IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 07-648

FRED ANDERSON, JR.,

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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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Mr. Anderson's motion for postconviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851.

Citations shall be as follows: The record on appeal from Mr. Anderson's trial proceedings shall be referred to as "TR" followed by the appropriate volume and page numbers. The postconviction record on appeal shall be referred to as "ROA" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Fred Anderson has been sentenced to death. The resolution of issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims at issue and the stakes involved. Fred Anderson, through counsel, respectfully requests this Court grant oral argument.

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Procedural History

On March 20, 1999, Fred Anderson was arrested and was subsequently charged in a five count indictment with Burglary of a Structure, Grand Theft of a Firearm, Armed Robbery, Attempted First Degree Murder, and First Degree Murder. TR Vol I, p. 6. The Public Defender of the Fifth Judicial Circuit was appointed on March 21, 1999. TR Vol I, p. 5. On April 1, 1999, William H. Stone of the public defender's office filed a written plea of not guilty, and a notice of discovery. TR Vol I, p. 8. Clinton Doud, also of the public defender's office at that time, joined Mr. Stone as second chair approximately four or five months after Mr. Anderson's arrest. ROA Vol. X, p. 1736, 1857.

Mr. Anderson's trial began on September 25, 2000 and concluded on October 3, 2000. The penalty phase began on October 5, 2000 and concluded on the same day. The jury recommended death by a vote of 12-0. The Spencer Hearing took place on December 8, 2000, and the trial court sentenced Mr. Anderson to death on January 11, 2001. The trial court found the following aggravators: 1)CCP; 2)Pecuniary gain; 3) Previous conviction of a felony and under sentence of imprisonment or placed on community control or on felony probation; 4)Prior violent felony (contemporaneous attempted first degree murder of Marishia Scott). The defense only argued for the catchall

statutory mitigator and the trial court found the following non statutory mitigation: 1) Remorse for his conduct (moderate weight); 2) Cooperation (some weight); 3)The court consolidated strong religious faith, active in his church, and active in community churches (substantial weight); 4)The court consolidated past achievements and constructive involvement, contributions to his community and society through exemplary work, care for his family and community, well liked in his community, sympathetic and thoughtful of people (moderate weight); 5)Loving relationship with family (little weight); 6)Employment history (little weight); 7) The court consolidated potential for rehabilitation and skills to be productive in prison (little weight); 8)No prior history of violence (substantial weight); 9)Appropriate courtroom demeanor (little weight); 10) Willingness to plead (little weight). This Court affirmed the conviction and sentence of death. Anderson v. State, 863 So.2d 169 (Fla. 2003).

Mr. Anderson timely filed his motion for postconviction relief on March 18, 2005. A Case Management Conference was held on August 2, 2005. The postconviction court entered an order on September 28, 2005 granting an evidentiary hearing on all claims designated by Mr. Anderson and reserved ruling as to the final cumulative error claim. ROA Vol.II, p. 368. On December 19, 2005, Mr. Anderson filed a motion to amend his 3.851 and an

amended 3.851 including a shackling claim. ROA Vol. II, p. 380. The State filed a written response objecting to the motion for leave to amend on or about January 17, 2006. ROA Vol. III, p. 438. The postconviction court granted Mr. Anderson leave to amend on January 20, 2006. ROA Vol. III, p. 467.

On December 29, 2005, Mr. Anderson filed a motion to interview jurors based on the shackling claim. ROA Vol. III, p. 422. The State filed its response, objecting to the motion, on or about January 17, 2006. ROA Vol. III, p. 445. The motion was denied on January 20, 2006 after a hearing on January 18, 2006. ROA Vol. III, p. 465; ROA Vol. VIII, p. 1445-1486.

The evidentiary hearing began on January 23, 2006 and concluded on January 25, 2006. Written closings were subsequently filed by both parties and on January 24, 2007, the postconviction court entered an order denying relief. ROA Vol. V, p. 836. A motion for rehearing was timely filed on February 7, 2007. ROA Vol. V, p.870. The motion for rehearing was denied on February 28, 2007. ROA Vol. V, p. 879. A Notice of Appeal was timely filed on March 29, 2007. ROA Vol. V, p. 881.

STATEMENT OF FACTS

Testimony and evidence admitted at the postconviction hearing established the following facts. Mr. Anderson presented the testimony of Dr. Villalba, who is a board certified forensic psychiatrist, a board certified child and adolescent

psychiatrist, and a board certified adult psychiatrist. ROA Vol. IX, p. 1495. The state stipulated to Dr. Villalba's qualifications. ROA Vol. IX, p. 1494. In forming his opinion, Dr. Villalba reviewed videotapes of Mr. Anderson's statements to law enforcement, reviewed Dr. McMahon's records, conducted a four hour clinical interview with Mr. Anderson, and also performed psychometric testing. ROA Vol. IX, p. 1496. Dr. Villalba testified that he achieved valid results in his psychometric testing and that there were no indications of malingering. ROA Vol. IX, p. 1538-39.

Dr. Villalba diagnosed Mr. Anderson with post-traumatic stress disorder as a result of an eight-year history of sexual abuse perpetrated by his cousin. ROA Vol. IX, p. 1497. Dr. Villalba also diagnosed Mr. Anderson with borderline personality disorder as a result of long standing substance abuse. Id. 1497. Dr. Villalba found no evidence of anti-social personality disorder. ROA Vol. IX, p. 1502.

Dr. Villalba testified about how the post traumatic stress disorder diagnosis and the borderline personality disorder interact with and affect one another. He explained:

> What happens in individuals who -- children who have long-standing history of abuse is that a long-standing trauma tends to fragment the development of personality or ego… And basically the long-standing abuse causes almost like taking a rock and throwing it at a mirror. It fragments in

> all aspects of the personality. So these types of individuals tend to develop chronic, maladaptive types of behavior, which very much correlate with the post-traumatic stress disorder in terms of poor impulse control, poor judgment, problems with sense of identity, sense of self and problems with interpersonal relationships.

ROA Vol. IX, p. 1502-1503.

In describing Mr. Anderson's mental illness, Dr. Villalba testified that Mr. Anderson experiences "severe dissociated symptoms as evidenced by his inability to recall parts of the events that took place during the felony murder." ROA Vol. IX, p. 1504. Dr. Villalba went on to describe Mr. Anderson's dissociation as it occurred during the bank robbery:

> Well, he reports feeling that things were not real or he did not have - - he had almost like a dream-like state. And what's interesting that he reported the same type of dissociated type feeling during periods of being sexually abused by the cousin.
>
> *****
>
> Basically being in a dream like or a state where you feel like things are not real or you're not real. Sometimes it could even be that other people are acting like if they were you or you're seeing yourself outside or like in a movie picture. It's very common in individuals with intense history of trauma.

ROA Vol. IX, p. 1505.

Dr. Villalba testified that Mr. Anderson met the statutory mental mitigator that the capital felony was committed while Mr. Anderson was under the influence of extreme mental and emotional

disturbance. ROA Vol. IX, p.1509. This was based on the diagnoses detailed above. Dr. Villalba also opined that it was not uncommon in a family like Mr. Anderson's to hide the sexual abuse he suffered as a child. Id.

Dr. Berland, a board certified forensic psychologist with over 27 years of experience, 20 of those dealing with primarily capital cases, also evaluated Mr. Anderson. Dr. Berland reviewed numerous documents, reviewed psychological and neuropsychological testing of Drs. McMahon and McClaren, met with Mr. Anderson on two occasions, and conducted interviews with lay witnesses Henry Banks, Latasha Harrision, Marty Kirens, Raymond Green, and Geneva Anderson, which provided corroborating information regarding Mr. Anderson's life history and behavior patterns prior to the crime. ROA Vol. IX, p. 1548. Dr. Berland's notes, prepared in outline form, were admitted into evidence and appear at Volume VI, p. 1074-1080 of the postconviction Record on Appeal.

In reviewing the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) of Dr. McMahon, Dr. Berland testified that Mr. Anderson's profile showed "significant delusional paranoid thinking." ROA Vol. IX, p. 1555. Dr. Berland concluded that this delusional paranoid thinking "indicates the presence of a long-standing chronic psychotic disturbance." ROA Vol. IX, p. 1556. Dr. Berland also reviewed Dr. McClaren's MMPI-2 and found

that while Mr. Anderson's delusional paranoid thinking appears less intense than when Dr. McMahon tested him, the delusional thinking is still present. ROA Vol. IX, p. 1557. He went on to explain, "With this kind of mental illness, with this psychosis, basically once you have it, you have it for life. It may wax and wane, but it doesn't go away." ROA Vol. IX, p. 1558. Dr. Berland testified that there was no evidence in either MMPI-2 profile that Mr. Anderson was attempting to fake or exaggerate his mental illness, and in fact in both profiles there appeared to be an attempt to hide or minimize his mental illness. ROA Vol. IX, p. 1555, 1557. Dr. Berland acknowledged that this was significant because given the situation that Mr. Anderson is currently in, it would be in his best interest to fake or exaggerate his symptoms. ROA Vol. IX, p. 1557.

Dr. Berland concluded that based on all of the sources he looked at, Mr. Anderson is actively psychotic and the psychosis was interfering with Mr. Anderson's ability to remember and report the events surrounding the bank robbery. ROA Vol. IX, p. 1562. Dr. Berland testified that based on Mr. Anderson's psychosis, he believed that Mr. Anderson met the statutory mitigator that at the time of the crime he was under the influence of extreme mental or emotional disturbance. ROA Vol. IX, p. 1554, 1562.

Dr. Berland testified that Mr. Anderson's "psychotic disturbance… has a panoramic effect on his thinking and decision making." ROA Vol. IX, p. 1569. As such, Dr. Berland concluded that at the time of the crime, Mr. Anderson's capacity to conform his conduct to the requirements of the law was substantially impaired. Id.

Dr. Berland testified to the effects a head-on car accident had on Mr. Anderson's brain. Dr. Berland was able to speak to witnesses who had known about the accident, which occurred when Mr. Anderson was approximately 22 years old and while he was away at college. ROA Vol. IX, p.1573. He was also able to speak to Marty Kirens, who had actually been in the car accident with Mr. Anderson. Mr. Kirens told Dr. Berland that both he and Mr. Anderson struck their heads on the windshield during the crash, causing the windshield to crack. ROA Vol. IX, p.1574. Mr. Anderson was dizzy and dazed after the crash, and both were taken to the hospital. ROA Vol. IX, p.1574. Mr. Anderson reported headaches and dizziness after the accident for some period of time. ROA Vol. IX, p.1575.

Other witnesses confirmed that Mr. Anderson's behavior changed in some ways after the accident. For example, Geneva Anderson noted that Mr. Anderson had frequent headaches and was vomiting in the days following the accident. ROA Vol. IX, p.1576. She also reported that he had memory problems for

several months after the accident. ROA Vol. IX, p.1576. Geneva told Dr. Berland that Mr. Anderson would get angry easily over little things that would not have bothered him before the accident. Id. She also acknowledged that after the accident, Mr. Anderson would often stare through people, or stare at her like he was reading her thoughts. ROA Vol. IX, p.1576, ROA Vol. VI, p. 1076. Lathsha Harrison and Henry Banks also noticed this tendency of Mr. Anderson to get easily angered over little things after college, but not before. ROA Vol. IX, p.1578. They also noted that he had depressive episodes after college, but not before. ROA Vol. IX, p.1578. Dr. Berland attributed these behaviors to the "significant brain injury" that Mr. Anderson suffered in the car accident. ROA Vol. IX, p.1577, 1578. Dr. Berland testified that the brain injury contributed to Mr. Anderson's mental illness and so in that sense it related to his extreme mental or emotional disturbance. ROA Vol. IX, p.1578. However, he also testified that "it's a separate piece of mitigating information" and "stands on its own." Id.

Dr. Berland also discussed the repeated violent acts of sexual abuse that Mr. Anderson suffered at the hands of his older cousin over a period of six or seven years. Dr. Berland opined that Mr. Anderson's mental illness is an explanation of why he hid the abuse from Dr. McMahon. He stated:

> To that it is necessary to add the effects of his biological - - Mr. Anderson's biological mental illness, his psychotic disturbance, which has consistently shown itself to be of a type where he is trying to hide or minimize reports of any problems that he has, whether they be mental health problems or emotional problems from an event like this. *So it would not be unexpected that he might have denied that, but this information appears to have been readily available from other sources.*

ROA Vol. IX, p.1584(emphasis added). Dr. Berland spoke of the significance of the sexual abuse and how it relates to mitigation in Mr. Anderson's case.

> There is a substantial and fairly long-standing literature on the long-term adverse emotional consequences of either sexual assaults on young children and/or violent assaults on young children. And this seems to fit into both categories so that it would appear to be a mitigating fact in that there's substantial literature which says that this kind of thing, especially because it was unresolved, has long-term consequences emotionally for the victim and would therefore be considered mitigating.

ROA Vol. IX, p.1582-83.

Reverend Raymond Green, Mr. Anderson's cousin, testified to repeated instances of sexual abuse that he and Mr. Anderson suffered at the hands of Michael Green, uncle to Raymond and cousin to Fred. Mr. Green's paternal grandmother and Mr. Anderson's mother are sisters. ROA Vol. X, p. 1694. Raymond witnessed the abuse on Fred on several occasions. ROA Vol. X, p. 1699. The abuse happened nearly every day. ROA Vol. X, p.

1609,1702. Michael Green would force the boys to perform oral sex and Michael Green anally raped Fred. ROA Vol. X, p. 1701. Raymond and Fred often discussed how painful the abuse was due to the size of Michael Green's penis. ROA Vol. X, p. 1703. One particularly violent incident stood out in Raymond's mind. ROA Vol. X, p. 1704. When he was eight and Fred was seven, both boys had been sent to the store with Michael Green. ROA Vol. X, p. 1705. One the way home, they knew that Michael was expecting sexual favors from them and upon realizing this, started to run. Id. Raymond was able to run faster than Fred and when he realized that Fred was not beside him, Raymond looked back and saw that Michael had tripped Fred and Fred was on the ground. 1706. Raymond kept running. ROA Vol. X, p. 1707. In a little while, Fred came home with bloody underwear and told Raymond that "Uncle Mike had done that to him." Id. Ashamed and crying, Fred asked Raymond to help him bury the bloody underwear in the backyard. ROA Vol. X, p. 1708.

Raymond testified that the abuse continued for four years, until he was nine and he and his parents moved to North Carolina. ROA Vol. X, p. 1711. For Fred, however, the abuse continued until he was thirteen or fourteen. ROA Vol. IX, p. 1580.

Dr. McMahon, a clinical psychologist, testified that she was appointed by the court at the request of the defense to

assess competency to stand trial, mental status at the time of the offense, and any possible mitigation. ROA Vol. IX, p. 1622, 1623. She interviewed Fred a total of four times. ROA Vol. IX, p. 1625. Two of the interviews were in September (less than three weeks before trial), one was on the day of trial during jury selection, (though that was for a session with a hypnotist and not a clinical interview), and the last one was in between the guilt and penalty phase to assess competency. Id. Dr. McMahon reviewed background materials but did not speak to any potential mitigation witnesses. ROA Vol. IX, p. 1625. She testified that it is her practice to rely on the attorneys to provide background information about the defendant to her. ROA Vol. IX, p. 1624.

Dr. McMahon testified that she usually has more time to interview and evaluate on capital cases and that it did concern her that she was appointed only a few weeks before trial. ROA Vol. IX, p. 1683. She testified that she had previously turned down a capital case from that same public defender's office where she felt she did not have enough time. ROA Vol. IX, p. 1683.

When asked about the sexual abuse, Dr. McMahon testified that had she known about the abuse, she certainly would have pursued it. ROA Vol. IX, p. 1640, 1643. She did ask Fred about abuse, but it was in the context of asking about parental abuse,

and she testified on cross examination that Fred could have been thinking she was only referring to parental abuse. ROA Vol. IX, p. 1660. She stated:

> A: Wait a minute. Let me say in response to that, you know, I'm asking that along with tell me about your mom and dad alone. I wasn't thinking in that sense that he had been sexually molested by a relative across the street. He may well have thought that my questions was meant narrowly, meaning had you ever been abused by anyone in your household, in other words, by your parents. If I had any idea that that had occurred, I would have pursued that differently. But I just asked it with tell me about your childhood, did you have any abuse that occurred. So I didn't expand on it.

ROA Vol. IX, p. 1660. Dr. McMahon went on to explain that while she did not see any "red flags" that would indicate post-traumatic stress disorder, she was not assessing for it. ROA Vol. IX, p. 1663. She talked about how her normal practice would be to sit down with the data and reflect on it for awhile and then go back if necessary. ROA Vol. IX, p. 1663. She did not see Mr. Anderson until September 6th, and jury selection began on September 25th. ROA Vol. IX, p. 1625.

Mr. Stone testified that he was the primary attorney for Mr. Anderson and that at the time of Mr. Anderson's trial, he had been a full time public defender for 10 years. ROA Vol. X, p. 1727. He was handling between five and ten other capital cases at the same time as Mr. Anderson's case. ROA Vol. X, p.

1728. Mr. Stone does not have any independent recollection of when he first met Mr. Anderson, but testified that J.T. Williams, his investigator, would have met him first. ROA Vol. X, p. 1729. Mr. Stone discussed the normal procedure for the first client interview between the investigator and the client and the use of a standard form "forensic questionnaire". The questionnaire appears as Defense Exhibit 4 in the postconviction ROA at pages 1098 to 1171. He stated:

> Q: So that suggests the way that the assessment is performed…Is it Q and A between J.T. or you and Mr. Anderson, or did Mr. Anderson fill this out?
>
> A: Normally, it's a question and answer interview, most of the time conducted over several conferences between Mr. Williams and the client, and then I might go back and make further inquiry for purposes of clarification if there's any uncertainty about the answers. *In Mr. Anderson's particular case, Mr. Williams took it over and left it with him and asked him to fill it out, and went back later and picked it up.*

ROA Vol. X, p. 1730(emphasis added). Mr. Stone offered no further explanation as to why there was a deviation from the standard procedure in Mr. Anderson's case. Mr. Stone had no recollection as to when the questionnaire was filled out, but said that it could have been within a month or even possibly a year after Mr. Anderson's arrest. ROA Vol. X, p. 1733. The form is not dated. Id. Mr. Stone did not remember discussing

the questionnaire with Fred nor discussing any of Fred's responses on the questionnaire. ROA Vol. X, p. 1734.

On part of the questionnaire it asks the respondent to list family members who died and the effects their deaths had on them. ROA Vol. X, p. 1739. Mr. Anderson listed Michael Green, his abuser, as a family member who had died. On a separate sheet, Mr. Anderson explained in great detail the effects the deaths of family members had on him, with one exception, Michael Green. ROA Vol. X, p. 1739-1741; ROA Vol. VII, p. 1146-48. On this separate sheet, Mr. Anderson offered no explanation as to the effect that Michael Green's death had on him. Id. This is in stark contrast to the descriptions given about the other family members. Id.

Mr. Stone claimed he had no way of knowing that Mr. Anderson had been sexually abused because there was "nothing in this (referring to the questionnaire) to indicate that it occurred." ROA Vol. X, p. 1742. However, Mr. Stone testified he did not inquire further about the discrepancy regarding Michael Green's death, but he did admit that if he knew of the extensive abuse, he would have presented those facts to the jury in the penalty phase. ROA Vol. X, p. 1742, 1804.

With respect to mental health mitigation, Mr. Stone testified that he knew at some point he would hire a mental health expert and that he probably had in the back of his mind

that he was going to hire Dr. McMahon to evaluate Mr. Anderson. ROA Vol. X, p. 1778. Mr. Stone testified that there is not any established protocol as far as the timing of hiring a mental health expert. ROA Vol. X, p. 1779. He offered no strategic reason as to why he waited until approximately one month prior to trial to contact Dr. McMahon. Mr. Stone contradicted Dr. McMahon's testimony when he said that she talked to most of the mitigation witnesses. ROA Vol. X, p. 1782. Dr. McMahon testified that she had spoken to no one. ROA Vol. IX, p. 1656. Mr. Stone testified about the hypnotic session that occurred on the first day of jury selection. ROA Vol. X, p. 1787. He said that the only reason the hypnotic session was conducted was to ascertain if anything precipitated the shootings in the bank vault. ROA Vol. X, p. 1786. Mr. Stone testified that he did not instruct them to seek other mitigation in the hypnotic session, despite knowing that Mr. Anderson had problems with his memory. ROA Vol. X, p. 1788.

When questioned about the prosecutor's statements regarding the weight of aggravation and mitigation during jury selection, Mr. Stone conceded that some of the statements were not completely accurate and may have even been misleading. ROA Vol. X, p. 1794-1804. He further stated that he had no tactical or strategic reason not to object to these misstatements. ROA Vol. X, p. 1804. Mr. Stone acknowledged that the prosecutor's

closing argument was improper and over the line. ROA Vol. X, p. 1805. Mr. Stone objected, but did not ask for a curative instruction or a mistrial. ROA Vol. X, p. 1805. The objectionable argument was when the prosecutor said:

> I've come to the conclusion that if I had to put this defense into a category, that it doesn't fit in any of the standard categories. What I would call this defense is the National Enquirer Defense. Inquiring minds want to know. Ladies and gentlemen, my job is not to satisfy the defendant's curiosity, or the judge's curiosity, or even your curiosity about these details. I've got one job, one job here today. If you folks have questions that you just have to know the answer to after this trial is over, my office is up on the fourth floor. You're welcome to come up here and ask me about any of these little details.

ROA Vol. X, p. 1805. Mr. Stone testified that there was no strategic or tactical reason for not asking for a curative instruction or a mistrial. Id. In fact, he thought he had asked for a mistrial. Id.

With respect to requesting jury instruction 7.11, which prohibits the use of the same facts to support two different aggravators, Mr. Stone thought that instruction was included in the record. ROA Vol. X, p. 1810. When asked, assuming the record reflected that the instruction was not included, if there would have been a strategic or tactical reason not to ask for such an instruction, Mr. Stone said there was not. Id.

Mr. Doud testified that he joined the defense team several months into the case. ROA Vol. X, p. 1856. Mr. Doud was the second chair attorney and would have deferred to Mr. Stone on strategic decisions. ROA Vol. X, p. 1859. Mr. Doud was in agreement with Mr. Stone's feelings that the case was essentially unwinnable in the guilt phase. ROA Vol. X, p. 1860. They decided that their strategy was to humanize Mr. Anderson as much as possible in the guilt phase instead of trying to challenge the elements of the crime. ROA Vol. X, p. 1861. Mr. Doud was the attorney who drafted the letter to Mr. Anderson having him acquiesce to this strategy, which Mr. Anderson did. The letter was introduced into evidence at the evidentiary hearing as Defense Exhibit 3. ROA Vol. VI, p. 1092-1096.

Mr. Doud conceded that if he had known about the extensive sexual abuse Mr. Anderson suffered as a child, he would have presented it at some point during mitigation. ROA Vol. X, p. 1869. Mr. Doud also was concerned about the appointment of Dr. McMahon "in the sense that it was very close to trial before she was retained or brought on board." ROA Vol. X, p. 1870. Mr. Doud had no input on the hiring of her and did not recall any conversations with Mr. Stone about the timing of bringing her on board. Id.

As for the statements in voir dire, Mr. Doud conceded that there was some misstatements of the law made by the prosecutor

with respect to the weighing of the aggravators and testified that there was no strategic or tactical reason not to object to those misstatements. ROA Vol. X, p. 1873-74. Mr. Doud also testified that there was no tactical or strategic reason not to ask for a mistrial or curative instruction after the prosecutor's categorizing the defense as a "National Enquirer Defense" during closing arguments. ROA Vol. X, p. 1875. In fact, he stated:

> I would have objected and asked for a curative, and then followed up with a mistrial. That would be standard procedure on something like that. I'd also move to have it struck - - the remark stricken.

Id.

Like Mr. Stone, Mr. Doud testified there was no tactical or strategic reason not to request jury instruction 7.11 dealing with the merging of aggravators. ROA Vol. X, p. 1879. He stated that at this point in his career he would have certainly asked for that instruction, but he testified, "I don't remember what my state of mind was then." Id.

Investigator J.T. Williams was an investigator with the public defender's office at the time of Mr. Anderson's trial. ROA Vol. XI, p. 1896. When asked if he had special training in mitigation investigation, he curtly responded, "Well, I would call it special training. I've been doing it for twenty years." ROA Vol. XI, p. 1896. He testified that he went to mitigation

seminars once or twice a year. Id. He offered no other training or expertise in the area of mitigation investigation. Id.

Mr. Williams testified that he probably would have gone to see Mr. Anderson within a week of his arrest. ROA Vol. XI, p. 1897. Mr. Williams did not recall how much time he spent with Mr. Anderson in the first few weeks after his arrest. ROA Vol. XI, p. 1899. Mr. Williams did testify that within approximately one month of Mr. Anderson's arrest, Mr. Williams brought a forensic assessment form to Mr. Anderson and had him fill it out. ROA Vol. XI, p. 1900. The forensic assessment, which was introduced as Defense Exhibit 4 of the postconviction ROA, is a question and answer form that appears to be meant to be filled out by the interviewer, not the interviewee. Investigator Williams merely dropped it off for Mr. Anderson to fill out and came back to collect it at a later date. ROA Vol. X, p. 1730. One part of the questionnaire is a section to underline certain current physical symptoms and instructs: "underline each of the following that applies." ROA Vol. VII, p. 1128. Mr. Anderson underlined "severe headaches", "weight gain" , "weight loss", "extremely tense", "feels guilty all the time", and "depressed a lot." Id. Mr. Williams did not follow up on any of those symptoms. ROA Vol. XI, p. 1907. On the next page of the form, the questionnaire states, "underline each of the following that

was a problem of the client's childhood." ROA Vol. VII, p. 1130. Mr. Anderson underlined "extreme fears", "accident prone", and "sick a lot." Id. Mr. Williams did not follow up on Mr. Anderson's admission of these symptoms and experiences in childhood. ROA Vol. XI, p. 1907. Mr. Anderson did not report the horrific sexual abuse in this impersonal form. Mr. Williams acknowledged that in his experience, some clients do in fact hold back evidence of sexual abuse. ROA Vol. XI, p. 1910.

On the morning before he testified at the evidentiary hearing, Mr. Williams provided to the state some handwritten notes of his investigation in this case. ROA Vol. XI, p. 1911. Mr. Williams testified that these were all the notes he generated as part of his investigation. Id. He further testified that the notes covered all of his activities in the case with the exception of serving subpoenas. Id. The notes were admitted into evidence as Defense Exhibit 5 and appear at pages 1172 to 1207 of the postconviction ROA. Every single entry in the notes occurred in September of 2000, the same month that Mr. Anderson's trial started. Id. In fact, the earliest indication that Mr. Williams investigated any mitigation is on September 13, 2000, a mere twelve days before trial began. Id. In addition, Mr. Williams was questioned as to when the bulk of the mitigation work was completed. The exchange was as follows:

Q: I'm just - - I'm looking at the dates of the material. So far everything was in September of 2000.

A: Uh-huh.

Q: So that's when you did all this work?

A: We did a lot of it then, but that's not when I did all of the work. Like I said, there were days that I didn't do anything with Bill or Clint. They went on to separate things, and I was out serving subpoenas. I couldn't be in two places at one time.

Q: Would it be fair to say that everything you recorded here occurred in September of 2000?

A: If those were the dates stated.

****

Q: And that's the extent of the notes that you found in your file on this case?

A: Uh-huh. Here you go, sir.

Q: Thank you. Now, all of those interviews were in September. Had you been told by Mr. Stone or Mr. Doud to get started interviewing mitigation witnesses prior to that month, September of 2000?

A: I really can't recall. I mean, I don't really know that was happening or going on then. I may have been working on another case or something. I'm not absolutely positive.

ROA Vol. XI, p. 1911,1928.

Mr. Williams described his attempts to contact Jackie Handy, a potential witness listed by Mr. Anderson in the initial forensic questionnaire. ROA Vol. XI, p. 1917; ROA Vol. VII, p. 1154. According to Mr. Williams' recorded notes, the first contact with Jackie Handy was on September 20, 2000, just five days before trial. ROA Vol. VII, p. 1200. She had initially agreed to be a penalty phase witness on Mr. Anderson's behalf. ROA Vol. XI, p. 1918. However, a few days later, at the start of the trial on September 25, 2000, she had her husband deliver a letter to the public defender's office saying she would not testify for Mr. Anderson. The letter, which is part of Defense Exhibit 5 and appears at pages 1178 to 1180 of the postconviction ROA, states that she didn't want to testify because she received "so many phone calls over the weekend asking how my name got on the supeona [sic] list." ROA Vol. VII, p. 1178. Mr. Williams described her change of heart in this manner:

> And she - - at first she was willing, and then she started seeing newspaper articles and reading some things, she wrote a letter saying that she didn't want to get involved. She stared being harassed by her probation officer, and things like that.

ROA Vol. XI, p. 1918. Ms. Handy's probation officer was Kathy Carver. Id. Ms. Carver was also Mr. Anderson's probation officer at the time of his arrest and was a state witness during

the guilt phase of Mr. Anderson's trial. ROA Vol. XI, p. 1918; TR Vol XIV, p. 1786. Mr. Williams summed up his basic strategy in looking for mitigation was to find people who thought Mr. Anderson was a "good person." ROA Vol. XI, p. 1929. He stated he wanted to know from the witnesses, "Is there anything you can say good about him." Id.

Karen Nelson, the bailiff for Judge Singeltary at the time of Mr. Anderson's trial, testified regarding Mr. Anderson's shackling during the trial. Prior to Ms. Nelson's testimony at the evidentiary hearing, she shackled Mr. Anderson in the exact same manner that he was shackled throughout his entire trial. ROA Vol. XI, p. 1956. Ms. Nelson placed Mr. Anderson in a two-foot shackle and attached it to a large set of handcuffs, which she called leg irons. Id. The leg irons were then connected to a brass connection point under the table. ROA Vol. XI, p. 1957. Postconviction counsel for Mr. Anderson then had Mr. Anderson rattle his shackles. ROA Vol. XI, p. 1959, 1964-65. Ms. Nelson testified that she could hear the shackles rattling from up on the witness stand, which was right next to the jury box. Id.

Photographs of the courtroom where Mr. Anderson's trial was held, which include the shackle point on the front and underneath defense table, were introduced as Defense Exhibit 6 and appear at pages 1209 to 1229 of the postconviction record on appeal. As the pictures make clear, there was a shackle point

on the front of the defense table where Mr. Anderson sat. There was not one on the State's table. ROA Vol. VII, p. 1215, 1221. There is also a shackle point underneath the defense table. ROA Vol. VII, p. 1217.

Deputy Nelson testified that during jury selection, Mr. Anderson would have been shackled to the front of the defense table. ROA Vol. VII, p. 1215; ROA Vol. XI, p. 1972. Mr. Anderson and all the attorneys faced the back of the courtroom during jury selection and the prospective jurors sat in the audience. ROA Vol. XI, p. 1934. From their vantage point, the prospective jurors could have seen the shackle point underneath the defense table ROA Vol. XI, p. 1972-3. Deputy Nelson said that she put a chair in front of the shackle point, however, the chairs, as depicted in the picture at page 1217, are swivel chairs that are open at the bottom. ROA Vol. VII, p. 1217; ROA Vol. XI, p. 1988,89. The shackle point would still have been visible underneath that chair.

Ms. Nelson was questioned by the prosecutor as to whether she instructed Mr. Anderson to "not move his feet in any way as to draw attention to the shackles." ROA Vol. XI, p. 1934. Ms. Nelson responded that she gave Mr. Anderson that instruction on several occasions. Id. Ms. Nelson also testified that while Mr. Anderson was on the stand, he was shackled to the witness stand, but that she placed a wastebasket on the floor and stood

nearby to attempt to block the jury's view. ROA Vol. XI, p. 1975-76.

Dr. Harry McClaren was the state's mental health expert. Dr. McClaren is a forensic psychologist who examined Mr. Anderson on two occasions in December of 2006 and conducted some psychological testing. ROA Vol. XI, p. 2013,2014. Dr. McClaren diagnosed Mr. Anderson with Anxiety Disorder. ROA Vol. XI, p. 2060. He testified that Post-traumatic Stress Disorder is a type of anxiety disorder. Id. Dr. McClaren did not formally diagnose Mr. Anderson with PTSD, but stated in his report, "Certainly significant information exists which would tend to support such a diagnosis." ROA Vol. XI, p. 2061. Dr. McClaren also testified that Mr. Anderson was reluctant to talk about the sexual abuse and appeared to be uncomfortable about it. ROA Vol. XII, p. 2092. Dr. McClaren opined that the reason could have been because of the traumatic nature of the event coupled with the shame. Vol. XII, p. 2093.

Dr. McClaren also explained that victims of sexual abuse are reluctant to come forward and talk about the abuse. ROA Vol. XI, p. 2063. Dr. McClaren also testified that in his experience, if he were to be retained for a mental health mitigation investigation, he would expect to be retained six months to a year prior to trial. ROA Vol. XI, p. 2073. At the time of the evidentiary hearing, Dr. McClaren had not testified

for the defense at all in the three years prior, but had testified for, or was retained by, the state on at least five cases. ROA Vol. XI, p. 2079-80.

SUMMARY OF ARGUMENT

The postconviction court erred in failing to grant relief for the following reasons. First, the post conviction court's finding that trial counsel did not render deficient performance in investigating and presenting mitigation is not supported by competent, substantial evidence. Trial counsel sought appointment of a mental health expert less than three weeks before trial. According to the notes of the investigator, no mitigation witnesses were contacted until twelve days before the trial. Trial counsel failed to provide his mental health expert with any meaningful background information, records, or witnesses. Had trial counsel conducted an adequate investigation, he would have discovered substantial mitigation including evidence of sexual abuse, mental illness, and brain damage. This evidence undermines confidence in the outcome of the trial and raises a reasonable probability that the results of the proceeding would have been different.

Second, trial counsel was ineffective for failing to object to or correct the prosecutor's misleading statements during voir dire. The prosecutor misstated the law as it related to the weighing of aggravators and mitigators. He failed to correct

the juror's obvious misunderstandings of the applicability of the death penalty. Trial counsel did not object to these misstatements and even compounded the error by making some of his own misstatements during his presentation.

Third, trial counsel was ineffective for failing to request the merging instruction for the two aggravators, "cold, calculated, and premeditated," and "pecuniary gain." Because the sentencing court gave double weight to both of these aggravators, yet relied on the same facts to support them, Mr. Anderson is entitled to receive that instruction. Failure to insure that instruction was included was deficient performance which prejudiced Mr. Anderson.

Fourth, trial counsel made numerous evidentiary errors in the guilt phase including a failure to ask for a mistrial based on the state's improper and prejudicial closing argument, failure to properly object to the blood spatter expert's speculative testimony, failure to object to inflammatory photographs, and failure to object to extensive, inflammatory, and prejudicial testimony about the conditions in the vault and the lifesaving efforts made on both victims. These errors allowed the jury to hear irrelevant and prejudicial evidence that had little or no probative value. Failure to limit this testimony was deficient performance which prejudiced Mr. Anderson. All of these deficiencies, separately or combined,

undermine confidence in the outcome of the trial and raises a reasonable probability that the results of the proceeding would have been different.

Fifth, the postconviction court erred in denying Mr. Anderson's motion to interview the jurors for his shackling claim. Mr. Anderson's shackling was an "overt prejudicial act" which is an appropriate subject for inquiry and the postconviction court abused its discretion in denying his motion to interview the jurors to determine whether the jurors saw or heard his shackles.

Sixth, the routine shackling of Mr. Anderson during both his guilt and penalty phase was a violation of Mr. Anderson's due process rights under both the Federal and Florida Constitutions. Mr. Anderson was shackled to the defense table throughout the trial, and was shackled to the witness stand during his testimony in the guilt and penalty phases. The trial court failed to make an individualized or fact based finding that warranted the shackling of Mr. Anderson. There was sufficient evidence presented at the evidentiary hearing that the jury was aware of his shackles. Mr. Anderson is entitled to a new trial.

Seventh, Mr. Anderson's due process rights were violated when he did not receive a competent mental health examination. Dr. McMahon's rushed evaluation that began a mere twenty days

before trial was insufficient. Had an adequate investigation been completed, Mr. Anderson would have been able to present evidence of sexual abuse, mental illness, and brain damage. He would have been able to present testimony that he met both statutory mental mitigators. With this evidence, the balance of aggravating and mitigating circumstances would weigh differently and there exists a reasonable probability that Mr. Anderson would have received a life sentence.

Finally, the combination of procedural and substantive errors deprived Mr. Anderson of a fundamentally fair trial as guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Repeated instances of ineffective assistance of counsel significantly tainted Mr. Anderson's guilt and penalty phases. Trial counsel allowed misleading statements to be made by the prosecutor during voir dire and throughout the penalty phase. Trial counsel made numerous evidentiary errors during the guilt phase by failing to properly object to inflammatory, irrelevant, and prejudicial evidence. Trial counsel failed to properly investigate and present mitigation, including uncovering extensive sexual abuse, mental illness, and brain damage. In addition, his attorneys failed to ensure he received an adequate mental health evaluation and failed to provide Dr. McMahon with

the necessary information and witnesses. Trial counsel failed to request proper jury instructions during the penalty phase. In addition, trial counsel failed to insure that Mr. Anderson remained free from unnecessary shackles throughout his trial.

STANDARD OF REVIEW

The standard of review is *de novo*. Stephens v.State, 748 So.2d 1028, 1032 (Fla. 2000). Under *Strickland*, ineffective assistance of counsel claims are a mixed question of law and fact; with the lower court's legal rulings reviewed *de novo* and deference given to factual findings supported by competent and substantial evidence. Sochor v.State, 883 So.2d 766, 772 (Fla. 2004).

ARGUMENT I

THE LOWER COURT'S FINDING THAT MR. ANDERSON'S ATTORNEYS DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE BY FAILING TO ADEQUATELY INVESTIGATE AND PRESENT MITIGATION IS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

Mr. Anderson's trial attorneys rendered deficient performance by failing to conduct a meaningful investigation into his history, background and family life. Trial counsel decided early on in the case that it was unwinnable in the guilt phase due to what they perceived was overwhelming evidence against Mr. Anderson. The defense team formed a goal of just

trying to "save Fred's life" by avoiding the death penalty. Despite this stated goal, trial counsel conducted a rudimentary investigation that was based on conversations with a narrow set of sources. Meaningful mitigation investigation and contact with potential mitigation witnesses did not begin until September of 2000, the same month that Mr. Anderson's trial began. Counsel failed to look for corroborating records, and failed to provide any meaningful background information to his sole expert, Dr. McMahon. Their investigation fell below the standard of reasonably competent capital defense counsel.

The United States Supreme Court held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversary testing process. Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Specifically, counsel has a duty to investigate in order to make the adversarial testing process work in the particular case. Id. at 690.

There are two prongs to an ineffective assistance of counsel claim.

> First, a petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so

> serious as to deprive the defendant of a fair trial, whose result is reliable.

Id. at 687. In addition, to establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Id. At 688.

In Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 80 L.Ed. 2d 674(2003), the Supreme Court held "Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather a reviewing court must consider the reasonableness of the investigation said to support that strategy." Id. at 2538.

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness.

Wiggins at 2535.

In making this assessment, the Court "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Id. at 2538. In finding that counsel's investigation and presentation "fell short of the standards for capital defense work articulated by the American Bar Association (ABA)-standards to which we have long referred as 'guides to

determining what is reasonable,'" the Court held the ABA Guidelines set the standards for counsel in investigating mitigating evidence. Id. at 2537 (internal citations omitted).

In Williams v. Taylor, trial counsel was held to be ineffective when they only considered a narrow set of sources and did not attempt to introduce evidence of Williams' borderline intellectual functioning, prison records showing commendations, and testimony from prison guards that Williams would not likely be a danger in prison. Williams v. Taylor, 529 U.S. 362,396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Citing the commentary to the ABA Guidelines, the Court found that counsel's failures and omissions "clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." Id. at 397. The Court further approved the finding of the state court that there was "a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence." Id. at 399 (internal quotations omitted).

In Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), the United States Supreme Court held that "even when a capital defendant's family members and the defendant himself have suggested that no mitigation evidence is available, his lawyer is bound to make reasonable efforts to

obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." Id. at 2460. The Court, in finding that counsel rendered deficient performance, cited counsel's failure to review Rompilla's prior conviction, failure to obtain school records, failure to obtain records of Rompilla's prior incarcerations, and failure to gather evidence of a history of substance abuse. Id. at 2463. The Rompilla Court further found that "this is not a case in which defense counsel simply ignored their obligation to find mitigating evidence, and their workload as busy public defenders did not keep them from making a number of efforts..." Id. at 2462. However, despite the scope of this mitigation investigation, the Court still found that counsel rendered deficient performance.

In Rompilla, trial counsel spoke with several members of Rompilla's family and three mental health experts, none of whom had any particularly favorable or useful information. Id. Rompilla himself was not very cooperative, even giving counsel false leads, thus frustrating the gathering of information. Id. Moreover, the consultation with the three mental health witnesses who had examined Mr. Rompilla prior to trial turned up nothing fruitful. Id. at 2463.

The Court recognized that "the duty to investigate does not force defense lawyers to scour the globe on the off-chance that

something will turn up; reasonably diligent counsel may draw the line to think further investigation would be a waste." Id. (citing Wiggins v. Smith, 539 U.S. at 525, 123 S.Ct. 2527). In rejecting the Commonwealth's argument that the information trial counsel gathered from Rompilla and other sources gave them reason to believe that further investigation would be pointless, the Court found that counsel's failure to examine the court file on Rompilla's prior conviction was deficient performance. Id.

The Eleventh Circuit has held that "[t]he primary purpose of the penalty phase is to insure that the sentence is individualized by focusing [on] the particularized characteristics of the defendant. By failing to provide such evidence to the jury, though readily available, trial counsel's deficient performance prejudices [a petitioner's] ability to receive an individualized sentence." Cunningham v. Zant, 928 F.2d 1006, 1019 (11th Cir.1991) Effective representation, consistent with the Sixth Amendment, also "involves the independent duty to investigate and prepare." House v. Balkcom, 725 F.2d 608, 618 (11th Cir.1984).

> [C]ounsel's duty of inquiry in the death penalty sentencing phase is somewhat unique. First, the preparation and investigation for the penalty phase are different from the guilt phase. The penalty phase focuses not on absolving the defendant from guilt, but rather on *the production of evidence to make a case for life*. The purpose of investigation is to find witnesses to help

> humanize the defendant, given that a jury has found him guilty of a capital offense.

Hardwick v. Crosby, 320 F.3d 1127, at 1162-1163 (11th Cir. 2003)(emphasis added). See also Haliym v. Mitchell, 492 F.3d 680(6th Cir. 2007)(Trial counsel rendered deficient performance where they "failed to discover important mitigating information that was reasonably available and suggested by information already within their possession." Id. at 30).

In addressing the importance of counsel's duty to investigate for the penalty phase, this Court has said:

> Trial counsel's obligation to zealously advocate for their clients is just as important in the penalty phase of a capital proceeding as it is in the guilt phase. There is no more serious consideration in the sentencing arena than the decision concerning whether a person will live or die. When an attorney takes on the task of defending a person charged with a capital offense, the attorney must be committed to dedicate both time and resources to thoroughly investigate the background and history, including family, school, health and criminal history of the defendant for the kind of information that could justify a sentence less than death. I believe that the constitution and the case law from this court and the United States Supreme Court requires no less.

Coday v. State, 946 So.2d 988, 1015-1016 (Fla. 2006) (*Quince, J., concurring*).

Further, this Court has held trial counsel renders deficient performance when his investigation involves limited

contact with a few family members and he fails to provide his experts with background information. Sochor v. Florida, 883 So.2d 766, 772 (Fla. 2004). *See also* State v. Lewis, 838 So.2d 1102, 1113 (Fla. 2002)("[T]he obligation to investigate and prepare for the penalty phase portion of a capital case cannot be overstated-this is an integral part of a capital case."); Ragsdale v. State, 798 So.2d 713, 718-19 (Fla. 2001) (Inexperienced counsel rendered deficient performance when his entire investigation consisted of a few calls made to family members); (Rose v. State, 675 So.2d 567, 571 (Fla. 1996) ("An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." (*quoting* Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994)); State v. Lara, 581 So.2d 1288, 1289 (Fla. 1991) (prejudice found where counsel failed to present evidence of abusive childhood).

The ABA Guidelines have been cited by the United States Supreme Court as "guides to determining what is reasonable." Wiggins at 2537. The Guidelines in effect at the time of Mr. Anderson's trial were created in 1989. The Guidelines' primary objective is "to ensure that quality representation is afforded to defendants eligible for the appointment of counsel during all stages of the case." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 1.1(1989). The

Commentary to that Guideline recognizes that in many capital cases there is overwhelming evidence of guilt. The Commentary states:

> [I]n many capital cases, no credible argument for innocence exists, so that the life or death issue of punishment is the real focus of the entire case. The Constitution requires individualization of the capital sentencing process. A capital defendant has the right to present his or her sentencer with *any* mitigating evidence that might save his or her life. Counsel should be aware of methods to effectively advocate for the life of the client, and should strive for an effective defense presentation in every case.

Commentary to ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 1.1(1989)(emphasis added)(internal citations omitted). When faced with a mountain of evidence pointing to guilt, counsel's efforts must be doubled and focused on preparing and presenting an effective and comprehensive penalty phase defense.

Further, "minimum standards that have been promulgated concerning representation of defendants in criminal cases generally...should not be adopted as sufficient for death penalty cases." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.2(1989). "Counsel in *death penalty cases* should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the

capital case, who has had adequate time and resources for preparation." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.2(1989)(emphasis added); Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 80 L.Ed. 2d 674(2003); Williams v. Taylor, 529 U.S. 362,396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

Counsel should conduct an interview of the client within 24 hours of counsel's entry into the case. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(D)(2). In that initial interview, counsel should:

> [C]ollect information relevant to the sentencing phase of the trial including, but not limited to: medical history, (*mental and physical illness or injury*, *alcohol and drug use*, birth trauma and developmental delays); educational history(achievement, performance and behavior); special educational needs (including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability);family and social history (including physical, *sexual* or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct on supervision and in the institution, education or training, and clinical services); and religious and cultural influences.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(D)(2)(1989)(emphasis added). Counsel should also "seek necessary releases for securing confidential

records relating to any of the relevant histories" and "obtain names of collateral persons or sources to verify, corroborate, explain and expand upon information obtained in (C) above." Id.

The Commentary to this guideline explains the importance of beginning a comprehensive mitigation investigation as early as possible into the case. This is necessary for "both developing the necessary trust and eliciting as many facts as you can to start you on the road to formulating your defense. Counsel cannot frame an adequate defense without knowing what is likely to develop at trial, including information that is or appears to be incriminating." The Commentary to this guideline also addresses the client's input into mitigation and explains that counsel's duty to investigate "is not negated by the expressed desires of the client." "Nor may counsel 'sit idly by, thinking that investigation would be futile.'" Finally, "the attorney must evaluate the potential avenues of action and then advise the client on the merits of each. Without investigation, counsel's evaluation and advice amount to little more than a guess."

Guideline 11.8.6 outlines the defense case at the penalty phase. The Guidelines state that "counsel should present...*all* reasonably available evidence in mitigation unless there are *strong* strategic reasons to forgo some portion of such evidence." ABA Guidelines for the Appointment and Performance

of Counsel in Death Penalty Cases 11.8.6(A)(1989)(emphasis added). The Guidelines further instruct that counsel should consider presenting "medical history, including mental and physical illness or injury, alcohol and drug use…"; "family, and social history, including physical, sexual or emotional abuse…"; "expert testimony concerning any of the above and the resulting impact on the client, relating to the offense and to the client's potential at the time of sentencing." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6(B)(1989).

The standard of proof for ineffective assistance of counsel is set out in Strickland. There, the Supreme Court explained that because the right to effective assistance of counsel is so fundamental, the standard for proving prejudice is low:

> An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, *even if the errors of counsel cannot be show by a preponderance of the evidence to have determined the outcome.*
>
> * * * *
>
> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors...When a defendant challenges a death sentence...the question is whether there is *a reasonable probability*

> that, absent the errors, the sentencer – including an appellate court to the extent it independently reweighs the evidence – would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness claim, must consider the totality of the evidence before the judge and the jury.

Strickland v. Washington, at 694-696 (emphasis added).

In Mr. Anderson's case, both attorneys felt from the beginning of the case that the State would not have a difficult time proving Mr. Anderson's guilt beyond a reasonable doubt due to the amount of evidence against him. They felt that the better course of action was to try to maintain credibility with the jury and try to "humanize Fred" during the guilt phase and work towards avoiding the death penalty. As evidenced by their letter to Mr. Anderson which was admitted as Defense Exhibit 3 at the evidentiary hearing, trial counsel felt that this was a case of overwhelming evidence of guilt. In the letter, trial counsel told Fred, "You also know that the facts make this a horrible case for trial." ROA Vol. VI, p. 1094. Counsel sought Mr. Anderson's acquiescence to the defense strategy of conceding guilt to some if not all the elements of the offense. The letter stated:

> However, based on your specific desire to avoid the death penalty, it appears that the best course of action is to use the guilt phase of the trial as an extended part of

> the penalty phase. Specifically, with each applicable witness we can try to get background information in about you in an effort to humanize you to the jury and at the appropriate time convey to the jury that you are extremely remorseful for what happened…Yes, such a strategy assures a conviction for the State. But, it may establish some credibility with the jury, and give us your best chance of convincing some of the juror [sic] to give a life recommendation.

ROA Vol VI, p. 1094. Still, despite this promise and decided "strategy" to focus on "saving Fred's life", counsel's investigation fell below prevailing norms and was deficient performance which prejudiced Mr. Anderson.

A. Failure to uncover evidence of sexual abuse.

Mr. Stone testified that it was standard practice to use the forensic questionnaire as a starting point for investigation of the case. It is clear that the forensic questionnaire Mr. Anderson filled out was meant to be completed in a question and answer fashion. In fact, trial counsel testified that the standard practice was to do it in that fashion, and offered no explanation as to why it was done differently in Mr. Anderson's case. Neither Mr. Stone, Mr. Doud, nor Investigator Williams spent any time going over Mr. Anderson's responses on the questionnaire in any great detail. Mr. Stone admitted that he did not question Mr. Anderson as to why he left out the description about the effect Michael Green's death had upon him.

This omission should have been a red flag for counsel to pursue and question further, especially since Mr. Anderson provided many details for every other individual he had listed.

In addition, all of the mental health experts testified at the evidentiary hearing that it is not uncommon for victims of sexual abuse, especially males, to hide that abuse. An attorney must develop trust and rapport with a client when investigating mitigating evidence, particularly homosexual sexual abuse. Mr. Williams' decision to merely drop off the form was itself an inadequate investigation, which failed to establish the necessary trust, confidence, and rapport essential to a reasonable attorney-client relationship in a capital case. In addition, Mr. Williams' and trial counsel's failure to follow up and discuss the topics raised in the form contributed to the deficient attorney-client relationship and investigation.

The postconviction court's order denying relief on this claim is not supported by competent, substantial evidence. The postconviction court held there was no deficient performance with respect to the sexual abuse claim because Mr. Anderson did not reveal the abuse to his trial counsel or to Dr. McMahon. In support of this position, the postconviction court cites to Cherry v. State, 781 So.2d 1040(Fla. 2000), Rodriguez v. State, 919 So.2d 1252(Fla. 2005), and Stewart v. State, 801 So.2d 59,

(Fla. 2001). The postconviction court's reliance on these cases is misplaced.

In Cherry, relief was denied because Mr. Cherry refused to communicate with his attorneys and provide them with names of people to speak to. Cherry at 1050. Cherry argued in postconviction that trial counsel was ineffective for failing to present evidence of his intoxication at the time of the murder. However, this was inconsistent with the defense theory put forth at Cherry's trial that he was not even present at the murder scene. This Court stated:

> Further, Cherry maintained throughout trial that he was not present at the scene of the murder and that he was innocent of all charges against him. Therefore, to argue in mitigation that Cherry was intoxicated at the time of the offense would be wholly inconsistent with the theory of defense, and therefore counsel cannot be deemed ineffective for failing to present it. See Rose v. State, 617 So.2d 291, 294 (Fla. 1993)("When a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made.

Id.

As noted above, Mr. Anderson was very cooperative with his attorneys and provided several names for them to follow up on. Mr. Anderson also provided the name of his abuser, Michael Green, and had they spent any time following up on Mr. Anderson's responses to the forensic questionnaire, they would

have learned of the effect Mr. Green had on Mr. Anderson. Also, the mitigation that Mr. Anderson presented at the postconviction evidentiary hearing was completely consistent with the defense's theory to "humanize Fred" and attempt to "save his life." Certainly, letting the jury know that Michael Green violently raped Fred as a child, and that Fred carried that trauma and shame into adulthood would have been the type of evidence of the "'diverse frailties of humankind' an understanding of which might place the barbaric act within the realm of tragic, but nonetheless human." Boyd v. North Carolina, 471 U.S. 1030, 1036 (1985)(quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

In Rodriguez, as in Cherry, the defendant was an uncooperative client who refused to allow counsel to speak to his family, refused to provide information to help with the investigation, and treated the mitigation investigation as though it had nothing to do with him. Rodriguez v. State, 919 So.2d 1252, 1263 (Fla. 2005). This is distinguishable from Mr. Anderson's case, where he was very cooperative with his attorneys and filled out the forensic questionnaire in some detail. Had trial counsel or their investigator developed some rapport with Mr. Anderson, and followed up on his answers in the questionnaire, they would have learned of the abuse.

Finally, in Stewart, the defendant did not tell his attorneys of the abuse he suffered at the hands of his stepfather; however, there was similar testimony presented at Stewart's trial about abuse he suffered at the hands of his mother. The defense psychiatrist testified at the evidentiary that learning of the stepfather's abuse would not have altered his opinion that he rendered at trial. Stewart v. State, 801 So.2d 59, 67 (Fla. 2001).

In contrast, there was no abuse presented on Mr. Anderson's behalf. Defense counsel presented nine witnesses (and Mr. Anderson) at the penalty phase. TR Vol. XVIII, p. 2404-2530. The testimony of the nine witnesses, opening statements, and the state's presentation of two proffers and two witnesses, was completed in one morning (October 5, 2000).[1] Id. at 2531. The defense penalty phase witnesses' provided cursory testimony about Mr. Anderson simply repeating that they had never known him to be violent and that he was active in church. TR Vol. XIII, p. 2404-2530. Trial counsel's presentation was woefully inadequate. It failed to explain Mr. Anderson's human frailties, his childhood, and to answer the question of what led the "choirboy" to commit this violent and brutal act. Had the jury heard that Mr. Anderson had been brutally raped as a child

[1] Mr. Anderson was the sole witness that testified for the defense that afternoon. Id. at 2534.

over a period of seven years and that while in the bank vault that day, Mr. Anderson was in a dissociative state suffering from post-traumatic stress disorder, there exists a reasonable probability that the outcome would have been different.

Moreover, the postconviction court's order ignores the testimony regarding the endorsement of symptoms from Mr. Anderson's childhood on the forensic questionnaire. Neither Mr. Anderson's attorneys, nor the postconviction court, addressed the discrepancy between Mr. Anderson endorsing these childhood symptoms, such as "extreme fears," and him saying at the same time that he had a normal childhood. Mr. Stone was questioned about this at the evidentiary hearing:

> Q:...The underlining, did you discuss any of the elements that Mr. Anderson indicated as being problems in his childhood? And correct me if I'm wrong, the State's exhibit indicated there was extreme fears, accident prone, and sick a lot.
>
> A: Yeah.
>
> Q: Did you talk about the extreme fears?
>
> A: I don't recall any specific discussion with him about extreme fears.
>
> Q: Did you ask him about any of the other elements on that list?
>
> A: I don't know. I don't think so. I don't notice any handwritten notes that I might have annotated in here.

ROA Vol. X, p. 1738.

In addition, witnesses who were readily available to the defense could have provided counsel evidence of the abuse. Counsel had a cooperative client who would have provided them the information. Had trial counsel conducted a meaningful mitigation investigation more than twelve days prior to trial, they would have uncovered the evidence of sexual abuse and been able to present such mitigation at the penalty phase. The sexual abuse itself is a nonstatuory mitigating circumstance. However, the expert testimony that could have been presented, as was presented at the evidentiary hearing by Drs. Berland and Villalba, would have proven the existence of statutory mental health mitigators as well. Mr. Anderson's trial counsel presented no evidence of nor asked for any of the statutory mental health mitigators. In fact, the only statutory mitigator they asked for was the "catchall" mitigator.

Trial counsel could have uncovered the evidence of sexual abuse had they conducted a reasonable investigation and followed up on the information that was readily available to them. As in Wiggins, it was not necessary for them to "scour the globe on the off-chance that something will turn up" - the information was right in front of them in their forensic questionnaire.

Finally, the postconviction court failed to follow clearly established precedent of the United States Supreme Court when, "it failed to evaluate the totality of available mitigation

evidence – both that adduced at trial, and the evidence adduced in the [postconviction] proceeding in reweighing it against the evidence in aggravation. See Clemons v. Mississippi, 494 U.S. 738, 751-752...(1990)."(Terry) Williams v. Taylor, 529 U.S. 362, 397 (2000). The postconviction court did not address the forensic questionnaire in its order, nor did it address trial counsel's failure to follow up on Mr. Anderson's responses. These were red flags that would have led to the discovery valuable mitigating evidence. Because the postconviction court's finding that counsel did not render deficient performance for failing to discover the sexual abuse is not supported by competent, substantial evidence, this Court must determine whether Mr. Anderson has proven the prejudice prong. Sochor v. State, 883 So.2d 766,772 (Fla. 2004).

B. Failure to provide Dr. McMahon with the necessary time, background information, and records necessary to conduct an adequate mental health evaluation.

This Court has held counsel renders deficient performance when he fails to ensure an adequate and meaningful mental health examination. Ponticelli v. State, 941 So.2d 1073, 1095 (Fla. 2006); Sochor v. Florida, 883 So.2d 766, 772 (Fla. 2004). Counsel's failure to pursue mental health mitigation despite "red flags" amounts to deficient performance; "a competency and sanity evaluation as superficial as the one [Dr. McMahon] performed for [Mr. Anderson] obviously cannot substitute for a

thorough mitigation evaluation." Arbelaez v. State, 898 So.2d 25, 34 (Fla. 2005) Prejudice is established when counsel fails to investigate and present evidence of brain damage and mental illness. Ragsdale v. State, 798 So.2d 713, 718-19 (Fla. 2001); Rose v. State, 675 So.2d 567, 571 (Fla. 1996) (citing Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994)).

Trial counsel did not retain Dr. McMahon until a little over a month before the trial. She did not make her first visit to Mr. Anderson until less than three weeks before the trial. She looked at no outside sources or records, and spoke to no potential mitigation witnesses. She testified that she usually has more time to work on capital cases and has rejected cases from that same public defender's office when she was given approximately the same time frame. Mr. Stone testified at the evidentiary hearing that there is no established protocol as to when he hires a mental health expert. He stated:

> I've got some right now that I'm pretty sure are crazy, and I got a mental health expert involved immediately. The ones where I don't personally have any real suspicion that there is a question of sanity or competency, *I'm not as concerned about it*, and in this particular situation I was trying to develop mitigation that I thought she might be interested in looking at as far as witnesses were concerned, because we were primarily concerned with the mitigation aspect of it, whether or not there were any mental mitigators.

ROA Vol. X, p. 1779 (emphasis added). Despite this statement that they were "primarily concerned with the mitigation aspect of it," trial counsel did not obtain appointment of a mental health expert until September 5, 2000, just twenty days before the start of Mr. Anderson's trial. Moreover, as evidenced by Mr. Williams notes, no mitigation witnesses were contacted until September 13, 2000, just twelve days before the start of Mr. Anderson's trial.

Had Dr. McMahon seen Mr. Anderson soon after his arrest, and not had the pressure of a looming trial date, she may have been able to develop some rapport with him that would have led to the disclosure of the horrific sexual abuse Mr. Anderson endured as a child. Dr. McMahon testified that she was not looking for evidence of post-traumatic stress disorder because she did not know of any traumatic events. She conceded that Mr. Anderson may have believed that she was talking about his parents abusing him because at the time, she was not thinking that that abuse was coming from "a relative across the street." If she had learned about the abuse, she definitely would have pursued it.

Dr. McMahon did not find that Mr. Anderson suffered from brain damage. However, she was not provided with any witnesses and either did not know about and/or did not follow up on Mr. Anderson's head-on car accident when he was twenty-two years

old. Postconviction counsel was easily able to locate the witness that was in the car accident with Mr. Anderson and provide that witness to Dr. Berland in order to get first hand knowledge of the severity of that accident. Further, Dr. Berland was able to corroborate the effects on Fred's behavior and how it was different after the accident.

Dr. McMahon's inadequate evaluation was in part caused by trial counsel's failure to provide her with relevant information and records. According to his notes, investigator Williams did not begin contacting mitigation witnesses until twelve days prior to the trial. ROA Vol. VII, p. 1184. There was simply not enough time for an adequate evaluation and investigation to be completed. The State's own mental health expert testified that the normal time frame for a mental health mitigation expert to begin work is six months to one year prior to the trial. ROA Vol. XI, p. 2073.

There is no strategic or tactical reason for this failure, especially since both Mr. Stone and Mr. Doud had developed the opinion very early on that this case was hopeless from a guilt standpoint and knew that the State was offering no less than death. When there is no credible argument of innocence, the life or death issue of punishment becomes the real focus of the entire case. Commentary to ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 1.1.

C. Failure to present evidence of mental illness and statutory mental health mitigation.

Mr. Anderson has demonstrated that he suffers from Post-Traumatic Stress Disorder (hereinafter PTSD), Borderline Personality Disorder, and suffers from a long standing chronic psychotic disturbance. Dr. Berland was able to speak to several lay witnesses who corroborated Mr. Anderson's symptoms and feelings prior to the murder.

Only Dr. Villalba examined Mr. Anderson for PTSD. Dr. Villalba explained how Mr. Anderson met the criteria for the diagnosis and further explained how Mr. Anderson experienced the same dissociative symptoms that day in the bank vault that he did while being raped by his cousin. Therefore, Dr. Villalba opined that Mr. Anderson met the statutory mitigator that the felony was committed while Mr. Anderson was under the influence of extreme mental or emotional disturbance. ROA Vol. IX, p. 1509.

The postconviction court's order implies that Mr. Anderson's mental health experts contradicted one another because Dr. Villalba found Mr. Anderson to be suffering from PTSD and Dr. Berland did not. ROA Vol. V, p. 858. This finding is not supported by competent substantial evidence because Dr. Berland testified that he did not *pursue* the issue of PTSD, not that Mr. Anderson did not suffer from it. ROA Vol. IX, p. 1614.

The postconviction court also categorizes Mr. Anderson as having "consistently provided differing accounts of his background, his mental health symptoms, and the crime." ROA Vol. V, p. 859. This is also unsupported by competent, substantial evidence. As argued above, Mr. Anderson's trial counsel conducted an inadequate mitigation investigation and did not develop the appropriate rapport with Mr. Anderson that would allow him to discuss his background fully, including the traumatic and violent sexual abuse he suffered. Moreover, Dr. McClaren indicated that even thirty years after the abuse, Mr. Anderson was still ashamed and embarrassed by it.

This Court has consistently stated that mental mitigation is one of the "weightiest mitigating factors." Santos v. State, 629 So.2d 838, 840 (Fla. 1994); See also Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995). In Hildwin, this Court found deficient performance and prejudice where trial counsel's mitigation was "woefully inadequate" and that "trial counsel failed to unearth a large amount of mitigation evidence which could have been presented at sentencing." Id. at 109. This Court identified that at the evidentiary hearing, Hildwin presented two mental health experts that testified he met both statutory mental mitigators, he presented evidence of abuse in childhood, he presented evidence of substance abuse, and he presented evidence

indicating organic brain damage. This Court found that none of this information had been presented at his original sentencing, and the testimony of the witnesses that were presented at the original sentencing "was quite limited." Id. at 110.

As in Hildwin, Mr. Anderson presented testimony at the evidentiary hearing that he meets both statutory mental health mitigators, that he has a history of substance abuse, and that there are signs of brain injury. Moreover, as noted above, the testimony his attorneys presented at his penalty phase took less than one morning. The testimony itself failed to offer any explanation of why Mr. Anderson committed such a violent act.

> [It may be that] many jurors vote to execute when they are repelled by the defendant, because he presents the threatening image of gratuitous, disruptive violence that they cannot assimilate into any social or psychological categories they use in comprehending the world. Jurors can probably give mercy to even the most vicious killers if they can somehow understand what might cause this person to be a killer.... A juror votes to expel the defendant who presents an image of violence he or she cannot assimilate into any stabilizing categories, and who thereby threatens his or her sense of comfortable order in the world. Weisberg, Deregulating Death, 1983 S.Ct.Rev. 305, 391.

Boyd v. North Carolina , 471 U.S. 1030, 1035 (1985).

Federal courts have also held that failure to present available mental mitigation evidence can be ineffective assistance of counsel. In Middleton v. Dugger, 849 F.2d 491

(11th Cir. 1988), the Eleventh Circuit Court of Appeals held that counsel was ineffective for failing to present psychiatric evidence. Id. at 495. In that case, an evidentiary hearing was held during which Dr. Krop testified that Middleton was under extreme emotional distress at the time of the homicide, and that he had a very limited capacity to conform his conduct to the requirements of the law. Id. The Court held that Dr. Krop's testimony, or testimony substantially similar to it, could very possibly have been obtained at the time of the sentencing. Id. The Court explained the importance of mental health mitigation in the following manner:

> This kind of psychiatric evidence, it has been held, has the potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior. Thus, psychiatric mitigating evidence not only can act in mitigation, it also could significantly weaken the aggravating factors.

Id. (Citing Huckaby v. State, 343 So.2d 29, 33-34 (Fla. 1977); Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987)(internal quotations omitted).

Again, the postconviction court failed to follow clearly established precedent of the United States Supreme Court when, "it failed to evaluate the totality of available mitigation evidence – both that adduced at trial, and the evidence adduced in the [postconviction] proceeding in reweighing it against the

evidence in aggravation. See Clemons v. Mississippi, 494 U.S. 738, 751-752...(1990).”(Terry) Williams v. Taylor, 529 U.S. 362, 397 (2000). As noted above, the postconviction court did not address the deficiencies in counsel’s investigation, deficiencies which led to counsel’s failure to uncover readily available evidence of mental illness. Because the postconviction court’s finding is not supported by competent, substantial evidence, this Court must determine whether Mr. Anderson has proven the prejudice prong. Sochor v. State, 883 So.2d 766,772 (Fla. 2004).

Conclusion

Mr. Anderson’s trial counsel did not meaningfully begin their mitigation investigation until the month of Mr. Anderson’s trial. All of investigator Williams’ contact with mitigation witnesses occurred within the twelve days prior to the beginning of Mr. Anderson’s trial. Dr. McMahon did not visit Mr. Anderson until three weeks prior to trial. Dr. McMahon did not have the chance to “sit down with the data and reflect on it for awhile” because there was simply not enough time prior to the start of the trial. Counsel’s performance fell below prevailing norms and was deficient. Had a reasonable mitigation investigation begun well in advance of trial, trial counsel would have uncovered the substantial mitigation that was presented at the evidentiary hearing and would have been able to present such

information to the jury. As a result, there is a reasonable probability that the outcome would have been different and Mr. Anderson would have been sentenced to life.

ARGUMENT II

THE LOWER COURT ERRED IN FINDING THAT TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO AND/OR CORRECT THE PROSECUTOR'S MISLEADING STATEMENTS ABOUT AGGRAVATION AND MITIGATION DURING VOIR DIRE.

Counsel rendered deficient performance when he failed to object to the numerous misstatements of the law made by the prosecutor during voir dire regarding the applicable death penalty law, including the weighing of aggravators and mitigators and the appropriateness of when to impose the death penalty. Counsel also rendered deficient performance by failing to clarify those misstatements and in fact making some of the same errors in his own presentation.

As noted above, the United States Supreme Court held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversary testing process. Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There are two prongs to an ineffective assistance of counsel claim.

> First, a petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the

> 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, whose result is reliable.

Id. at 687. In addition, to establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Id. At 688.

During its voir dire, the State made repeated misstatements of the law regarding the death penalty and failed to correct what were obvious, on the face of the record, misunderstandings from the jury about how to apply the death penalty. Several jurors stated that if they believed the murder was proven beyond all doubt, the death penalty should be imposed. Their overall concern was making a mistake in the guilt/innocence phase and allowing that concern to spillover into their consideration of the penalty. Juror Gleason, who ended up serving on Mr. Anderson's jury, articulated this concern on her questionnaire and during the State's voir dire:

> MR. GROSS: Miss Gleason, what have we got here for you? "If there is definite proof and there is no doubt, I'm for it." Is that right?
>
> PROSPECTIVE JUROR: Yes, pretty much the same thing he said, if it's definitely proven really true and it's deserving, but I'm also for the same thing, where it it's really not the case, or that's not what happened, then I wouldn't go for it either.

TR Vol. XI, p. 1028-1029. Several other jurors expressed the same concern on their questionnaires and their responses during voir dire including Juror Holcomb, who was also seated on Fred Anderson's jury:

> MR GROSS: Mr. Holcomb, "If there is no doubt that someone killed someone else, I think the death penalty is fair. But if there is any question about it, no."

TR Vol. XI, p. 1034. After a brief explanation by the State that by the time they have decided the penalty they will have decided guilt or innocence and a leading question by the State, Mr. Holcomb stated he was in the middle.

Prospective juror Hendrickson was not seated on Mr. Anderson's jury, but expressed her views about when the death penalty is appropriate in front of the entire venire panel.

> PROSPECTIVE JUROR: If he is guilty of First Degree Murder beyond a shadow of a doubt, in my mind, the death penalty is what he deserves.

TR Vol. XI, p. 1041-1042.

The confusion among the jurors was even more apparent with the questioning of Prospective Juror Himmelsbach, who was not seated on Mr. Anderson's jury, but expressed his views in front of the entire venire panel.

> PROSPECTIVE JUROR: It really came to light, what he said, about the light bulb for me, if it's one hundred percent without a doubt,

> I mean if you're not one hundred percent sure this murder has taken place intentionally, then it should be life. And so the death penalty - - am I giving you the right answer?
>
> MR. GROSS: If that's your opinion.

TR Vol. XI, p. 1048-1049.

Even further into jury selection, Mr. Dewitt, who ultimately sat on Mr. Anderson's jury, still expressed the same incorrect reasoning, despite leading questions by the state:

> MR. GROSS: Okay. So you're in the middle of the road.
>
> PROSPECTIVE JUROR: You have to be absolutely one hundred percent, whatever the crime was, whatever happened, it has to be one hundred percent proven.

TR Vol. XI, p. 1052.

At no time did the defense object nor did the State instruct the jurors that residual doubt was not something they were allowed to consider when determining if death is the appropriate penalty.

This Court has long held that "residual or lingering doubt is not an appropriate mitigating circumstance." Sims v. State, 681 So.2d 1112, 1117 (Fla. 1996)(citing Bogle v. State, 655 So.2d 1103, 1107(Fla. 1995), cert. denied, 516 U.S. 978, 133 L.Ed.2d 410 (1995); Downs v. State, 572 So.2d 895, 900 (Fla. 1990), cert. denied, 502 U.S. 829, 112 S.Ct. 101, 116 L.Ed.2d 72 (1991); Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987).

Several jurors, including at least 3 that ultimately sat on Mr. Anderson's jury, were confused about when the death penalty was appropriate. Failure to object or correct the State's allowed mischaracterizations of the law was deficient performance which prejudiced Mr. Anderson by allowing jurors who did not understand the weighing process to sit on his jury and decide his fate.

During voir dire and again in closing argument, the prosecutor continued to mislead the jury about the weighing process on several separate occasions. He repeatedly told the jury that it was a weighing of the aggravators against the mitigators and neglected to mention the first crucial step where the jury is first supposed to make an independent determination as to whether the aggravating factors standing alone justify a death sentence. For example, the prosecutor at one point during voir dire stated, "You weigh the aggravating evidence versus the mitigating evidence, and which ever way your personal scale tips, that, under the law, is supposed to be the recommendation that you make." TR Vol. XI p. 1069. He also made statements referring to the "aggravating evidence stacking up against the mitigating evidence" and if the "scales tipped in favor of the death penalty." TR Vol. XI, p. 1102; TR Vol. XII, p. 1275. The prosecutor continued making these misstatements throughout the penalty phase, both in opening statement and closing arguments.

The misstatements were never objected to nor corrected by Mr. Anderson's counsel.

In addressing this claim, the postconviction court conceded that the explanations of the weighing process "may have been less than a full explanation regarding the sentencing process." ROA Vol. V, p. 842. Despite this apparent finding of deficient performance, the postconviction court denied relief because it found that the jury had been properly instructed. However, the postconviction court's order does not address the extensive misunderstanding on the applicable death penalty law, as evidenced above, that Mr. Anderson's jury demonstrated throughout the voir dire as evidenced above. As such, his finding is not supported by competent substantial evidence.

ARGUMENT III

THE LOWER COURT ERRED IN FINDING THAT TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO REQUEST THE MERGING INSTRUCTION FOR THE PENALTY PHASE.

Counsel rendered deficient performance by failing to request the trial judge to give Florida Standard Jury Instruction in Criminal Cases 7.11. As noted above, the United States Supreme Court held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversary testing process. Strickland v. Washington,

466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There are two prongs to an ineffective assistance of counsel claim.

> First, a petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, whose result is reliable.

Id. at 687. In addition, to establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Id. At 688.

In Mr. Anderson's case, the state sought, and the jury found, two aggravators based on the same facts. The two aggravators were "cold, calculated, and premeditated," and "pecuniary gain." Instruction 7.11 reads as follows:

> *Merging aggravating factors*
> *Give the following paragraph if applicable. When it is given you must also give the jury an example specifying each potentially duplicitous aggravating circumstance. See Castro v. State, 596 So.2d 259 (Fla. 1992).*[2]
>
> **The State may not rely upon a single aspect of the offense to establish more than one aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are proven beyond a reasonable doubt by a single aspect of the offense, you**

[2] The correct cite for Castro v. State is 597 So.2d 259 (Fla. 1992).

> **are to consider that as supporting only one aggravating circumstance.**

Florida Standard Jury Instructions in Criminal Cases 7.11.

Trial counsel did not request this instruction to be given, or if he had, it was withdrawn. TR Vol. XVII, p. 2321-2332. This Court has held that it is error for the trial court not to give that limiting instruction when requested. Castro v. State, 597 So.2d. 259, 261 (Fla. 1992). The Castro court clarified the holding in Suarez v. State, 597 So.2d 259 (Fla. 1985). Suarez held that "it was not reversible error when the jury was instructed on both factors as long as the trial court *did not give the factors double weight in its sentencing order.*" Id. at 1209 (emphasis added). Mr. Anderson's jury was not given that instruction. Moreover, the trial judge *did* give the factors double weight in its sentencing order. The trial judge gave great weight to CCP and moderate weight to Pecuniary Gain. TR Vol. V, p. 852,855. The trial judge's order cites almost exclusively to facts relating to the premeditation and planning of the robbery under its discussion of CCP. On the other hand, his discussion of the facts supporting Pecuniary Gain is a mere three sentences and simply a restatement of the facts under CCP:

> The defendant's plan was to rob the bank, deposit the stolen money in another bank, pay his restitution in order to stay out of the Probation and Restitution Center, and then continue to live a normal life. In order to successfully carry out his plan, he

> had to kill the two eyewitnesses who had observed and talked with him for hours over a two day period. This Court finds this aggravator was proven beyond a reasonable doubt and is accorded moderate weight in determining the appropriate sentence in this case.

Id. at 855.

Therefore, under both Castro and Suarez, it was error for the jury not to be read that limiting instruction, and counsel was ineffective for failing to request it.

Mr. Stone testified that he thought the merger instruction had been given at trial, and that he had no strategic or tactical reason not to seek the instruction. ROA Vol. X, p. 1810. Mr. Doud testified that he would have sought the merger instruction at trial, but could not recall his state of mind at trial, and recalled no tactical or strategic reason for failing to seek the instruction. ROA Vol. X, p. 1879.

The evidence showed fairly elaborate premeditation and planning for the bank robbery. However, the evidence did not show that the murder of Ms. Young was any part of that planning. In its order denying relief, the postconviction court does not address Suarez or Castro. The order merely cites to this Court's affirmance of both aggravators on direct appeal. ROA Vol. V, p. 862, 863. It does not address the performance or prejudice prongs of the ineffective assistance of counsel claim. As such, the post conviction court's order as to this claim

fails to rely on competent, substantial evidence, and, to the extent that the postconviction court's Order rejects this claim, it "fails to point to any evidence from the trial or [postconviction proceedings] that actually controverts [Mr. Anderson's claims.]" Coday v. State, 946 So.2d 988, 1020 (Fla. 2006) (Bell, J., *concurring*). This Court should substitute its own findings of fact and weigh the credibility of the witnesses for this claim. Sochor v. Florida, 883 So.2d 766, 781 (Fla. 2004).

ARGUMENT IV

THE LOWER COURT'S FINDING THAT TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE DURING THE GUILT PHASE BY FAILING TO ASK FOR A MISTRIAL AFTER THE STATE'S IMPROPER AND PREJUDICIAL CLOSING ARGUMENT, BY FAILING TO PROPERLY OBJECT TO THE BLOOD SPATTER EXPERT, AND BY FAILING TO OBJECT TO INFLAMMATORY PHOTOGRAPHS AND IRRELEVANT AND PREJUDICIAL TESTIMONY REGARDING THE LIFESAVING EFFORTS USED AND THE PHYSICAL CONDITION OF THE VICTIMS IS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

As noted above, the United States Supreme Court held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversary testing process. Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There are two prongs to an ineffective assistance of counsel claim.

> First, a petitioner must show that counsel's performance was deficient. This requires

> showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, whose result is reliable.

Id. at 687. In addition, to establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Id. at 688.

A. Failure to ask for a mistrial based on the State's improper and prejudicial closing argument.

At the close of the guilt phase the prosecutor improperly characterized Mr. Anderson's defense as the National Enquirer defense, and mocked, "Inquiring minds want to know." TR Vol. XVII, p. 2212. Then, to compound the blatantly improper statement, he invited the jurors to come and see him in his office after the trial and implied there were other facts that the jury did not hear that would answer their questions. Id. Counsel for Mr. Anderson objected and asked to approach the bench. Id. at 2213. At the bench, the judge admonished the prosecutor against inviting jurors to speak with him in his office after the trial. Id. However, the objection was ultimately overruled and the jury never heard the trial judge's admonition. Id. Thus, they were left with the impression that

there was extraneous information that would better explain the reason behind why Mr. Anderson committed this crime.

On direct appeal, this Court found the argument improper and noted that the trial counsel only objected, and did not move for a mistrial or curative instruction. Anderson v. State, 863 So.2d 169,187 (Fla. 2003). Ultimately, this Court held that Anderson was not entitled to relief. Id. At the evidentiary hearing, both Mr. Doud and Mr. Stone stated that they thought they had asked for a mistrial and that there was no tactical or strategic reason for them not to have done so.

The postconviction court's order as to this claim fails to rely on competent, substantial evidence, and, to the extent that the postconviction court's Order rejects this claim, it "fails to point to any evidence from the trial or [postconviction proceedings] that actually controverts [Mr. Anderson's claims.]" Coday v. State, 946 So.2d 988, 1020 (Fla. 2006) (Bell, J., *concurring*). This Court should substitute its own findings of fact and weigh the credibility of the witnesses. Sochor v. Florida, 883 So.2d 766, 781 (Fla. 2004).

In its Order denying relief, the postconviction court stated, "Even considering the cumulative effect of the alleged errors, Defendant has failed to show a reasonable probability the outcome of the proceedings would have differed in the absence of Counsel's alleged deficient performance." ROA Vol.

V, p. 844. However, the postconviction court's analysis is insufficient. The order does not address or cite to any of the other compelling mitigation evidence that was presented at the evidentiary hearing. The postconviction court did not address the numerous evidentiary errors made by counsel in the guilt phases, nor does it address trial counsel's woefully inadequate mitigation investigation and presentation. As such, the denial of this claim as to its cumulative effect is not supported by competent, substantial evidence.

B. Failure to object to the state's blood spatter expert's testimony as speculative, highly inflammatory, and of dubious probative value.

At trial, the defense objected to the lack of qualification of the blood spatter expert, Farley "Jake" Caudill, but raised no other objection. On direct appeal, Mr. Anderson argued that the testimony of Mr. Caudill should have been excluded because he was not qualified *and* that the testimony was of dubious probative value, completely speculative, and highly inflammatory. This Court found that the dubious probative value, completely speculative, and highly inflammatory objection was not properly preserved at trial because trial counsel did not lodge that specific objection. Anderson at 181. At the evidentiary hearing, Mr. Stone offered no strategic or tactical reason not to object on those grounds and testified that he thought he had in fact objected on the ground that it was

speculative. He agreed that it would have been appropriate to do so. ROA Vol. X, p. 1807.

On direct appeal, this Court found that even if the objection was properly preserved, the trial court did not abuse its discretion in allowing Mr. Caudill to testify. Anderson at 181. However, Mr. Anderson argued to the postconviction court that the cumulative effect of the failure to properly preserve the issue prejudiced Mr. Anderson and that Mr. Anderson has shown that there exists a reasonable probability the outcome of the proceedings would have been different based on the cumulative effect of the error.

The postconviction court, in its order denying this claim, does not address the cumulative effect of the error. Again, the order does not address or cite to any of the other compelling mitigation evidence that was presented at the evidentiary hearing. The postconviction court did not address the numerous evidentiary errors made by counsel in the guilt phases, nor does it address trial counsel's woefully inadequate mitigation investigation and presentation. As such, the denial of this claim as to its cumulative effect is not supported by competent, substantial evidence.

C. Failure to object to inflammatory photographs.

On direct appeal, counsel for Mr. Anderson objected to the introduction of three photographs of the surviving victim

Marisha Scott. Anderson at 185. Counsel had objected to these photos at trial. Id. Trial counsel did not object to the five pictures of deceased victim Heather Young. Anderson at 186. In his 3.851 motion and at the evidentiary hearing, Mr. Anderson argued that trial counsel was ineffective for failing to object to the photos of Heather Young. He also argued that counsel was ineffective for failing to stipulate that Mr. Anderson shot Marishia Scott, and failing to effectively narrow the issues in the guilt phase.

The defense in the guilt phase was focused on whether Mr. Anderson intentionally shot the two victims. Mr. Stone's cross-examinations of the state's witnesses essentially conceded the shootings, the identities of the victims, and the felony murder theory. Mr. Anderson could only offer testimony that he did not have an intent to shoot the victims when he initiated the bank robbery, or even when the guns were fired. Had trial counsel properly objected and pointed this out to the court, he could have prevented the introduction of the photographs of Marishia Scott as cumulative, inflammatory, and unduly prejudicial.

Counsel Stone testified he thought he had objected to the photographs, and he had no strategic or tactical reason for failing to move in limine pretrial to limit or eliminate the photographs. Defense counsel Doud testified that he did not recall any strategic decisions to deal with the photographs in

this ineffective manner. Had the defense done so, they could have structured the defense to eliminate the rationale for admitting the photos.

The photographs were highly inflammatory, and a total of eight graphic victim photos were introduced. Effective trial counsel could have been able to limit them to one or two per victim. Failure to move in limine or adequately object was deficient performance which prejudiced Mr. Anderson.

D. Failure to object or move in limine to exclude irrelevant and prejudicial testimony about the lifesaving efforts used to tend to the victims.

At trial, there was extensive testimony about the conditions of the victims as they were lying in the bank vault and the heroic efforts that emergency medical personnel made to try to save them. Such testimony was irrelevant, inflammatory, and highly prejudicial. Defense counsel rendered ineffective assistance of counsel when, in cross examining Deputy Thomas, a first responding officer, he failed to object and move to strike a nonresponsive, prejudicial answer. The exchange was as follows:

> Q: …You said you looked in the vault after the suspect was under control out there in the lobby, correct?
>
> A: Yes, sir. And I saw blood splatter and the two victims lying on the ground as well as, once again, I saw Heather Young, who was still convulsing - -

> Q: Excuse me, did you know Miss Young?
>
> A: No, this was after the fact. I didn't know the suspect's name, but I learned of it after the fact. Immediately after I arrested him and got his I.D. Miss Young was deceased, later found out who she was, and Marisha Scott as well, who they were. And I saw Heather Young on the ground and *Marisha Scott was pretty much choking on her blood, pretty much trying to grasp for air. I held Heather Young in my arms and she pretty much was just trying to say "help me." She went.*

TR Vol XII, p. 1380(emphasis added).

This answer was not at all responsive to the question, "Did you know Miss Young?" Counsel was ineffective for failing to object, seek an instruction to the witness to answer responsively, to strike the testimony, to instruct the jury with a curative instruction, and to seek a mistrial. Mr. Stone and Mr. Doud testified they were unaware of any strategic or tactical element involved in the asking of the question or the failure to object to the unresponsive answer. ROA Vol. p. 1808, 1878.

Counsel was ineffective for failing to object or limit the gruesome and detailed testimony of Deputy Thomas, TR Vol. XII, p. 1380-82; Kirk Lewis, TR Vol. XIII, p. 1406-26 (EMT), Mark O'Keefe, TR Vol. XIII, p. 1426-52 & p. 1506-08 (Paramedic); Dr. Susan Rendon, TR Vol. XIII, p. 1562-91 (medical examiner); Marisha Scott, TR Vol. XV, p. 1986-2000, TR Vol. XVI, 2003-2024 (victim); and James Jicha, TR Vol. XVI, p. 2024-34

(investigating detective who introduced video of Ms. Scott making mute ID of defendant in hospital bed after objection that video would have been unfairly prejudicial unless the sound was activated).

Reasonably competent counsel would not have elicited the testimony of Deputy Thomas, and could have eliminated or limited the gruesome and detailed testimony of Lewis and O'Keefe as to the final moments of Ms. Young's life and the agonies of Ms. Scott at the scene and on her rescue flight to the hospital. The jury would have been properly informed of the facts had the testimony been limited to that of the medical examiner and Ms. Scott, the surviving victim. The evidence of the medical efforts to save the victims' lives was simply not relevant to any element of the offense or the case, and was clearly introduced to inflame the jury. The state did not seek the aggravator of heinous, atrocious or cruel, so the testimony was irrelevant even if it would have been offered in the penalty phase.

There was no evidence produced at the evidentiary hearing to show that this omission was a strategic or tactical choice. Lead counsel Stone testified that he did not consider a motion in limine to prevent the introduction of the multiple witnesses who testified about the efforts to save the victim's lives in the vault. In fact, even though he was present at the trial,

his opinion of this lengthy, prejudicial, and cumulative presentation was: "I don't know that there was that much redundant depth, but, you know, maybe there was." ROA Vol. X, p. 1752. He offered no strategic or tactical reason for allowing it to happen. This was deficient performance which prejudiced Mr. Anderson.

ARGUMENT V

THE LOWER COURT ERRED IN DENYING MR. ANDERSON'S MOTION TO INTERVIEW JURORS TO DETERMINE THE PREJUDICIAL EFFECT OF MR. ANDERSON'S ROUTINE SHACKLING DURING THE ENTIRE TRIAL AND THIS COURT SHOULD REMAND TO ALLOW THE JUROR INTERVIEWS TO TAKE PLACE.

Mr. Anderson filed his Motion to Interview Jurors at the same time he amended his 3.851 motion to include the shackling claim. ROA Vol. III, p. 422. A hearing was held on January 18, 2006 wherein the postconviction court heard the motion. The motion was subsequently denied on January 20, 2006. The sole purpose of the motion to interview the jurors was to determine whether or not they saw or heard Mr. Anderson's shackles at any point during the guilt or penalty phases of his trial.

The standard of review for a denial of a motion to interview jurors is an abuse of discretion. Marshall v. State, ---So.2d---, 2007 WL 5258618 (Fla.). This Court has said that "juror interviews are not permissible unless the moving party has made sworn allegations that, if true, would require the

court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceeding." Power v. State, 886 So.2d 952, 957(Fla. 2004)(citing Johnson v. State, 804 So.2d 1218,1224 (Fla. 2001)(citing Baptist Hosp. of Miami, Inc. v. Maler, 579 So.2d 97, 100 (Fla. 1991).

Further, in Maler, this Court recognized the importance of considering "exactly what type of information will be elicited from the jurors" when determining whether to grant a motion to interview jurors. Maler at 99. This Court noted that:

> Florida's evidence code, like that of many other jurisdictions, absolutely forbids any judicial inquiry into emotions, mental processes, or mistaken beliefs of jurors. Jurors may not even testify that they misunderstood the applicable law. This rule rests on a fundamental policy that litigation will be extended needlessly if the motives of the jurors are subject to challenge. The rule also rests on a policy of preventing litigants or the public from invading the privacy of the jury room.
>
> However, jurors *are* allowed to testify about overt acts which *might* have prejudicially affected the jury in reaching their own verdict.

Maler at 99.(internal quotations and citations omitted)(emphasis in original). Moreover, jurors may testify as to whether extraneous prejudicial information was improperly brought to their attention. Mattox v. U.S., 146 U.S. 140 (1892); Tanner v. U.S., 483 U.S. 107 (1987).

The case law provides a distinction between overt prejudicial acts and subjective juror impressions. If a motion to interview jurors seeks to inquire about subjective impressions or about matters which "inhere in the verdict," it is properly denied. However, a motion to interview jurors on overt prejudicial acts is permissible.

Mr. Anderson's shackling is an "overt prejudicial act" which was an appropriate subject for inquiry and the trial court abused its discretion in denying his motion to interview the jurors to determine whether the jurors saw or heard his shackles.

Moreover, the allegations in Mr. Anderson's sworn motion to interview jurors, if true, would require the court to grant Mr. Anderson a new trial. As will be discussed more fully below, the routine shackling of Mr. Anderson during both his guilt and penalty phase was a violation of Mr. Anderson's due process rights under both the Federal and Florida Constitutions. Holbrook v. Flynn, 475 U.S 560, 106 S.Ct. 1340, 89 L.Ed.2d. 525; Deck v. Missouri, 544 U.S. 622,125 S.Ct. 2007, 2014 (2005). He is entitled to a new trial free from the burdens of his shackles, unless the trial court can specify an essential state interest specific to the danger or security risk of Mr. Anderson himself. Mr. Anderson respectfully requests that this court

remand this issue to the postconviction court and order the interview of jurors to take place.

ARGUMENT VI

THE LOWER COURT ERRED IN FINDING THAT MR. ANDERSON'S DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN HE WAS ROUTINELY SHACKLED DURING THE GUILT AND PENALTY PHASE INCLUDING WHEN HE TOOK THE STAND IN HIS DEFENSE.

A defendant's due process rights are violated when he is shackled in the presence of the jury during his trial. Holbrook v. Flynn, 475 U.S 560, 568-569, 106 S.Ct. 1340, 89 L.Ed.2d. 525. (1986). Routine shackling is prohibited; there must be an "essential state interest" to justify the practice such as a "security-specific to the defendant on trial." Id. This right was extended by the Supreme Court in 2005 to include the sentencing phase of a capital case.

> Nonetheless, shackles at the penalty phase threaten related concerns. Although the jury is no longer deciding between guilt and innocence, it is deciding between life and death. That decision, given the severity and finality of the sanction, is no less important that the decision about guilt.

Deck v. Missouri, 544 U.S. 622, 632, 125 S.Ct. 2007, 2014 (2005) (internal quotations and citations omitted).

Prior to the United States Supreme Court's holding in Deck, the Eleventh Circuit recognized that shackling a defendant during the penalty phase of his trial without a prior finding of necessity violates a defendant's Due Process rights. Elledge v.

Dugger, 823 F.2d 1439 (11th Cir.)(per curiam), *receded from on other grounds*, 833 F.2d 250 (11th Cir. 1987)(per curiam), *cert.denied*, 485 U.S. 1014(1988). Elledge held that shackling of petitioner at sentencing hearing violated Due Process Clause because inadequate prior determination of dangerousness and need for restraint. See also Duckett v. Godinez, 67 F.3d 734, 740 (9th Cir. 1995); Rhoden v. Rowland, 172 F.3d 633(9th Cir. 1999)(habeas petition granted where petitioner was shackled throughout trial, in view of jurors, even though no compelling security need for shackles was established).

The reasons for prohibiting routine shackling are threefold. First, every criminal defendant is presumed innocent until proven guilty. Deck. at 2103. "Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process." Id. Moreover, "it suggests to the jury that the justice system itself sees a need to separate a defendant from the community at large." Id. (internal quotations omitted).

Second, every defendant has a Sixth Amendment right to counsel. Having a defendant physically restrained interferes with that right. Id. Shackling will "interfere with the accused's ability to communicate with his lawyer" and "ability to participate in his own defense, say, by freely choosing

whether to take the witness stand on his own behalf." Id. (internal citations and quotations omitted).

Third, the judicial process is supposed to be a dignified one.

> The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment.
>
> ****
>
> [t]he use of shackles at trial affronts the dignity and decorum of judicial proceedings that the judge is seeking to uphold.

Id. at 2013, 631. (Internal quotations and citations omitted.

The Deck Court rejected the state's claim that the defendant did not show prejudice because there was no evidence as to how much the jury was aware of the shackling or any record that the defendant's ability to participate in the proceedings was diminished. "This statement does not suggest that the jury was unaware of the restraints. Rather it refers to the *degree of the jury's awareness*, and hence to the kinds of prejudice that might have occurred." Id. at 2015, 634 (emphasis added).

Mr. Anderson was shackled throughout his capital murder trial, without any determination by the court that shackling was necessary. Mr. Anderson was shackled with leg irons to a shackle point underneath defense table. The leg irons are thick

chains which can be very noisy, especially when they make contact with the metal shackle point. During voir dire, when the jury was seated in the audience, the state and defense sat on the opposite sides of the table. Mr. Anderson was shackled to a metal point at the front of that table. From that viewpoint, the venire panel could see underneath defense table, where there was another shackle point. Deputy Nelson, testified that she placed a chair in front of that point in order to minimize the jury's view. However, as is clear from the pictures taken and admitted as Defense Exhibit 6 at the evidentiary hearing, the chair is a typical office chair that has an empty space under the seat, and can be easily seen through. The venire panel could see that shackle point and see Mr. Anderson seated directly across from it. Then, to those selected on the jury, the shackle point on the front of the defense table was visible, with one conspicuously absent from the state's table. They could see Mr. Anderson seated directly across from that shackle point. They would easily infer that Mr. Anderson was shackled to both of those points throughout the trial. During jury selection, there was confusion from the jurors as to whether Mr. Anderson was incarcerated. TR Vol. XI, p. 1006. Ms. Nelson also testified that while Mr. Anderson was on the stand, he was shackled to the witness stand, but that she

placed a wastebasket on the floor and stood nearby to attempt to block the jury's view. ROA Vol. XI, p. 1975-76.

Mr. Anderson was instructed by Ms. Nelson not to move too much so as not to rattle the chains. This fear of noise and restricted movement had a chilling effect on Mr. Anderson's ability to participate fully in his defense. He was constantly aware of being tethered to the defense table and trying not to make noise so as to further prejudice him in front of the jury, all of which hampered his ability to communicate with his defense team.[3] In addition, he was tethered to the witness stand during his testimony in the guilt phase, a fact the prosecutor was fully aware of when he forced Mr. Anderson to stand up and show the jury how he was holding the guns during the bank robbery. TR Vol. XVI, p. 2137.

Trial counsel did not object to the shackling and the court never held a hearing to determine the need to shackle Mr. Anderson. There is no indication anywhere in the record that Mr. Anderson ever presented a security risk to the courtroom personnel or any spectators. Rather, it appears that it was routine practice to shackle capital defendants, and perhaps all defendants, given the permanency of the shackle points at

[3] Mr. Anderson filed a motion to interview jurors regarding the shackling issue. That motion was denied. As such, Mr. Anderson cannot present any further evidence as to the jury's awareness of the shackles. The denial of the motion to interview jurors was discussed above in Argument V.

defense table as evidenced by the photographs. In fact, Deputy Nelson referred to it as standard procedure with an incarcerated defendant. ROA Vol. XI, p. 1977.

Mr. Anderson presented sufficient evidence to show that the jury was aware of his shackles. As noted above, to show prejudice, Mr. Anderson does not have to show the extent of the awareness in order to obtain relief. The practice of shackling is "inherently prejudicial." Holbrook v. Flynn, 475 U.S. at 568, 106 S.Ct. 1340. Because of this presumption, Mr. Anderson "need not demonstrate actual prejudice to make out a due process violation;" instead the state must prove beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained." Deck v. Missouri, 544 U.S. 622, 635 125 S.Ct. 2007, 2014, 2015 (2005)(citing Chapman v. California, 386 U.S 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)(internal quotations omitted).

The routine shackling of Mr. Anderson during both his guilt and penalty phase was a violation of Mr. Anderson's due process rights under both the Federal and Florida Constitutions. He is entitled to a new trial free from the burdens of leg irons, unless the trial court can specify an essential state interest specific to the danger or security risk of Mr. Anderson himself. Absent such a finding, the dignity of the judicial process cannot be compromised, and Mr. Anderson cannot be hampered in

his ability to enjoy the presumption of innocence and participate in his defense.

ARGUMENT VII

MR. ANDERSON WAS DEPRIVED OF HIS DUE PROCESS RIGHTS TO DEVELOP FACTORS IN MITIGATION BECAUSE THE PSYCHOLOGIST RETAINED BY THE DEFENSE FAILED TO CONDUCT THE APPROPRIATE TESTS FOR ORGANIC BRAIN DAMAGE AND MENTAL ILLNESS. THIS VIOLATED MR. ANDERSON'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION.

Due Process requires competent mental health assistance to ensure fundamental fairness and reliability in the adversarial process. Mason v. State, 489 So.2d 734 (Fla.1986); Sireci v. State, 536 So.2d 231 (Fla. 1988); Ake v. Oklahoma, 470 U.S. 68 (1985). Due Process is violated under Ake where a mental health examination is so "grossly insufficient" that clear indicators of brain damage are ignored. Sireci v. State, 502 So.2d 1221, 1224 (Fla. 1987). See also Powell v. Collins, 332 F.3d 376 (6th Cir. 2003)(recognizing that a defendant's Fifth and Sixth Amendment rights are violated when, in a capital sentencing, counsel fails to prepare and present mitigation evidence of brain damage).[4]

[4] Mr. Anderson recognizes that this Court has held this issue to be procedurally barred, but argues that the procedural bar is arbitrarily applied, as evidenced by Mason and Sireci.

Mr. Anderson did not receive a professionally adequate mental health evaluation and hence, a fundamentally fair sentencing, in light of the mitigation which should have been presented. Dr. McMahon, the psychologist appointed by the court to assist Mr. Anderson, did not give Mr. Anderson competent mental health assistance because she did not perform a competent evaluation which would have revealed Mr. Anderson's longstanding mental illness.

Dr. McMahon's mental health evaluation failed to detect obvious signs that Mr. Anderson suffers from Post-Traumatic Stress Disorder and Borderline Personality Disorder and that these mental illnesses affected his behavior and decision making ability at the time of the crimes. Dr. McMahon's mental health evaluation also failed to include a comprehensive biological, social and psychological history of Mr. Anderson and was based on incomplete and inadequate investigation, documentation and sources. Dr. McMahon testified that she did not talk to any outside witnesses or seek any corroborative sources to determine Mr. Anderson's mental state at the time of the crime.

Dr. McMahon's failure to give a professionally adequate mental health evaluation prejudiced Mr. Anderson. Had Dr. McMahon carefully reviewed the forensic questionnaire that was provided to her, she would have seen that Mr. Anderson noted "extreme fears", "sick a lot", and "accident prone" during his

childhood. This was in marked contrast to him saying that he had loving parents and was not abused. Had she been more thorough in questioning Mr. Anderson she would have discovered the extent of the sexual abuse he suffered and the effect that abuse had on his development. She would have been able to corroborate this abuse by speaking to Raymond Green, who was readily available. This objective data would have allowed Dr. McMahon to testify that Mr. Anderson met the statutory mental mitigators. With this evidence, the balance of aggravating and mitigating circumstances would weigh differently and there exists a reasonable probability Mr. Anderson would have received a life sentence.

ARGUMENT VIII

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. ANDERSON OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Anderson did not receive the fundamentally fair trial to which he was entitled under the Sixth, Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The sheer number and types of errors in Mr. Anderson's guilt and penalty phases, when considered as a whole, virtually dictated the sentence of

death. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel significantly tainted Mr. Anderson's guilt and penalty phases. Trial counsel allowed misleading statements to be made by the prosecutor during voir dire and throughout the penalty phase. Trial counsel made numerous evidentiary errors during the guilt phase by failing to properly object to inflammatory, irrelevant, and prejudicial evidence. Trial counsel failed to properly investigate and present mitigation, including uncovering extensive sexual abuse, mental illness, and brain damage. In addition, his attorneys failed to ensure he received an adequate mental health evaluation and failed to provide Dr. McMahon with the necessary information and witnesses. Trial counsel failed to request proper jury instructions during the penalty phase. Finally, trial counsel failed to insure that Mr. Anderson remained free from unnecessary shackles throughout his trial.

These errors cannot be harmless. Under Florida case law, the cumulative effect of these errors denied Mr. Anderson his fundamental rights under the Constitution of the United States and the Florida Constitution. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Ray v. State, 403 So.2d 956 (Fla. 1981); Taylor v.

State, 640 So.2d 1127 (Fla. 1st DCA 1994); Stewart v. State, 622 So.2d 51 (Fla. 5th DCA 1993); Landry v. State, 620 So.2d 1099 (Fla. 4th DCA 1993).

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Anderson relief on his 3.851 motion. This Court should order that his sentences be vacated and remand the case for a new trial, or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by U.S. Mail to all counsel of record on this ____ day of April, 2008.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Courier New 12 point font, pursuant to Fla. R. App. P. 9.100 and 9.210.

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