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.	)	
	)	

REPLY 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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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

Trial counsel's investigation into possible defenses in this matter was deficient and resulted in a denial of Mr. Pooler's due process rights. There is a substantial likelihood that the outcome of the trial would have been different had trial counsel investigated and presented a voluntary intoxication defense. Trial counsel testified that Mr. Pooler would not allow him to present a defense in which he would have to admit he committed the crime. This is the basis of the State's argument that relief should be denied.

While that may have been true at one time, once trial counsel made Mr. Pooler aware of the results of his investigation, Mr. Pooler clearly changed his mind. On September 9, 1995, trial counsel visited Mr. Pooler and memorialized his conversation in a memorandum to Mr. Pooler with an update of the case. This memorandum was introduced as Exhibit 6 in the Rule 3.850 hearing. Two days later, when trial counsel's investigator went to see Mr. Pooler, Mr. Pooler wanted trial counsel to argue that the crime was a manslaughter or second degree murder, not a first degree murder. This is accomplished by admitting the crime was committed by Mr. Pooler, but

that there was no intent. Even after this decision by Mr. Pooler, trial counsel failed to investigate this defense. The State's reliance on Rivera v. State, 717 So.2d 477 (Fla. 1998) is misplaced. In Rivera, the Defendant always maintained his innocence, however, as Exhibit 5 clearly states, Mr. Pooler wanted trial counsel to adopt a new strategy.

According to trial counsel, he and associates would come back from meetings with Mr. Pooler "scratching [their] heads" and they "were not sure [they were] getting through to him." (TR10, p. 77). One of the competency doctors, Dr. Stephen Alexander, found Mr. Pooler incompetent to proceed and found that Mr. Pooler's ability to consult with trial counsel was "extremely limited" and found that conversation between Mr. Pooler and trial counsel would be flawed. (TR10, p. 72).

Trial counsel could not rely on Mr. Pooler, with such limited mental ability to decide to abandon a defense without even presenting to him the facts of the defense. When faced with a client with such limited mental ability, trial counsel had an even greater duty to present everything to Mr. Pooler so that he could try to make an educated decision as to what an appropriate defense would be. In fact, after Mr. Pooler was presented with the reality of the case, he wanted trial counsel to explore defenses that would result in a second degree murder or manslaughter, as Exhibit 5 to the Rule

3.850 hearing shows in black and white. Yet, trial counsel failed to do so. It is also worth noting that trial counsel was familiar with this defense in that he successfully used a voluntary intoxication defense previously. (T. 179).

The State argues that "without evidence of intoxication or Pooler's willingness to admit to the crime charged, there was no basis for seeking a jury instruction on voluntary intoxication." (AB, p. 33). However, as has been shown, Mr. Pooler wanted trial counsel to explore defenses which could have resulted in conviction of a lesser included offense. As to the issue of evidence of intoxication, there are a number of undisputed facts that would have supported a voluntary intoxication defense. At the deposition of Carolyn Glass, trial counsel learned that Mr. Pooler had a drink in his hand the day before the murder. (T. 179). Trial counsel had Officer Alonso's report that Mr. Pooler fell asleep in his car due to intoxication hours before the murder. (T. 184). Yet trial counsel never even took his deposition. At trial, Ms. Glass testified that Mr. Pooler had been drinking all day the day before the murder. (TR17, p. 1130). "Where there is any evidence introduced at trial which supports the theory of the defense, a defendant is entitled to have the jury instructed on the law applicable to his theory of defense when he so requests." Bryant v. State, 412 So.2d 347, 350 (Fla. 1982). Trial counsel had enough at the time to introduce evidence of Mr.

Pooler's intoxication and to have requested a jury instruction on the same.

Dr. Gutman's report was introduced as Exhibit 17 in the 3.850 hearing. Dr. Gutman's opinion is clearly that Mr. Pooler was intoxicated at the time of the offense. Trial counsel failed to even have Mr. Pooler evaluated for intoxication at the time of the offense. Trial counsel also failed to contact Brian Warren and Darren Warren, two family members who knew Mr. Pooler and were familiar with his heavy drinking habit. They both stated that Mr. Pooler was drinking heavily in the point of his life when the murder occurred and that he would become threatening and potentially violent, but only when he was drunk. Mr. Warren actually spoke with Mr. Pooler shortly after the murder and he sounded drunk. In fact, trial counsel's investigator's memorandum dated February 9, 1995, which ten days after the offense, shows Mr. Pooler provided the name and phone number of Brian Warren to him. This memorandum was introduced as Exhibit "10". However, it is undisputed that neither Brian Warren, nor Darren Warren were ever contacted.

Trial counsel abandoned a defense, or as trial counsel testified, allowed Mr. Pooler abandon a defense without even having the facts. Ignoring an obvious defense constitutes ineffective assistance of counsel and can not be cured by simply labeling it as strategy. *See* Young v. Zant, 677

F.2d 792 (11th Cir. 1982). Trial counsel's performance was deficient and resulted in significant prejudice to Mr. Pooler.

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

This Court's decision on this issue will set public policy of the State of Florida. There is no question that a number of "facts" relied upon by the sentencing judge to deny Mr. Pooler mitigation are not facts at all. Even the State does not dispute the facts as alleged by Mr. Pooler, however, the State argues that these facts do not amount of entitlement to relief under Strickland. Will it be the public policy of the State of Florida to allow the execution of a borderline retarded inmate based upon findings that are not factually supported? The State can blame Mr. Pooler and can conveniently label everything that is wrong with the findings as "strategy", but at the end of the day, it is undisputed that the trial court and the jurors relied upon factually incorrect information in sentencing Mr. Pooler to die.

This simply does not satisfy due process requirements, nor does it sufficiently narrow the class of those eligible for the death penalty and ensure a reliable sentence. The State contends that Mr. Pooler's claim is based upon an allegation that "counsel should have offered a penalty phase

showing Mr. Pooler in a less favorable light." (AB, p. 37). However, this argument misses the point. The constitutional deprivation resulted from trial counsel perpetuating a fictional account of Mr. Pooler's life, instead of a factually accurate account. As this Court has noted: "In its death penalty decisions since the mid-1970s, the United States Supreme Court has emphasized the importance of ensuring reliable and informed judgments. These cases stand for the general proposition that the 'reliability' of death sentences depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact." State v. Steele, 921 So.2d 538, 549 (Fla. 2005). Simply stated, a death penalty sentencing based upon fictions, and not facts, can not amount to a "reliable" death sentence based upon "informed" judgments.

Throughout the State's argument on this issue, it is intimated that "written documentation was not available" to trial counsel, that trial counsel "made the effort to discover evidence, but was merely unsuccessful, thus he did not have certain records to give to his experts," and that trial counsel was "unable to obtain records detailing his client's history." (AB 50, 57-58). While these are convenient arguments, they are not factually supported. The facts are that the investigator, Mr. Jenne, found out where to order the military records, wrote a memorandum about it (introduced as Exhibit 9),

but for some unexplained reason did not order the military records. (T. 262). This was his testimony. The evidence shows that trial counsel and his investigator knew where to get the records, and **never made any effort to actually order them**. Thus, the State's argument that an effort was made is not supported by and evidence or testimony in the record.

On the issue of the school records, Mr. Jenne testified that it was important to order them because they could reflect grades, disciplinary actions, and may uncover additional witnesses. (T. 263). Yet, he never obtained them. The records were introduced as Exhibit 2 in the Rule 3.850 hearing. They were not unavailable as the State has alleged. They were **easily available and never obtained by trial counsel**. These records would have unearthed a plethora of available mitigation, such as that Mr. Pooler's IQ was tested at 75 as a child, that he had great difficulty in school and ultimately did not graduate high school. The IQ test results are extremely important because it shows throughout Mr. Pooler's life, he has extremely limited intellectual ability.

The State argues that "[h]ad the military records and Pooler's co-worker, Mr. Weeks, been presented, such would have 'backfired' against the defense strategy of presenting Mr. Pooler in a favorable light." (AB p. 51). The word "strategy" is used loosely throughout the State's argument. While

it is easy and convenient to label any deficiency as strategy, a working definition of strategy should be employed. A constitutionally adequate strategy is one which is based upon all of the information that is available on any given subject. A strategy is a conscious choice. The State would like this Court to believe that trial counsel had all of the information available to him, but he chose to paint a particular picture of Mr. Pooler's life. However, the evidence and testimony shows that trial counsel did not have all of the information available to him.

Counsel could not have chosen to paint Mr. Pooler in favorable light instead of the one portrayed in the records because he never obtained the records. However, since he never obtained them, it could not have been strategy to fail to introduce them. Further, the investigator himself testified that there was no strategy in failing to order these records. (T. 262). The simple fact is that had trial counsel taken the basic step of ordering Mr. Pooler's various records, the trial court would not have been able to deny Mr. Pooler certain mitigation.

The investigator had the names of Darren Warren and Brian Warren, along with Brian Warren's phone number ten days after the crime and memorialized them in a memorandum introduced as Exhibit 10 at the Rule 3.850 hearing. They would have testified that Mr. Pooler had a bad alcohol

problem. They would have testified that Mr. Pooler was never the same when he came back from Vietnam and that he would have flashbacks. Mr. Pooler would comment that Vietnam "took his mind" and he wished he never went there. *See Exhibit 13 & 14.* Trial counsel could not have consciously chosen to exclude this testimony as a strategy because he never spoke to these two family members.

The State further argues that "[a]ny flaw in this strategy should be placed squarely where it belongs, namely, at Pooler's feet because he refused to tell his lawyer the truth." (AB, p. 52). The State completely misses the point and ignores Mr. Pooler's mental capacity. As trial counsel himself testified, he and his associates "were not sure they were getting through" to Mr. Pooler and they would leave meetings with him "scratching their heads". (TR10, p. 77). Dr. Alexander testified that Mr. Pooler's ability to consult wit trial counsel was "extremely limited", that conversation between them would be flawed, that defense counsel was likely to get misconceptions about Mr. Pooler's statements, and that these would all hamper trial counsel's ability to prepare an adequate defense. (TR10, p. 72). Dr. Levine also testified that he was concerned about Mr. Pooler's ability to assist his attorney in planning a defense. (TR10, p. 155). Even the State's expert, Dr. Silversmith, found that Mr. Pooler suffers from a personality or character

disorder. (TR 10, p.140). This is the information that trial counsel had available to him.[1] Not to mention that Mr. Pooler has a borderline retarded IQ. All of this would have tipped off any reasonable attorney to make sure a thorough investigation into Mr. Pooler's background was done, not one in which military records were mistakenly not ordered and school records and employment were not obtained. Had trial counsel performed the basic task of ordering these records, a number of red flags would have been raised. However, the undisputed fact is that trial attorney did not even order the military records, did not obtain the school and employment records, and did not speak with witnesses that Mr. Pooler provided to him ten days after the crime. Had trial counsel taken the basic steps of obtaining this information, the trial court could not have used fictional accounts of Mr. Pooler's background to deny him mitigation.

The State has attempted to distinguish this factual scenario from the one in Rompilla v. Beard, 125 S.Ct. 2456 (2005), however, there are no factual distinctions which would prohibit the application of the holdings in that case to the one at hand. The State argues as the pertinent factual distinction that trial counsel's "attempt to find the records which distinguishes this matter from Rompilla v. Beard 125 S.Ct. 2456 (2005)."

[1] It is also worth noting that none of these experts evaluated Mr. Pooler for anything other

(Abp. 62 footnote). However, as was argued previously, the investigator had the address to send the military request to, he just never did it. This is a fact in the record and there are no facts whatsoever to establish that there was any attempt to order these records. On the issue of the school records, a simple letter to the school authorities in Louisiana was all it took to get them. This is not a difficult procedure and the investigator's efforts were minimal at best. So, while the State continually argues that trial counsel made an effort to obtain these records, there is not one shred of evidence or testimony to support this. The evidence supports Mr. Pooler's contention that trial counsel never took the basic steps of ordering these records.

It is difficult to argue that Rompilla is not similar to the case at hand. Even the State only distinguishes it based upon trial counsels alleged "efforts" to order the records. In Rompilla, the defense attorney knew from "police reports provided in pretrial discovery" that he was drinking before the offense, but "did not look for evidence of a history of dependence on alcohol that might have extenuating significance." Rompilla at 2463. Likewise, in the case at hand, trial counsel had a police report that Mr. Pooler was drinking before the murder, but did not look for any history of dependence on alcohol. The State's reliance on trial counsel's testimony that

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than competency.

Mr. Pooler would not admit to the crime is not relevant here because a history of alcoholism is mitigation regardless of whether Mr. Pooler would admit to the crime.

Further, the State blames Mr. Pooler for this botched sentencing and argues that the blame should be laid at his feet. This argument was also made in Rompilla and was rejected. "Rompilla's own contributions to any mitigation case were minimal. Counsel found him uninterested in helping, as on their visit to his prison to go over a proposed mitigation strategy, when Rompilla told them he was 'bored being here listening' and returned to his cell…To questions about his childhood and schooling, his answers indicated they had been normal…There were times when Rompilla was even actively obstructive by sending counsel off on false leads." Id, at 2462. Likewise, in the case at hand, Mr. Pooler, like Mr. Rompilla, reported a normal childhood and schooling. Yet, the United State Supreme Court, ordered that Mr. Rompilla was entitled to a new sentencing hearing because, in part, the trial attorney "never examined" the school records, irrespective of the false information that was provided to the defense attorney. Id. at 2463. The Court held in no uncertain terms that despite the fact that Mr. Rompilla gave false information to his attorney, the attorney still had to conduct an independent investigation, and that Mr. Rompilla was entitled to a new

sentencing. Thus, the State's argument that Mr. Pooler is to blame has been squarely rejected by the United State Supreme Court, and should be rejected by this Court, especially in light of the mental deficiencies that Mr. Pooler suffers from.

There are even more similarities between the case at hand and Rompilla. In Rompilla, the defense attorney spoke with the defendant's family members, as well as three competency experts and all of the information from them gelled with the information from Mr. Rompilla. Thus, the State argued, unsuccessfully, that there was no need for the defense attorney to investigate further. However, as the United States Supreme Court noted, had the defense attorney obtained Rompilla's background documentation, "counsel would have become skeptical of the impression given by the five family members and would have unquestionably have gone further to build a mitigation case." Id. at 2468. In Rompilla, the jury never heard the mitigation that was brought up in the post-conviction proceedings "and neither did the mental health experts who examined Rompilla before trial…[however] their post-conviction counterparts, alerted by information from school, medical, and prison records that trial counsel never saw, found plenty of 'red flags' pointing to a need to test further." Id. at 2469. That is identical to Mr. Pooler's situation.

The State alleges that Mr. Pooler's trial counsel "did not just rely upon Pooler's representations, but he obtained corroboration from the family…" (AB, p. 52). Further, the competency experts that testified at Mr. Pooler's sentencing hearing did not have the benefit of any of the documentation that was presented at the Rule 3.850 hearing. As Dr. Michael Brannon, Mr. Pooler's expert at the Rule 3.850 hearing, testified, the fact that the records do not add up to what was presented gives him, as a mental health expert, great pause for concern. (T. 334). Speaking with family members and having competency doctors testify based upon fiction, not fact, does not cure the deficiency in failing to obtain, or even order, the records, as Rompilla has shown.

In Rompilla, the Court noted that the Circuit Court of Appeals which ultimately upheld the death sentence noted that although "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 their other efforts gave no reason to believe the search would unearth anything helpful." Id. at 2461. The State is making the same argument in the case at hand. Since the information that Mr. Pooler's trial counsel obtained from Mr. Pooler was corroborated by family members, he did not have any reason to believe that

the records would have shown anything different, thus trial counsel's performance did not fall below that of a reasonable attorney under the circumstances. However, as Rompilla has shown, the basic step of reviewing background records **must be made**, regardless of whether there is reason to believe anything will be found.

Mr. Pooler does not argue that trial counsel should have scoured the globe on the off-chance something will turn up, as the State has suggested. (AB, p. 46). Mr. Pooler is arguing that the failure to take the most basic steps of even ordering the background materials is ineffective assistance of counsel. The prejudice lies in the fact that the trial court used the fictitious account of Mr. Pooler's life to deny him mitigation and ultimately sentence him to death. Mr. Pooler's death sentence is based upon fiction, not fact, and thus is not a reliable sentence.

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

Mr. Pooler relies upon the arguments made in the initial brief and

incorporates the arguments made in Issue #2 for his rebuttal to the State's arguments.

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 relies upon the arguments made in the initial brief in support of this issue.

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

Mr. Pooler relies upon the arguments made in the initial brief in support of this issue.

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

It is undisputed that trial counsel failed to have even one mental health expert perform a forensic death penalty mitigation examination on Mr. Pooler. The State argues that "[c]ompetent assistance was retained and [trial counsel] provided the experts with access to Pooler, his records and/or his corroborative evidence." (AB, p. 57). Again, while this is a convenient argument, it is not one supported by the facts of this case. Trial counsel did not have any of Mr. Pooler's background records, including his school records, his military records, and his employments records. Thus, clearly, the experts could not have been provided with any records or corroborative evidence.

The first doctor to testify was at the sentencing hearing was Dr. Laurence Levine. He testified that he was appointed for competency only. (TR19, p. 1379). He testified that there were inconsistencies between what Mr. Pooler told and him and his test results. (T19, p. 1388-1389). He testified that trial counsel never gave him Mr. Pooler's medical records. Further, this doctor testified at the competency hearing that trial counsel "made it very difficult" for him by failing to provide with any documentation for his assessment and by failing to speak with him about the

assessment. (TR10, p. 101). Further, since this doctor did not do any further tests for the penalty phase, trial counsel did not provide him any documentation before his testimony. Thus, despite the State's assertion in its brief that trial counsel provided the experts with the all of the necessary records, this expert received absolutely no records.

The next expert witness at the penalty phase was Dr. Jude Desormeau, a jail psychiatrist, who testified that he visited Mr. Pooler one time in jail because he was placed on suicide watch. (TR19, P. 1413). No forensic testing or mitigation investigation was done on Mr. Pooler, nor were any records provided to this expert for the evaluation.

Dr. Michael Armstrong was the next mental health expert to testify at the penalty phase. He testified that he briefly saw Mr. Pooler while he was in the crisis center in the jail. (TR20, p. 1455). No forensic testing or mitigation investigation was done on Mr. Pooler, nor were any records provided to this expert for the evaluation.

The last mental health expert to testify at the penalty phase was Dr. Stephen Alexander. He testified that Mr. Pooler was not even competent to proceed. (TR20, p. 1487). He performed a two hour evaluation, but did not give Mr. Pooler any intelligence tests. He was also not provided with any documentation, as is evidenced by his testimony that Mr. Pooler completed

high school. (TR20, p. 1492).

There is no evidence whatsoever in the record that even one doctor who testified in the penalty phase was provided with even one piece of paper regarding Mr. Pooler's life and background. In fact, as Dr. Levine testified, he had a hard time with the evaluation because trial counsel did not provide him with anything. Thus, any argument by the State that trial counsel provided the experts with the necessary records should be summarily dismissed.

Turning to the "strategy" argument, the State has argued that "Salnick's strategy was to rely upon the mental health experts who did the competency and psychological evaluations." (AB, p.9). The most glaring problem with this argument is that none of the experts did anything other than competency evaluations, and no full psychological workup was ever done. Thus, the State's argument is not factually supported.

Failing to have a forensic mental health examination and psychological workup can not be deemed strategy. It is almost ironic how trial counsel dismisses the opinions of these doctors and relies upon information from Mr. Pooler, despite their advice not to, and yet he uses solely these experts for penalty phase testimony. Again, in order for there to be a strategy involved, trial counsel would have had to choose the fictitious

portrayal of Mr. Pooler's life that was presented over some alternative, to wit: the actual facts of Mr. Pooler's life. However, since trial counsel failed to take some basic steps, he was deprived the opportunity to know all of the facts to then make an informed decision on how to proceed. Only if trial counsel had all of the facts at his disposal could his choice of presentation be labeled as strategy. Since all he had was the fiction of Mr. Pooler's life, there was no choice, hence no strategy.

The State made no effort in its brief to distinguish this case from Sochor v. State, 883 So.2d 766 (Fla. 2004) which is on point for the deficient performance prong in this ineffective assistance of counsel claim. However, the facts and holding of Sochor are relevant to rebut the State's arguments in its Answer Brief. In Sochor, the defense attorney utilized three experts who evaluated the defendant "for the purpose of determining [his] competency to stand trial and his sanity at the time of the crime." Id. at 775. The defense attorney "did not provide any background materials to [the] experts; their evaluations were based solely on information gathered from their clinical interviews with Sochor. Nor did counsel instruct the experts to conduct their evaluations with an eye towards developing evidence of mitigating circumstances…" Id. This could not be more factually identical to the case at hand. Mr. Pooler was evaluated for nothing other than competency, as

was Mr. Sochor.

The State argues throughout its brief on this issue that the competency examinations were sufficient and that trial counsel's "strategy" in failing to obtain other experts, or have these experts examine Mr. Pooler for mitigation, is constitutionally permissible and thus Mr. Pooler's death sentence is reliable. This Court has expressly rejected this argument and has stated that "[t]o address the particularized characteristics of a defendant in any meaningful way it is necessary to perform a much more in-depth evaluation than that required for the determination of competency and/or sanity." Id. at 794. An in-depth evaluation was not done in Mr. Pooler's case. "Competency and sanity are purely legal concepts. As such they are narrowly defined, and to determine their presence or absence, only a relatively few number of questions have to be answered. By contrast, mental health mitigation is a much more open ended concept. Since the Eighth and Fourteenth Amendments require that sentencer 'not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death'…it requires a much more thorough evaluation on the part of the mental health professional." Id. Thus, there can be no strategy, as alleged by the State, in failing to obtain

mental health experts and evaluations beyond those done for competency.

Dr. Michael Brannon, Defendant's expert in the Rule 3.850 hearing, testified that there is a significant difference between competency and examining a defendant for penalty phase mitigation. (T. 311, 314-315). Competency is a "here and now" evaluation, while penalty phase mitigation evaluations are "much more comprehensive" and look at a person's life history. (T. 315). "Thus the development of mental health mitigation requires a much more thorough investigation in to (sic) the defendant's background, **including obtaining collateral information** in order to find out about those aspects of the defendant's life and the offense that would allow the sentencer to make a meaningful decision as to the sentence. This was manifestly not done in Mr. Sochor's case." Id. Likewise, this was not manifestly done in Mr. Pooler's case.

This resulted in significant prejudice to Mr. Pooler. Not one expert did a full psychological workup of Mr. Pooler. Not one expert was competent to testify to Mr. Pooler's intelligence. Dr. Brannon, Mr. Pooler's expert at the Rule 3.850 hearing, testified that based upon the Wechsler Intelligence Scale that he performed with Mr. Pooler, Mr. Pooler's IQ was 75. (T. 318). This is consistent with the school records that were never provided to any expert. They show that Mr. Pooler tested at a 75 IQ as a

child. The trial court found that Mr. Pooler's IQ was 80, but that he functioned at a higher level, thus the court did not find "dull intelligence" to be mitigating. However, had the trial court and jury heard the testimony of Dr. Brannon that he actually performed an intelligence test, and that the results were consistent with the results in the school records, there stands a substantial likelihood that this mitigating factor would have been established.

The trial court did not find that Mr. Pooler suffered from any mental health disorders and she denied him this mitigating factor. Had the trial court and jury heard the testimony of Dr. Brannon that Mr. Pooler suffered from alcohol dependency disorder, confabulation, cognitive deficits or disabilities, neuropsychological damage, head trauma, problems from Vietnam, and extreme traumatic stress-like reactions, there is a substantial likelihood that the trial court would have found this mitigating factor existed. (T. 344, 323, 348, 318, 336, 344, 350).

Had a full mental health mitigation evaluation been done, and trial counsel chose to ignore those findings and present the fiction that was presented, maybe there could be some strategy. However, failing to investigate and learn the true facts of your client's life can not be deemed a strategy. Trial counsel's performance was deficient, which resulted in

substantial prejudice to Mr. Pooler.

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 relies upon the arguments made in the initial brief in support of this issue.

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 relies upon the arguments made in the initial brief in support of this issue.

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

Mr. Pooler relies upon the arguments made in the initial brief in support of 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

Mr. Pooler relies upon the arguments made in the initial brief in support of 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

Mr. Pooler relies upon the arguments made in the initial brief in support of 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

Mr. Pooler relies upon the arguments made in the initial brief in support of 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

Mr. Pooler relies upon the arguments made in the initial brief in support of 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 relies upon the arguments made in the initial brief in support of this issue.

CONCLUSION

On the guilt phase, trial counsel ignored an obvious defense. He failed to develop and present Mr. Pooler with the facts which could have supported a voluntary intoxication defense so that Mr. Pooler could make an informed decision whether or not to use this defense. When trial counsel spoke with Mr. Pooler about the weaknesses in his defense, Mr. Pooler asked him to explore other avenues, which he did not. Mr. Pooler is entitled to a new trial on the crimes charged.

Mr. Pooler is entitled to a new penalty phase as well. "The primary purpose of the penalty phase is to ensure that the sentence is individualized by focusing on the particularized characteristics of the defendant." Brownlee v. Haley, 306 F.3d 1043, 1074 (11th Cir. 2002). In Mr. Pooler's case, he is being sentenced to die based upon fiction, not fact. This is not the individualized sentence focused on the particular characteristics that due process demands.

CERTIFICATE OF SERVICE AND 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 this 25th day of January, 2007.

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

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