IN THE SUPREME COURT OF FLORIDA
CASE NO. SC05-914

ALLEN W. COX,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On February 5, 1999, a Lake County Grand Jury returned an indictment charging Allen Ward Cox, the appellant, with the first-degree murder[1] of Thomas M. Baker, Jr. The indictment also charged one count of battery in a detention facility.[2] The victim of the battery was Lawrence Wood, another inmate. (I 1) Immediately prior to jury selection, appellant pled guilty to count II of the indictment, battery in a detention facility. (ROA-XII 411-20)

During the case-in-chief, an inmate witness who had become hostile to the defense blurted out an unresponsive answer that revealed that appellant was serving two life sentences. The trial court denied Mr. Cox's subsequent motion for mistrial but did give a curative instruction. (ROA-XXII 2463-77)

Appellant presented the testimony of several other witnesses, introduced physical evidence, and testified in his own behalf. The defense rested and renewed his motion for judgment of acquittal which the trial court denied. (ROA-XXIII 2713-14)

The state presented three witnesses in rebuttal. (ROA-XXIII 2722-XIV 2818) Appellant presented one witness in surrebuttal. (ROA-XIV 2823-27)

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1 § 782.04(l)(a)(l), Fla. Stat. (1998).

2 §§ 784.03, 784.02, Fla. Stat. (1998).

Appellant's renewed motion for judgment of acquittal was denied. (ROA-XIV 2837)

A penalty phase commenced on March 16, 2000. (ROA-XXV 3035) Appellant attempted to stipulate to his prior violent felony convictions. Appellant's offer was rebuffed by the state and denied by the trial court. (ROA-XI 220-29; ROA-XXV 3036- 41, 3089) The state's entire case-in-chief at the penalty phase consisted of the testimony from five victims of appellant's prior violent felony convictions. (ROA-XXV 3090-3136)

Appellant presented the testimony of several family members and a mental health expert during the penalty phase case-in-chief. (ROA-XXV 3147-3200; ROA-XXVI 3279, 3326-3400; ROA-XXVII 3401-16, 3503-3600) The state presented several witnesses in rebuttal.. (ROA-XXVII 3417-48; ROA-XXVIII 3612-3750) Appellant recalled one witness in surrebuttal. (ROA-XXVIII 3751-55)

The jury recommended death. Following a *Spencer* hearing the trial court sentenced Mr. Cox to death. *Cox v. State*, 819 So. 2d 705, 709 (Fla. 2002)

The trial court found the following aggravating circumstances: (1) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment; (2) the defendant was previously convicted of a felony involving the use or threat of violence; (3) the capital felony was especially heinous, atrocious, or cruel; and (4) the capital felony was committed in a cold,

calculated, and premeditated manner without any pretense of moral or legal justification. *Id*. at 710 fn. 4.

The trial court found the following mitigators: (1) severe domestic violence in Cox's childhood home – slight weight; (2) Cox's mother was very cruel and unpredictable – slight weight; (3) Cox's mother was very cruel to the children – slight weight; (4) frequently absent father who failed to protect Cox from mother's physical abuse – slight weight; (5) Cox's mother was emotionally unstable – slight weight; (6) Cox was forced to haul firewood as a small child until he dropped from physical exhaustion – slight weight; (7) Cox's parents divorced and remarried only to divorce again – some weight; (8) Cox has no happy memories from his childhood – slight weight; (9) Cox's mother abandoned him when he was eleven years old, forcing his father to send him to his grandmother's house for her to raise – some weight; (10) Cox was the frequent victim of inconsistent and unpredictable patterns of discipline as a child – no separate weight; (11) Cox's mother failed to demonstrate any maternal affection – no additional weight; (12) Cox grew up feeling unwanted, unloved, and worthless – no additional weight; (13) Cox is able to form friendships – slight weight; (14) Cox suffers from dysthymic disorder, a chronic depressive disorder unrelated to substance abuse; the disorder is amenable to treatment – slight weight; (15) Appellant has been diagnosed additionally with adjustment disorder with depression; major depressive disorder, recurrent and

severe; anti-social personality; alcohol dependence; and mixed personality disorder – slight weight; (16) Cox has been on antidepressant medication since 1991 – no additional weight; (17) Cox suffers from severe depression – no additional weight; (18) Cox attempted suicide once in his youth and still has suicidal thoughts – slight weight; (19) Cox demonstrates brain impairment possibly from a head injury or a congenital birth defect or both – slight weight; (20) Cox's early childhood left him with feelings of hopelessness, insecurity, rejection, and inadequacy – no additional weight; (21) Cox was severely injured in a motorcycle accident when he was sixteen rendering him unconscious – no additional weight; (22) Cox suffers from very rigid and repetitive thinking – no additional weight; (23) Cox is alienated and isolated and is distrustful of others – little weight; (24) Cox suffers from a severely impaired spectrum of emotional responses – slight weight; (25) as a result of his childhood, Cox has no sense of moral development – no additional weight; (26) Cox's mental illness could have been treated and controlled with medication or counseling or both – no additional weight; (27) at the time of the offense, Cox's ability to exercise good judgment was impaired – no additional weight; (28) Cox behaved well throughout these court proceedings – some weight; (29) Cox's moral development was similar to a retarded person – no additional weight; (30) Cox is able to function and grow in prison – some weight; (31) Cox is loved by his family

– slight weight; and (32) Cox is a human being – no additional weight. *Id*. at 710; fn 4.

Mr. Cox appealed the judgment and sentence of the lower court to the Florida Supreme Court. The Florida Supreme Court affirmed Mr. Cox's conviction and sentence of death. *Id*. at 725.

Mr. Cox petitioned the United States Supreme Court for a writ of certiorari *Cox v. Florida*, 537 U.S. 1120 (2003). The United States Supreme Court denied Mr. Cox's petition. *Id.*

On January 6, 2004 Mr. Cox timely filed a Motion to Vacate Judgment and Sentence pursuant to rule 3.851 of the Florida Rules of Criminal Procedure. (ROA-PC-Vol I at 1-71) On April 19, 2005, following an evidentiary hearing, the lower court denied Mr. Cox's motion. (ROA-PC-Vol II 349-387) On May 13, 2005 Mr. Cox filed a timely Notice of Appeal, and this Brief follows.

STATEMENT OF THE FACTS

State's Guilt Phase Case-in-Chief

The killing at issue occurred at Lake Correctional Institute (hereinafter LCI) near Clermont, Florida. In December, 1998, LCI was home to almost 1,000 inmates. (ROA-XV 1027-32) The prison was also a "psych camp", in the vernacular, meaning that many of the inmates suffered some form of mental illness. The facility included a 180 bed mental health unit that housed inmates in a secure facility. (ROA-XV 1032) LCI was also home to approximately 200 inmates on out- patient status who took medication and received therapy. However, they worked alongside the rest of the inmates on the compound. (ROA-XV 1033-49)

On December 21, 1998, Thomas Baker, Jr. was stabbed in the prison yard near the canteen. After he was stabbed, Baker ran to corrections officer Susan Parker's post in C-dorm, arriving at approximately 12:45 p.m. Baker told Officer Parker that he had been stabbed. Baker seemed to be in some distress. (ROA-XV 1116-22) Officer Parker called for assistance and began ministering to inmate Baker. Once Baker's shirt was removed, Officer Parker noticed a small puncture wound in his back. (ROA-XV 1122) Officer Parker asked Baker who had stabbed him. Baker responded, "Big Al, Echo dorm, quad 3."[3] (ROA-XV 1050-52, 1129)

[3] Further questioning revealed that Baker did not know his assailant's Christian name. (XV 1129)

Unfortunately for inmate Baker, medical help was not immediately forthcoming. (ROA-XV 1050-52) Although the puncture wound in Baker's back was not bleeding externally, Baker exclaimed that his lungs were filling up with blood. Additionally, the corrections staff noticed blood trickling from Baker's mouth. Rather than wait for the emergency cart any longer, several officers put Baker on a stretcher and took him to the medical unit. (ROA-XV 1050-52, 1165)

Thomas Baker lost consciousness and died approximately fifteen minutes after the initial attack. The cause of death was a single stab wound to the chest accompanied by internal blood loss. (ROA-XIV 996) The fatal wound was to the left side of Baker's back below the shoulder blade. The wound entered the chest cavity between two ribs, went through the midpoint of his left lung, through the aorta, and then into the right lung. The wound measured almost seven inches in depth. (ROA-XIV 991-93) The autopsy also revealed a few small bruises, scratches or abrasions on various parts of Baker's body. (ROA-XIV 991) The medical examiner also noted two very shallow, non-life-threatening puncture wounds, one to each of Baker's sides. (ROA-XIV 991)

After the stabbing, Captain Johnson ordered the entire compound locked down. (ROA-XV 1058-60) Scrutiny of the bunk roster of Echo dorm, specifically Quad 3, revealed an inmate by the name of Allen Cox, the appellant. (ROA-XV 1055-56, 1216-17) Officer Joseph McBrayer took Cox into custody near his dorm

without incident. Appellant seemed calm and composed without any signs of intoxication or drug use. He had no noticeable blood on his clothing. (ROA-XVI 1216-22, 1237-40) The only eyewitnesses to the stabbing and the events leading up to the homicide were fellow inmates at the prison. Of course, all of these witnesses had prior felony convictions which were used as impeachment. Additionally, several of the eyewitnesses were psychiatric patients who were taking psychotropic drugs on a daily basis. (ROA-XVII1524-26, ROA- XVIII 1688-91, 1778-79) All of the information concerning the prelude to and the homicide itself came from these inmate witnesses.

On Sunday, December 20, 1998, the day before the murder, Allen Cox discovered that the footlocker in his "house" (cell) had been burglarized. His property had been stolen. He was angry.[4] Cox stood on top of the balcony railing that day and announced to all of the inmates within earshot, that he would pay a $50.00 reward for the name of the culprit. He eventually raised the reward to $100.00 and promised the informant anonymity. Cox said that if he found the culprit, he would kill him.[5] Cox added that he did not care about the consequences.

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[4] This was not the first time that Cox had been victimized. (XX 2072-78, XXIII 2671)

[5] In prison vernacular, "kill" did not necessarily mean to end one's life . It generally meant the meant the declarant intended to "mess up" or "beat up" someone. (XVII 1440-41, 1538-39; XVIII 1785-86)

He announced that he was not afraid of a life sentence. Other inmates heard him say that he could do his time on death row with a color television. (ROA-XVI 1385-97, 1405, 1432-34; ROA_XVII 1527-30; ROA- XVIII1647-49, XX 2055-56)

At approximately 7:30 a.m. on Monday, the next day, Tony Wilson, a black homosexual inmate, began fighting with Thomas Baker, the eventual murder victim. Baker was upset that Tony Wilson had purportedly told Allen Cox that Baker was the thief. Baker and Wilson had had a prior feud when Tony's "sugar daddy", Dancing Willie, stole Baker's shoes. ROA_XVII 1506-15; ROA-XVIII 1696-1707) After his fight with Tony Wilson, Baker asked another inmate to watch his back. The inmate assumed that Baker feared retribution from Dancing Willie. (ROA-XVII 1508-9)

Later that day, during the noon hour, many of the inmates had finished their lunch chow. Almost 200 inmates had gravitated around the canteen where they could buy snacks and pick up mail. (ROA-XVII1462-69) Right before lunch that day, Cox told Robert Nies that Dancing Willie and Tony were accusing Thomas Baker of the theft in hopes of getting the reward money. Cox told Nies that he did not think that Baker committed the theft. (ROA-XVIII1720-21, 1728-30) Shortly before the murder Gerald Hatcher was standing near the canteen. Hatcher saw Cox

walking with two other inmates. As they walked by, Hatcher heard someone say, "I believe in my heart that he did it and I think you should kill the little bastard." (ROA-XVII 1498-99)

Melvin Young was eating ice cream near the canteen at chow time. He noticed Cox call Baker off the handball court in order to talk. (ROA-XVIII 1650-53) Several inmates heard a commotion. They looked up and saw Allen Cox fighting with Thomas Baker. Cox was on top of Baker and was punching him. During the fight, Baker yelled "I ain't got it!" (ROA-XVII 1450-58) At one point Baker got up, but Cox grabbed him and threw him to the ground. Cox then pulled a shank from his waistband and stabbed Baker once is the back. (ROA-XVII 1593-97, 1650-53, 1738- 50). Someone in the crowd yelled, "Man, you're going to kill him." (ROA-XVIII 1745) After the admonition from the crowd, Cox seemed to let up and hit Baker with a knife a couple of times below the waist. (ROA-XVIII1758) Cox then stopped the attack, got up, and walked away. Some inmates heard Cox say, "I've got one more of you [mothers] to get." (ROA-XVII1450-58, 1483, 1594-97; ROA-XVIII 1738-50; ROA-XX 2059) One inmate noticed that Cox stuck his weapon inside his jacket sleeve and walked away between the weight pile and the pump house. (ROA-XVIII 1653)

Meanwhile, Baker got up and ran. He fell near the canteen but got up and ran to C-dorm. (ROA-XVII1598-99, 1650-53) A few inmates noticed blood coming from Baker's mouth as he ran for help.

Robert Nies watched as guards and another inmate ministered to Baker as they waited for medical attention. (ROA_XVIII 1692-94) Nies later saw Cox by the canteen. Nies told Cox that he thought Baker was going to die. Cox responded, "I'm tired of this shit. Maybe they will just give me the electric chair." (ROA-XVIII 1694-95)

After the stabbing, Cox returned to his cell where he punched his cellmate Lawrence "Woody" Wood.[6] As he hit Woody, another inmate heard Cox accusing Woody of stealing his money. Cox told Woody, "I got your friend, [mother]. You're lucky I put it up or I'd get your ass." (ROA-XX 2078-83) Cox then left E-dorm and was arrested shortly thereafter. As Cox was leaving the dorm, he encountered Donny Cox (no apparent relation) on the steps.[7] Cox asked Donny if Woody had given him the stolen money. After Donny denied any knowledge,

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[6] Immediately prior to the start of the trial, appellant pled guilty to count II of the indictment which charged the battery of Lawrence Wood while in a detention facility. (XII 411)

[7] Of the numerous inmates who testified at trial, Donny Cox held the record for the most felony convictions with 54. (XVIII 1780)

appellant reportedly said, "If I find out whose got my money, I'm killing you, too." (ROA_XVIII 1780-82)

After locking down the compound, police decided that "Big Al" was Allen Cox, the appellant. (ROA-XVI1216-17) They took Cox into custody. A pat down revealed no weapons. (ROA-XVII 1217-19) Police did not tell Cox why they were taking him into custody. He cooperated and went with them willingly. They found no blood on appellant's clothing. (ROA -XVI1222) Investigators searching the next day found a shank (a homemade knife) in a pipe near the pump house. (ROA-XVI 1244-51, 1257-58, 1293-96, 1324-25) It was not uncommon to find homemade weapons like this on the compound at LCI. (ROA-XVI 1326)

Mr. Cox's Case-in-Chief at the Guilt Phase

Dr. Reeves, a forensic pathologist, examined the autopsy results. Dr. Reeves concluded that the knife found by police and attributed to the appellant could not possibly have inflicted the fatal wound on Thomas Baker. (ROA-XXI 2251 - 54, 2262) Specifically, Dr. Reeves pointed out that the knife admitted into evidence by the state was three inches too short to cause a wound that deep.[8] (ROA-XX 2175-2200;ROA- XXI 2210-14) While elasticity (compression of the tissue) could

[8] The fatal stab wound measured between 7 and 8 inches while the knife in question had a blade shorter that 5 inches. (XXI 2219-21, 2228-31, 2245-48)

explain a deeper wound than the length of the knife, Reeves did not believe a three inch excursion in that location would not be possible.[9] (ROA-XXI2210-14) Reeves also would expect some trace of blood would remain on the blade, especially since the knife was so crude.[10] (ROA-XXI 2217-19)

Appellant also called Vincent Maynard, aka Pig, another inmate in the prison. Appellant's case suggested that Maynard was the true assailant. Allen Cox had owed Vincent Maynard $500.00 for several months. When Maynard found out that Cox was "holding out" on him, Maynard became upset.[11]

Maynard saw Tony Wilson and Thomas Baker fight that morning after Wilson accused Baker of the burglary. (ROA-XXI 2281-83) Wilson warned Baker that Baker had better get a knife and should watch,his back. (ROA-XXI 2283-85)

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[9] Such an occurrence would fracture the ribs. Baker's ribs were not fractured.

[10] The state found no blood on the knife.

[11] It became obvious that Cox had previously had enough money to repay his debt to Maynard when Cox announced that $500.00 had been stolen from his footlocker.

Maynard also saw the fight between Cox and Baker after it started.[12] Maynard walked with Cox to the canteen that day. Maynard assured Cox that Baker was not the thief. Cox asked Maynard to give him a moment alone to talk with Baker. A short while later, Maynard heard the commotion and looked up to see the fight. Baker appeared to be reaching for a weapon, when Cox beat him to the punch and pulled out his shank. (ROA-XXI2298-2305) Cox stabbed Baker three times. Throughout the incident, Cox was white as a ghost and incoherent. He seemed not to comprehend what anyone said. (ROA_XXI 2304-6)

Allen Cox testified at the guilt phase. He stated Woody had been his roommate for less than thirty days when Cox's money disappeared from his footlocker. Cox offered a $50.00 reward but did not threaten the culprit. Cox only wanted the burglar to move out of his quad. (ROA-XXIII 2616- 22) Tony Wilson told Cox that he had seen Thomas Baker coming out of Cox's room with a canteen bag. Cox knew about the prior problems between Wilson and Baker. Cox believed that Tony was trying to set Baker up as the fall guy. (ROA-XXIII 2622-24)

On the morning of the murder, Dancing Willie (Tony's "sugar daddy") and several of his friends paid a visit to Cox. The group attempted to collect the

[12] Maynard and Cox had been drinking buck (homemade prison wine), smoking pot and eating pills (Kolonpins) all weekend. This continued into Monday morning. As a result, Cox was hung over, white as a ghost and "pretty out of it." (ROA-XXI 2291-94)

reward money pointing out that Tony had identified Thomas Baker as the burglar. Cox refused to pay contending that they were attempted to set up Baker. (ROA-XXIII 2625-26) Cox subsequently armed himself with a knife that day. He was afraid that Dancing Willie and his friends would make good on their threats to return for the money. (ROA-XXIII 2627-28; XXI 2286-90)

Meanwhile, Cox talked to Vincent Maynard that morning. Maynard was upset that Cox had not repaid his debt. (ROA-XXIII 2628-30) Cox skipped lunch that day and went right to the canteen for his mail. He saw Maynard and Baker there together. Cox asked Maynard for a moment alone with Baker so that he could assure Baker that he knew that he was innocent. Before he could say anything, Baker showed Cox that he was armed with a knife and was not afraid. Baker angrily denounced Cox for his failure to repay Maynard. Cox grabbed Baker's knife hand and hit him in the face. (ROA-XXIII 2634-39) Maynard ran up and entered the fray. Maynard pulled out a knife and tried to stab Cox in the side. Cox retreated such that Baker was pulled between him and Maynard's knife. Maynard stabbed Baker in the back as Maynard lunged at Cox. (ROA-XXIII 2640-41)

Cox was still struggling with Baker. Maynard had been pushed into the bushes. Cox knocked Baker to the ground and forced him to drop his knife. Once he had Baker on the ground, Cox pulled out his knife and asked what he had done with the stolen money. Baker claimed that he gave it all to Woody. As Cox

started to leave, Baker began kicking. Cox then poked Baker lightly in the buttocks region of his buttocks. (ROA-XXIII 2641-42) Cox then hid the knife in the pipe behind the pump house, went back to his cell, and inflicted the beating on Woody. (ROA-XXIII 2641-42)

Michael Johnson, a inmate with only one prior felony conviction, supported Cox's testimony that placed the lethal shank in Vincent Maynard's hand. Johnson saw Maynard and several other inmates talking right after Baker's stabbing. Maynard and the others then walked over by the lake.[13] Johnson watched as Maynard and his crew took shanks out of their pockets and threw them into the lake. (ROA-XXII 2597-2600)

State's Rebuttal in the Guilt Phase

Willie James Pittman, aka Dancing Willie, admitted that he took two of his friends when he paid a visit to appellant's small cell in a effort to collect the reward money for Tony.[14] Pittman was looking out for Tony who he described as dumb and gullible. Cox refused to pay the money. However, when he left Cox that morning, Pittman thought it was on good terms. (ROA-XXIII 2722-35)

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[13] Lake Correctional Institution is very unusual in that the prison walls contain a lake.

[14] Pittman admitted a homosexual relationship with Tony Wilson. (XXIII 2724-25)

Cox's roommate, Lawrence Woods, aka Woody, testified that Cox told him the night before the murder that he would make sure that the thief never got around to spending the stolen money. (ROA-XXIII 2740-43) Cox appeared sober on the morning of the murder. Another inmate brought a knife to Cox that morning. Cox hid the knife in his clothing and told Woody he had someone to take care of that day. (ROA-XXIII 2740-47) Woods denied any preferential treatment from the state in exchange for his testimony. (ROA-XXIII 2747-48, 2757-60)

<u>Appellant's Surrebuttal at the Guilt Phase</u>

Manocher Rafi shared a cell with Lawrence Wood (Woody) in the Lake County Jail when Woody had returned to testify. Woody told Rafi that the prosecutor would have to make it worth his while for him to testify. (ROA-XXIV 2823- 27)

EVIDENTIARY HEARING FACTS

At the evidentiary hearing conducted by the lower court, the following evidence was presented:

Dr. Robert Berland testified that in his opinion Mr Cox met the criteria for a finding of the statutory mental health mitigator that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. (ROA-PC-Vol. III at 59). He found Mr. Cox was

psychotic and had been throughout his teen years. (ROA-PC-Vol. III at 59). Dr. Berland reached these conclusions based upon his discussions with key witnesses who were never interviewed or presented by counsel representing Mr. Cox at trial: Teresa Morgan, Betty Gilbert, Nina Thomas, and Tina Farmer.

Dr. Berland provided the lower court with a very detailed outline gathered from the witnesses which supported each finding with mitigating circumstances. Specifically, mitigating circumstances found by Dr. Berland were:

Extreme mental or emotional disturbance;

Substantially impaired capacity to perform his conduct of the requirements of law;

Brain injury;

Drug & Alcohol abuse;

Unstable home from birth to adulthood;

Severe frequent nightmares from age 11 on; and

Severe problems in defendants genetic history.

(ROA-PC-Vol. III p 75-76)

Dr. Berland also testified as to evidence of chronic psychotic disturbance in Mr. Cox's MMPI results from 1990 & 1991. (ROA-PC-Vol. III p. 70-73)

Dr. Berland explained the specific impact of the diagnosed psychotic behavior at the time of the homicide. (ROA-PC-Vol. III p. 73-75). He rendered his opinion that Mr. Cox meets the criteria for finding that he had substantially impaired capacity to conform his conduct to the requirements of the law. (ROA-PC-Vol. III p. 75-76). He testified that a complete presentation of mental mitigation could not be presented in Mr. Cox's case without speaking to the lay witnesses who were never spoken to at the time of the penalty phase, specifically, Teresa Morgan, Betty Gilbert, Nina Thomas and Tina Farmer. (ROA-PC-Vol. III p. 77).

Dr. Berland found significant evidence that the brain injury Mr. Cox suffered during the motorcycle accident when he was 15 years old intensified his mental illness. (ROA-PC-Vol. III p. 78). He also testified about additional traumas Mr. Cox suffered – head trauma while hauling logs with a mule and head trauma when struck by a bottle. (ROA-PC-Vol. III p. 78-80). He also outlined how the drug and alcohol abuse during Mr. Cox's life contributed to his mental illness and psychotic symptoms. (ROA-PC-Vol. III p. 80-81)

Dr. Berland further testified as to Mr. Cox's life history after he went to live with his father and stepmother and grandmother. (ROA-PC-Vol. III p. 84). Dr.

Berland detailed the beatings Mr. Cox witnessed of Betty Gilbert by his father Ray Cox during the time he lived with them. This information was gathered from Betty Gilbert, a witness Mr. Cox's trial counsel never contacted. (ROA-PC-Vol. III p. 85). Dr. Berland further outlined the lack of supervision given to Mr. Cox even when living part of the time with his loving grandmother, Hazel. (ROA-PC-Vol. III p. 84). Dr. Berland also explained the impact of the unstable upbringing on Mr. Cox in light of his mental illness and explained why some of his siblings went on to live law abiding lives. (ROA-PC-Vol. III p. 87). Dr. Berland explained the problem in Mr. Cox's genetic history, outlining the various members of Mr. Cox's family suffering from severe mental illness. (ROA-PC-Vol. III p. 90 - 91).

Betty Gilbert testified about the beatings she received from Ray Cox while Allen Cox was living with them. She stated she was actually present when Mr. Cox was dropped off by his mother, who said as she abandoned him in the road "Here he is, you all wanted him, now you can have him. . . ..If he ever comes back I'll kill him." (ROA-PC-Vol. III p. 13). Betty Gilbert also testified that when Allen Cox came to live with her and Ray it was for about two years and during that period she received frequent and severe beatings from Ray Cox. (ROA-PC-Vol. III p. 14). She was physically injured as the result of the beatings including black eyes, broken fingers, and multiple bruises. (ROA-PC-Vol. III p. 15). She also

testified as to lack of supervision when he went to his grandmother's house. She described going to visit Allen Cox after the motorcycle accident and described the injuries to his head. (ROA-PC-Vol. III p. 22). Most importantly, no one from the defense team interviewed this crucial witness prior to Mr. Cox's penalty phase. (ROA-PC-Vol. III p. 23).

Cathy Null, Mr. Cox's sister testified about the abuse in the Cox household while Allen was growing up. (ROA-PC-Vol. III p. 32). She recalled Allen picking up a rock to throw at Ray Cox in order to get him to stop beating his mother. (ROA-PC-Vol. III p. 32). She described the whippings that would occur in the household from the mother. (ROA-PC-Vol. III p. 35). She described an incident where Ray Cox beat Allen Cox in the back of a police patrol car while Allen was handcuffed. (ROA-PC-Vol. III p. 36). She stated Betty Gilbert would often have black eyes during the time Allen lived with Betty and Ray. (ROA-PC-Vol. III p. 36). She also stated that Allen had "free reign" at this grandmother's house without any supervision. (ROA-PC-Vol. III p. 38)

Dr. Henry Dee testified as to the existence of the two statutory mitigators based upon the neuropsychological testing he administered. He testified he administered the WAIS IQ test, Denman memory scale, Wisconsin card test, categories test, judgment and line orientation, and facial recognition. (ROA-PC-

Vol. VI p. 11). Dr. Dee found that Mr. Cox's capacity to conform to the requirements of the law was substantially impaired at the time of the homicide. (ROA-PC-Vol. VI p. 11).

Dr. Dee described in great detail the results of the various testing he administered which supported his findings. (ROA-PC-Vol. 6 at 11-15). Most importantly, Dr. Dee described the relationship between his findings of neuropsychological impairment and Mr. Cox's behavior on the day of the homicide. (ROA-PC-Vol. 6 at 17, 18).

Attorney Jeffrey Higgins testified that he became a member of the bar in April of 1998. (ROA-PC-Vol.5 84) After becoming a member of the bar he joined the Public Defender's Office (ROA-PC-Vol. 5 at 98). He had never previously participated in a homicide case where the State was seeking the death penalty. (ROA-PC-Vol. V at 98). He was unsure whether he had ever attended a "Life over Death" seminar but recalled he may have viewed videotapes prior to trial. (ROA-PC-Vol. V at 99). When he began in the Public Defender's Office in April of 1998 he worked in the juvenile and misdemeanor division for about one year before moving to felony cases in April of 1999. (ROA-PC-Vol V at 102). He stated counsel Stone was primarily responsible for mental mitigation evidence and working with expert witnesses in that area. (ROA-PC-Vol. V at 99). There was an

investigator assigned to the case, but he did not do any investigation concerning potential mitigating circumstances (ROA-PC-Vol V at 101). It was his understanding that counsel Stone was primarily responsible for conducting the mitigation investigation without the aid of an investigator and had traveled up to Kentucky to speak to some family members (ROA-PC-Vol. V at 101). Mr. Stone was the one who made the decisions as to what mitigation witnesses to present. (ROA-PC-Vol V at 101).

Mr. Higgins further testified he did not consult with Mr. Cox before he made the opening statement to the jury. (ROA-PC-Vol. V at 105). At the time of the opening statement, the defense theory of the case was that Mr. Cox had not been the one to inflict the fatal stab wound. (ROA-PC-Vol. V at 106). Mr. Higgins stated he never received permission from Mr. Cox to concede that Mr. Cox administered the fatal wound (ROA-PC-Vol. V at 107). He did not recall any strategy in which the defense would be trying to argue a lesser included offense (ROA-PC-Vol. V at 107).

Ray Cox, Allen Cox's father, testified that he recalled counsel Stone coming up to Kentucky before the tria1. (ROA-PC-Vol. III at 123). Mr. Stone talked to him about wanting to find members of Allen Cox's family and friends to testify for him. (ROA-PC-Vol. III at 123). Ray Cox and Counsel Stone then went to a tavern

to talk to some of Allen's friends. (ROA-PC-Vol III at 123). Ray Cox and Mr. Stone had some drinks. (ROA-PC-Vol. III at 123). They started drinking beer, then whiskey. (ROA-PC-Vol. . III at 125). They stayed for 2-3 hours, and Mr. Stone got "real drunk". (ROA-PC-Vol. III at 125). Since Mr. Stone was drunk, Ray Cox drove him to the Cox house in Mr. Stone's car. (ROA-PC-Vol. III at 125). Because Mr. Stone was too drunk to drive, Loraine Cox, Ray Cox's wife, drove Mr. Stone's car back to his hotel while Mr. Stone rode with Ray Cox. (ROA-PC-Vol. III at 125) During the ride, Mr. Stone threw up in Ray Cox's car. (ROA-PC-Vol. III at 126). Ray and Loraine Cox then helped Mr. Stone get up to his room. (ROA-PC-Vol. III at 126).

While Mr. Stone was in town, Ray Cox gave him the name and address of Betty Gilbert. (ROA-PC-Vol. III at 126). Mr. Ray Cox admitted he had beaten Betty Gilbert to the point people could not recognize her during the time Allen lived with them. (ROA-PC-Vol. V at 126).

Loraine Cox, Ray Cox's wife, testified that Counsel Stone had come to their home in Kentucky before Allen Cox's trial. (ROA-PC-Vol. V at 143). She stated Ray Cox and Mr. Stone left together to do some visiting and when they returned Mr. Stone was drunk. (ROA-PC-Vol. V at 144). Because Mr. Stone was too drunk

to drive, she drove his car for him back to his hotel. (ROA-PC-Vol V at 144). She and Ray Cox helped Mr. Stone into his room (ROA-PC-Vol. V at 145).

William Stone testified that he represented Mr. Cox at trial. (ROA-PC-Vol. IV at 245). He did not have an investigator to locate mitigating circumstances (ROA-PC-Vol. IV at 247). The theory in the guilt phase was that Mr. Cox was not the one who was responsible for inflicting the fatal blow. (ROA-PC-Vol. IV at 247). The defense attempted to develop Mr. Maynard, AKA "Pig," as the alternate suspect. (ROA-PC-Vol IV at 249).

Mr. Stone did not recall having any discussions with Mr. Cox about the content or direction of the opening statement. (ROA-PC-Vol. IV at 250). He had no strategic reason for failing to object to statements by the prosecutor concerning the weighing of aggravating circumstances and mitigating circumstances, and if the evidence in aggravation outweighed the mitigating circumstances, the jury must recommend that Mr. Cox die. (ROA-PC-Vol. IV at 251). Mr. Stone denied cross examining Mr. Maynard in an openly hostile manner. (ROA-PC-Vol. IV at 253). He never anticipated that Mr. Mayuard would blurt out the statement about Mr. Cox serving two life sentences. (ROA-PC-Vol. IV at 253).

Mr. Stone contacted Dr. McMahon in July of 1999 to be an expert after Dr. Berland had stated he was going to be unable to testify due to his workload. (ROA-

PC-Vol. Iv at 254). He stated that Dr. McMahon had conducted a "number" of interviews with Mr. Cox. (ROA-PC-Vol. IV at 256). Mr. Cox did not want his family members involved but Mr. Stone was able to convince him to allow his grandmother, Hazel, to testify on his behalf. (ROA-PC-Vol. IV at 258). However, Mr. Stone also stated that he did not forego contacting family members, or other mitigation witnesses who were not contacted or presented, because of any instruction by Mr. Cox to avoid involving such witnesses. (ROA-PC-Vol. IV at 258).

Mr. Stone went to Kentucky prior to trial to try and "meet Ms. Veatch and to see if I could get some photographs or anything that might have been significant as far as Allen's history and upbringing and talk to the father" (ROA-PC-Vol. IV at 259). He admitted he never talked to Betty Gilbert, Tina Farmer, Nina Thomas, Virginia Gaskins, or Teresa Morgan. (ROA-PC-Vol. IV at 259). He further admitted he had no strategic reason for not calling any of those witnesses (ROA-PC-Vol. IV at 260).

Mr. Stone stated that after riding around with Ray Cox in Kentucky, the two ended up in a tavern. (ROA-PC-Vol. IV at 261). He admitted to drinking some alcohol in the bar, but he denied becoming drunk. (ROA-PC-Vol. At 283). He stated he had one drink, but started feeling sick on the way home. (ROA-PC-Vol.

IV at 286). He could not drive his car back to the hotel, so Loraine Cox drove his car, and he rode with Ray. (ROA-PC-Vol. IV at 286). He denied being too drunk to drive (ROA-PC-Vol. IV at 286). He said he got sick from the food in Kentucky, not from being drunk. (ROA-PC-Vol. IV at 287).

Elizabeth McMahon testified that she was retained as an expert by the defense in October of 1999 (ROA-PC-Vol. VI at 55). She spent approximately 11 hours with Mr. Cox. (ROA-PC-Vol. VI at 56). The witnesses she spoke with were Barbara Edelin (Mr. Cox's mother), Ray Cox, his sisters Elizabeth and Cathy, and Hazel Cox. (ROA-PC-Vol. VI at 56). She stated Mr. Cox never told her he had been dragged by a mule and knocked out, and he had indicated he had lived with Hazel Cox during his adolescent years. (ROA-PC-Vol. VI at 59). Mr. Cox had denied and visual or audio hallucinations during her interview. (ROA-PC-Vol. VI at 59). For the postconviction hearing, she reviewed taped interviews of several additional witnesses provided by a CCRC investigator, and her opinions concerning Mr. Cox did not change after reviewing the materials. (ROA-PC-Vol. VI at 62).

Dr.McMahon disagreed with Dr. Berland's findings in the postconviction proceedings that Mr. Cox is psychotic. (ROA-PC-Vol. VI at 65). She admitted she never spoke with Theresa Morgan, Betty Gilbert, Nina Thomas, or Tina

Farmer. (ROA-PC-Vol. VI at 78). She relied on Mr. Stone to give her the relevant witnesses for mitigation. (ROA-PC-VI at 78)

Henry Wheeler testified that he had formerly been incarcerated at Lake Correctional Institution. (ROA-PC-Vol. III at 147). He said he had previously been transferred to a disciplinary camp by Inspecter Kenneth Williams, prior to the Baker stabbing. (ROA-PC-Vol. III at 148). He had been transferred from prison to Lake County to speak with Mr. Cox's attorneys but was transferred back. (ROA-PC-Vol. III at 150). Mr. Williams questioned him and made it clear that he should stay out of the Cox case. (ROA-PC-Vol. III at 151).

Mr. Wheeler was aware that Washington Correctional Institution was a very bad prison and he feared being sent there. (ROA-PC-Vol. III-158). Mr. Williams made it clear that his life would be a "living hell" if he helped Allen Cox in any way. (ROA-PC-Vol. III at 150). Mr. Wheeler agreed not to become involved in the Cox case and was rewarded with a transfer to Brevard Correctional Institution, a very good prison.

After Mr. Wheeler was paroled, Mr Higgins contacted him about testifying in the Cox case. (ROA-PC-Vol. III at 156). Mr. Wheeler's probation officer notified him he was still under the guardianship of the Department of Corrections. (ROA-PC-Vol. III at 150). The probation officer told him that "You know they

can make things rough on you". (ROA-PC-Vol. III at 161). Mr. Wheeler then called Mr. Cox's counsel and stated he would not be testifying in the Cox case. (ROA-PC-Vol. III at 161). Inspector Williams also showed up at Tomoka Prison and gave him an intimidating look. (ROA-PC-Vol. III at 164).

While at Tomoka, Mr Wheeler spoke with Mr. Maynard, AKA Pig. (ROA-PC-Vol. III at 165-166). Mr. Maynard told Mr. Wheeler that he had given Mr. Cox $500.00 to get some marijuana into the institution. (ROA-PC-Vol. III at 167). But, since someone had robbed Mr. Cox of the $500.00, the marijuana deal never came through. (ROA-PC-Vol. III at 167). Mr. Maynard told Mr. Wheeler that Mr. Cox had said he had $400.00 in his locker, and he was going to give him that. (ROA-PC-Vol. III at 165). Maynard told Mr. Wheeler that he knew Mr. Baker was going to get his. (ROA-PC-Vol. III at 170). Mr. Maynard, AKA Pig, told Mr. Wheeler that he got Mr. Cox drunk on the day of the homicide because he wanted Mr. Cox to beat Baker up. (ROA-PC-Vol. III at 171). Mr. Maynard, AKA Pig, told Mr. Wheeler that he had gotten a shank form 'Slick Rick". (ROA-PC-Vol. III at 171).

Mr. Maynard told Mr. Wheeler that he got Mr. Cox intoxicated and that Mr. Cox stabbed Baker three times. (ROA-PC-VOl. III at 172). Wheeler then asked Mr. Maynard "I thought he was stabbed four times", and Mr. Maynard got a

devious look on his face and smiled. He also stated that Maynard told him he hid his shank by the water pump. (ROA-PC-VOl. III at 177).

Kenneth Williams testified that in 1999 he was an institutional inspector for the Department of Corrections. (ROA-PC-Vol. V at 4). He remembered Mr. Wheeler from a drug investigation in the prison involving Mr. Wheeler and his father. (ROA-PC. Vol. V at 6). He denied ever talking to Mr. Wheeler and threatening a transfer to Washington Correctional. *Id*. Mr. Williams did admit to having the authority to recommend transfers, and also admitted to making eye-contact with Mr. Wheeler at Tomoka Correctional. *Id*.

SUMMARY OF THE ARGUMENT

Claim I - Trial counsel failed to adequately investigate and develop mitigating evidence. *Wiggins* holds that retaining a mental health expert does not relieve defense counsel from the duty to discover *all reasonably available* mitigating evidence and evidence to rebut aggravating evidence. Mr. Cox's trial counsel abandoned investigation after acquiring only rudimentary knowledge of his history. The defense did not undertake any investigation into potential mitigating evidence until the final three weeks before trial.

The postconviction evidentiary hearing established the existence of multiple witnesses who were never contacted or developed. These witnesses had

knowledge which added to the weight of the mitigating circumstances, provided additional mitigating circumstances, and provided evidence necessary for a valid mental health evaluation by experts.

The failure in penalty phase is compounded by the inexperience of co-counsel, who did not have the experience required by ABA guidelines and Florida rules. Lead counsel's behavior during an investigatory trip to Mr. Cox's hometown was not resolved by the order denying postconviction relief and offers additional evidence of why the investigation was constitutionally inadequate.

The defendant's mental health experts at the postconviction hearing, and the family witnesses overlooked at trial, presented compelling mitigating circumstances establishing the prejudice arising from the desultory efforts of trial counsel.

Claim II - Inexperienced trial counsel conceded Mr. Cox's guilt in the opening statement. The state understood the constitutional implications, even when defense counsel and the court did not. *Strickland* and *Nixon* do not permit the admissions made by the defense in this case. Mr. Cox did not consent, and the concessions were directly contrary to the theory of innocence pursued by the defense.

Claim III

Ineffective assistance during voir dire – On direct appeal, this Court found that the state made numerous misrepresentations of the law during voir dire, but held that the failure to object left the Court no avenue to grant relief. The defense compounded the error by echoing the identical misrepresentation of the law. Relief is available now that Mr.Cox has shown that the prejudicial error resulted from ineffective representation rather than strategic error.

Ineffectivness during opening statement - Besides the *Nixon* failure, trial counsel was ineffective in opening statement by arguing defenses not recognized in the law. A delay in medical care for the victim given was not a valid defense and diverted focus from the actual defense, that Vincent Maynard killed the victim. The trial court's ruling against the defense resulting in damage to defense counsels' credibility with the jury.

Ineffectiveness in the guilt phase - Defense counsel failed to object when the state elicited inadmissible speculation from the medical examiner. Defense counsel was ineffective when he elicited evidence that Mr. Cox was serving two life terms. The postconviction order denying relief erroneously found that the prejudicial testimony was not elicited by the defense, contrary to this Court's holding on direct appeal that the testimony was invited but not a basis for relief on direct appeal. The postconviction order also fails to include the failure in a

cumulative error analysis. Trial counsel also failed to investigate and present evidence of a pattern of state manipulation of witnesses with threats and intimidation, to the prejudice of Mr. Cox.

CLAIM I

THE LOWER COURT ERRED IN DENYING MR COX'S CLAIM THAT HIS DEFENSE COUNSEL'S WERE INEFFECTIVE IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND UNDER THE PRINCIPALS ENUMERATED IN *STRICKLAND* FOR FAILING TO INVESTIGATE AND PRESENT AVAILABLE MITIGATING EVIDENCE AT THE PENALTY PHASE

STANDARD OF REVIEW

Under the principles set forth by this Court in *Stephens v. State*, 748 So.2d

1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de novo review with deference only to the factual findings by the lower court. his claim was presented in Mr. Cox's 3.850 motion.

ARGUMENT

The legal principles that govern claims of ineffective assistance of counsel were established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). An ineffective assistance of counsel claim has

two components: a petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Id.* at 687. To establish deficient performance, a petitioner must establish that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. 2052. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. *Id.*

Mr. Cox raised ineffective assistance of counsel claims for failure to investigate and present available mitigating evidence in claim II (D) of his Motion to Vacate Judgment and Sentence. (PC-R-32-36). Following an evidentiary hearing, the lower court denied the claims for failure to investigate and present mitigating evidence (PC-R-372-380).

Recent cases from the United States Supreme Court provide excellent guidance to this court in evaluating Mr. Cox's ineffective assistance of counsel claims. In *Wiggins v. Smith*, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), the Court addressed factors relating to prevailing professional standards regarding penalty phase investigation. Wiggins argued that his attorney's failure to investigate his background and present mitigation evidence of his unfortunate life history at his capital sentencing proceedings violated his sixth amendment right to counsel. *Id.*

at 2531. The Court went to great length to provide guidance as to standards for determination of a reasonable investigation in a death penalty case as follows:

> The record demonstrates that counsel's investigation drew from three sources. App. 490-491. Counsel arranged for William Stejskal, a psychologist, to conduct a number of tests on petitioner. Stejskal concluded that petitioner had an IQ of 79, had difficulty coping with demanding situations, and exhibited features of a personality disorder. *Id.*, at 44- 45, 349-351. These reports revealed nothing, however, of petitioner's life history. Tr. of Oral Arg. 24-25.
>
> With respect to that history, counsel had available to them the written PSI, which included a one-page account of Wiggins' "personal history" noting his "misery as a youth," quoting his description of his own background as " 'disgusting,' " and observing that he spent most of his life in foster care. App. 20-21. Counsel also "tracked down" records kept by the Baltimore City Department of Social Services (DSS) documenting petitioner's various placements in the State's foster care system. *Id.*, at 490; Lodging of Petitioner. In describing the scope of counsel's investigation into petitioner's life history, both the Fourth Circuit and the Maryland Court of Appeals referred only to these two sources of information. See 288 F.3d, at 640-641; *Wiggins v. State*, 352 Md., at 608-609, 724 A.2d, at 15.
>
> Counsel's decision not to expand their investigation beyond the PSI and the DSS records fell short of the professional standards that prevailed in Maryland in 1989. As Schlaich acknowledged, standard practice in Maryland in capital cases at the time of Wiggins' trial included the preparation of a social history report. App. 488. Despite the fact that the Public Defender's office made funds available for the retention of a forensic social worker, counsel chose not to commission such a report.

Id., at 487. Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)--standards to which we long have referred as "guides to determining what is reasonable." *Strickland, supra*, at 688, 104 S.Ct. 2052; *Williams v. Taylor*, supra, at 396, 120 S.Ct. 1495. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. Cf. *Id.*, 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences) (emphasis added); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing .... Investigation is essential to fulfillment of these functions").

The scope of their investigation was also unreasonable in light of what counsel actually discovered in the DSS records. The records revealed several facts: Petitioner's mother was a chronic alcoholic; Wiggins was shuttled from foster home to foster home and displayed some emotional difficulties while there; he had frequent, lengthy absences from school; and, on at least one occasion, his mother left him and his siblings alone for days without food. *See* Lodging of Petitioner 54-95, 126, 131-136, 140, 147, 159-176. As the Federal District

Court emphasized, any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background. 164 F. Supp.2d, at 559. Indeed, counsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless; this case is therefore distinguishable from our precedents in which we have found limited investigations into mitigating evidence to be reasonable. *See, e.g., Strickland*, 466 U.S., at 699, 104 S.Ct. 2052 (concluding that counsel could "reasonably surmise ... that character and psychological evidence would be of little help"); *Burger v. Kemp*, 483 U.S. 776, 794, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) (concluding counsel's limited investigation was reasonable because he interviewed all witnesses brought to his attention, discovering little that was helpful and much that was harmful); *Darden v. Wainwright*, 477 U.S. 168, 186, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (concluding that counsel engaged in extensive preparation and that the decision to present a mitigation case would have resulted in the jury hearing evidence that petitioner had been convicted of violent crimes and spent much of his life in jail). Had counsel investigated further, they may well have discovered the sexual abuse later revealed during state postconviction proceedings.

The record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment. Counsel sought, until the day before sentencing, to have the proceedings bifurcated into a retrial of guilt and a mitigation stage. *See supra*, at 2532. On the eve of sentencing, counsel represented to the court that they were prepared to come forward with mitigating evidence, App. 45, and that they intended to

> present such evidence in the event the court granted their motion to bifurcate. In other words, prior to sentencing, counsel never actually abandoned the possibility that they would present a mitigation defense. Until the court denied their motion, then, they had every reason to develop the most powerful mitigation case possible.
>
> What is more, during the sentencing proceeding itself, counsel did not focus exclusively on Wiggins' direct responsibility for the murder. After introducing that issue in her opening statement, *Id.*, at 70-71, Nethercott entreated the jury to consider not just what Wiggins "is found to have done," but also "who [he] is." *Id.*, at 70. Though she told the jury it would "hear that Kevin Wiggins has had a difficult life," *Id.*, at 72, counsel never followed up on that suggestion with details of Wiggins' history. At the same time, counsel called a criminologist to testify that inmates serving life sentences tend to adjust well and refrain from further violence in prison--testimony with no bearing on whether petitioner committed the murder by his own hand. *Id.*, at 311-312. Far from focusing exclusively on petitioner's direct responsibility, then, counsel put on a halfhearted mitigation case, taking precisely the type of "shotgun" approach the Maryland Court of Appeals concluded counsel sought to avoid. *Wiggins v. State*, 352 Md., at 609, 724 A.2d, at 15. When viewed in this light, the "strategic decision" the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a post-hoc rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing.

A review of the trial record and the evidence and testimony introduced at the postconviction evidentiary hearing demonstrates that Mr. Cox's counsel did not perform in accordance with the dictates of *Strickland/Wiggins*. Mr.

Cox's trial began on March 6, 2000. On February 14, 2000, the state notified the trial court that the defense had until the following day to provide particulars of any mental mitigation under 3.202. (ROA Vol. III at 233). The defense responded that as of that date they had received a "bottom line opinion" from a mental health expert. (ROA Vol. III at 233) On February 17, 2000 trial counsel informed the court he had not made an election as to which witnesses he was going to call in the penalty phase. (ROA Vol. III at 247). On February 28, 2000, trial counsel informed the court that counsel Stone did not talk to any family members until the deposition of Hazel Cox which took place on February 23, 2000. (ROA Vol. III at 297) Trial counsel further informed the court on February 28, 2000 that he did not file the notice disclosing mental illness mitigators within the 60-day requirement because he did not know what they were. (ROA Vol. III at 329) The mental health expert had not completed her evaluation. (Tr. 329). On March 1, 2000, trial counsel informed the court that Dr. Elizabeth McMahon had found no "statutory mitigators." (ROA Vol. III at 363)

The above trial references reveal the defense did not even begin any investigation into potential mitigating evidence which could be produced at Mr. Cox's penalty phase until in very close proximity to the trial date. Family members were not contacted until February 23, 200, a mere eleven days prior to

the start of Mr. Cox's trial. As late as February 28, 2000, the defense team was unaware of what, if any, mental mitigation was going to be found by. Dr. McMahon. This haphazard, last minute investigation is not what is contemplated by *Strickland*, or *Williams v. Taylor*, 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed..2d 389 (2000), or *Wiggins v. Smith*, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Rather, these United States Supreme Court cases mandate that trial counsel in capital cases are obligated to conduct a thorough investigation into the defendant's background. As will be demonstrated below, Mr. Cox's counsel did not fulfill this obligation.

Trial counsel failed to conduct a complete investigation into Mr. Cox's background. A complete investigation would have led to important mitigation testimony from individuals with knowledge of Mr. Cox's life and upbringing. Consequently, several available witnesses who could have provided a wealth of important mitigation evidence were either never interviewed, or the mitigation evidence they possessed was never properly developed for a professional presentation by trial counsel or the defense team. These witnesses include Margurite Sallee, Josephine Bowen, Virginia Gaskins, Ray Cox, Betty Gilbert, Earl Garrett, Harold Pittman, Pauline Bennett, Elizabeth Ann Veatch, Thurman Bagby, Kent Bland and Cathy Nulls.

Counsel never thoroughly investigated the motorcycle accident involving Mr. Cox, a head injury he sustained while working with mules where he was knocked unconscious for several hours, or an incident of sexual molestation committed upon Mr. Cox in his formative years.

Due to the poor investigation, all of the facts about the abuse of Mr. Cox by his mother were undeveloped. Mr. Cox's alcohol and drug abuse was not properly investigated. The lack of a normal nurturing environment, even after Mr. Cox briefly lived with his grandmother, was not fully explored. This information was neither developed through complete investigation nor timely given to the mental health expert to allow for a comprehensive and professional presentation of Mr. Cox's mental condition in general, or at the time of the homicide in question.

In a death penalty case, the investigation and presentation of available mitigation evidence is of paramount importance. This requires a team approach and the use of investigators to research the client's social history. The 1989 Guidelines of the American Bar Association for the Appointment and Performance of Counsel In Death Penalty Cases provide a specific guideline as to the proper team approach as follows:

> GUIDELINE 8.1 SUPPORTING SERVICES
>
> The legal representation plan of each jurisdiction should provide counsel appointed pursuant to these guidelines with investigative, experts, and other services necessary

> to prepare and present an adequate defense. These should include not only those services and facilities needed for an effective defense at trial, but also those that are required for effective defense representation at every stage of the proceedings, including the sentencing phase.
>
> COMMENTARY
> Additionally, counsel for the defense is obligated to conduct a thorough investigation of the defendant's life history and background, and, if it is the best interest of the client, to present mitigating evidence uncovered during the course of that investigation at the penalty phase of the trial. Counsel, whether practicing privately or within a defender's office, cannot adequately perform these and other crucial penalty phase tasks without the assistance of investigators and other assistants.

In Mr Cox's case, the defense did not have an investigator for the penalty phase. (ROA-PC-Vol. IV p. 246). This violation of the ABA standards led to a substandard investigation and presentation of mitigating factors in the penalty phase. The investigation in the penalty phase, in regard to contacting Mr. Cox's family members, did not even begin until very close to the trial - a mere eleven days before the penalty phase was to begin.

Rather than use an investigator from the beginning of the case in order to fully develop facts to be presented in mitigation, the mitigation investigation consisted of counsel Stone flying up to Kentucky a few days before the trial to speak with family members. That is not the type of thorough investigation of mitigation issues contemplated by *Strickland* and *Wiggins.*

Furthermore, co-counsel Higgins did not have satisfactory experience. Mr. Higgins testified at the evidentiary hearing that he became a member of the Florida Bar in April of 1998. (ROA-PC-Vol. V at 98) Mr. Cox's trial began on March 6, 2000, less than two years after Mr. Higgins had become a member of the Florida Bar. Mr. Higgins also testified that he had been handling felony cases for only one year before working as co-counsel in Mr. Cox's trial. (ROA-PC-Vol. V at 99)

The Guidelines of the American Bar Association for the Appointment and Performance of Counsel In Death Penalty Cases state the following guidelines for appointment of trial co-counsel in death penalty cases:

> Trial co-counsel assignments should be distributed to attorneys who:
>
> 1. Are members of the bar admitted to practice in the jurisdiction and
>
> 2. Who qualify as lead counsel under paragraph 9A) of this Guideline or meet the following requirements:
>
> a. are experienced and active trial practitioners with at least <u>**three years litigation experience in the field of criminal-defense**</u>; and
>
> b. have prior experience as lead counsel or co-counsel in no fewer than three jury trials of serious and complex cases which were tried to completion, <u>**at least two of which were trials in which the charge was murder or aggravated murder, or alternatively, of the three jury**</u>

> **trials, at least one was a murder or aggravated murder trial and one was a felony jury trial**; and

ABA Guidelines for Appointment and performance of Counsel in death penalty cases, Guideline 5.1

Florida Rule of Criminal Procedure 3.112, adopted Oct. 28, 1999, incorporated the ABA standards for the level of experience needed for co-counsel in death penalty cases as follows:

> (f) Co-counsel: Trial Co-counsel assignments should be given to attorneys who:
>
> (1) are members of the Florida Bar admitted to practice in the jurisdiction,
>
> (2) Who qualify as lead counsel under paragraph (e) of these standards or meet the following requirements:
>
> (A) are experienced and active trial practitioners with **at least three years of litigation experience in the field of criminal law**: and
>
> (B) **have prior experience as lead counsel in no fewer than three jury trials of serious and complex cases which were tried to completion, at least two of which the charge was murder; or alternatively, of the three jury trials, at least one was a felony jury trial;**

Fla. R. Crim. P. 3.112 (f).

The purpose of the rules establishing minimum qualifications for death penalty counsel are stated in the comments: "These standards are based on

the general premise that the defense of a capital case requires specialized skill and expertise. The Supreme Court has not only the authority, but the constitutional responsibility to ensure that indigent defendants are provided with competent counsel, especially in capital cases where the State seeks to take the life of the indigent defendant."

Applying the standards of the ABA and the Florida Rules of Criminal Procedure, Mr. Higgins did not meet the minimal requirements to handle a death penalty case as co-counsel. He did not have the experience mandated by the rules as he had been practicing law less than two years before appearing as co-counsel in a death penalty case.

Ultimately, the investigation conducted by the defense failed to meet the standards put forth in *Wiggins.* Mr. Stone spoke only to Hazel Cox, Elizabeth Veatch, and Ray Cox concerning mitigation issues. It is important to note that the defense expert used by the defense, Elizabeth McMahon, relied upon Mr. Stone to provide her with the people she needed to talk to in order to formulate her opinions and present mitigating factors to the jury. (ROA-PC-Vol VI at 78).

In addition to the inadequacies of the defense investigation due to improper staffing and untimeliness, the actions of counsel Stone in Kentucky also contributed to the substandard mitigation investigation. There is a conflict of

evidence as to what happened in Kentucky concerning Mr. Stone and his consumption of alcohol. According to Mr. Stone, he went to a tavern with Ray Cox, had one drink, became sick due to food, and was driven back to his hotel room by Ray Cox with Mrs. Cox following in Mr. Stone's car. (ROA-PC-Vol. IV at 286). According to Ray Cox, when Mr. Stone came to Campbellsville, Kentucky shortly before Mr. Cox's trial, they went to a local tavern. (ROA-PC-Vol. III at 124). They both drank some beer and whiskey. (ROA-PC-Vol. III at 125). Mr. Stone became very drunk and had to be driven back to his hotel, with Loraine Cox following in Mr. Stone's car. (ROA-PC-Vol. III at 125). Mr. Stone vomited in Ray Cox's car. (ROA-PC-Vol. III at 126). Upon arriving at the hotel, Mr. Stone had to be helped to the room. *Id*.

Loraine Cox testified that when Mr. Stone was in Kentucky, Ray and Mr. Stone went out for a while, and at around 9:30 P.M. they returned. (ROA-PC-Vol. III at 144). Mr. Stone was drunk. She drove his car, and followed Ray Cox and Mr. Stone back to the hotel where they helped Mr. Stone into the room. (ROA-PC-Vol. III at 144)

Based upon the above testimony, it is clear that while in Kentucky conducting a critically important mitigation investigation with his client's life in the balance, Mr. Stone was out drinking at a tavern with Ray Cox and had to be

driven back to the hotel. It is difficult to determine from the testimony the extent of Mr. Stone's intoxication (or if he got sick after only one drink as he says). However, under any of these facts, he clearly was not concentrating his efforts where they needed to be, conducting a complete and thorough penalty phase investigation. For example, his client would have been much better served speaking with Betty Gilbert, Theresa Morgan, Nina Thomas, and Tina Farm, as each had very important mitigating evidence that should have been presented to the jury and court had a proper investigation been conducted. All would have been easily located and presented with a proper investigation.

Dr. Robert Berland, armed with a complete investigation and information from critical witnesses Betty Gilbert, Theresa Morgan, Nina Thomas, and Tina Farmer, testified that in his opinion Mr. Cox met the criteria for a finding of the statutory mental health mitigator that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. (ROA-PC-Vol. III at 59). He found Mr. Cox was psychotic and had been through his teen years. (ROA-PC-Vol. III at 59). Most important, Dr. Berland reached these conclusions based upon his discussions with key witnesses who were never interviewed or presented by counsel representing Mr. Cox at trial – Teresa Morgan, Betty Gilbert, Nina Thomas, and Tina Farmer. As Dr. Berland explained,

each witness provided important factual support for findings of hallucinations, and ultimately a diagnosis that Mr. Cox was psychotic.

Dr. Berland provided the lower court with very detailed outlines of the information gathered from each witness which supported each finding of mitigating circumstances. (ROA-PC-Vol. IX at 433-435). Specifically, the mitigating circumstances found by Dr. Berland were extreme mental or emotional disturbance, substantially impaired capacity to conform his conduct to the requirements of law, brain injury, drug and alcohol abuse, unstable home from birth to adulthood, severe, frequent nightmares from age 11 on, and severe problems in the defendant's genetic history. Dr. Berland gave a very detailed and specific outline of the lay witness symptoms he obtained from the various witnesses and how he assessed the credibility of each witness, as well as how the symptoms provided for a diagnosis that Mr. Cox is psychotic. (ROA-PC-R Vol. III at 62-68)

Teresa Morgan, Betty Gilbert, Nina Thomas, Tina Farmer, Cathy Null, Margurite Sallee, and Barbara Edelen provided the necessary information to Dr. Berland to allow for his complete and comprehensive presentation of mitigating circumstances.

Dr. Berland also testified as to the evidence of chronic psychotic disturbance in Mr. Cox's MMPI results from 1990 and 1991. (ROA-PC-Vol III at 70-73). Dr. Berland explained the specific impact that the diagnosis of psychotic behavior would have had on Mr. Cox at the time of the trial. (ROA-PC-Vol. III at 73-75). He further testified as to his opinion that Mr. Cox meets the criteria for a finding that he had substantially impaired capacity to conform his conduct to the requirements of the law (a statutory mitigator under Fla. Statute 921.142). (ROA-PC-Vol. III at 75- 76). He also testified that a complete presentation of mental mitigation could not be presented in Mr. Cox's case without speaking to the lay witnesses who were never spoken to at the time of the penalty phase. (ROA-PC-Vol. III at 77)

Dr. Berland also testified that he found significant evidence that the brain injury Mr. Cox suffered during the motorcycle accident when he was 15 years old intensified his mental illness. (ROA-PC-VOl. III at 78). He also testified about additional neurological trauma to Mr. Cox – an incident with a mule, and another involving a bottle, both of which caused head trauma. (ROA-PC-Vol. III at 78-80). Dr. Berland explained thoroughly the relationship of the head traumas with the psychotic mitigator. (ROA-PC-Vol. III at 80, 81). He also outlined how

the drug and alcohol abuse during Mr. Cox's life contributed to his mental illness and the psychotic mitigator. (ROA-PC-Vol. III at 82).

An important issue addressed by Dr. Berland was a complete rendition of Mr. Cox's life history after he went to live with his father and stepmother, and later with his grandmother. (ROA-PC-VOl. III at 84). Dr. Berland detailed the beatings Mr. Cox witnessed when his father, Ray Cox, beat his stepmother, Betty Gilbert, during the time he lived with them. (Information gathered from Betty Gilbert, with whom the defense never spoke). (ROA-PC-Vol. III at 85). Dr. Berland further outlined the lack of supervision given to Mr. Cox even when living part of the time with his loving grandmother, Hazel. (ROA-PC-Vol. III at 84). Dr. Berland also explained the impact the unstable upbringing had on Mr. Cox in light of his mental illness and explained why some of his siblings went on the live law abiding lives. (ROA-PC-Vol. III at 87).

Dr. Berland also explained the problems in Mr. Cox's genetic history. (ROA-PC-Vol. III at 90). He identified and discussed the various members of Mr. Cox's family who suffered from severe mental illness. (ROA-PC-Vol. III at 90-91).

The presentation of mental mitigation presented by Dr. Berland was far more extensive and meaningful than that presented at the trial. This was due to

a failure of the defense to perform an adequate investigation into mitigation, in part because of a lack of investigative help, in part because of the lateness of the ultimate investigation, and in part because of the actions/inactions of Mr. Stone in simply not speaking with whom he needed to in Kentucky in order to present a complete presentation to the jury and court. As a result, neither the sentencing jury nor the trial judge heard that Mr. Cox qualified for the two statutory mental mitigators, is psychotic, and had a very unstable childhood even after living with his father, stepmother, and grandmother.

Further, the evidence of brain injury due to the various accidents was not fully presented to the jury to establish a meaningful relationship between the brain injury and Mr Cox's mental illness and psychotic behavior. The severe frequent nightmares were not presented to provide evidence of the psychotic nature of his mental illness. The impact of the drug and alcohol abuse on his mental illness likewise was not properly explained.

Contrary to the order of the lower court, this is not a case where there is mere disagreement with the opinions of the expert called by the defense. Despite Dr. McMahon's testimony, she was not provided with adequate investigation in order to present a complete picture of mitigation on Mr. Cox's behalf. Most important, because she never had an opportunity to personally speak with many

witnesses that Dr. Berland spoke to, (specifically Teresa Morgan, Betty Gilbert, Nina Thomas, and Tina Morgan), she is not in the same position as Dr. Berland to assess their credibility and importance in presentation of mental mitigators.

The lower court also had an opportunity to personally hear from Betty Gilbert and Cathy Null. The testimony of Betty Gilbert concerning the beatings she received from Ray Cox while Alan Cox was living with them was compelling and should have been heard by the penalty phase jury and the trial judge. She stated she was actually present when Mr. Cox was dropped off by his mother, who said "Here he is. You all wanted him, now you can have him. If he ever comes back, I'll kill him" (ROA-PC-Vol. III at 13). This testimony brought clarity to that incident which the court found inconsistent in the sentencing order. Betty Gilbert's testimony provides additional corroboration that Mr. Cox's mother did threaten to kill Allen if he tried to come back.

Betty Gilbert also testified that when Allen Cox came to live with her and Ray, it was for about two years, and during that period she received frequent and severe bearings from Ray Cox. (ROA-PC-Vol. III at 14). She would be physically injured as a result of the beatings, including black eyes, broken fingers, bruises, etc. (ROA-PC-Vol. III at 15). Betty Gilbert also testified as to the lack of supervision of Mr. Cox when he went to his grandmother's house. (PC-R-Vol. III

at 19). She described going to visit Allen Cox after the motorcycle accident and described the injuries to his head. (ROA-PC-Vol. III at 22).

Betty Gilbert had a wealth of information which would have assisted Dr. McMahon in reaching a correct diagnosis. Her compelling litany of the horrific events in Mr. Cox's horrific younger years would have given the jury and judge a better understanding of the nonstatutory mitigators and their role in the origins and aggravation of the statutory mental health mitigation. Yet no one from the defense team talked with this crucial witness prior to Mr. Cox's penalty phase. (ROA-PC-Vol. III at 23).

This court also heard from Cathy Null , Mr. Cox's sister, about the abuse in the Cox household when Allen was growing up. (PC-ROA-Vol. III at 32). She recalled Allen picking up a rock to throw at Ray Cox in order to get him off his mother. (PC-ROA-Vol. III at 32). She described the whippings that would occur in the household from the mother. (PC-ROA- Vol. III at 35). She described an incident when Ray Cox beat Allen Cox in the back of a patrol car while Allen was handcuffed. (PC-ROA-Vol. III at 36). She stated Betty Gilbert would often have black eyes during the time Allen lived with Betty and Ray. (PC-ROA-Vol. III at 36). She stated that Allen had "free reign" at his grandmother's house without any supervision. (PC-ROA-Vol. III at 38).

The lay witness testimony from Betty Gilbert and Cathy Null provides significant testimony which, had it been presented at the penalty phase, would have prevented erroneous findings in the sentencing order. For example, the court found there was no "frequent" severe domestic violence in the home where Mr. Cox grew up to justify assigning only slight weight as to that mitigator. Betty Gilbert and Cathy Null would have provided testimony to establish and corroborate the "frequent" domestic violence in the home.

The sentencing order repeats a fact which was proven false in the evidentiary hearing. The trial court minimized the abuse surrounding and committed on Mr. Cox by finding that "Allen Cox only lived in his parents home until he was approximately ten years old and his father was not present much of the time At age 11, Mr. Cox went to live with his grandmother, who was a very loving, comforting, supporting influence in his life." This falsehood is repeated six times in the sentencing order as justification for rejecting or giving little weight to various mitigators.

Letting the jury and judge hear Betty Gilbert and Cathy Null would have presented a true picture of Mr. Cox's upbringing after he was dropped off at age ten by his mother with her threaten to kill him if he returned to her. But Mr. Cox did not find refuge in a happy, loving environment with his grandmother when

he was cast out by his mother. He lived with Betty Gilbert and Ray Cox for around two and a half years after the abandonment, and he continued to live in a household with severe domestic abuse. Also, even during the times he was living with this grandmother, he was given virtually no supervision and was allowed to do whatever he wanted with "free reign."

Because of the incomplete presentation by the defense lawyers, the trial judge rejected or gave slight weight to mitigating circumstances which would have been established as substantial and weighty, had there been a competent penalty phase presentation by counsel.

Further evidence of the defense's incomplete penalty phase testimony came from Dr. Henry Dee, who testified about the existence of the two statutory mental mitigators established by the neuropsychological testing he administered. He testified he administered the WAIS IQ test, Denman memory scale, Wisconsin card test, categories test, judgment and line orientation, and facial recognition. (PC-ROA-Vol. VI at 11).

Dr. Dee found that Mr. Cox's capacity to conform his conduct to the requirements of the law was substantially impaired. (PC-ROA-Vol. VI at 11). Dr. Dee described in great detail the results of the various testing he administered which supported this finding. (PC-ROA-Vol. VI at 11- 15). Most important, Dr. Dee

explained the relationship between his findings of neuropsychological impairment and Mr. Cox's behavior on the day of the homicide. (PC-R-Vol. VI at 17, 18). Counsel were ineffective for failing to present the available statutory mental mitigation evidence.

The lower court's order denying relief in this post-conviction proceeding does not reveal a meaningful review of the evidence and testimony presented at the evidentiary hearing. The lower court failed to address the testimony of Betty Gilbert and Cathy Null, or the additional information and mitigation compiled by Dr. Berland and Dr. Dee. Instead, the lower court dismissed the claim of ineffectiveness merely because the defense had hired Dr. McMahon at trial.

Strickland and *Wiggins* do not hold that counsel has acted competently, foreclosing any further inquiry, merely because a mental health expert is retained. A complete investigation is still required.

The lower court failed in its responsibility to assess the mitigating circumstances presented at the evidentiary hearing which would have been discovered in a proper investigation by Mr. Cox's counsel. Most glaring in omission, the lower court did not address the issue of counsel Stone's consumption of alcohol in Kentucky with Ray Cox when he should have been conducting a proper investigation of presentable mitigating circumstances as contemplated by *Wiggins* and *Strickland*.

Mr. Cox urges this Court, in its de novo review, to consider all of the testimony introduced at the evidentiary hearing. A proper and complete review establishes ineffectiveness of counsel sufficient to undermine confidence in the sentence imposed and necessitates a new penalty phase proceeding.

CLAIM II

THE LOWER COURT ERRED IN DENYING MR. COX'S CLAIMS THAT HIS COUNSEL WERE INEFFECTIVE IN BOTH THE GUILT AND PENALTY PHASE.

A. Counsel was Ineffective for conceding guilt in opening statement.

During opening statement, Mr. Cox's trial counsel stated the following:

> The purpose of correctional officers in many situations is to protect inmates from themselves and from each other. But, in this particular situation there wasn't a guard within sight of this crime. If there had been a guard

> there, quite possibly Venezuela would have lived. The fight could have been broken up before it escalated to the point where Venezuela ended up dying..........
>
> As Mr. McCune told you, there were two far less serious stab wounds to Venezuela's lower half; once in the groin area and once in the butt, on one side, I don't remember if it was the left side or the right side, but once in the butt. Certainly not a lethal wound. Neither one of them was particularly lethal.
>
> The one serious wound was the wound that Mr. McCune talked about, on the left-hand side, just below the shoulder blade, between the seventh and eighth ribs, one wound. Not a lot of blood.
>
> As far as the medical care goes, Venezuela was able to get up, and if Venezuela was able to get up, given the difference in size between the two men, it's only because Allen let him.

ROA XV at. 962, 963 (*emphasis added*)

In the above statements, trial counsel conceded that there was a fight between Mr. Cox and victim Venezuela which "escalated" to the point where Venezuela ended up dying, and Mr. Cox had "let" Venezuela up after the stabbing. Even the state recognized these statements as concessions of constitutional dimension:

> MR. GROSS(Assistant State Attorney): Judge, I don't know if you remember, but a couple of weeks ago you brought to our attention and sent us a copy of, I believe, the Nixon case. In light of the opening statement given yesterday, I don't know, but it may be appropriate to do a Nixon inquiry of the defendant.

> THE COURT: Based on what I heard, I am trying to remember everything I heard.
>
> Mr. Stone, do you think that is an issue at this point?
>
> MR. STONE: I don't know what he is referring to in the opening statements. It's not an issue, as far as I am concerned.
>
> THE COURT: Could you be specific if you think it's appropriate, Mr. Gross?
>
> MR. GROSS: I can tell you that as I understood Mr. Higgins' argument, the Defense conceded that the defendant was the person who attacked and killed Mr. Baker.
>
> MR. STONE: Not at all.
>
> MR. GROSS: If that's not true, then I must not have been listening very carefully.
>
> MR. STONE: No, sir. That wasn't the gist of the opening statement.
>
> MR. GROSS: I guess, my bad, as they say.
>
> THE COURT: I heard him talk about what lack of evidence and what prison folks saw, et cetera, et cetera. But I never heard him admit that Mr. Cox stabbed the victim.

(ROA-XVat 1111, 1112

Mr. Cox concedes that the United States Supreme Court in *Florida v. Nixon* 125 S.Ct. 551 (U.S. 2004), reversed this Court's decision and found that in

cases where counsel admits guilt should be judged under *Strickland* not *Chronic*. (*Id*. at 560). The Court in *Nixon,* in applying the *Strickland* standard, found counsel's concession of guilt to be reasonable because there was no viable defense and concessions are sometimes reasonable in death penalty cases in order to attempt to save the clients life. (*Id.* at 562, 563).

This was not the "strategy' utilized by counsel for Mr. Cox in admitting in the opening statement that Mr. Cox stabbed and killed Baker. Rather, Higgins' concessions appear to be errors made by inexperienced counsel not qualified to handle death penalty cases. Mr. Higgins testified at the evidentiary hearing that he became a member of the Florida Bar in April of 1998. (ROA-PC-Vol. 5 at 98). Mr. Cox's trial began on March 6. 2000, less than two years after Mr. Higgins had become a member of the Florida Bar. (ROA-PC-vol v at 102) Mr. Higgins also testified that he had been handling felony cases for one year before working as co-counsel in Mr. Cox's trial.

The Guidelines of the American Bar Association for the Appointment and Performance of Counsel In Death Penalty Cases state the following guidelines for appointment of Trial co-counsel in death penalty cases:

> Trial co-counsel assignments should be distributed to attorney's who:
>
> 1. Are members of the bar admitted to practice in the jurisdiction and

> 2. Who qualify as lead counsel under paragraph 9A) of this Guideline or meet the following requirements:
>
> a. are experienced and active trial practitioners with at least **three years litigation experience in the field of criminal-defense**; and
>
> b. have prior experience as lead counsel or co-counsel in no fewer than three jury trials of serious and complex cases which were tried to completion, **at least two of which were trials in which the charge was murder or aggravated murder, or alternatively, of the three jury trials, at least one was a murder or aggravated murder trial and one was a felony jury trial**; and
>
> ABA Guidelines for Appointment and performance of
>
> Counsel in death penalty cases, Guideline 5.1.

Florida Rule of Criminal Procedure 3.112, (1999), adopted the ABA standards for the level of experience needed for co-counsel in death penalty cases as follows:

> (f) Cocounsel: Trial cocounsel assignments should be given to attorneys who:
>
> (1) are members of the Florida Bar admitted to practice in the jurisdiction,
>
> (2) Who qualify as lead counsel under paragraph (e) of these standards or meet the following requirements:
>
> (A) are experienced and active trial practitioners with **at least three years of litigation experience in the field of criminal law**: and

(B) **have prior experience as lead counsel in no fewer than three jury trials of serious and complex cases which were tried to completion, at least two of which the charge was murder; or alternatively, of the three jury trials, at least one was a felony jury trial;**

F.R.C.R. 3.112 (f)

The purpose of the rules regarding minimal qualifications for death penalty counsel are stated in the comments: "These standards are based on the general premise that the defense of a capital case requires specialized skill and expertise. The Supreme Court has not only the authority, but the constitutional responsibility to ensure that indigent defendants are provided with competent counsel, especially in capital cases where the State seeks to take the life of the indigent defendant".

Applying the standards of the ABA and the Florida Rules of Criminal Procedure, Mr. Higgins did not meet the minimal requirements to handle a death penalty case as cocounsel. He did not have the experience mandated by the rules – he had been practicing law less than two years before appearing as co-counsel in a death penalty case. Admittedly, this does not establish a "per se" ineffectiveness. However, the lack of experience of defense counsel likely contributed to the error of admitting Mr. Cox's guilt in the opening statement, as well as other instances of ineffectiveness on the part of Mr. Higgins, e.g. putting forth defenses not allowed in the law. *See infra.*

The admission of guilt was <u>not</u> discussed with Mr. Cox, and in fact Mr. Higgins testified that the theory of the case was going to be that Mr. Cox was <u>not</u> the person who inflicted the fatal stab wound, in direct conflict with the

admission in the opening statement. (ROA-PC-Vol. V at 106) Mr. Higgins further testified that he never received permission from Mr. Cox to concede to the jury that Mr. Cox was the one who stabbed Mr. Baker. *Id*.

The evidence establishes that Mr. Higgins admitted that Mr. Cox killed Mr. Baker, that Mr. Cox never agreed to this, and that the admission was entirely *inconsistent* with the defense theory of the case. This is in sharp contrast with the permitted concession in *Nixon*, in which there was no viable defense and the concession was made in an attempt to avoid a death sentence. Therefore, unlike *Nixon*, the concession by Mr. Higgins amounts to ineffective assistance of counsel under the *Strickland* standard and Mr. Cox is entitled to relief. This ineffectiveness should also be considered cumulatively with other instances of ineffective assistance of counsel in assessing the prejudice prong of *Stric* The lower court erred in finding in the order denying postconviction relief that counsel Higgins did not concede anything in opening. (ROA-PC-Vol. I at 318). Contrary to this holding by the lower court, and consistent with the prosecution's correct understanding of the concession (the result of observing the presentation), Mr. Higgins' opening statement was an admission of guilt which had not been discussed or agreed to by Mr. Cox, in abrogation of the duty to provide competent counsel required by *Strickland* and *Nixon*.

Strickland.

The legal principles that govern claims of ineffective assistance of counsel were established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed2d 674 (!984). An ineffective assistance of counsel claim has two components: a petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. Id. At 687, 104 S.Ct. 2052. To establish deficient performance, a petitioner must establish that counsel's representation "fell below an objective standard of reasonableness." Id. At 688, 104 S.Ct. 2052. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. Id.

Mr. Cox asserts that the totality of his counsel's performance in guilt and penalty phases of his trial was deficient and prejudiced his defense.

B. INEFFECTIVENESS DURING JURY SELECTION

The defense was incompetent for failure to object to blatantly improper questioning and statements by the prosecutor during jury selection:

> If the evidence in aggravation outweighs the evidence in mitigation, then under the law the recommendation of the jury should be for the death penalty. (Tr. 632)
>
> If you have the evidence in aggravation outweighs the evidence in mitigation you must recommend Mr. Cox dies. (Tr. 633)

Mr. Ullah, same question, even though the law would require a recommendation form you sir, the Mr. Cox die, do you think you could do it? (Tr. 634)

Let's assume that clearly the evidence in aggravation outweighs the evidence in mitigation, it was obvious to you as a juror........could you make that recommendation? (Tr. 635)

If the law says that if the aggravating circumstances outweighs the mitigating it requires that you make the recommendation for death, can you follow and obey that law? (Tr. 636)

Could you make that recommendation that Mr. Cox over here die for his crime, should the evidence tip the scale against life in prison and in favor of the death penalty? (Tr. 640)

What the law says is that you need to weigh the evidence against and weigh it in the other direction and depending upon which way it balances out, that is supposed to decide your recommendation. (Tr. 641)

And if the evidence in favor of the death penalty, the aggravating evidence is heavier, it is more substantial than the evidence in favor of a life sentence, then your recommendation should be for the death penalty. (Tr. 642)

If the evidence in favor of the death penalty outweighs the evidence against the death penalty, would you in consideration of your conscious and your own belief be able to make that recommendation of death for Mr. Cox? (Tr. 644)

On the other hand, if the aggravating evidence outweighs on the imaginary scale of justice, the mitigating evidence, then by law your individual vote must be that he dies. (Tr. 844)

If the evidence in aggravation outweighs the mitigating evidence...if the evidence in aggravation outweighs the mitigation, can you make that recommendation that Mr. Cox over here die? (Tr. 845)

> If the defendant is convicted and the evidence that you hear next week in aggravation outweighs the mitigating circumstances, do you think that you could make that recommendation? (Tr. 846)
>
> If the evidence in aggravation suggests that it is appropriate punishment, that it outweighs the mitigating evidence, can you make that recommendation? (Tr. 858)
>
> Now, the judge is going to tell you that the law says you must make the recommendation based upon the evidence, which way the scales tip...(Tr. 858).

The claim that the above statements by the prosecutor were fundamental error was raised by Mr. Cox on direct appeal. This Court ruled as follows:

> During jury selection, the prosecutor misstated Florida law by advising the prospective jurors that "if the evidence in aggravation outweighs the evidence in mitigation, the law says that you *must* recommend that Mr. Cox die." (Emphasis added.) The substance of this statement was repeated five times to the jury, four times during voir dire and once during closing arguments. It is unmistakable that these statements are improper characterizations of Florida law regarding weighing mitigators and aggravators, as we have declared many times that "a jury is neither compelled nor required to recommend death where aggravating circumstances outweigh mitigating factors." *Henyard v. State,* 689 So.2d 239, 249-50 (Fla. 1996); *see also Gregg v. Georgia*, 428 U.S. 153, 203, 96 S.Ct. 2909, 49 L.Ed2d 859 (1976)(holding that a jury can dispense mercy, even where the death penalty is deserved); *Alvord v. State,* 322 So.2d 533, 540 9Fla. 1975). Additionally, Florida statutory law details the role of a penalty phase jury, which directs the jury panel to determine the proper sentence without precise direction regarding the

weighing of aggravating and mitigating factors in the process:

> After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
> (a) Whether sufficient aggravating circumstances exist...
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
> (c) Based upon these considerations, whether the defendant should be sentenced to life imprisonment or death.

921.141(2), Fla. Stat. (2001). **The defense in this case did not, however object to the State's mischaracterization of the law at any time.**
Despite the lucidity of the law here, and the unavoidable conclusion that the prosecution's comments during Cox's trial were error, we hold that no fundamental error occurred in the instant case. Fundamental error "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Kilgore v. State*, 688 So.2d 895, 898 (Fla. 1996)(quoting *State v. Delva*, 575 So.2d 643, 644-45 9Fla. 1991)0. During voir dire, the prosecutor made the following additional statements:

> Well. Maybe I'm being a little too simplistic here. What the law says is that you need to weigh the evidence against and weigh it with other in the other direction, and depending upon which way it balances out, that is supposed to decide your recommendation. You're supposed to make your recommendation based upon the weight. It's not worded that way, but that's a short rendition.

Also, the trial court did not repeat the prosecutor's misstatements of the law during its instruction of the jury–indeed the trial court's instructions properly informed the jury of its role under Florida law. Thus, the prosecutorial misrepresentation of the law was harmless

> error, and certainly does not constitute fundamental error. *See Henyard*, 689 So.2d at 250 (holding that three of precisely the same prosecutorial misstatements of the law, when accompanied by correct jury instructions on the matter, were *harmless error*).

Cox at 717.

Although this Court denied the claim of fundamental error regarding the remarks of the prosecution during voir dire and closing argument, this does not foreclose a claim of ineffective assistance of trial counsel for failing to object to the prosecutor's misstatements of the law which this Court recognizes were overt misstatments. The standard for fundamental error and ineffective assistance of counsel are different. As stated by this Court, to be fundamental, error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. This is quite different from the more friendly defense standard of ineffective assistance of counsel claims. To establish prejudice under *Strickland* the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland* at 694 (*see also Rose v. State*, 675 So.2d 567 (Fla. 1996); *Rutherford v. State*, 727 So.2d 216, 220 (Fla. 1999).

Furthermore, in claims of ineffective assistance of counsel, the cumulative effect of all of counsel's errors must be considered when determining the prejudice prong of *Strickland.* (*See Cherry v. State*, 659 So.2d 1069, 1074 (Fla. 1995); *Mclin v. State*, 827 So.2d 948 (Fla. 2002)(holding that a cumulative effect analysis is necessary in ineffective assistance of counsel claims). Mr. Cox asserts that the failure of his trial counsel to object to the mischaracterizations of law by the prosecution in voir dire and closing, which this Court recognizes were clearly erroneous, is one of several instances of ineffective assistance of counsel. A cumulative analysis of all the claims of ineffectiveness in this motion is necessary.

In addition to failing to object to the mischaracterizations of law by the prosecutor during voir dire, trial counsel also joined in the mischaracterization as follows:

> The judge is the one who will instruct you as to what mitigators are that you can consider. It is up to you to decide whether any aggravators have been proven, and, if so, which ones outweigh the others. (Tr. 678)

The clear meaning of the statement by the defense counsel is that the jury would be merely weighing aggravators and mitigators and would be legally obligated to impose a death sentence if the aggravators outweighed the mitigators. Trial counsel could have corrected the mischaracterizations of the prosecution by informing the jury they did not have to recommend death even if the aggravators

outweighed the mitigators. Failing to understand this longstanding point of law fell short of the professional standard of care in Florida in 2000.

Trial counsel also conducted the voir dire in an unprofessional manner. The extremely brief questioning by trial counsel did not probe the jury panel as to several important areas standard in death penalty litigation. Virtually no questions were asked of the panel concerning mental mitigation and mental health issues. At one point in the questioning of the prospective panel, trial counsel asked a jury about answers she had given on her jury form where she stated “fry him” “once they get cooked they ain’t gonna kill anyone else”(ROA III 671-672). Although it may have been important to question this juror concerning these statements, to do it before the entire panel was short of the professional standard of care. Trial counsel’s cursory and incomplete voir dire fell short of the professional standard of care in Florida in 2000.

C. **INEFFECTIVENESS DURING OPENING STATEMENT**

Trial counsel was further ineffective in opening statement by arguing defenses not recognized in the law. Counsel argued in opening statement as follows:

> The guards should have locked up Baker and Wilson for fighting..........The first thing they could have done to save Baker’s life...Had he been locked up he wouldn’t have been in harms way. (ROA XIV 959)

> No guards were around during the fight...the fight could have been broken up before it escalated to the point of Venezuela ended up dying. (ROA XIV 962)
>
> After Baker reported stabbing to Officer Parker..."I've been hit", she attempted to call emergency medical with no answer. (ROA XIV 964)
>
> They have a rule requiring getting inmates into medical treatment within three minutes of call..didn't do it in this case. (ROA XIV 966)
>
> The poor medical care to Baker makes you wonder where fault for this case lies (ROA XIV 967)

The delay in medical care given to Mr. Baker by the prison authorities is not a valid defense to the homicide in question. The lower court ultimately agreed with the state that this was not a valid defense (ROA XIV 973-984) Putting forth a defense later ruled invalid damaged the defense's credibility with the jury and shifted focus away from the defense which Mr. Cox asserted, that Vincent Maynard killed Mr. Baker.

D. INEFFECTIVENESS DURING THE GUILT PHASE

Counsel was ineffective for failure to object when the State elicited opinions from the medical examiner which did not meet the standard of admissibility under Florida law.

At Mr. Cox's trial, the State called medical examiner Dr. Janet Pillow. The state asked the following questions of Dr. Pillow:

> Q. Would a person who is experiencing these injuries after being injured, but prior to being rendered

unconscious from lack of blood, would they be able to recognize that they were in serious danger of dying?
A. That's certainly **possible**. (Tr. 1004, emphasis added)

Q. Doctor, I have one more item to show you it's not in evidence, so we really can't display it yet, but it's been marked for purposes of identification as State's exhibit A, and I am going to ask you to assume that this is the same item that you saw depicted in State's exhibit G, I think, the photograph–Im sorry H. Is that the weapon, which of course is now in a different condition that when it was originally found, is that weapon **consistent with** having caused the injury that you saw to Thomas Baker?
A. Yes Sir.

Q. Doctor, let's assume that the shank in the photograph was plunged into Mr. Baker's body and then drawn out through cloth, because of the lack of a significant amount of bleeding, is it possible that the cloth itself would wipe off the blood as the weapon is being pulled back out of the cloth.
A. That's possible but also because of the type of injury and the narrowness of the injury, stab wound, of the size of the skin, as the weapon, or whatever is being drawn out of the body, by just drawing out **could** wipe away any visible effects of blood, and certainly anything else that the blade might come through, whether it's cloth or any other substance, could also possibly wipe off the blood, if there were blood. (Tr. 1005, 1006 emphasis added)

Q. So, even though the weapon goes through a big blood vessel right off the heart, as it's being pulled out, the mechanical rubbing of the skin **could** clean the blade of detectable blood?
A. Yes sir. (Tr. 1006)

(ROA XVI at 1005-1007)

Trial counsel was ineffective for allowing the state to elicit testimony about mere possibilities of the victim's awareness of imminent death (a matter which was irrelevant in the guilt phase and highly prejudicial), and to engage in rank speculation as to whether blood on the shank "could" have been wiped clean. Reasonably professional counsel would have objected to the state's introduction of possibilities and speculation through the medical examiner. Competent counsel would have required the testimony to be in the form of opinion based upon a reasonable degree of medical probability. Only when testifying as to actual cause of death can a medical examiner expert testify as to less than a reasonable degree of medical probability. (*See Delap V. State*, 440 So.2d 1242 (Fla. 1983) All other opinions must be within a reasonable degree of medical probability.

Trial Counsel was ineffective in the manner in which he cross examined Vincent Maynard.

This Court addressed counsel's cross-examination of Vincent Maynard as follows:

> In the preparation for the testimony of the witnesses to the appellant's "reward pronouncement," the trial court granted a defense motion in limine to preclude the State from introducing any evidence of the appellant's statement during his proclamation that he did not care about the consequences of killing the thief, because he was already serving two life sentences. To ensure compliance with the order, the court instructed the State

to inform all of its witnesses of the ruling, and the court also did so before each of them testified. All of the witnesses complied with the order.

During the defense case-in chief, the appellant's attorney's elicited the testimony of Vincent Maynard, another LCI inmate. After an initial period of neutral direct examination, the defense began to explicitly attempt to blame Maynard for the death of the victim. The defense proffered reverse *Williams* rule evidence of Maynard's prior crimes, and started to question him in an openly hostile manner, resulting in an argumentative exchange of questions and answers between the examining attorney and the witness. Not long after direct examination in the presence of the jury commenced, Maynard responded to a wholly unrelated but hostile line of questioning by saying, "Sir, he has two life sentences already." The defense moved for a mistrial, however, the court denied the motion and gave the following curative instruction:

> Ladies and gentleman, you are instructed that the sentence that Mr. Cox was serving at Lake Correctional Institution is not relevant to this case in any way. He has never been convicted nor is he serving any sentence for homicide or any type of murder.

The appellant contends that this situation os similar to the circumstances addressed by the Fourth and First Disctrict Courts of Appeal in *Bozeman v. State*, 698 So.2d 629 9Fla. 4th DCA 1997), and *Thomas v. state*, 701 So.2d 891 (Fla. 1st DCA 1997). In each of these cases, a witness for the state was wrongly allowed to relay to the jury that the defendant was housed in a portion of the correctional facility "reserved for the more violent inmates." *Thomas*, 701 So.2d at 89 ; see *also Bozeman*, 698 So.2d at 630. As juries in those cases were extraordinarily likely to infer from such testimony that the defendant had committed the acts of violence of which they were accused, each court of appeal reversed the defendant's conviction and

> remanded for anew trial. *See Bozeman*, 698 So.2d at 632; *Thomas*, 701 So.2d at 893.
> A close reading of the *Bozeman* and *Thomas* , however, reveals that the information related to the jury in both those cases was critical to the prosecution's factual theories, because both of the defendants were accused of attacking someone and both asserted at trial they were only defending themselves. *See Bozeman*, 698 So.2d at 630; *Thomas*, 701 So.2d at 892. The fact of being housed in a particular section was used to enhance apredisposition for violence. In the instant case, the fact that Cox was serving two life sentences was certainly not critical to the State's case, and was not related to its theories– the jury already knew that he was an inmate at the lake Correctional Institution where the events occurred. Additionally, defense counsel knew and assumed the risks of argumentatively questioning in an openly hostile manner, and chose to do so in an extraordinarily hostile manner. While the defense may have been chagrined that the jury was informed that the appellant was serving two life sentences due to the defense strategy, this information did not "vitiate the entire trial". *Duest v. State*, 462 So.2d 446, 448 (Fla. 1985)

Cox at 713, 714.

This Court essentially stated in the *Cox* opinion that trial counsel, in the manner of questioning Mr. Vincent, caused the prejudicial information that Mr. Cox had two life sentences to come before the jury. This was ineffective assistance of counsel. Utilizing strategy which led to the introduction of otherwise inadmissible evidence is below the professional standard of care in Florida in 2000. The lower court erroneously found, contrary to the findings of this court, that the

Counsel Stone's examination did not invite the response from Mr. Maynard. (ROA-PC-Vol. II at 329). The lower court also failed to conduct a cumulative analysis of all the ineffectiveness claims, as this Court has stated is required.

Trial counsel was ineffective for failing to investigate and present evidence of a pattern of threats and intimidation utilized by State investigators toward inmates at Lake Correctional Institution in order to obtain trial testimony against Mr. Cox.

As to the claim of ineffectiveness for failing to investigate the pattern of abuse and intimidation against potential defense witnesses, Mr. Cox asserts that the testimony of Mr. Henry Wheeler established this claim. Mr. Wheeler testified that Inspector Williams told him to stay out of the Cox case, and wanted to know if Wheeler had spoken to any defense lawyers. (ROA-PC-VOL-III at 151) Williams told Wheeler that he could "make it tough" for him in the institution. He stated that Mr. Williams told him "life could be a living hell" if he helped Alan Cox. (ROA at 158). After agreeing not to testify, Wheeler was sent to an air conditioned prison. (ROA-PC-VOL. III at 158). He stated that the probation and parole officer told him that if he testified that "you know they could make things rough on you", that there "could be repercussions from it," and that "it would not be a good idea". (ROA-PC-VOL-III at 169) Inspector Williams also gave him an intimidating look in the Tomoka Correctional Institution. (ROA-PC-VOL-III at 169).

Inspector Williams told Mr. Wheeler that no matter what the outcome of this was done with the judges and the State Attorney's Office, Allen Cox would never leave the cell again. (ROA-PC-VOL. IV at 177) Wheeler further testified that he told Counsel Higgins about the intimidating statements Wheeler had made. (ROA-PC-VOL.AT 208). Failure to utilize Mr. Wheeler and present the pattern of intimidation and abuse by personnel of the DOC was ineffective assistance of counsel.

Once again, Mr. Higgin's inexperience amplifies the ineffectiveness claim as he was the lawyer Mr. Wheeler talked to before deciding not to testify. Mr. Wheeler would have been highly useful in exposing the outrageous governmental actions, and the bias and prejudice of Mr. Williams and other DOC employees.

Mr. Wheeler also testified as to recent statements made to him by Vincent Maynard concerning getting Mr. Cox drunk and the smile he gave when asked about the fourth stab wound. This constitutes newly discovered evidence under the *Jones* standard.

CONCLUSION

Trial counsel was ineffective at all stages of trial. A near total failure to develop the readily available mitigation evidence deprived the court, the jury,

and the experts of the knowledge which establishes a death sentence in this case is constitutionally impermissible. Inexperienced co-counsel was employed who did not meet the requirements of the ABA standards and Florida rules. This contributed to the failure in the penalty phase. This also resulted in the damaging admissions in the opening statement which vitiated the theory of defense and advanced unfounded defenses which led to the loss of credibility with the jury. Multiple failures in the guilt phase compound the prejudice.

The individual and cumulative effect of the constitutionally deficient defense compel reversal for a new trial.

DEMAND FOR ORAL ARGUMENT

Due to the important nature of this death penalty case, Mr. Cox requests that this court allow Oral Argument.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **INITIAL BRIEF** Has been furnished by U. S. Mail, first-class, to all counsel of record on this 12th, day of January, 2006.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing INITIAL BRIEF OF APPELLANT, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210**.**

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