that he never obtained Mr. Pooler's school records. (T. 220).

Mr. Salnick also testified that if he had to do the trial again, he would have had a second attorney handle the penalty phase. (T. 221). Some of the reasons would be manpower, concentration of different areas, and credibility with the jury. (T. 222 – 223).

The next witness to testify at the evidentiary hearing was Marvin Jenne, Mr. Salnick's private investigator assigned to handle Mr. Pooler's case. Mr. Jenne had no death penalty training and had not attended any seminars on death penalty investigation. (T. 247-248). On or about September 11, 1995, Mr. Jenne saw Mr. Pooler and generated the memorandum which was introduced as Exhibit 5. (T. 250). This is the memorandum wherein Mr. Pooler wanted trial counsel to argue for manslaughter or second degree murder. (T. 250). Mr. Jenne testified that very early on in the case, the decision was made not to pursue voluntary intoxication. (T. 255). No investigation was done into this defense whatsoever (T. 256). Another of Mr. Jenne's memoranda was introduced as Exhibit 8. (T. 259). Mr. Jenne memorialized that Mr. Pooler had given him

different stories as to what happened at the murder, and that Mr. Pooler had failed to disclose Louisiana arrests. (T. 259-260).

On the issue of the military records, Mr. Jenne testified that he found out where to order the records, and even wrote a memorandum about it. (T. 261). This memorandum was introduced as Exhibit 9. Mr. Jenne never obtained the military records. (T. 262). There was no strategy in failing to obtain these records. (T. 262). Mr. Jenne also testified that it is important to obtain the school records because the records could reflect grades, disciplinary actions, and may uncover additional witnesses. (T. 263). Mr. Jenne kept a list of specific tasks that needed to be completed. (T. 267). This list was introduced as Exhibit 10. On that list was the name of Mr. Pooler's nephew, Brian Warren and a phone number. Mr. Jenne testified that he never saw Officer Alonso's report which was introduced as Exhibit 4.

The next witness to testify was Detective Frank Alonso. Detective Alonso testified that on morning of the murder, he was called to the lobby of the police station to take a report from Mr. Pooler. (T. 296.). Mr. Pooler smelled like alcohol, but didn't act as if he was drunk. (T. 298). Mr. Pooler reported that he had been robbed of $301.00. (T. 298). The detective prepared a report, which was introduced as Exhibit 4. The report states that "Victim (Leroy Pooler) was sitting in his vehicle with suspect when he fell

asleep due to intoxication." *See Exhibit 4.* Later that day, Detective Alonso was called to the murder scene of Kim Wright. (T. 297). Detective Alonso's deposition was never taken by defense counsel in the murder case. (T. 297).

The last witness to testify at the evidentiary hearing was Dr. Michael Brannon, a psychologist who examined Mr. Pooler. Dr. Brannon's curriculum vitae was introduced as Exhibit 12. Dr. Brannon initially performed a competency evaluation on Mr. Pooler prior to the evidentiary hearing and later performed a forensic evaluation for the purposes of mitigation. (T. 311, 313). Dr. Brannon ultimately found that Mr. Pooler was competent to proceed. (T. 313). Dr. Brannon testified regarding the differences between evaluations for competency and for death penalty mitigation. He testified that they are two very different in the types of evaluations. (T. 311, 314). "It's very different because it's more comprehensive in terms of information that you would actually need for – if you are actually doing mitigation at this time or looking at what somebody else might have done; you are looking at different sources of information, archival or retrospective as opposed to 'in the here and now', it isn't spontaneous. It doesn't have to do with the snapshot of the person now, it's more like reviewing a movie or films, how a person may have behaved

always all through their lives. It's getting information from the developmental historical framework and also information from things that might have occurred at the time of the actual instant offense, so it's much more comprehensive and requires attention to detail, it requires more research , more like a detective would do; you behave like a detective, if you will, as opposed to just getting some type of evaluation and assessment of their mental status at the time you see them." (T. 315).

Dr. Brannon performed the Test of Memory Malingering, which showed no evidence of malingering. (T. 317-318). He performed the Wechsler Adult Intelligence Scale, and found that Mr. Pooler has an IQ of 75, which is in the borderline range. (T. 318). This was consistent with the IQ test that was performed on Mr. Pooler when he was a child, as reflected in the school records. (T. 319-320). Mr. Pooler's performance in school was sub-par. (T. 331). He was slow academically, disinterested in school, had poor grades, and never finished high school. (T. 331).

Dr. Brannon found that Mr. Pooler had a high probability of severe substance abuse dependency, which can result in higher probability of legal problems. (T. 322-323). In reviewing the military records, Dr. Brannon noted that Mr. Pooler had problems with subordination towards an officer, which resulted in a recommendation that he be dishonorably discharged. (T.

324). Dr. Brannon was unable to test Mr. Pooler to determine how Mr. Pooler was impacted by the combat in Vietnam due to his limited reading ability, however, he reviewed the statements prepared by Mr. Pooler's nephews (Exhibits 13 and 14), and both describe significant changes in Mr. Pooler when returned from Vietnam. (T. 325). When someone was in combat, there is a possibility that there would have a trauma-like reaction from that. (T. 325). Dr. Brannon also reviewed the reports of Dr. Paul Bryan, Dr. Laurence Levine, and Dr. Michael Gutman, introduced as Exhibits 15, 16 and 17, respectively.

Dr. Brannon testified that if he were advising counsel for the penalty phase mitigation, he would need to speak with witnesses and have other information, such as academic records and job performance records. (T. 322). Dr. Brannon would never have relied upon the information that Mr. Pooler provided as the sole basis for an evaluation. (T. 332). That would be the "poorest way" of conducting an evaluation, unless it was simply for competency. (T. 332).

Dr. Levine's opinions in the competency evaluation were based upon assumptions, such as that Mr. Pooler graduated high school, had done well in the military, that he had no problems at work, and that he did not have any significant problems. (T. 333). Dr. Brannon noted there would not have

been any red flags if all of the information provided by Leroy Pooler checked out. However, given the fact that the records provided to Dr. Brannon, such as the school and military records, contradicted the test findings, there is great pause for concern. (T. 334). Dr. Bryan's report, which was another report that focused on competence, also had a great deal of contradictory finding when compared to the records that were obtained from the school, military and the work records. (T. 338).

These inconsistencies could indicate a number problems. (T. 338). It could indicate that Mr. Pooler was lying, that he does not remember well, or that he is confabulating, which means filling in the details that he does not remember. (T. 338). Dr. Gutman's report, introduced as Exhibit 17, indicates that Mr. Pooler was confabulating. (T. 341). A person who confabulates fills in the details even with inaccurate information, such as Mr. Pooler did. (T. 341). The strongest conclusion that can be made about the inconsistencies is that Mr. Pooler confabulated the details of life, not lied about the details of his life. (T. 342, 348).

Alcoholism is a mitigator that could have been presented. Mr. Pooler suffers from hepatitis C, which is consistent with alcohol abuse. (T. 344). Dr. Brannon diagnosed Mr. Pooler with alcohol dependency disorder. (T. 349)

Most of Mr. Pooler's problems, both behaviorally and legally began when Mr. Pooler returned from Vietnam. (T. 344). Mr. Pooler's nephews both discussed this in their statements. (T. 345). Mr. Pooler himself reported feelings of paranoia, having his mind stolen, feelings of aggression, and being uneasy about things since his tour of duty in Vietnam. (T. 345).

The last document to be introduced into evidence was the statement from Carlton Weeks, one of Mr. Pooler's co-workers, which was introduced as Exhibit 18. (T. 348). Mr. Pooler had tremendous difficulty getting along with people. (T. 347). He was also very difficult to manage on the job. (T. 347).

SUMMARY OF THE ARGUMENTS

The crux of Defendant's claims is that trial counsel was ineffective for failing to properly investigate the defense of voluntary intoxication, for failure to properly investigate Mr. Pooler's life for the penalty phase, and for failure to have effective mental health evaluations. There was ultimately no psychological testing done of Mr. Pooler until the undersigned retained Dr. Brannon. When the undersigned counsel investigated this case and conducted a proper mitigation investigation, it became apparent that trial counsel failed to conduct even a minimally sufficient mitigation investigation and presentation, resulting in Mr. Pooler's death sentence.

Death is the ultimate penalty that can never be reversed. As a matter of public policy, courts and juries should base their sentencing decisions based upon facts, not fiction. It is undisputed that many of the findings of fact made by the trial court in the sentencing order are not based in reality. Many of these "facts" that the trial court used to deny Mr. Pooler certain mitigating factors were not facts at all.

Such gross failure to properly investigate mitigating factors can not be labeled as strategy. Trial counsel had serious doubts, as expressed to the trial court, regarding Mr. Pooler's mental capacity. Therefore, trial counsel did not have the luxury of doing nothing in regards to mitigation investigation, and relying solely upon Mr. Pooler for information. Mr. Pooler deserves to be sentenced based upon the true facts of his life, and not the fiction that was portrayed by trial counsel's deficient performance.

ISSUE I – THE TRIAL COURT ERRED IN DENYING DEFENDANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT A VOLUNTARY INTOXICATION DEFENSE

The testimony of the eyewitnesses at the trial clearly established that Mr. Pooler was present at the scene of the murder and that he was the one who did the shooting. Trial counsel acknowledged that there were five eyewitnesses who put Mr. Pooler at the scene and that he was the shooter.

This was not the type of case in which counsel could have argued that Mr. Pooler did not do the shooting. Trial counsel testified at the evidentiary hearing that Mr. Pooler did not want any defense presented in which he would have to admit he did the shooting. However, Mr. Pooler was never in a position to make an informed waiver of his only possible defense. Trial counsel never even explored the defense of voluntary intoxication to present it to Mr. Pooler.

Had Mr. Pooler's trial counsel investigated this case more thoroughly, he would have learned that Mr. Pooler was intoxicated at the time of the murder. Voluntary intoxication was a defense to the crimes Mr. Pooler was convicted of, to-wit: First Degree Murder[2], Attempted First Degree Murder[3], and Armed Burglary[4] of a dwelling. Voluntary intoxication could have been employed as a defense to Mr. Pooler's first-degree murder charge on both theories of first-degree murder: premeditated murder and felony murder. On the theory of felony-murder, the State must prove the required mental element for the underlying felony. The underlying felony in Mr. Pooler's case is a specific intent crime. Stewart v. State, 420 So.2d 862, 863

[2] Gardner v. State, 480 So.2d 91 (Fla. 1985), Wright v. State, 675 So.2d 1009 (Fla. 2nd DCA 1996) Brunson v. State, 605 So.2d 1006 (Fla. 1st DCA 1992).
[3] Freeman v. State, 630 So.2d 1225 (Fla. 4th DCA 1994).
[4] Whitty v. State, 687 So.2d 689 (Fla. 2nd DCA 1997).

(Fla. 1982) cert. denied, 460 U.S.1102, rehearing denied, 462 U.S. 1124 (1983); Gardner, 480 So.2d at 92-93. Counsel failed to develop a defense of voluntary intoxication, failed to request a jury instruction on the issue, and failed to present evidence of intoxication to rebut the specific intent of premeditation and the underlying felony.

Trial counsel was familiar with the defense in that he successfully used voluntary intoxication as a defense in a prior case. It is undisputed that there was no investigation whatsoever into the defense of voluntary intoxication. Trial counsel's testimony that Mr. Pooler did not want any defense in which he would have to admit he did the shooting was rebutted by the memorandum prepared by the private investigator, Marvin Jenne. *See Exhibit 5.* Mr. Pooler told Mr. Jenne that he wanted trial counsel to argue that this was manslaughter or second degree murder. As trial counsel testified, one of the ways to accomplish this was to voluntary intoxication.

When trial counsel was investigating this case, he had an absolute duty to investigate all available defenses. Just because trial counsel would have investigated a possible voluntary intoxication defense, does not mean that such a defense must be presented. Mr. Pooler was unable to make an educated decision regarding what defense should be presented when he did not have all available information before him.

When trial counsel took the deposition of Carolyn Glass, the witness who heard Mr. Pooler make a threat to kill the victim the day before the murder with a glass of liquor in his hand, he did not ask any follow up questions about Mr. Pooler drinking or intoxication. Yet, at trial, Ms. Glass testified that Mr. Pooler had been drinking all day the day before the murder. The report of Detective Alonso that was admitted into evidence as Exhibit 4 was found in trial counsel's file. In that report, it states that Mr. Pooler reported that he fell asleep in his car due to intoxication. This occurred just hours before the murder. Trial counsel never even took the deposition of Detective Alonso to learn any of this information, despite the fact that Detective Alonso was also one of the first officers on the scene. Further, trial counsel did not have Mr. Pooler evaluated for anything other than his competence to proceed. There was no testing done, nor any inquiry, by any medical professional regarding Ms. Pooler's state of mind and intoxication at the time of the offense. During Dr. Gutman's evaluation of Mr. Pooler, whose report is in evidence as Exhibit 17, he learned that Mr. Pooler had been drinking prior to the offense, and that his blood alcohol limit would have been many times over the legal limit.

If trial counsel had done an effective job in investigating all possible defenses, Mr. Pooler could have made an educated and informed decision

regarding what defenses he wished to present. However, trial counsel abandoned this defense early on without any investigation.

While trial counsel blames Mr. Pooler for his failure to conduct proper discovery, it is critical to note that trial counsel himself had serious doubts about whether he was "getting through" to Mr. Pooler. Further, he had the opinion of Dr. Alexander that Mr. Pooler was completely incompetent and that trial counsel would get misconceptions of Mr. Pooler's life and story. Additionally Mr. Pooler had an extremely low IQ, which is borderline retarded. When faced with a client with such limited intellectual ability, trial counsel had even more of a duty to ensure that all defenses were explored. Trial counsel was completely ineffective in this regard.

At the May 16, 2005 evidentiary hearing, trial counsel testified that he had no problems communicating with Pooler and eliciting information. While this is convenient testimony for the postconviction relief hearing, it is a far cry from what trial counsel argued to the trial court. At the September 15, 1995 competency hearing, trial counsel argued to the court that "…my investigator explained things to him and the other attorney in my office spent time and we came back scratching our heads; we are not sure we are getting through." Trial counsel argued that Mr. Pooler was incompetent.

Mr. Pooler's trial counsel did not introduce any evidence, or present

any testimony, at the guilt phase of the trial. Had trial counsel interviewed Mr. Pooler's family about his alcoholism, or anything that they spoke to Mr. Pooler about after the murder, it would have revealed that Mr. Pooler told them that he was drinking heavily the night before, and the morning of, the murder. Trial counsel failed to locate two witnesses who were closest to Mr. Pooler at the time of the murder. Brian Warren is Mr. Pooler's cousin who visited him regularly in West Palm Beach. He knew of Mr. Pooler's drinking habits, and actually left Mr. Pooler the day before the murder, drinking and drunk. Brian Warren was never contacted by trial counsel or his investigator. On Marvin Jenne's notes, introduced as Exhibit 10, one of his tasks was to contact Brian Warren. He never did. Had Mr. Warren been contacted, trial counsel would have learned that Mr. Pooler was drunk before the murders and that when Mr. Pooler called him after the murders, he sounded intoxicated. This is despite the fact that Mr. Pooler provided both of them with Brian Warren's name, address, and telephone number, as is evidenced in Marvin Jenne's notes that were introduced at the evidentiary hearing. Darren Warren, Mr. Pooler's nephew was also never contacted by trial counsel. He lived with Mr. Pooler during the summer before the murder. Pursuant to the written statement that was introduced in evidence, he can testify to the fact that Mr. Pooler had an alcohol problem and was

having mental problems. Trial counsel was ineffective for failing to locate and present these witnesses for a voluntary intoxication defense.

The United States Supreme Court set for the test for ineffectiveness in Strickland v. Washington, 466 U.S. 668 (1984). Strickland requires a Defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice. Mr. Pooler has satisfied each of these prongs. Trial counsel's performance was unreasonable, which denied Mr. Pooler his Sixth Amendment rights. As in Francis v. Spraggins, 720 F.2d 1190, 1195 (11th Cir. 1983), trial counsel ignored an obvious defense, which can not be labeled as strategy. As in Francis, trial counsel failed to act as an advocate and Mr. Pooler suffered actual and substantial damage to his defense. Again, trial counsel called no witnesses whatsoever. In fact, trial counsel had no clear theory of defense. Right in trial counsel's file was evidence of voluntary intoxication.

Had Mr. Pooler been properly represented by counsel, and the intoxication defense was presented to the jury there is a reasonable probability that the outcome of the case would have been substantially different. Thus, Mr. Pooler has established unreasonable attorney performance, as well as prejudice. Mr. Pooler prays this Honorable Court reverse the trial court's order denying Defendant's Amended Motion to

Vacate Judgment and Sentence and to order a new trial in this matter.

ISSUE II – THE TRIAL COURT ERRED IN DENYING DEFENDANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY INVESTIGATE AND PRESENT MITIGATING FACTORS

It is undisputed that trial counsel failed to obtain Mr. Pooler's school records, Mr. Pooler's military records, and Mr. Pooler's employment records. This caused the trial court to use the fiction of Mr. Pooler's life against him, while the facts of his life would have resulted in a different sentence.

The trial court gave only little weight to the mitigating factor that Mr. Pooler was under the influence of extreme mental or emotional disturbance. Had trial counsel effectively investigated the issue of Mr. Pooler's intoxication, he could have presented evidence of intoxication to support this mitigating factor. The argument that Mr. Pooler did not want any evidence presented that he was the shooter certainly would not have excluded evidence of intoxication in the penalty phase. However, since trial counsel failed to conduct even a minimal amount of discovery and investigation into this issue, Mr. Pooler was denied the benefit of greater weight to this mitigating factor.

The trial court denied Mr. Pooler the statutory mitigating factor that

his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The court denied this mitigating factor based upon Mr. Pooler graduating from high school. It is now undisputed that Mr. Pooler did not graduate high school. *See Exhibit 2.* The trial court also denied this mitigator based upon the allegation he was a good student. It is undisputed that he was not. The notes in the school records clearly indicate that Mr. Pooler was a slow learner, that he lost interest in school, and that the majority of his high school grades were D's and F's. The IQ test he received in school indicated that his IQ was a mere 75, which is borderline retarded. The trial court further denied this mitigating factor based upon the allegation that he was honorably discharged from the Marine Corps as a non-commissioned officer. As the military records introduced as Exhibit 1 undeniably show, he was recommended for a dishonorable discharge, had a less than stellar military career, and was discharged as an E-2. There was no strategy in failing to obtain these records. All that was required were a few letters and releases. In fact, Marvin Jenne, trial counsel investigator, had a memorandum in his file with the address on where to send for the military records. He just never did.

Further, no evidence of intoxication was presented to support this

mitigating factor. As the Florida Supreme Court has noted, intoxication is a factor the court should consider when weighing this mitigating factor. Stewart v. State, 558 So.2d 416 (Fla. 1990). Trial counsel never followed up on this important issue. Had trial counsel presented the reality of Mr. Pooler's life, this mitigating factor would have been found and given great weight. Mr. Pooler was clearly prejudiced by trial counsel's unreasonable performance.

The trial court denied Mr. Pooler the statutory mitigating factor of his age at the time of the offense. Again, this was denied based upon his service in the Marine Corps. As has been previously shown, his military career was not as presented by trial counsel. It is not that trial counsel had this information and chose as a strategy not to use it, he just never bothered to obtain it. The fiction as presented by trial counsel was used against Mr. Pooler. The trial court further denied this mitigating factor based upon the allegation that he was experienced and mature and was not mentally ill, when in fact he was mentally ill.

Trial counsel failed to request any experts whatsoever to do a psychological workup on Mr. Pooler. The only experts that were presented were two jail doctors who both briefly met with Mr. Pooler, but did not do any meaningful evaluation of him, other than to watch him for suicidal

actions. The other two experts that were presented only evaluated Mr. Pooler for competency. They did not receive any background information on Mr. Pooler from trial counsel. In fact, Dr. Laurence Levine testified that trial counsel made it "extremely difficult" for him because he did not provide any records to him, nor did he speak with him prior to the evaluation. The other expert that evaluated Mr. Pooler for competency was Dr. Silversmith, who spent one hour with Mr. Pooler. He also was not provided with any background materials on Mr. Pooler. He did not perform any psychological tests on Mr. Pooler, despite the fact that he was used to testify for death penalty mitigation.

As Dr. Michael Brannon testified at the evidentiary hearing, a competency evaluation and a forensic psychological evaluation for the purpose of mitigation are two completely different evaluations requiring two completely different approaches. In a competency evaluation, the doctor is looking at the "here and now" to determine present competence. During a forensic examination for the purpose of death penalty mitigation, more testing needs to be done, and that testing must be correlated with the examinee's life history. In this case, the only life history was that information provided by Mr. Pooler, who Dr. Alexander found would not be able to assist his defense by giving correct and relevant information. All

counsel had to do was order some records, and Mr. Pooler's mental deficiencies would have become more apparent. The trial court would have been compelled to find that Mr. Pooler did suffer from mental illness and the court would have found that this mitigating factor existed and would have given it great weight. Mr. Pooler was clearly prejudiced by trial counsel's unreasonable performance.

The trial court did not find Mr. Pooler's dull intelligence to be mitigating at all. The court found that because of his high school, job, and service record, he functioned at a higher level and thus this mitigating factor did not apply. As was previously argued these assertions are not supported by the true facts. In fact, the Supreme Court has found an IQ of 79 to be sufficient to support a finding that this mitigating factor exists. DuBoise v. State, 520 So.2d 260 (Fla. 1988). An interesting note is that the school records indicate that when Mr. Pooler's IQ was tested as a child, the test revealed his IQ was actually only 75. Had trial counsel obtained these school records, he would have been in a better position to argue that this mitigator existed.

The Court also based the finding that this mitigator was not established on Mr. Pooler's employment record. His employment record clearly indicates that he was nothing more than a furniture mover used

solely for his brawn, not his brain. The undersigned did the simple task of obtaining Mr. Pooler's past employment records from the City of Baton Rouge. These records indicate that Mr. Pooler was a refuse collector for the City. *See Exhibit 3.* After that, Mr. Pooler was a minimum wage worker as a subcontractor for Exxon Oil. Had trial counsel simply ordered these records, the court would have been compelled to find that this mitigating factor exists and would have given it great weight. Mr. Pooler was clearly prejudiced by trial counsel's unreasonable performance.

The trial court found that the mitigating factor that Mr. Pooler suffered from mental illness was not established. As was argued above, this is as a direct result of trial counsel's failure to obtain proper experts and have proper evaluations done. The only aspect of Mr. Pooler's mental capacity that was tested was his then present competence to stand trial. Mr. Pooler was clearly prejudiced by trial counsel's unreasonable performance.

Trial counsel failed to present intoxication as a mitigating factor. There are two types of mitigation when it comes to intoxication. The fact that the defendant was intoxicated at the time of the murder is not only a defense to the underlying crimes charged, but is also a recognized mitigating factor. Masterson v. State, 516 So.2d 256 (Fla. 1987), Norris v. State, 429 So.2d 688 (Fla. 1983), Buford v. State, 570 So.2d 923 (Fla. 1990), Fread v.

State, 512 So.2d 176 (Fla. 1987). Further, the fact that the Defendant was an alcoholic, as opposed to drunk at the time of the offense, is also a mitigating factor the Court never considered due to counsel's deficient performance. Scott v. State, 603 So.2d 1275 (Fla. 1992).

As previously discussed, Detective Alonso's report was in trial counsel's file. This report indicated that Mr. Pooler was intoxicated the morning of the murder. Detective Alonso's testimony would have revealed that Mr. Pooler fell asleep due to intoxication hours before the murder. The Court never considered either of these two issues. This is directly due to trial counsel's failure to investigate this aspect of the case and present it to the court and jury, as described herein. As Dr. Michael Brannon, the defense expert presented at the postconviction relief hearing, testified, Mr. Pooler suffered from severe alcohol dependence. Had trial counsel presented the available evidence of intoxication to the trial court and to the jury, this mitigating factor would have been established.

Trial counsel did no independent investigation into Mr. Pooler's life or background. Trial counsel expressed to the court a few months before trial that he had serious competency concerns and that he was not sure he was "getting through to him." He read Dr. Alexander's report and heard his testimony that Mr. Pooler was incompetent and could not effectively

communicate with his attorney or to present facts. He had a client who he knew to be borderline retarded. Yet, trial counsel failed to properly get psychological testing done for anything other than competence. If trial counsel would have just obtained the military, job, and school records, as well as a forensic psychological examination, the trial court would have been presented with the facts, not fiction, and would have been compelled to find that mitigating factors were established and would have been compelled to give them great weight.

All of these inconsistencies in Mr. Pooler's account of his work history, military background, and school history should have started trial counsel and Marvin Jenne thinking. It also should have been emphasized that Mr. Pooler was neither successful in life nor mature. The information that Leroy Pooler gave about his life was not corroborated by any documents. Had trial counsel's investigator done an effective investigation, he would have realized that something was wrong with Leroy Pooler.

Mr. Pooler was not lying to the mental health practitioners; he simply is confabulating and replacing missing details of his life. To rely solely on a client who has a 75 IQ for mitigation is in and of itself ineffective assistance of counsel. Had trial counsel followed up on even one piece of information, he would have realized that the information does not fit Mr. Pooler's story,

which should have tipped trial counsel off to the fact that Mr. Pooler has serious mental health problems.

The United States Supreme Court in Rompilla v. Beard, 545 U.S. 374 (2005) addressed some of the same issues that are present in this matter. Trial counsel in Rompilla failed to investigate the defendant's background for mitigation purposes. The District Court in Rompilla found that "in preparing the mitigation case, the defense lawyers had failed to investigate 'pretty obvious signs' that Rompilla had a troubled childhood and suffered from mental illness and alcoholism, and **instead had relied unjustifiably on Rompilla's own description of an unexceptional background."** Id. At 375. (emphasis added). As is the case here, trial counsel failed to do independent investigation and have true mitigation evaluations by experts because counsel relied upon what Mr. Pooler told him without investigating further. Rompilla was uninterested in assisting his attorneys prepare for the penalty phase, and would even send his attorneys chasing false leads. This case is factually similar in that the Supreme Court found Rompilla's trial attorneys ineffective for failing to order school records, which yielded mitigation. Further, Rompilla's trial attorneys had a police report that Rompilla had been drinking before the offense, and his trial counsel never followed up on it, nor did he look for evidence of extensive history of

alcohol abuse. This issue is factually identical to Mr. Pooler's case. Mr. Salnick never obtained the school records, nor did he follow up on a report in his file that Mr. Pooler was drinking before the offense, which is especially important in light of Carolyn Glass' testimony that Mr. Pooler had been drinking all day the day before the murder. The Supreme Court went on to say that the Third District Court of Appeals erred when it "found nothing unreasonable in the state court's application of Strickland, given defense counsel's efforts to uncover mitigation material, which included interviewing Rompilla and certain family members, as well as consultation with three mental health experts. Although the majority noted that the lawyers did not unearth the 'useful information' to be found in Rompilla's 'school, medical, police, and prison records,' it thought that the lawyers were justified in failing to hunt through these records when other efforts gave no reason to believe the search would yield anything helpful." Id. quoting Rompilla v. Horn, 355 F.3d 233, 252 (2004). The United States Supreme Court disagreed and reversed the Court of Appeals. So, even though Rompilla's attorneys spoke with family members, and consulted with three mental health experts, his trial counsel was still ineffective for failing to order the school records, and other background records, and presenting them to the mental health experts, even though they had no reason to believe

that they would yield anything helpful. Similarly, Mr. Salnick also interviewed Mr. Pooler's family members and sought competency opinions from doctors, but he failed to order Mr. Pooler's background records, failed to follow up with proper evaluations, and failed to follow up on the alcohol issue. The Supreme Court found that had Rompilla's attorney cared to check, they would have learned that Rompilla's previous test results would have pointed to "schizophrenia and other disorders, and test scores showing a third grade reading level of cognition after nine years of schooling. The accumulate entries would have destroyed the benign conception of Rompilla's upbringing and mental capacity defense counsel had formed from talking with Rompilla himself and some of his family members, and from the reports of the mental health experts. With this information, counsel would have become skeptical of the impression given by the five family members and would unquestionably have gone further to build a mitigation case." Id. at 41. When Rompilla's attorneys asked the family members about his life, they said everything was essentially normal, just like Mr. Pooler's family did. Rompilla's records, when finally ordered, painted a different picture, as do Mr. Pooler's records. Had counsel done the simple task of obtaining the school records, military records, and employment records, counsel would have learned that the information he had thus far was

erroneous and would have opened the door to the mitigation that was not presented at the evidentiary hearing.

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

Beyond the guilt-innocence stage, defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." Id. At 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

In Mr. Pooler's capital penalty proceedings, substantial mitigation,

both statutory and non-statutory, never reached the judge or jury. See Espinosa v. Florida, 505 U.S. 1079 (1992). Further, the information that was presented to the court and to the jury was false to begin with. Mr. Pooler was sentenced to die by a judge and jury who knew little about him. Further, what little they knew was incorrect. Counsel failed to adequately investigate and present the plethora of available mitigation. Because available mitigation was not presented to the judge and jury, the resulting death sentence is rendered unreliable. Counsel's highest duty is the duty to investigate and prepare. Where counsel does not fulfill that duty, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. See, e.g., 477 U.S. 365 (1986) (failure to request discovery based on mistaken belief that the state was obliged to hand over evidence); Harris v. Dugger; Middleton v. Dugger; Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses); Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986) (little effort to obtain mitigating evidence) cert. denied, 107 S. Ct. 602 (1986); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984) (failure to present additional character witnesses was not the result of a strategic decision made after reasonable investigation), cert. denied, 471 U.S. 1016 (1985); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978) (defense counsel

presented no defense and failed to investigate evidence of provocation); Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972) (refusal to interview alibi witnesses). See also Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985) (counsel did not pursue a strategy, but "simply failed to make the effort to investigate").

No tactical motive can be ascribed to an attorney whose omissions are based on the failure to properly investigate or prepare. See Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986). Mr. Pooler's sentence of death is the resulting prejudice. It cannot be said that there is no reasonable probability that the results of the penalty phase of the trial would have been different if the evidence discussed herein had been presented to the judge and jury. Strickland, 466 U.S. at 694. The key aspect of the penalty phase is that the sentence be individualized, focused on the particularized characteristics of the individual defendant. Gregg v. Georgia, 428 U.S. 153 (1976). This did not occur in Mr. Pooler's case.

Crucial evidence regarding mental health mitigation never reached the trial court and jury. Florida law made Mr. Pooler's mental condition relevant to both guilt/innocence and sentencing in the following areas: (a) specific intent; (b) statutory mitigating factors; (c) aggravating factors; and

(d) a myriad of non-statutory mitigating factors. What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1976)(quoting United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974). When mental health is at issue, as it is here, there is a duty to conduct proper investigation into the defendant's mental health background, and to assure that the defendant is not denied a professional and professionally conducted mental health evaluation. See State v. Michael, 530 So.2d 929 (Fla. 1988). A professionally conducted mental health evaluation did not occur in Mr. Pooler's case. The only experts that testified at the penalty phase were the competency experts appointed during the pretrial phase of the case. These experts were solely evaluating for competency, not mitigation. Experts, such as Dr. Gutman and Dr. Brannon could have been able to testify in the penalty phase regarding long term alcohol use and the subsequent effect on a person, both physically and mentally. Without this testimony the jury was not permitted to view Mr. Pooler as the individual he was. Instead, the jury was subjected to a desperate attempt by defense counsel to present mental health testimony that

had not been properly prepared.

Defense counsel failed to investigate this obvious potential avenue of mental health mitigation; this failure cannot be tactical, because it was based upon ignorance of the facts. When trial counsel's failure to present mitigating evidence "result[s] not from an informed judgment, but from neglect," trial counsel has rendered constitutionally ineffective assistance. Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989); Stevens v. State, 552 So.2d 1082, 1087 (Fla. 1989).

Had he prepared, counsel's efforts clearly would have led to the existence of statutory and non-statutory mitigation. Regarding mental health mitigation, an adequate investigation into Mr. Pooler's past would have provided a defense expert with critical and necessary information in order to render a professionally adequate assessment of Mr. Pooler's mental condition. Family history, school records, employment records, military records and substance abuse information was readily available had it only been sought. Only then, would a competent mental evaluation have found the presence of mitigating factors. "An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994). The failure to do so will render counsel's

performance ineffective.

Dr. Gutman, and Dr,. Brannon have now examined Mr. Pooler and provided a considerable amount of evidence which was available at the time of Mr. Pooler's penalty phase. Appropriate testing has been conducted. As a result, expert testimony is now available, based upon these materials, of substantial and compelling mitigation. Expert testimony can now explain how the relevant mental health mitigating circumstances apply to Mr. Pooler. This expert testimony has substantiated and corroborated the findings of mitigation with information that went undiscovered at the time of Mr. Pooler's penalty phase. Further, this evidence has disputed the findings of fact made by the trial court that were used to deny Mr. Pooler substantial mental health mitigation.

All of the information upon which expert testimony can be presented was available at the time of Mr. Pooler's penalty phase. Without a tactical or strategic reason, defense counsel failed to adequately investigate Mr. Pooler's background and life history. Had this been done, statutory and non-statutory mitigation could have been credibly presented to the jury from which the jury could have returned a binding life recommendation. "The need for the respect due the uniqueness of the individual" is required by the Eighth and Fourteenth Amendments. Lockett v. Ohio, 438 U.S. 586, 605

(1978). "[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. Or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545 (1987)(concurring opinion). The Supreme Court of the United States has defined mitigation as "evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigates against imposing the death penalty." Penry v. Lynaugh, 492 U.S. 302, 303 (1989). Earlier, the Court had mandated that mitigation was to include "any aspect" of such evidence. Lockett, 438 U.S. at 604.

This substantial and compelling mitigating evidence was easily available and accessible to trial counsel, but was not investigated and prepared for presentation to either the jury or the judge. As a result, Mr. Pooler was sentenced to death by a jury and judge which heard little of the available mitigation which was essential to an individualized capital sentencing determination. Lee v. United States, 939 F. 2d 503 (7th Cir. 1991); Kubat v. Thieret, 867 F. 2d 351, 369 (7th Cir. 1989).

Mr. Pooler's judge and jury were not able to "make a sensible and educated determination about the mental condition of the defendant at the

time of the offense." Ake. Oklahoma, 470 U.S. 68, 81 (1985). A wealth of compelling mitigation was never presented to the jury charged with the responsibility of whether Mr. Pooler would live or die. Important, necessary, and truthful information was withheld from the jury, and this deprivation violated Mr. Pooler's constitutional rights. See Penry v. Lynauch, 492 U.S. 302 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

In discussing the statutory mental health mitigating factors, this court has recognized that

> A defendant may be legally answerable for his actions and legally sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state.

Perri v. State, 441 So.2d 606, 609 (Fla. 1983). The Eleventh Circuit has also recognized that "[o]ne can be competent to stand trial and yet suffer from mental health problems that the sentencing jury and judge should have had an opportunity to consider." Blanco, 943 F.2d at 1503. This is especially true here, when Mr. Pooler was only evaluated for competency and not for mitigation. Armed with evidence that counsel could have discovered, a mental expert would have conclusively established statutory mitigation and would have presented substantial non-statutory mental health mitigating

evidence.

The argument may be made that because not all of the information contained in the school, military, and employment records was good, that counsel may not have introduced it anyway. However, counsel must first obtain them and review them before this determination can be made. The failure to introduce these records because they may contain unfavorable information does not justify keeping these records from the jury, especially in light of the fact that the court used fictional information to sentence Mr. Pooler to death. *See* Williams v. Taylor, 529 U.S. 362 (2000). The information in the records would have refuted the trial court's findings of fact. This court has previously found counsel ineffective for failing to order background records, such as school records. State v. Lewis, 838 So.2d 1102 (Fla. 2002). Further, this court has previously found counsel ineffective for not presenting a history of alcohol abuse to the jury. Ragsdale v. State, 798 So.2d 713 (2001). Failing to present evidence of a mental disorder has also been deemed ineffective. Orme v. State, 896 So.2d 725 (2005).

Lastly, in Sochor v. State, 883 So.2d 766, 772 (2004), this court found the trial attorney provided ineffective assistance of counsel when he "did not provide [the] experts with any information about Sochor's background, nor did he specifically instruct them to examine and evaluate Sochor for the

purpose of establishing mitigating evidence. Based upon these undisputed facts, counsel's performance was clearly deficient…" Sochor, at 772. Counsel in Sochor did not "instruct the experts to conduct their evaluations with an eye towards developing mitigating circumstances; rather, their evaluations were done for the purpose of determining Sochor's competency to stand trial and his sanity at the time of the offense." Id., at 775. That is identical to the issue in Mr. Pooler's case. The experts who did testify only evaluated Mr. Pooler for competence, not for mitigation. Further, it is undisputed that counsel did not provide them with any of Mr. Pooler's background information, since counsel himself did not have the materials.

Counsel also was ineffective for failing to request a second chair to handle the mitigation investigation. Trial counsel himself states that if he had to do it again, he would have asked for another attorney to assist him. There are many challenges and complexities when representing a client charged with first degree murder. There are two phases of the trial and due process mandates that two different attorneys handle the different phases. Preparing a murder cases for trial at the guilt phase can be a daunting task and oftentimes leads to the penalty phase almost being forgotten, which is what happened in this case. If trial counsel had obtained a second chair, there would have been another attorney who could have ensured that all of

the mitigation experts have been retained and were properly prepared, which clearly was not done in this case.

Because of counsels' failure to properly investigate and prepare for the penalty phase, Mr. Pooler received inadequate assistance. Cunningham v. Zant, 928 F.2d 1006, 1017 (11th Cir. 1991). The resulting prejudice is clear –"[b]y failing to provide such evidence to the jury, though readily available, trial counsel's deficient performance prejudiced . . . [the defendant's] ability to receive an individualized sentence." Id. at 1019 (citations omitted). Mr. Pooler prays this Honorable Court remand the case for a new sentencing on this issue.

ISSUE III – THE TRIAL COURT ERRED IN DENYING DEFENDANT AN EVIDENTIARY HEARING AND RELIEF FOR DEFENDANT'S CLAIM THAT HE WAS DENIED A RELIABLE SENTENCING BECAUSE THE TRIAL COURT FAILED TO FIND THE EXISTENCE OF MITIGATION ON THE RECORD AND THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FULLY INVESTIGATE AND PROPERLY PRESENT MR. POOLER'S MITIGATION TO THE COURT

The argument and evidence set forth in Issue II clearly establish that trial counsel was ineffective in many respects for failing to investigate the intoxication mitigating factor, for failing to investigate the military background, for failure to investigate the employment background, for

failure to investigate his family background, for failure to investigate his school background, as well as other factors. Other mitigating factors, that were supported by the evidence, were not found by the trial court. For one, the Court did not find that Mr. Pooler had good behavior while awaiting trial. The Court did not find his low IQ to be mitigating. The Court did not find Mr. Pooler's age to be mitigating. These are all factors that were supported by the evidence that should have been found to be mitigating. Other factors, such as those discussed in Issue II, should have been found to be mitigating, but were not due to trial counsel's ineffective assistance. Thus, Mr. Pooler was denied his rights under the Eighth and Fourteenth Amendment. The trial court erred in failing to grant an evidentiary hearing on this issue. The record does not conclusively establish that Mr. Pooler is not entitled to relief on this issue.

ISSUE IV – THE TRIAL COURT ERRED IN DENYING DEFENDANT AN EVIDENTIARY HEARING AND RELIEF THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE COURT REPEATED INSTRUCTIONS AND COMMENTS THAT INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY FOR SENTENCING

Mr. Pooler's jury was repeatedly instructed by the Court that its role was merely "advisory" (TR 19 p. 1360, 1361; TR21, p. 1620, 1621, 1623,

1625, 1626, 1627), in violation of law. However, because great weight is given the jury's recommendation, the jury is a sentencer. Espinosa v. Florida, 505 U.S. 1079 (1992). Here the jury's sense of responsibility would have been diminished by the misleading comments and instructions regarding the jury's role. This diminution of the jury's sense of responsibility violated the Eighth Amendment. Caldwell v. Mississippi, 472 U.S. 320 (1985). See also Pait v. State, 112 So.2d 380 (Fla. 1959). Throughout the proceedings in Mr. Pooler's case, the Court frequently made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase. As to sentencing, however, they were told that they merely recommended a sentence to the judge, their recommendation was only advisory, and that the judge alone had the responsibility to determine the sentence to be imposed for first degree murder. The Court repeatedly informed the jurors that the Court had the responsibility for deciding what punishment shall be imposed.

The Court failed to instruct the jury that their recommendation would carry great weight **and** would only be overridden in circumstances where no reasonable person could agree with it. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). Mr. Pooler does not have to show that the effect of the comments was to unconstitutionally dilute the jury's sense of responsibility.

In Boyde v. California, 494 U.S. 370 (1990), the United States Supreme Court held that where there was a reasonable likelihood that a jury had understood an instruction to preclude them from considering mitigating evidence in violation of Lockett v. Ohio, 438 U.S. 586 (1978), then relief was warranted. In this case there was much more than a reasonable likelihood that Mr. Pooler's jury misunderstood the effect of its decision in the Florida sentencing calculus. The overall effect of this was to create a grave danger that the sentence which emerged from Mr. Pooler's trial did not represent "a decision that the State had demonstrated the appropriateness of the defendant's death." Caldwell, 472 U.S. at 332.

Under Florida's capital statute, the jury has the primary responsibility for sentencing. It's decision is entitled to great weight. McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982); Espinosa v. Florida, 505 U.S. 1079 (1992). Thus, suggestions and instructions that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is free to impose whatever sentence he or she deems appropriate irrespective of the sentencing jury's decision, is inaccurate and is a misstatement of Florida law. see Mann v. Dugger, 844 F.2d at 1446 (discussing critical role of jury in Florida capital sentencing scheme); Espinosa v. Florida, 505 U.S. 1079 (1992). Mr. Pooler's jury, however, was led to believe that its determination

meant very little and that the judge was free to impose whatever sentence the court wished.

To the extent counsel failed to object and litigate this issue, request curative instructions, and move for mistrial, counsel rendered deficient performance. The trial court erred in denying Mr. Pooler an evidentiary hearing on this issue, and the record does not conclusively establish that Mr. Pooler is not entitled to relief.

> ISSUE V – THE TRIAL COURT ERRED IN DENYING DEFENDANT AN EVIDENTIARY HEARING AND RELIEF FOR DEFENDANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE COURT'S INSTRUCTIONS AND COMMENTS THAT SHIFTED THE BURDEN ON POOLER TO PROVE THAT DEATH WAS AN INAPPROPRIATE SENTENCE

Under Florida law, a capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed. . .
>
> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So.2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Pooler's capital proceedings. To the contrary, both the court and the

prosecutor shifted to Mr. Pooler the burden of proving whether he should live or die. In Hamblen v. Dugger, 546 So.2d 1039 (Fla. 1989), a capital post-conviction action, the Florida Supreme Court addressed the question of whether he should live or die. The Hamblen opinion reflects that these claims should be addressed on the case-by-case basis in capital pose-conviction actions. Mr. Pooler herein urges that the Court assess this significant issue in his case and, for the reasons set forth below, that the Court grant him the relief to which he can show his entitlement. Moreover, he asserts that defense counsel rendered prejudicially deficient assistance in failing to object to the errors. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985), Hitchcock v. Dugger, 481 U.S. 393 (1987), and Maynard v. Cartwright, 486 U.S. 356 (1988).

Prosecutorial argument and judicial instructions at Mr. Pooler's capital penalty phase required that the jury impose death unless mitigation was not only produced by Mr. Pooler, but also unless Mr. Pooler proved that the mitigation he provided outweighed and overcame the aggravation. The trial court then employed the same standard in sentencing Mr. Pooler to death. See Zeigler v. Dugger, 524 So.2d 419 (Fla. 1988)(trial court is presumed to apply the law in accord with manner in which jury was instructed). This standard obviously shifted the burden to Mr. Pooler to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the aggravation. The standard given to the jury violated state law. According to this standard, the jury could not "full[y] consider" and "give effect to" mitigating evidence. Penry, at 302. This burden-shifting standard thus "interfered with the consideration of mitigating evidence." Boyde v. California, 494 U.S. 370 (1990). Since "[s]tates cannot limit the sentencer's consideration of any relevant circumstances that could cause it to decline to impose the [death] penalty," McCleskey v. Kemp, 481 U.S. 279, 306 (1987), the argument and instructions provided to Mr. Pooler's sentencing jury, as well as the standard employed by the trial court, violated the Eighth Amendment's "requirement of individualized sentencing in capital cases

[which] is satisfied by allowing the jury to consider all relevant mitigating evidence." Blystone v. Pennsylvania, 494 U.S. 299, 307 (1990). See also Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393 (1987). The instructions gave the jury inaccurate and misleading information regarding who bore the burden of proof as to whether a death recommendation should be returned.

As explained below, the standard which the prosecutor argued, upon which the judge instructed Mr. Pooler's jury, and upon which the judge relied is a distinctly egregious abrogation of Florida law and therefore eighth amendment principles. See McKoy v. North Carolina, 494 U.S. 433, 452 (1990) (Kennedy, J. concurring)(a death sentence arising from erroneous instructions "represents imposition of capital punishment through a system than can be described as arbitrary or capricious"). In this case, Mr. Pooler, the capital defendant, was required to establish that life was the appropriate sentence, and the jury's and judge's consideration of mitigating evidence was limited to mitigation "sufficient to outweigh" aggravation.

In the penalty phase instructions to the jury, the judge explained that the jury's job was to determine if the mitigating circumstances outweighed the aggravating circumstances:

> You are instructed that this evidence, when considered with the evidence that you already

> heard, is presented in order that you might determine first whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty. And second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

(TR19, p. 1361)(emphasis added).

After these unconstitutional instructions there can be no doubt that the jury understood that Mr. Pooler had the burden of proving whether he should live of die. The instructions violated Florida law and the Eighth and Fourteenth Amendments in two ways. First, the instructions shifted the burden of proof to Mr. Pooler on the central sentencing issue of whether he should live or die. Under Mullaney, this unconstitutional burden-shifting violated Mr. Pooler's Due Process and Eighth Amendment rights. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F2d 1469 (11th Cir. 1988). The jury was not instructed in conformity with the standard set forth in Dixon.

Second, in being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating

circumstances. see Mills v. Maryland, 486 U.S. 367 (1988); Hitchcock v. Dugger, 481 U.S. 393 (1987). Thus, the jury was precluded from considering mitigating evidence and from evaluating the "totality of the circumstances" in considering the appropriate penalty. State v. Dixon, 283 So.2d at 10. According to the instructions, jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered. Therefore, Mr. Pooler is entitled to relief in the form of a new sentencing hearing in front of a jury, due to the fact that his sentencing was tainted by improper instructions.

Counsel's failure to object to the clearly erroneous instructions was deficient performance under the principles of Harrison v. Jones, 880 F.2d 1277 (11th Cir. 1989) and Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). But for counsel's deficient performance, there is a reasonable probability that the jury would have recommended life. The trial court erred in denying Mr. Pooler an evidentiary hearing on this issue, and the record does not conclusively establish that Mr. Pooler is not entitled to relief.

ISSUE VI – THE TRIAL COURT ERRED IN DENYING DEFENDANT'S CLAIM THAT HE WAS DENIED HIS RIGHTS UNDER *AKE V. OKLAHOMA* WHEN TRIAL COUNSEL FAILED TO RETAIN ADEQUATE EXPERTS AND PROVIDE THEM WITH THE NECESSARY BACKGROUND INFORMATION TO RENDER COMPETENT OPINIONS

Trial counsel's performance was seriously deficient in failing to obtain proper mental health experts and examination. As Dr. Brannon testified to at length at the postconviction relief hearing, there were no proper forensic mental health examinations performed on Mr. Pooler. Every doctor that did examine Mr. Pooler did so for competency, or saw him briefly while he was on suicide watch. As Dr. Brannon explained, the focus on a competency evaluation and the focus of an evaluation for mitigation are completely different. For the latter type of examination, the expert needs to delve into the defendant's background and review all relevant information to get an accurate picture of the defendant's life, not just whether he meets the legal definition of competency on any given day.

Dr. Brannon performed testing that clearly shows Mr. Pooler was suffering from severe alcohol dependence and that his intelligence was in the borderline range. The doctors who examined Mr. Pooler were working on false assumptions, such as that Mr. Pooler graduated high school and was a good student, which have been proven false. They worked on the assumption that he had a good military career, which was also proven false.

It is crucial not only to examine the testimony the experts provided in Mr. Pooler's penalty phase, but also to examine the testimony provided at the competency hearing because trial counsel was on notice what their

testimony would be at trial. Dr. Levine testified that trial counsel made it very difficult for him because he did not provide any documentation for the competency assessment, nor did he speak with counsel prior to assessment. Dr. Levine did not do a psychological assessment of Mr. Pooler. He found the testing that he performed to be somewhat less effective because the finding did not match Mr. Pooler's educational, military, and occupational background as provided by Mr. Pooler, which has clearly proven to be false. Dr. Silversmith testified that he spent approximately one hour with Mr. Pooler. Dr. Silversmith did not do any psychological testing on Mr. Pooler, either. No doctor ever performed any psychological testing on Mr. Pooler. Yet these were the experts that were used to form the basis for mitigation.

The other two experts who testified at the penalty phase were two jail doctors who briefly saw Mr. Pooler while he was on suicide watch. It is undisputed that there was not any real mental health testing done on Mr. Pooler. He was never properly diagnosed until Dr. Brannon's evaluation that was performed pursuant to the undersigned's request for the purpose of mitigation.

Had trial counsel taken the rudimentary step of ordering the school records and military records, the mental health experts would have had correct information to compare to Mr. Pooler's sometimes delusional

behavior. Instead, they were left with inaccurate information, as was the trial court. Trial counsel was ineffective in failing to obtain the information necessary for the mental health experts to conduct proper forensic mitigation investigation and for failing to request any expert to conduct a forensic evaluation as opposed to simply evaluating competency.

This court previously addressed the issue of whether an attorney is ineffective in mitigation preparation when the experts used only evaluated the defendant for competency in Sochor v. State, 883 So.2d 766 (2004). In Sochor, defense counsel had three mental health experts testify at the penalty phase, along with five family members, very similar to Mr. Pooler's penalty phase. The mental health experts in Sochor were appointed solely for the purpose of competency, exactly like the experts that testified in Mr. Pooler's penalty phase. Further, defense counsel in Sochor did not provide any of the experts with the defendant's background information, again exactly like in Mr. Pooler's case. In fact, Dr. Levine testified that trial counsel made it very difficult for him because he did not provide any background information on Mr. Pooler. The trial court's findings in denying Mr. Pooler postconviction relief in the instant case were likewise erroneous. In Sochor, this court denied relief because the defendant could not show prejudice. However, Mr. Pooler has clearly been prejudiced when most of the "facts" found by the

trial court were undisputedly proven to be false, and substantial mitigation was presented at the evidentiary hearing that was not presented at trial.

A criminal defendant is entitled to expert psychiatric assistance when his mental state is relevant to the proceedings. Ake v. Oklahoma, 470 U.S. 68 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F. 2d 1278, 1279 (5th Cir. 1979). When mental health is an issue, counsel has a duty to conduct proper investigation in to his or her client's mental health background, see O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. Mason v. State, 489 So.2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

The mental health expert must also protect the client's rights, and the expert violates these rights when he or she fails to provide adequate assistance. State v. Sireci, 502 So.2d 1221 (Fla. 1987); Mason v. State, 489 So.2d 734 (Fla. 1986). The expert also has the responsibility to obtain and properly evaluate and consider the client's mental health background.

Mason, 489 So.2d at 736-37. The United States Supreme Court has recognized the pivotal role that the mental health expert plays in criminal cases:

> [W]hen the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder or behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely described symptoms they might believe might be relevant to the defendant's mental state psychiatrists can identify the "elusive and offer deceptive" symptoms of insanity, and tell the jury why their observations are relevant.
>
> Ake, at 80.

Generally accepted mental health principles require that an accurate medical and social history be obtained "because it is often only from the details in the history" that organic disease or major mental illness may be differentiated from a personality disorder. R. Strub & F. Black, Organic Brain Syndrome, 42 (1981). This historical data must be obtained not only from the patient but from sources independent of the patient. Patients are

frequently unreliable sources of their own history, particularly when they have suffered from head injury, drug addition, and/or alcoholism, as does Mr. Pooler. Consequently, a patient's knowledge may be distorted by knowledge obtained from family and their own organic or mental disturbance, and a patient's self-report is thus suspect.

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information in the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Bonnie & Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case of Informed Speculation, 66 Va. L. Rev. 727 (1980) (cited in Mason, 489 So.2d at 737).

In Mr. Pooler's case, counsel failed to provide his client with competent mental health experts to properly evaluate Mr. Pooler for the purpose of mitigation. Since defendants are unreliable sources of their own background information, especially when alcoholism is involved, trial counsel had an absolute duty to investigate Mr. Pooler's background.

Both the expert and trial counsel have a duty to perform an adequate background investigation. When such an investigation is not conducted, due process is violated. The judge and jury are deprived of the facts which are necessary to make a reasoned finding. Information which was needed in order to render a professionally competent evaluation was not investigated. Mr. Pooler's judge and jury were not able to "make a sensible and educated determination about the mental condition of the defendant at the time of the offense." Ake, at 81.

A wealth of compelling mitigation was never presented to the jury charged with the responsibility of whether Mr. Pooler would live or die. Important, necessary, and truthful information was withheld from the jury, and this deprivation violated Mr. Pooler's constitutional rights. See Penry v. Lynauch, 492 U.S. 302 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

There was considerable evidence of Mr. Pooler's intoxication at the time of the offense which would have been relevant both at the guilt/innocence and penalty phases of the trial. Mr. Pooler suffered from an addiction to drugs and alcohol which went largely undiscovered and was not presented due to the ineffective investigation and performance of his trial counsel and psychological expert. Counsel now has discovered evidence

which was readily available to trial counsel in 1995. His failure to discover these facts was deficient performance.

In discussing the statutory mental health mitigating factors, the Florida Supreme Court recognized that:

> A defendant may be legally answerable for his actions and legally sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state.

Perri v. State, 441 So.2d 606, 609 (Fla. 1983).

The prejudice inherent in counsel's deficient performance is obvious. The available evidence of intoxication at the time of the offense and evidence of Mr. Pooler's drug addition could, separately or in combination with his other mental health problems, have established statutory mitigating factors. Armed with evidence that counsel could have discovered, a mental health expert could have conclusively established statutory mitigation and would have presented substantial non-statutory mental health mitigating evidence. Counsel's failure to present evidence of intoxication at the time of the offense was deficient performance and clearly prejudicial. See Bunney v. State, 603 So.2d 1270 (Fla. 1992). This evidence would have made a difference.

Some of the information needed by the expert was at the disposal of

the trial attorney, yet he inexplicably failed to provide it to the experts. Most of the information, however, was never sought out by counsel. Because of counsel's lack of investigation and preparation, Mr. Pooler's judge and jury received an incomplete personal portrait of the person they sentenced to die. Trial counsel's performance was clearly deficient and Mr. Pooler clearly established prejudiced, as evidenced by the trial court's erroneous findings of fact.

ISSUE VII – THE TRIAL COURT ERRED IN DENYING DEFENDANT AN EVIDENTIARY HEARING AND RELIEF ON HIS CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO AN "AUTOMATIC AGGRAVATOR" AND TO ARGUE THE SAME TO THE JURY

Mr. Pooler was convicted of two counts of first degree murder, with attempted robbery and burglary being the underlying felonies. The jury was instructed on the "felony murder" aggravating circumstance:

> One, the defendant has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person. I do instruct you that the crime of attempted first degree murder with a firearm is a felony involving the use or threat of violence to another person.

(TR21, p. 1621). The trial court subsequently found the existence of the "felony murder" aggravating factor.

The jury's deliberation was obviously tainted by the unconstitutional

and vague instruction. see Sochor v. Florida, 504 U.S. 527 (1992). The use of the underlying felonies as an aggravating factor rendered the aggravator "illusory" in violation of Stringer v. Black, 503 U.S. 222 (1992). The jury was instructed regarding an automatic statutory aggravating circumstance, and Mr. Pooler thus entered the penalty phase already eligible for the death penalty, whereas other similarly situated petitioners would not. The death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance – the very felony murder finding that formed the basis for conviction. The prosecutor, in his closing argument, even told the jury that this aggravating circumstance must be automatically applied:

> The defendant has already been convicted by you of burglary of a dwelling while armed with a firearm during the guilt phase of the case, as well as first degree murder with a firearm. It is rather easy therefore to see where this aggravating circumstance has been proven beyond a reasonable doubt. (TR 21, p.1578).

Trial counsel was clearly ineffective for failing to object to this automatic aggravator. Further, trial counsel was ineffective for failing to object to the prosecutor's argument that "first degree murder" can support this aggravator. There is no support for the proposition that the conviction for the underlying murder, which is the subject of the penalty phase, can, in and of itself, be

aggravating. The prosecutor here argued that since Mr. Pooler was convicted of "first degree murder," this aggravator applies. The only murder conviction was for Kim Wright. If this sort of argument was permitted, then every single murder, whether felony or premeditated, would automatically be eligible for the death penalty in that there would always be an automatic aggravator. The jury was thus mislead to believe that the "first degree murder" conviction makes this aggravator applicable. Trial counsel was ineffective for failing to object to this argument.

Aggravating factors must channel and narrow sentencers' discretion. The use of this automatic aggravating circumstance did not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983), and therefore the sentencing process was rendered unconstitutionally unreliable. Id. "Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988). The trial court erred in denying Mr. Pooler an evidentiary hearing on this issue, and the record does not conclusively establish that Mr. Pooler is not entitled to relief.

ISSUE VIII – THE TRIAL COURT ERRED IN DENYING DEFENDANT AN EVIDENTIARY

HEARING AND RELIEF ON HIS CLAIM THAT THE CUMULATIVE EFFECT OF TRIAL COUNSEL ERRORS DENIED HIM EFFECTIVE ASSISTANCE OF COUNSEL

Mr. Pooler contends that he did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments, due to trial counsel's ineffective assistance of counsel. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991). It is Mr. Pooler's contention that the process itself failed him, along with trial counsel. It failed because the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive. The flaws in the system which sentenced Mr. Pooler to death are many. They were established at the evidentiary hearing, and were set forth in Defendant's Amended Motion to Vacate Judgment and Sentence. The fact remains that addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence – safeguards which are required by the Constitution.

Trial counsel's errors and deficient performance can not be looked at in a vacuum. This court must consider all of the errors and take them as a whole. Even if one of the errors would not be enough to establish prejudice, when all of the errors, such as failing to obtain proper mental health evaluations, failing to obtain background information, and presenting the

fiction of Mr. Pooler's life, instead of the facts of Mr. Pooler's life, are taken into consideration, it is clear that Mr. Pooler was denied due process. The trial court erred in denying Mr. Pooler an evidentiary hearing on this issue, and the record does not conclusively establish that Mr. Pooler is not entitled to relief.

ISSUE IX – THE TRIAL COURT ERRED IN DENYING DEFENDANT AN EVIDENTIARY HEARING AND RELIEF ON HIS CLAIM THAT THE RULE PROHIBITING JUROR INTERVIEWS VIOLATED HIS CONSTITUTIONAL RIGHTS

Florida Rule of Professional Responsibility 4-3.5(d)(4) provides that a lawyer shall not initiate communications or cause another to initiate communication with any juror regarding the trial. This stricture impinges upon Mr. Pooler's right to free association and free speech. This rule is a prior restraint. This prohibition restricts Mr. Pooler's access to the courts and ability to allege and litigate constitutional claims which may very well ensure he is not executed based on an unconstitutional verdict of guilt and/or sentence of death. The Eighth and Fourteenth Amendments require that Mr. Pooler be given a fair trial. The Sixth and Fourteenth Amendments require an impartial jury in order to receive a fair trial. The failure of jurors to truthfully answer voir dire questions has been the basis for relief in other jurisdictions. United States v. Scott, 854 F.2d 697 (5th Cir. 1988); United

States v. Perkins, 748 F.2d 1519 (11th Cir. 1984); Freeman v. State, 605 So.2d 1258 (Ala. Cr. App. 1992). Obviously, a dishonest juror prevents a defendant from fully exploring any bias or lack of impartiality on the part of the juror.

Mr. Pooler's inability to fully explore possible misconduct and biases of the jury prevents him from fully detailing the unfairness of the trial. Misconduct may have occurred that Mr. Pooler can only discover by juror interviews. see Turner v. Louisiana, 379 U.S. 466 (1965); Russ v. State, 95 So.2d 594 (Fla. 1957). Florida has created a rule that denies due process to defendants such as Mr. Pooler. "A trial by jury is fundamental to the American scheme of justice and is an essential element of due process." Sruggs v. Williams, 903 F. 2s 1430, 1434-35 (11th Cir. 1990)(citing Duncan v. Louisiana, 391 U.S. 145 (1968)). Implicit in the right to a jury trial is the right to an impartial and competent jury. Tanner v. United States, 483 U.S. 107, 126 (1987). However, a defendant who tries to prove members of his jury were incompetent to serve has a difficult task. It has been a "near-universal and firmly established common-law rule in the United States" that juror testimony is incompetent to impeach a jury verdict. Tanner 483 U.S. at 117.

An important exception to the general rule of incompetence allows

juror testimony in situations in which an "extraneous influence" was alleged to have affected the jury. Tanner, 483 U.S. at 117 (citing Mattox v. United States, 146 U.S. 140, 149 (1892)). The competency of a juror's testimony hinges on whether it may be characterized as extraneous information or evidence of outside influence. Shillcutt v. Gagnon, 827 F.2d 1155, 1157 (7th cir. 1987). Such extraneous information that may be testified to by jurors includes evidence that jurors heard and read prejudicial information not in evidence, Mattox v. United State, 146 U.S. 140 (1892); that the jury was influenced by a bailiff's comments about the defendant, Parker v. Gladden, 385 U.S. 363, 365 (1966); or that a juror had been offered a bribe, Remmer v. United States, 347 U.S. 227, 228-30 (1954).

In order for a defendant to obtain relief, the extraneous information that infects the jury deliberations must amount to a deprivation of due process. Jeffries v. Blodgett, 5 F.3d 1180, 1190 (9th Cir. 1993); Harley v. Lockhart, 990 F.2d 1070, 1073 (8th Cir. 1993); Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7thCir. 1987). Furthermore, prejudice that pervaded the jury room, yet is not attributable to extrinsic influences, may nonetheless be so egregious that "there is a substantial probability that the [juror's comment] made a difference in the outcome of the trial," thus allowing the admission of juror testimony to prove the abuse. Shillcutt v. Gagnon, 827 F.2d 1155,

1159 (7th Cir. 1987). Because error can occur in the jury room that amounts to a denial of due process, defendants must be given the opportunity to discover that error. Florida, however, bars defendants from their best source of information of what took place in the jury room – the jurors themselves. Patrick Jeffries never would have known of the impermissible extrinsic evidence considered by his jury, and never would have been granted habeas relief, if Washington had a rule similar to Florida's prohibiting contact with jurors. see Jeffries v. Blodgett, 5 F.3d 1180 (9th Cir. 1993). Mr. Pooler cannot allege what, if any, impermissible extrinsic factors other than those previously cited, Tanner; Jeffries; or intrinsic prejudices, Shillcutt; may have affected his jury's deliberations because Florida has erected a bar to his discovery of such due process violations. Florida's rule prohibiting contact with jurors is therefore, in itself, a denial of due process.

The court has recognized that overt acts of misconduct by members of the jury violate a defendant's right to a fair and impartial jury and equal protection of the law, as guaranteed by the United States and Florida Constitutions. Powell v. Allstate Insurance Co., 652 so.2d 354 (Fla. 1995). It is imperative that post conviction counsel be permitted to interview jurors to discovery of over acts of misconduct impinging upon the defendant's constitutional rights took place in the jury room. The Florida rule likewise

impinges upon Mr. Pooler's right to free association and free speech. This rule is a prior restraint. Any legitimate interest the State has in preventing interference with the administration of justice ends when the trial ends, at least with regard to jurors. Wood v. Georgia, 370 U.S. 375 (1978). There is no "clear and present danger" that talking to Mr. Pooler's jurors years after his trial would interfere with the administration of justice. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). The Florida rule is overbroad. Whatever interests it seeks to protect are outweighed by the rule's chilling effect on speech. The Florida rule unconstitutionally limits freedom of association. Litigation is a mode of expression and association protected by the First Amendment. NAACP v. Button, 371 U.S. 415 (1963). In order to enforce the rule, the State must show that the governmental interest being furthered is compelling, and that interest cannot be achieved by means less restrictive to freedom of association. NAACP v. Alabama, 357 U.S. 449 (1958). The State can make neither showing here. Florida's rule constitutes an impermissible restriction on freedom of association. The prohibition violates equal protection in that a defendant who is not in custody can freely approach jurors to determine if juror misconduct occurred when an incarcerated defendant is precluded from doing so. In addition, death-sentenced inmates in other states are not precluded from

communicating with jurors to determine if cause exists to prove juror misconduct and have been granted relief after proving such error existed. see, e.g., Jeffries v. Blodgett, 5 F.3d 1180 (9th Cir. 1993). Florida's rule thus denies Florida inmate's equal protection rights.

Mr. Pooler requests that this Court declare this ethical rule invalid as conflicting with the First, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and to allow Mr. Pooler discretion to interview the jurors in this case. The failure to allow Mr. Pooler the ability to freely interview jurors is a denial of access to the courts of this state under Article I, Section 21 of the Florida Constitution and deprives him of Due Process. The trial court erred in failing to grant an evidentiary hearing on this issue. The record does not conclusively establish that Mr. Pooler is not entitled to relief on this issue.

ISSUE X – THE TRIAL COURT ERRED IN DENYING DEFENDANT AN EVIDENTIARY HEARING AND RELIEF ON HIS CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBTAIN PROPER FORENSIC EXPERTS

Counsel did not request, nor did Mr. Pooler receive the professionally adequate assistance of a pathologist who was able to render a reliable opinion regarding issues at trial. As a result of counsel's failure independently to investigate the findings of the state's crime scene and

medical examiner witnesses, he was unable to impeach their testimony effectively, to Mr. Pooler's substantial prejudice. A well informed independent medical expert could have opined that the victim died instantaneously and thus the Heinous, Atrocious, and Cruel aggravating factor may not have applied. Odom v. State, 403 So.2d 936 (Fla. 1981) and Williams v. State, 386 so.2d 538 (Fla. 1980).

There is an abundance of evidence that was available to refute the arguments advanced by the state in support of Mr. Pooler's conviction and death sentence. Counsel failed to conduct any forensic investigation. As a result of counsel's deficient performance, Mr. Pooler was not provided with the assistance of a competent, confidential pathologist who was capable of rendering a reasoned opinion regarding the numerous forensic issues in this case. Lacking such medical expertise, the defense was unable to present critical information to the judge and jury. Counsel's failure to ensure that Mr. Pooler received competent investigative assistance from a qualified expert was deficient performance. A capital defendant is entitled to the effective assistance of a qualified forensic specialist. Unreasonable failure to conduct necessary investigation constitutes ineffective assistance of counsel. Counsel is obligated to obtain the services of a qualified expert to assist in the defense, evaluate the presence of mitigating circumstances, and challenge

proposed aggravating circumstances.

When a State brings its judicial power to bear on an indigent defendant in a criminal case, "it must take steps to assure that the defendant has a fair opportunity to present his defense." Ake v. Oklahoma, 470 U.S. 61 (1985). When the assistance of an expert is needed to present a defense, an indigent defendant has a constitutional right to the services of an independent expert at state expense. The Due Process Clause requires protection of the right to competent expert assistance as a mater of fundamental fairness to the defendant and in order to assure reliability in the truth-determining process:

> [When a] question. . .[is] likely to be a significant factor in his defense. . .[the accused is] entitled to the assistance of a[n expert] on this issue and the denial of that assistance deprive[s] him of due process.

Ake v. Oklahoma, 470 U.S. 68, 86 – 89 (1985). As the Court explained in Ake, providing competent psychiatric expertise to a defendant assures the defendant "a fair opportunity to present his defense," Id. At 77, and also "enable[s] the jury to make its most accurate determination of the truth on the issue before them." See also Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990); Cowley v. Strickland, 929 F.2d 640 (11th Cir. 1991).

The decision in Ake is not limited on its facts, but applies to all services and expenses reasonably necessary for an effective defense. see,

e.g., State v. Moore, 321 N.C. 327, 364 S.E. 2d (1988) (fingerprint specialist); State v. Spaulding, 298 N.C. 149, 257 S.E. 2d 391 (1979) (social anthropologist); Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980) (pathologist); Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975) (firearms expert); United States v. Hartfield, 513 F.2d 254 (9th Cir. 1975) (psychiatrist to administer electroencephalogram); Thorton v. State, 255 Ga. 434, 339 S.E. 2d 241 (1986) (dental expert); Patterson v. State, 232 S.E. 2d 233 (Ga. 1977) (narcotics analyst).

The Supreme Court's decision in Ake was based on its recognition that to deny an indigent accused basic, critical expertise while the State has unfettered access to any expert of its choosing would render a criminal trial fundamentally unfair. The truth finding function of the adversary process would be undermined if the prosecution were allowed simply to overwhelm the impoverished defendant with the wealth of the State's resources:

> We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. . .[This Court] has often reaffirmed that fundamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims

fairly within the adversary system.'

470 U.S. at 77, quoting Ross v.Moffitt, 417 U.S. 600, 612, 94 S. Ct. 2437, 41 L.Ed.2d 341 (1974). See United States v. Hartfield, 513 F.2d 254, 258 (9th Cir. 1975) ("If the fairness of our system is to be assured, indigent defendants must have access to minimal defense aids to offset the advantage presented by the vast prosecutorial and investigative resources available to the Government.") See also, Bounds v. Smith, 430 U.S. 817, 823 (1970) (Access to the courts must be adequate, effective, and meaningful). Due process and fundamental fairness thus forbid the State from "legitimately assert[ing] an interest in maint[aing]. . .a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." Ake v. Oklahoma, 470 U.S. 68, 79 (1985).

To provide effective assistance, an attorney must adequately investigate and prepare his/her client's case. Magill v. Dugger, 824 F.2s 879, 890 (11th Cir. 1987) ("One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial."); House v. Balkcom, 725 F.2d 608, 618 (11th Cir.), cert. denied, 469 U.S. 870 (1984) ("pretrial preparation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps the most critical stage of a lawyer's preparation."). see also, Goodwin v. Balcom, 684 F.2d 794, 805

(11th Cir. 1982) (at heart of effective representation is independent duty to investigate and prepare); McQueen v. Swenson, 498 F.2d 207, 217 (8th Cir. 1974) (attorney who does not seek out all facts relevant to client's case will not be prepared at trial). Where investigative and other services, including expert assistance, are necessary to the preparation and presentation of an adequate defense, the denial of access to those services may deprive a defendant of the minimally effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments. Blake v. Kemp, 758 F.2d 523, 531 (11th Cir. 1985); Pedrero v. Wainwright, 590 F.2d 1383, 1396 (5th Cir. 1979); United States v. Fessel, 531 F.2d 1275 (5th Cir. 1976). See also, Mason v. Arizona, 504 F.2d 1345, 1352 (9th Cir. 1974), cert. denied, 420 U.S. 9936, 95 S. Ct. 1145, 43 L.Ed.2d 412 (1975) (failure to provide investigative assistance when necessary to defense constitutes ineffective performance).

A criminal defendant is entitled to expert medical/investigative assistance. There is a critical interrelation between retaining expert forensic assistance and administering minimally effective representation of counsel. Counsel has a duty to conduct proper investigation, and to assure that the client is not denied a professional and professionally conducted expert services. see Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984). "The failure of defense counsel to seek such assistance when the need is apparent

deprives an accused of adequate representation in violation of his Sixth Amendment right to counsel." Proffitt v. United States, 582 U.S. 854, 857 (4th Cir. 1978), cert. denied, 447 U.S. 910 (1980), rhg. denied, 448 U.S. 913 (1980).

Defense counsel failed to ensure that Mr. Pooler received the assistance of a competent qualified pathologist to develop evidence rebutting aggravating factors and supporting mitigating factors. Mr. Pooler was prejudiced by being denied any defenses to the death sentence based upon the available forensic evidence, and being deprived of the opportunity to present statutory and non-statutory mitigating circumstances to the jury. The trial court erred in failing to grant an evidentiary hearing on this issue. The record does not conclusively establish that Mr. Pooler is not entitled to relief on this issue.

ISSUE XI – THE TRIAL COURT ERRED IN DENYING DEFENDANT AN EVIDENTIARY HEARING AND RELIEF ON HIS CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FULLY OBJECT TO THE INTRODUCTION OF GRUESOME PHOTOGRAPHS

The prosecution was permitted to introduce into evidence numerous

gruesome photographs that were inflammatory, cumulative, and prejudicial, and admitted solely to inflame the passion of the jurors based on impermissible factors. Numerous photographs of the deceased's body taken at the scene of the crime and during the autopsy were introduced into evidence. The admission of these photographs allowed the state free reign in inflaming the passions of the jury. The probative value of these photographs was not only outweighed by their prejudice, but these photographs were cumulative to each other. Their graphic content was further emphasized through the testimony of witnesses and stressed by the state in closing argument.

The prejudicial effect of the photographs undermined the reliability of Mr. Pooler's conviction and death sentence. The photographs themselves did not independently establish any material part of the state's case nor were they necessary to corroborate a disputed fact. The trial court's error in admitting these photographs cannot be considered harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Use of these gruesome photographs, which were cumulative, inflammatory, and appealed improperly to the jury's emotions, denied Mr. Pooler a fair trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and to corollary provisions within the Florida

Constitution.

The trial court erred in failing to grant an evidentiary hearing on this issue. The record does not conclusively establish that Mr. Pooler is not entitled to relief on this issue.

ISSUE XII – THE TRIAL COURT ERRED IN DENYING DEFENDANT AN EVIDENTIARY HEARING AND RELIEF ON HIS CLAIM THAT HE IS INNOCENT OF THE DEATH PENALTY

The United States Supreme Court has held that, where a person is sentenced to death and can show innocence of the death penalty, he is entitled to relief for constitutional errors which resulted in a sentence of death. Sawyer v. Whitley, 505 U.S. 333 (1992). The Florida Supreme Court has recognized that innocence is a claim that can be presented in a motion pursuant to Rule 3.850. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993); Jones v. State, 591 So.2d 911 (Fla. 1991). This court has recognized that innocence of the death penalty constitutes grounds for Rule 3.850 relief. Abron v. Dugger, 604 So.2d 465 (Fla. 1992). Innocence of the death penalty is shown by demonstrating insufficient aggravating circumstances so as to render the individual ineligible for death under Florida law. In this case, Mr. Pooler's trial court relied upon three aggravating circumstances to support his death sentence: (1) previous conviction of a felony involving the use or

threat of violence; (2) the murder was committed during the course of burglary (3) and the murder heinous, atrocious, or cruel. Each of these aggravating factors is invalid, to wit: prior violent felony is based on a contemporaneous conviction that is constitutionally infirm; and the sentencing judge relied on the facts not in the record to find the heinous, atrocious, or cruel aggravating circumstance. Absent constitutionally adequate constructions, the aggravating circumstances cannot be said to have been proven beyond a reasonable doubt.

Mr. Pooler's death sentence is disproportionate. In Florida, a death sentenced individual is rendered ineligible for a death sentence where the record establishes that the death sentence is disproportionate. Here, the lack of valid aggravating circumstances coupled with the overwhelming evidence of mitigating evidence discussed elsewhere render the death sentence disproportionate. Mr. Pooler is innocent of the death penalty. To the extent that trial counsel failed to adequately raise this issue, Mr. Pooler was denied effective assistance of counsel. The trial court erred in failing to grant an evidentiary hearing on this issue. The record does not conclusively establish that Mr. Pooler is not entitled to relief on this issue.

ISSUE XIII – THE TRIAL COURT ERRED IN DENYING DEFENDANT AN EVIDENTIARY HEARING AND RELIEF ON HIS CLAIM THAT FLORIDA DEATH PENALTY STATUTE IS

UNCONSTITUTIONAL

Florida's capital sentencing scheme denies Mr. Pooler his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied in this case. Florida's death penalty statute is, in theory, designed to prevent arbitrary imposition of the death penalty and narrow application of the penalty to the worst offenders. See Proffitt v. Florida, 428 U.S. 242 (1976). The Florida death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eight Amendment to the United States Constitution. The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the consideration each of the aggravating circumstances listed in the statute. see Godfrey v. Georgia, 466 U.S. 420 (1980). These deficiencies lead to the arbitrary and capricious imposition of the death penalty and violate the Eighth Amendment to the United States Constitution.

Florida's capital sentencing procedure does not have the independent reweighing of aggravating and mitigating circumstances required by Proffitt v. Florida, 428 U.S. 242 (1976). The aggravating circumstances in the

Florida capital sentencing statute have been applied in a vague and inconsistent manner, and juries receive unconstitutionally vague instructions on the aggravating circumstances. See Godfrey v. Georgia; Espinosa v. Florida, 505 U.S. 1079 (1992). Florida law creates a presumption of death if a single aggravating circumstance is found. This creates a presumption of death in every felony murder case, and in nearly every premeditated murder case. Once an aggravating factor is found, Florida law provides that death is presumed to be the appropriate punishment, which can only be overcome by mitigating evidence so strong as to outweigh the aggravating factor. This systematic presumption of death does not satisfy the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders. see Furman v. Georgia, 408 U.S. 238 (1972); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988); Richmond v. Lewis, 113 S. Ct. 528 (1992). To the extent trial counsel failed to properly raise this issue, defense counsel rendered prejudicially deficient assistance. see Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).

Section 921.141, Fla. Stat. is unconstitutional in that it concerns matters of court practice and procedures in violation of Art. V, § 2(a), Fla. Const. which requires the Supreme Court of Florida to adopt all rules for practice and procedure in the courts of the State of Florida. The trial court

erred in failing to grant an evidentiary hearing on this issue. The record does not conclusively establish that Mr. Pooler is not entitled to relief on this issue.

ISSUE XIV – THE TRIAL COURT ERRED IN FINDING THAT FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED TO MR. POOLER IN LIGHT OF *RING V. ARIZONA*

Mr. Pooler concedes that this issue has been squarely addressed by this court in other cases. However, Mr. Pooler urges this court to re-consider this issue and find Florida's death penalty scheme unconstitutional.

The jurors hearing Mr. Pooler's case were told that the sentence that Mr. Pooler would receive was left to the Court and that the jury would make an "advisory" recommendation. (TR 19 p. 1360, 1361; TR21, p. 1620, 1621, 1623, 1625, 1626, 1627). The jurors were repeatedly told that the judge would make the ultimate sentencing decision. Although this is an accurate statement of Florida law, the law itself violates the Sixth Amendment made applicable to the states through the Fourteenth Amendment. Under Florida's current death penalty scheme, the judge makes the finding as to what aggravating circumstances have been proven, after receiving the jury's advisory recommendation as to what the appropriate sentence should be. This is directly contradictory to the

mandates of Ring v. Arizona, 536 US. 584 (2002). Florida Statute 921.141 violates the Sixth and Fourteenth Amendments to the U.S. Constitution as well as the mandates of Ring because it entrusts to a judge the finding that a statutory aggravation factor exists. Without that finding, the maximum sentence as defendant convicted of first-degree murder can receive its life imprisonment without the possibility of parole. Pursuant to Ring, in order for a death sentence to be legally imposed, the Defendant's Sixth Amendment right requires a finding by the jury that at least one aggravating factor exists beyond a reasonable doubt. However, Florida's current death penalty scheme does not provide such a safeguard. In Ring, the United States Supreme Court requires the jury to make specific findings on the existence of aggravating factors in order for the death penalty to be legally imposed. Those specific findings were not made in Mr. Pooler's case.

In order to comply with the holding in Ring, the juror's verdict form must reflect the finding of an aggravating factor beyond a reasonable doubt. The verdict form in Mr. Pooler's case did not have the requisite findings. As in the guilt phase of any criminal trial, a finding that an aggravating factor exists beyond a reasonable doubt, in accordance with the defendant's Sixth and Fourteenth Amendment rights, requires the verdict be unanimous. As the United States Supreme Court noted, "[i]f the State makes an increase in a

Defendant's authorized punishment, contingent on a finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." Ring, at 586. In the case at bar, the state did not move for, nor did it prove, that the jury found an aggravating circumstance existed beyond a reasonable doubt. Nor did the verdict reflect any finding was unanimous. This is directly contradictory to the holding in Ring.

A new penalty phase is required pursuant to Ring because Florida does not require a unanimous verdict for penalty. In Johnson v. Louisiana, 406 U.S. 356 (1972), the Court upheld a system whereby verdicts in serious felonies must be by at least nine votes out of twelve and verdicts in capital cases must be unanimous. In Apodaca v. Oregon, 406 U.S. 404 (1972), the Court upheld verdicts of 10-2 and 11-1 in non-capital felonies. In Burch v. Louisiana, 441 U.S. 130 (1979), the Court held that a six person jury must be unanimous. The Court took pains to note that Apodaca was a non-capital case. 441 U.S. at 136. The U.S. Supreme Court has not specifically reached the issue of whether a unanimous verdict is required in a capital case. However, the Florida courts have held that unanimity is required in a capital case. Williams v. State, 438 So.2d 781, 784 (Fla. 1983); Jones v. State, 92 so.2d 261 (Fla. 1956); Brown v. State, 661 So.2d 309 (Fla. 1st DCA 1995); Flanning v. State, 597 So.2d 864 (Fla. 3rd DCA 1992).

The reasoning of Ring is consistent with decisions of the Florida courts. In State v. Overfelt, 457 So.2d 1385 (Fla. 1984), the Florida Supreme Court stated:

> The district court held, and we agree, "that before a trial court may enhance a defendant's sentence or apply the mandatory minimum sentenced for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating." 434 So.2d at 948. See also, Hough v. State, 448 So.2d 628 (Fla. 5th DCA 1984); Smith v. State, 445 So.2d 1050 (Fla. 1st DCA 1984); Streeter v. State, 416 So.2d 1203 (Fla. 3d DCA 1982); Bell v. State, 394 So.2d 570 (Fla. 5th DCA 1981).

457 So.2d at 1387. The District courts of Appeal have consistently held that a three year mandatory minimum can not be imposed unless the use of a firearm is alleged in the indictment. Peck v. State, 425 So.2d 664 (Fla. 2nd DCA 1983); Gibbs v. State, 623 So.2d 551 (Fla. 4th DCA 1993); Bryant v. State, 744 So.2d 1225 (Fla. 4th DCA 1999). Accordingly, the aggravating factors which the prosecution seeks to prove must be contained in the indictment and the jury must unanimously find them on a special verdict form that the aggravating factors were proven beyond a reasonable doubt. Such was not the case with Mr. Pooler's conviction and sentence.

In short, Florida's death penalty scheme is unconstitutional on its face and as applied to Mr. Pooler. In order for any death penalty scheme to pass

constitutional muster, the indictment must contain the aggravating factors that the State seeks to prove, the jury must be unanimous in its decision as to what aggravating factors apply to any given case, the State must prove every aggravating factor beyond a reasonable doubt, and the jury must be the sentencer. None of these are present in Florida's current death penalty scheme, and Mr. Pooler was denied these procedural safeguards before his conviction and sentence of death were imposed. Clearly, based upon the Ring decision, Florida's death penalty scheme is constitutionally defective. Thus, Mr. Pooler's judgment and sentence were imposed in violation of the Sixth and Fourteenth Amendments and Mr. Pooler must be afforded a new trial on the issues of guilt and sentence.

CONCLUSION

Mr. Pooler was denied effective assistance of counsel at both the guilt and penalty phases. Counsel failed to present any defense whatsoever to the crimes charged. The voluntary intoxication defense was right under counsel's nose, however, counsel failed to initiate even a minimal amount of investigation to determine whether or not it was viable. Trial counsel's excuse for failing to do so is that Mr. Pooler told him he would not admit guilt. However, as the evidence introduced establishes, Mr. Pooler wanted

trial counsel to argue for second degree murder or manslaughter. Further, trial counsel had every reason to believe that Mr. Pooler was less than capable of making decisions and orchestrating his own defense. Trial counsel was ineffective in this regard.

Trial counsel was also grossly ineffective in the penalty phase presentation. As has been argued in this brief, trial counsel failed to present one iota of forensic psychological evidence. Instead, he relied on competency evaluations that were based upon false information. Further, due to counsel's failure to take the most basic steps of ordering records, the court relied on false information in making the sentencing determination. If the State of Florida wishes to place Mr. Pooler to death, due process demands that the weighing of aggravating and mitigating factors be based on reality and truth, not the fiction propounded by trial counsel.

CERTIFICATE OF SERVICE & FONT

I hereby certify that a copy of the forgoing was sent by U.S. Mail to Leslie Campbell, Office of the Attorney General, 1655 Palm Beach Lakes Boulevard, Suite #300, West Palm Beach, FL 33401 and Paul Zacks, Office of the State Attorney, 401 North Dixie Highway, West Palm Beach, FL 33401, and the Honorable Jorge Labarga, 205 North Dixie Highway, West

Palm Beach, FL 33401, and Leroy Pooler, DC # 124283, Union Correctional Institution, 7819 N.W. 228th Street Raiford, Florida 32026-4000, this 11th day of September, 2006.

I FURTHER CERTIFY that this brief meets the font requirements of Fl.R.App.Pro. 9.320(a)(2).

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