IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-1406

LOWER COURT CASE NO. 91-002CF

VICTOR MARCUS FARR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR COLUMBIA COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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STANDARD OF REVIEW

Mr. Farr presents several issues that involve mixed questions of law and fact. This Court has reviewed such issues with a mixed standard of review. "Brady claims are mixed questions of law and fact. When reviewing Brady claims, this Court applies a mixed standard of review, "defer[ring] to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but review[ing] de novo the application of those facts to the law." *Johnson v. State*, 921 So. 2d 490, 507 (Fla. 2005)(citations omitted). Likewise, this Court has applied a similar standard of review for ineffective assistance of counsel claims. *Evans v. State*, 946 So. 2d 1, 24 (Fla. 2006).

REQUEST FOR ORAL ARGUMENT

Mr. Farr has been sentenced to death. The resolution of the issues in this action will determine whether Mr. Farr lives or dies. This Court has not hesitated to allow oral argument in other capital cases in similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Farr, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS[1]

On December 11, 1990, Victor Farr spent the day drinking and bar-hopping in Lake City, Florida. By evening, he had consumed somewhere between seventeen and twenty-nine beers and mixed drinks.[2] At approximately 7:30 p.m., Mr. Farr exited a bar called "Tom's Place," and staggered down the street looking for a ride. He approached Cindy Thomas and Patsy Lynch and asked them for a ride, waving a gun in the air. Police reports state that one of the women thought "he was just kidding" and told him to "go for it." Mr. Farr then fired several shots wounding Ms. Thomas and Ms. Lynch, who ran into Tom's Place.

Mr. Farr continued down the street and came to a car occupied by Christopher Todd and Shirley Bryant. Again, he asked for a ride. Mr. Todd thought Mr. Farr "was really drunk" and told police: "I tried to blow him off like you know, 'You're drunk. You're crazy.'" (D.Ex 11). Mr. Farr got into the vehicle and attempted to drive it but he was "too drunk to put [the keys] in the ignition." The passenger, Shirley Bryant, "had to put the keys in the ignition" for him. Mr. Farr "could not get the headlights on." (D.Exs 9, 10). Mr. Todd exited the vehicle and Mr. Farr drove off with Shirley in the passenger seat.

Shortly after 8:30 p.m., Mr. Farr stopped at the Suwanee River Food Store some thirty miles northwest of Lake City. According to the store clerk, Mr. Farr entered the store while the female pumped gas in the car (D.Ex 28). After purchasing a six-pack of beer, Mr. Farr drove off. A short time later, he was pursued by two pick-up trucks, one driven by an officer of the Florida Game and Fish Commission and the other by an employee of the Department of Transportation (*Id.*). In high-

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[1]The following abbreviations will be sed to cite to the record: "R ____," record on direct appeal to this Court; "SR ____," supplemental record on direct appeal to this Court following re-sentencing; "PC _:___," Rule 3.850 record on appeal, designated as "volume: page"; "EH__," Rule 3.850 evidentiary hearing transcript; "D.Ex_," defense exhibits admitted during the evidentiary hearing; "S.Ex ____." State's exhibits admitted during the evidentiary hearing.

[2]There is no trial record in the case and there was no sworn witness testimony of any kind until the Rule 3.850 evidentiary hearing in November 2007. These details and the following account are derived from police reports reconstructing Mr. Farr's alcohol consumption and activities that day, introduced at the Rule 3.850 hearing (S.Ex 8; D.Exs 12, 14, 17, 19, 28).

speed pursuit, the trucks attempted to stop the vehicle by pulling along side it, but Mr. Farr accelerated and pulled ahead. Moments later, at approximately 8:46 p.m., the vehicle went into a large curve and ran off the road into a pine tree (*Id.*). Shirley Bryant was killed in the collision. Several hours later, at 10:56 p.m., a blood sample was taken from Mr. Farr at the hospital. His blood alcohol content at that time was determined to be .21%.

The next day, Mr. Farr was interviewed at the Hamilton County Jail by Lake City Police Chief Frank Owens. Mr. Farr remembered little about the previous evening (D.Ex 7). That afternoon, in transit to the Columbia County jail he told the transport officer that the first thing he remembered was his jeans being cut off at the hospital (D.Ex 8). He asked the officer, "How is the girl that was riding with me?" (*Id.*). The officer replied that he "wasn't sure." Mr. Farr said, "I don't see how she could have been hurt so bad, and I didn't get hurt hardly at all." (*Id.*). According to the officer, Mr. Farr "did ask about the girl two more times before we got back to Lake City." (*Id.*).

The next day, December 13, 1990, William Slaughter was appointed to represent Mr. Farr. During the next two months, Mr. Farr, who has a seventh grade education, wrote numerous letters imploring his attorney to visit him. He wrote, "I never ment to kill her. I never plained to hurt her." (sic) (D.Ex 34). Mr. Farr wrote to his attorney that he had a psychiatric history and asked counsel to obtain his mental health records from Texas (D.Ex 39). He wrote that he was being threatened by jail officers (D.Exs 39, 43). After two months in jail, Mr. Farr had still not received a visit from his attorney. On February 14, counsel wrote Mr. Farr stating, "You are correct . . . that I have not come to talk with you. . . *There is no need for a face to face conference*." (D.Ex 42).

Mr. Farr continued to write to his attorney, begging him to visit. Finally, more than two months after his arrest and having received *no* visits from his lawyer, on February 20, Mr. Farr wrote to his prosecutor claiming that he had driven into the tree intentionally "wishing to end both lives." (R. 217-8). On February 28, Mr. Farr was beaten "to a bloody pulp" by guards at the Columbia County Jail (EH 564-7, 578-9, 580-2, 669-71). That night, Mr. Farr wrote a detailed account of the beating to his attorney (D.Ex 43). On March 14, Mr. Farr informed counsel that he had written to

the prosecutor "saying I ment to kill the girl" (D.Ex 46). He confided, "True I did not mean any of that night to take place," but informed his attorney nevertheless: "I'll get on the stand and tell how I plained to kill (sic)."

On March 25, counsel wrote to Mr. Farr and informed him the state was not seeking the death penalty and that they "might be offering us a 'deal.'" On March 28, counsel drafted a "deal" whereby Mr. Farr would plead guilty and receive a death sentence (R. 180-3), and on April 2, 1991, per that agreement, Mr. Farr pled guilty "in return for" being sentenced to death (R. 1-38, 175-83).

On direct appeal, this Court vacated Mr. Farr's death sentence and remanded for resentencing, stating that "mitigating evidence *must* be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. . .":

> That requirement applies **with no less force when a defendant argues in favor of the death penalty and even if the defendant asks the court not to consider the mitigating evidence.**

Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993)(citations omitted)(italics in original; bold added). Noting that the trial court "apparently was influenced by Farr's decision not to present a case in mitigation," *id.*, this Court vacated Mr. Farr's death sentence because the trial court failed to consider

> information about Farr's troubled childhood, numerous suicide attempts, the murder of his mother, psychological disorders resulting in hospitalization, sexual abuse suffered as a child, and his chronic alcoholism and drug abuse, among other matters.

Id. At his resentencing on December 8, 1993, Mr. Farr disavowed all the mitigating evidence relied upon by this Court in remanding the case. No mitigating evidence was offered at the resentencing proceeding, and Mr. Farr was again sentenced to death (SR. 493-512). The sentencing memorandum setting forth the reasons for sentencing Mr. Farr to death was written entirely by Mr. Farr's prosecutor (DExs. 22, 31, 33; EH 118, 752).

On appeal, this Court affirmed. *Farr v. State,* 656 So. 2d 448 (1995). The United States Supreme Court denied certiorari on October 16, 1995. *Farr v. Florida*, 116. S.Ct. 333 (1995).

An evidentiary hearing on Mr. Farr's Rule 3.850 motion was held in November, 2007. Mr. Farr's trial attorney testified that he conducted no background investigation whatsoever into Mr.

Farr's life (EH 257-8, 292). Counsel testified that "investigation" in a capital case requires only "review of discovery materials [and] interview of the client, those two things." (EH 279). Counsel testified he felt no duty to determine the truth about Mr. Farr's background (EH 269). Counsel thus did not ascertain that Mr. Farr had a history of psychiatric treatment and suicide attempts, that he suffers from a multi-generational bi-polar disorder, that he was severely abused and neglected throughout childhood, grew up in poverty, and that he had only a seventh grade education.

Counsel testified that despite Mr. Farr's well-documented state of extreme intoxication at the time of the offense, he recommended Mr. Farr not pursue an intoxication defense because he "absolutely" believed Mr. Farr would "have to get on the stand" and testify in order to utilize such a defense (EH 250-1).

Counsel conducted no investigation of the circumstances of the fatal automobile collision at issue in Mr. Farr's case. Had counsel done so, he would have known that it was utterly "impossible" for Mr. Farr to have hit the tree intentionally (EH 546). Counsel thus accepted uncritically Mr. Farr's claim that he ran into the tree deliberately – a claim first made in a letter to his prosecutor asking to receive the death penalty, after two months in jail without a visit from his lawyer.

Forty days after post-hearing briefing was concluded, the Circuit Court issued an Order denying all relief. In its Order, the court acknowledged that "going to trial would require a great deal more investigation both in the guilt/innocence phase and the penalty phase," and that trial counsel "believed that he probably could have avoided the death penalty for Farr." (PC7:123). The court found that during the first 60 days after Mr. Farr's arrest, counsel made but one "brief" visit to the jail (before being appointed to the case), and "had written Farr twice and had at least one phone conversation." The court determined that this was adequate, holding that "a defendant's subjective desire for the comfort of a face-to-face meeting with his attorney simply does not rise to the level of a professional obligation." (PC7:125-6).

The court found that counsel's decision "not to pursue" a voluntary intoxication defense "was a reasonable strategic decision." (PC7:126). The court determined that counsel had no duty to

conduct any investigation into the circumstances of the offense, finding: "[H]ad litigation continued on, there were many areas to be investigated. However, Farr insisted on resolving this matter before those matters could be pursued." (PC7:127).

The court categorically rejected the sworn testimony of three eyewitnesses to Mr. Farr's severe beating at the hands of jail staff some sixteen years earlier. Without any explanation, the court found: "these three witnesses were incredible. Their stories appear totally concocted and fabricated." (PC7: 127).

The court found that Mr. Farr "generated a great volume of legally admissible mitigation evidence" at the hearing (PC7:132). Nevertheless, the court concluded that trial counsel was not ineffective in failing to conduct any investigation whatsoever because "Farr had directed him not to investigate any mitigation." (*Id.*). The court embraced Mr. Farr's own logic at the 1993 resentencing where he testified that introducing evidence of his troubled life would be a "cop out." Adopting the reasoning of a bi-polar, seventh grade dropout, the court quoted Mr. Farr in holding that: "although others may view Farr's childhood as deprived, it is certainly not necessarily wrong for Farr to view it as a 'cop out to say that that played any part in that night for it did not'. . . A large segment of the population would certainly share Farr's views." (PC7:133). The court thus concluded: "Farr credibly established that there was no substantial mitigation." (PC7:132).

With regard to the prosecutor's improper authorship of the trial court's capital sentencing order, the court acknowledged that "The bulk of the [trial court's] findings were identical to the State's proposed findings." (PC7:136). Although evidence of the violation was not in the record, the court found the claim procedurally barred (PC7:136). The court likewise found: "[C]laims of inaccuracies in the factual findings clearly should have been raised on direct appeal." (PC7:136, 138).

Ultimately, the court accepted trial counsel's testimony that throughout his representation of Mr. Farr, "his client was cooperative, intelligent and articulate. . . sane and rational." (PC7:138-9). "As to the guilty plea, there is simply no basis to suggest that Slaughter should have done any further

mental health investigation." (*Id.*).

SUMMARY OF THE ARGUMENT

Trial counsel conducted no investigation whatsoever into Mr. Farr's profoundly troubled life or the circumstances of the vehicular homicide at issue. Counsel failed to verify Mr. Farr's history of psychiatric treatment, alcoholism and suicide attempts before drafting the plea agreement whereby Mr. Farr pled guilty to all charges in return for receiving the death penalty, four life sentences, and ninety years in prison. The capital sentencing order was unlawfully written by the prosecutor.

At the Rule 3.850 evidentiary hearing, trial counsel asserted that United States Supreme Court law and ABA standards for capital representation do not apply to him or this case. The circuit court agreed, which was clearly erroneous.

ARGUMENT I

MR. FARR'S PLEA WAS INVALID AND HIS CONVICTION MUST BE VACATED DUE TO COUNSEL'S INEFFECTIVE REPRESENTATION.

"Counsel must strive to prevent a (perhaps depressed or suicidal) client from pleading guilty where there is a likelihood that such a plea will result in a death sentence."

- ABA Guidelines for the Appointment and Performance of Counsel in Death

Penalty Cases (1989), "Commentary" to Guideline 11.6.3(B)

C. COUNSEL'S UNREASONABLE NEGLECT OF MR. FARR AND HIS LEGAL DEFENSE.

On December 13, 1990, less than 48 hours after the fatal crash, William Slaughter was appointed as Mr. Farr's lawyer. Over the next two months, Mr. Farr wrote to his lawyer repeatedly, begging for a visit and for some word about his case. Barely two weeks after his arrest, he wrote: "I never ment to kill her (sic). I never plained to hurt her. The police man run me off the road." (D.Ex 34). Three weeks after his arrest, having heard from other inmates and capital defendants what his lawyer was supposed to be doing, he wrote counsel requesting that basic motions be filed (D.Ex 36). After one full month in jail, he still had not heard from his lawyer except for a terse letter, January 10, 1991, containing a copy of the Indictment and telling Mr. Farr that counsel already had everything he needed to know:

> These notes, plus your several letters to me, have given me a fairly clear picture of your version of the facts surrounding the incidents which have led to your indictment.

(D.Ex 37). The following week, Mr. Farr wrote to his lawyer again, in desperation:

> I'm seting here in my cell, it must be 3:00 or 4:00 in the morning. It has been 36 days now. Sir, I have yet to have one night of good sleep. I have bad dreams. I need someone to tolk to. I'm about to lose my mind. I start to tolk to an inmate but stop myself . . . because I may say the wrong thing. I've held all this in side wateing for you to come.

(D.Ex 38)(errors in original). After receiving a visit from Lake City Police Chief Frank Owens, Mr. Farr wrote his lawyer again informing him that he had asked Chief Owens "to get a list of my charges." He knew it was "dum" to speak with Owens, but explained that he had nowhere else to turn for help with his case:

> Maybe because I feel the end has come. *I've yet to see you. Or recive any word* on the things I've asked. Have you sent for the med. records from the State Hosp. And the Crises Center in San Antonio, Tex where I received mental help yet?

(D.Ex 39). He wrote that he was being threatened and mistreated:

> Also Sir, the police have been doing me wrong. One night I rcived no super. To night I was told I was going to recive a ass kicking. . . can't they leve me alone?

(*Id.*). *Two months after his arrest, Mr. Farr had still not received a visit from his lawyer.*[3] Increasingly desperate, Mr. Farr wrote again requesting that counsel file motions for discovery and for a statement of particulars (D.Ex 40). The next day, he wrote again, asking about other motions. He inquired whether counsel had filed a "Defence of Insanity," stating "I was truely not in my right mine that night." (sic). He also stated:

> *Also you have never even tolk with me about it.* For how could you, for you have *yet to tolk with me about anything.* That brings me to this if we can't work somethings out. I'm going to ask you to withdraw from my case.
>
> On this growns [grounds] in Rule Regulating the Florida Bar Rules of Professional Conduct, Rule 4-1.1 Competence, Rule 4-1.3 Diligence (I've wrote 5 times no reply) from Dec. 90 - Jan Rule 4.-1.3 Communication (you have yet to communicat with me on my case, after (2) times [momentary conversations in the courtroom] you told me you would be up but yet have, And once told someone you had but had not.
>
> *I've had no ider whats going on in my case from you. I've never seen you but once, for 3 min.* in court, "When you was late". . .we are looking at the rest of my life. *"I want and need to know whats going on".* And how can you be ready March 5th when you have yet talked, even thru mail to me.

(D.Ex 41)(italics added). Counsel *still* did not visit the jail to meet even once with his mentally ill, depressed, isolated and anxious client. Counsel asserted there was "no need" to meet his capital client in a February 14, 1991, letter to Mr. Farr:

> *You are correct when you say that I have not come to talk* with you at the Jail. As I told you in a recent telephone conversation and at the Courthouse, you have given me your version and comments in writing, and *there is no need for a face to face conference* at this point. . . .
>
> . . . . I have written at least two letters [this being the second], had at least one telephone conference with you and one meeting at the Courthouse.

(D.Ex 42)(italics added.) Mr. Farr replied to this admonishing correspondence and attempted to explain the reasons for his impatience with counsel:

> . . . . And by you not comeing to the jail, (ever) to tolk I felt a lost case. No one had tryed to explain what I cold fight with. So I've had to read for myself. . . .
>
> . . . . Let me know something, don't leve me, hanging out to dry, as I've been feeling. " I

[3]Counsel testified that he did meet with Mr. Farr "very briefly" the day before he was appointed to the case "to see if I would accept the appointment." (EH 197). They discussed "nothing of substance other than to say, I'm Bill Slaughter, I know you've got a problem. You know, it was very brief." (EH 198). There is no record of the meeting or reference to it in counsel's files.

don't feel we are ready for court." "We need to tolk"!

(D.Ex 43). In the same letter, he expressed fear of going to a state prison "full of Waldrons who work there."

> The girl who was killed in the car's, Mama's people. I've been told I would receive a "nice welcome." "By a Waldron"
>
> So even if I receive the Death Sen. I feel I'll be bet to death before geting to the chair.

(Id.)(underscore in original).

Mr. Farr grew more despondent about his case and his inability to get attention from his lawyer. Ignored by counsel, verbally abused and threatened by those sworn to guard and protect him, and advised by jail personnel to bite the bullet and accept that he deserved the death penalty, Mr. Farr decided that his only option was to procure for himself a death sentence. On February 20, Mr. Farr, a former psychiatric patient with a 7th grade education, wrote to assistant state attorney Coleman claiming that his actions on December 11, 1990, were planned and that he intentionally drove into the tree "wishing to end both lives". He wrote that when he shot Cindy Thomas that night, he "was aiming at her heart." He said he meant to kill Shirley "and the lady in the parken lot." (sic)(R. 217-8). It was well known to those around Mr. Farr that he fabricated these "facts" to provoke the state to seek the death penalty (*See e.g.* EH 582-3).

Finally, on February 25, more than two months after Mr. Farr's arrest and his appointment to the case, counsel paid Mr. Farr his first visit, but it was far too little and far too late.

On February 28, Mr. Farr was beaten to a "bloody pulp" by guards at the Columbia County Jail (EH 578). The beating was known to others in the jail and Mr. Farr's injuries were observed by numerous individuals. *See infra.* Mr. Farr wrote his lawyer that night informing him of the incident in great detail, naming the officers involved and identifying witnesses by name. Mr. Farr related a chilling account of being taken from his cell to a holding cell by Sgt. Jones and several other guards:

> I walked in and he told me to get down. I set on the floor, he said on your stomack I lay down as told. He then kicked me in the side, in the back, in the back of the head. And then cuffed my feet behind me. The Sgt. Jones nocked my head to the floor, with his boot.
>
> I tryed not to cry out. For I felt if I did it would only be what they wished to hear. .

.Inmates seen me covered with blood.

(D.Ex 48). Mr. Farr named various prisoners and staff who saw him bloodied from the beating. Still, he got no response from his lawyer, no protection, no help.[4]

On March 14, 1991, Mr. Farr wrote to his attorney and informed him of his self-incriminating February 20 letter to prosecutor Coleman. Reasonable counsel, aware that his client was receiving visits from the Chief of Police and writing to the prosecutor, would have taken the basic measure of meeting with his client to discourage such communications, but counsel here did not. Remarkably, in his March 14 letter, Mr. Farr informed counsel that his statements to Coleman professing his guilt and his intent were, in fact, *not true*. Mr. Farr told counsel of his intention to falsely portray himself as an incorrigible killer who meant to kill Shirley Bryant:

> So I did write (I'm sure you know by now) the state a letter saying I ment to kill the girl in the car. . . . *True, I did not mean any of that night to take place. Nor can I understand why it did. . . . I'll get on the stand and tell how I plained to kill, "have before and will again." (Have not)(Will not.)* (sic)

(D.Ex 46)(italics added.) Mr. Farr thus informed counsel that he would *lie* "on the stand."

On March 25, 1991, Mr. Farr's lawyer wrote Mr. Farr another letter. At this point, three and one-half months after Mr. Farr's arrest and counsel's appointment to the case, counsel had been to see Mr. Farr *only one time* at the jail, and this was only his second substantive letter to Mr. Farr during that entire period. Counsel informed Mr. Farr of the possibility of a plea "deal." Significantly, the letter indicates that the case was not being treated officially as a death penalty case:

> At this point, the State Attorney's Office has not yet advised me as to whether or not it plans to seek the death penalty in your case. If the State does not seek the death penalty, there will be no death penalty. At this point, the State Attorney's Office has indicated that it might be offering us a "deal", however, . . . I do not know that at this point, and therefore, will discuss this matter with you in greater detail when I have the details.

(D.Ex 47). On March 28, 1991, only three days after counsel had written to inform Mr. Farr of the possibility of a "deal" for prison time, Mr. Farr's attorney spent 13.4 hours working on the case.

[4] *See* further discussion of this incident and its legal significance in Arguments I.F. and II, *infra.*

S.Ex 53. He spoke on the phone with the State Attorney and with Mr. Farr. He even visited Mr. Farr at the jail – for only the second time since he was appointed to the case. By the end of the day, a deal was indeed struck – but it was a "deal" for death. Counsel spent 7.0 hours that critical day drafting two legal documents that were expressly intended to bring about the death of his client (S.Ex 53). One of the documents was a lengthy letter, perfectly typed and grammatical, purporting to be from Mr. Farr to counsel instructing him to assist Mr. Farr in achieving his death wish. Counsel spent 2.6 hours crafting this letter to himself for Mr. Farr's signature (*Id.*). *See* R. 180-3.

In his testimony at the evidentiary hearing, Mr. Farr's counsel did not deny or refute any of the allegations or matters discussed and detailed above. Counsel testified he "might or might not" feel any need to visit a capital defendant in jail, even after receiving a letter with detailed accounts of his client's psychiatric treatment and previous suicide attempts (EH 214-5). "If I felt a need to go, I would have probably gone. . . If not, then I didn't." (EH 217). Counsel's failure to visit Mr. Farr and to communicate with him clearly violated 1989 ABA Guideline 11.4.2 "Client Contact," which provides:

> GUIDELINE 11.4.2 CLIENT CONTACT
>
> Trial counsel should maintain close contact with the client throughout preparation of the case, discussing (inter alia) the investigation, potential legal issues that exist or develop, and the development of a defense theory.
>
> Commentary:
>
> Counsel always has a duty to interview the client, to keep the client informed of developments and progress in the case and to consult with the client on strategic and tactical matters. . . .
>
> Ongoing client contact is therefore important both practically and ethically. .
>
> ***Counsel's general duty to maintain client contact is compounded in a capital case.*** The complexity and unique nature . . . mandate careful consultation with the person who may be killed. Furthermore, ***counsel may have to try to keep the client from making suicidal choices about the case.*** Capital counsel frequently must [struggle] . . . against the self-destructive behavior of the client as well. While involving the client . . . is no guarantee . . . ***such involvement may greatly reduce the potential for a self-destructive choice.***

1989 ABA Standards, (D.Ex 50)(emphasis added.)[5] Counsel was asked about his compliance with the above Standard:

> Q: Do you feel like you did that?
> A: I think I did.
> Q: You maintained close contact with Mr. Farr?
> A: That depends on what you call close, counselor. If you're talking about did I go out and hold his hand at the jail every day and tell him what he wants to hear, no, I did not.

(EH 294). Under any interpretation of *Strickland,* Mr. Farr's counsel acted unreasonably in failing to maintain an appropriate capital attorney-client relationship with Mr. Farr. Had counsel done so, as set out in the ABA Standards, there is a reasonable probability Mr. Farr would not have entered into the unconscionable and unprecedented agreement to plead guilty to a death sentence. Counsel manifestly failed to function "as counsel" with regard to the plea agreement. Accordingly, the plea must be invalidated and Mr. Farr's convictions vacated.

B. COUNSEL'S DISREGARD FOR MR. FARR'S HISTORY OF SEVERE DEPRESSION AND SUICIDE ATTEMPTS.

Mr. Farr's trial counsel facilitated his suicidal guilty plea without ascertaining that Mr. Farr had a history of depression and suicide attempts. *See also* Argument VIII, *infra*. Although Mr. Farr had told his attorney about his psychiatric history, including the names and locations of mental institutions and individuals who had participated in having him civilly committed (D.Ex 38, 39), trial counsel, to this day, does not know whether it is true or not. Trial counsel testified:

> Q: Were you aware of his psychiatric history?
> A: Yes, sir, partially. . . He had talked about being in an institution in Texas I believe it was and then later he turns around and says, well, I was faking it. . .
> Q: You had heard that he had numerous suicide attempts previously, correct?
> A: Yes, sir, I had heard that.
> Q: Did you take that seriously?
> A: At first I probably did, but after the things that Victor had said, I'm not – *I don't know at this point.*

(EH 255). Counsel continued:

> Q: Did you feel a duty to find out --
> A: I thought I had fulfilled my duty by talking to him. He is my client.
> Q: You didn't feel any duty to confirm whether he had suicide attempts previously?

[5]The capital representation of Mr. Farr was governed by the 1989 ABA standards. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

A: Again, based upon what he told me at the time he was telling me this, he seemed to be very sane , very rational and knew exactly what he was talking about . . . I don't know.

* * *

Q: So when he got on the stand and said , Oh, I had a great life, I never tried to kill myself, my mother's murder didn't really affect me, he was sane and rational.
A: Yes, I think he was sane and rational.

(EH 272-3).

Q: What would have been the down side of having his psychiatric records?
A: Probably nothing.

(EH 299). Counsel's handling of Mr. Farr's guilty plea flew in the face of ABA Standards for dealing with precisely such situations, i.e., to be vigilant in trying "to keep the client from making suicidal choices about the case." "Commentary" to 1989 ABA Guideline 11.4.2. Counsel acknowledged that he did exactly the opposite:

A: And I think what he – and I even told him that what he's trying to do is have the State accomplish his goal of suicide.

(EH 384). Effective counsel would have known of Mr. Farr's history of depression, suicide attempts and psychiatric treatment. The failure of counsel to carry out these essential functions was patently ineffective. Accordingly, Mr. Farr's guilty plea must be invalidated and his convictions vacated.

C. COUNSEL'S UNREASONABLE FAILURE TO PURSUE THE VIABLE DEFENSE OF VOLUNTARY INTOXICATION TO THE CHARGES.

Argument III, *infra,* addresses the unreasonable failure of Mr. Farr's attorney to raise the defense of voluntary intoxication on his behalf. As set out there, proof of Mr. Farr's extensive alcohol consumption and intoxication at the time of the alleged offenses was abundant. Mr. Farr was observed by neutral observers to have consumed at least seventeen (17) and as many as twenty-nine (29) drinks on the afternoon and evening of December 11, 1990. *See* D.Exs. 9, 10, 11, 12, 14, 15, 17, 18, 19. In addition, he was described by various individuals as "drunk" and "intoxicated" at the time the offenses occurred (*Id.*). Most significant, Mr. Farr's blood-alcohol content was tested more than two hours after the collision and was determined to be .21%, which would have made it at least .24% at the time of the offenses (EH 629).

Mr. Farr had a viable and strong affirmative defense to all the charges against him: voluntary

intoxication. Counsel was obliged under these circumstances to inform Mr. Farr of the availability and viability of voluntary intoxication as a defense to all the crimes with which he was charged. Had counsel done so, Mr. Farr would not have pled guilty to the offenses. His plea, therefore, is invalid and must be vacated. *State v. Grosvenor,* 874 So. 2d 1176 (Fla. 2004).

D. COUNSEL'S FAILURE TO INVESTIGATE THE FACTS AND CIRCUMSTANCES OF THE CASE.

Counsel conducted no investigation whatsoever into the facts and circumstances of the twelve felonies for which Mr. Farr was indicted and to which he pled guilty. Counsel's time records do not reflect the expenditure of even one minute of investigation in this most serious case (S.Ex 53). At the evidentiary hearing, counsel admitted he conducted no pretrial investigation and that he did not use an investigator (EH 257, 292). Counsel testified that to him "investigation" means only obtaining information from his client and reading discovery provided by the state (EH 279). Had counsel investigated, as required, he would have uncovered facts that could have been used to defend Mr. Farr, facts that would have defeated the state's case of first degree murder for the numerous major felonies charged. Counsel would have been able to prove that the fatal car wreck was an accident and that it was not intended. *See* Argument IV, *infra*. Counsel would have discovered facts that disproved the state's charges of kidnapping while armed with a firearm, robbery while armed with a firearm, burglary while armed with a firearm, attempt to commit murder in the first degree, attempt to commit burglary while armed with a firearm, attempt to commit robbery while armed with a firearm, and attempt to commit kidnapping while armed with a firearm. Reasonable counsel would have investigated and known that such charges were grossly exaggerated, found the evidence with which to defend Mr. Farr. Had counsel investigated, he would not have allowed Mr. Farr to plead guilty to crimes he did not commit. Accordingly, the convictions resulting from Mr. Farr's invalid guilty plea must not be allowed to stand and must be vacated. *See also* Argument IV, *infra*.

E. COUNSEL'S UNREASONABLE STIPULATION TO AN INACCURATE AND FALSE "FACTUAL BASIS" FOR MR. FARR'S PLEA TO THE OFFENSES CHARGED.

On April 2, 1991, in open court, Mr. Farr entered his guilty plea to the twelve major felonies with which he was charged. At the outset, the court was presented with the stipulated "Offer of Negotiated Plea," drafted by Mr. Farr's lawyer, whereby Mr. Farr pled guilty to everything charged "in return for" receiving the death penalty. Attached thereto was the lengthy legalistic letter Mr. Farr's lawyer had written to himself purporting to be Mr. Farr's understanding of the rights he was waiving, and his instructions to counsel (PH 2-8). The court acknowledged that the document was obviously authored by learned counsel, not semi-literate client, when it inquired of Mr. Farr only whether he was able to *read* it, not whether he had *written* it (*Id.*). Advised inaccurately that Mr. Farr "went through Junior High"(he actually made it only through 7th grade) and could do his "own newspaper reading," the court satisfied itself that Mr. Farr understood what was contained in the papers his lawyer had drawn up to bring about his execution. At least, the court ascertained that Mr. Farr was able to comprehend the document "Knowing that if you needed to, you could ask somebody what a particular word meant?" (PH 8).

The prosecutor then proceeded with a recitation of what purported to be the factual basis for the plea that was being entered, taking considerable liberty with the "evidence," in turning what was not being prosecuted as a death penalty case *one week earlier* into an open-shut death sentence. As to the charges of attempted kidnapping (two counts), attempted first degree murder (two counts), and burglary with a firearm, the prosecutor proffered simply that Mr. Farr "went outside and tried to kidnap two women, Cindy Thomas and Patsy Lynch." (*Id.*). There was no basis for this contention, nothing in the statements of those witnesses, or any witnesses, that Mr. Farr attempted to kidnap them. Nor do the statements contain anything suggesting he attempted to murder them. Nor is there any suggestion in the police reports that "he attempted to take [their] vehicle," as the prosecutor falsely stated (PH 27). The prosecutor then described how Mr. Farr approached the car in which Chris Todd and Shirley Bryant were sitting, asserting that Mr. Farr "forced Todd into the back, and as he did . . . began to kidnap them." (*Id.*). Again, the witness statements do not back up this assertion.

The prosecutor described Mr. Farr's departure, with Shirley, in Todd's vehicle and speculated on the route taken north towards Hamilton County where "the car was spotted by a Game and Wildlife Officer and an Agricultural Officer [who] began to follow the vehicle . . . " (PH 28). The prosecutor untruthfully asserted that the officers, in following the vehicle, were *"really not getting into a pursuit status.*" In truth, the officers violated agency protocol by pursuing the vehicle and in running it off the road and perhaps contributing to the fatal and tragic result.[6]

The prosecutor contended that the FHP homicide investigator "would testify that the marking he saw on the side of the road" were "acceleration marks," a questionable thesis at best. *See* EH 545 (testimony of crash reconstruction expert Bryant Buchner that there was no such evidence at the scene).

Defense counsel, who had done no investigation in the case and whose sole contribution to Mr. Farr's defense was to draft the papers that would bring about his execution, responded:

> MR. SLAUGHTER: Those facts would be consistent with my investigation. I believe that based upon my investigation the state would be able to make a prima facie case before a jury or court as the case may be, which would establish, indeed, those facts.

(PH 29-30). In truth, a factual basis for Mr. Farr's plea was sorely lacking. Reasonable defense counsel would not have allowed his client to plead to unproven major felonies. The plea was invalid and this court must vacate Mr. Farr's convictions.

F. COUNSEL'S FAILURE TO PROTECT MR. FARR FROM PHYSICAL AND PSYCHOLOGICAL ABUSE IN JAIL PRIOR TO AND DURING THE TIME HE AGREED TO PLEAD GUILTY.

Early in his jail incarceration, Mr. Farr was harassed and verbally abused by guards. He complained of the mistreatment in letters to his lawyer. "Sir, the police have been doing me wrong. One night I rcived no super. To night I was told I was going to recive a ass kicking. . . can't they leve me alone?" (D.Ex 39). In another letter to counsel, Mr. Farr expressed fear of going to a state

[6]In his testimony at the evidentiary hearing, prosecutor Coleman flatly contradicted his significant misrepresentation at the plea hearing concerning the officers' pursuit of Mr. Farr. He testified that "law enforcement people, recognized the vehicle, *got in pursuit which resulted in ultimately a crash* with her being a fatality in it." (EH 22). *Accord* EH 887 ("There was a law enforcement pursuit, yes, sir.").

prison "full of Waldrons who work there":

> The girl who was killed in the car's, Mama's people. I've been told I would receive a "nice welcome." "By a Waldron"
>
> So even if I receive the Death Sen. I feel I'll be bet to death (sic) before geting to the chair.

(D.Ex 43)(emphasis in original.) Counsel did nothing in response to these pleas. He did not visit Mr. Farr or write to him.

Finally, on approximately February 28, Mr. Farr was beaten severely by guards at the jail. He wrote to his lawyer describing the incident in detail, naming the officers involved and identifying witnesses to his injuries. *See* further details in Argument III, *infra.* At the evidentiary hearing, seventeen years after the incident, these witnesses testified to their observations of the physical and mental effects on Mr. Farr of being beaten by jail personnel. They told the court of the threats Mr. Farr received from jail staff prior to the incident (EH 562-3, 580-2, 671-2), and they described the bruises and blood covering Mr. Farr when he was returned to his cell (EH 564, 566-7, 578-9, 669-71). Most importantly, they testified to the dramatic changes in Mr. Farr after the beating. There was "a big noticeable change" in Mr. Farr's attitude towards his case and its disposition (EH 568, 673-4). Mr. Farr was clearly worried about "what was going to happen in prison."

> A: If it's going to be like that, fearing for his life every day, then maybe he's better off with the death penalty, and he wanted it quick.

(EH 569).

> He told me, is this what's going to happen to me all the time?
>
> If I go to prison, is this what's going to happen to me? Am I going to be subjected to this kind of abuse for 25 years? He said I can't do this.

(EH 579). After being beaten at the jail, Mr. Farr took steps to avert the possibility of life in prison and further beatings:

> Q: After Victor was beaten by guards, did he undertake any specific actions to bring about imposition of the death penalty on himself?
>
> A: Yes, he did.
>
> * * *
>
> Q: Did you talk to Victor about ways he could achieve his goal of getting the death sentence imposed on him?
>
> . . . And what was the nature of those discussions or efforts?
>
> A: How he could write the victim's family, how he could write the state attorney's office,

specifically Thomas Coleman, how he could write Judge Agner and put information in the letters, make up lies to have the crime appear more brutal, more – I think even somebody used the term premeditated, and he put that in the letter, that he had a conscious intent to kill.
Q: Did he embellish the details of the crime?
A: Oh, yeah, he made up all sorts of different angles and different things.
Q: And how do you know he made that up?
A: Because Victor would ask me, he said, on different occasions, do you think this would get me the death penalty. I said, yeah, I'm sure it will. You better not play with fire, you might get burned.

(EH 582-3). *See also* EH 674-5. It was nearly an entire month after Mr. Farr informed counsel of this traumatic abuse by the jail staff that Mr. Farr received so much as a letter from counsel. At the evidentiary hearing, trial counsel described his response to the beating of Mr. Farr:

A: I picked up the phone and called the chief corrections officer, Mr. Maxwell.

(EH 227).

Q: And you called the jail and basically were satisfied with your friend the jailer telling you it was inmates who did it.
A: Yes, sir.

(EH 232-3). At the evidentiary hearing, counsel admitted that he totally ignored Mr. Farr's written request that he speak with witnesses to the beating -- inmates Douglass, Texton and Heath:

Q: In his letter to you describing this in great detail, he did mention three inmates who were witnesses to it.
A: Yes, he did.
Q: And did you make any effort to contact them?
A: Absolutely not.

(EH 375-6). Counsel failed to respond appropriately and professionally to reports of verbal abuse and threats to Mr. Farr. Even when the abuse escalated to physical brutality, counsel's response was not to visit Mr. Farr or interview the witnesses identified for him. Rather, counsel called an acquaintance who ran the jail and accepted at face value the jailer's verbal assurance that his underlings, for whom he was legally liable, had not beaten Mr. Farr. Trial counsel acknowledged the legal significance of what happened to Mr. Farr in jail – *especially* if it indeed was perpetrated by guards:

Q: Does it make a big difference who beat him up just for the sake of argument?
A: *I think it would make a big difference, sure do.*
Q: How so?

> A: . . . . [O]ur system is not designed for the guards to jump on him and beat him up, so, yeah, *it makes a big difference.* And, you know, his statements in his letter that he says, well, they told me, you know, I was going to state prison and the Waldrons that'll be down there, they'd take care of me. Yeah, sure, *that'd make a big difference if it happened that way, . . .*

(H 282-3)(italics added). Had counsel functioned as an effective advocate, Mr. Farr would not have pled guilty as he did, and the Court must vacate Mr. Farr's convictions.

G. LEGAL ANALYSIS

Effective capital counsel would have developed and maintained an appropriate attorney-client relationship with Mr. Farr; would have been aware of Mr. Farr's mental fragility and history of self-destructive acts; would have communicated with Mr. Farr, especially when he was in crisis; would have informed Mr. Farr of viable defenses; and would not have facilitated such a pointless and self-defeating plea.

In *State v. Grosvenor*, 874 So. 2d 1176, 1177 (Fla. 2004), this Court addressed the situation where "a defendant seeking to vacate a plea of guilty because of ineffective assistance of counsel" contended she would not have pled guilty had defense counsel informed her of the existence of a possible defense. Grosvenor's lawyer, like Mr. Farr's, did not advise his client about the possibility of a voluntary intoxication defense. At an evidentiary hearing in circuit court, Grosvenor presented witnesses to her "frequent intoxication and her demeanor when intoxicated," but eyewitnesses testified "she did not appear intoxicated at the time of the crime." *Id.* at 1178. The defendant herself had told officers she was only "a little high, tipsey [sic]" at the time. *Id.* Her attorney testified he had considered the intoxication defense but he concluded it was "not a valid defense." *Id.* He also believed intoxication would not be considered "mitigating," for capital sentencing purposes, by a Sumter County jury. *Id.*[7] The circuit court concluded that Grosvenor's intoxication defense was not "viable" and that she had not demonstrated "prejudice" as required for an ineffective assistance of counsel claim. The Fifth District Court of Appeal affirmed, but recognized that its decision

[7]Mr. Farr's counsel, too, was insistent that such a defense "never works." (EH 250). In addition, counsel believed it would have been absolutely "necessary" for Mr. Farr to testify – notwithstanding all the independent objective evidence.

conflicted with other district courts that had held that a challenge to a guilty plea did not require a demonstration that the defense neglected by counsel was "viable." *Grosvenor v. State*, 816 So. 2d 822 (Fla. 5th DCA 2002). The Fifth District thus certified a conflict with other district courts to this Court.

This Court reversed, adopting the reasoning of the First District that "to show prejudice, 'the defendant must show [only] that there is a reasonable probability that, but for counsel's errors, *he would not have pleaded guilty* and would have insisted on going to trial.'" *Brazeail v. State*, 821 So. 2d 364, 368 (Fla. 1st DCA 2002), quoting *Hill v. Lockhart*, 474 U.S. 52 (1985) (emphasis added by 1st DCA). This Court held that "it is not necessary for the defendant to show that he actually would have prevailed at trial" to vacate a plea based on counsel's failure to inform his client of a possible defense. 874 So. 2d at 1181, quoting *Miller v. Champion*, 262 F. 3d 1066. 1069 (10th Cir. 2001). This Court held that the correct focus is on the *plea process* rather than speculation as to the likely outcome of the trial process. "The merits of any defense" would be relevant nevertheless to the "*credibility* of the defendant's assertion that he would have insisted on going to trial. If the defense was meritless, the defendant's claim carries much less weight." *Id*. In Mr. Farr's case, the defense of intoxication was not "meritless," and the conclusion in *Grosvenor* makes clear that Mr. Farr's plea was invalid and that his convictions must be vacated:

> In sum, we must follow the holding of *Hill v. Lockhart*. A defendant who has pleaded guilty who claims that defense counsel was ineffective for failing to advise of an available defense establishes *Strickland's* prejudice prong by demonstrating a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. Counsel's effectiveness is determined by the totality of the circumstances. *Strickland*, 466 U.S. at 690. Therefore, in determining whether a reasonable probability exists that a defendant would have insisted on going to trial, a court should consider the totality of the circumstances surrounding the plea, including such factors as whether a particular defense was likely to succeed at trial, the colloquy between the defendant and the trial court at the time of the plea, and the difference between the sentence imposed under the plea and the maximum sentence the defendant faced at trial.

Grosevenor, 874 So. 2d at 1181-2. The "totality of the circumstances" here demonstrate that Mr. Farr's plea was directly attributable to his lawyer's unsatisfactory performance. As to the first factor referred to above, "whether a particular defense was likely to succeed at trial," Mr. Farr has a very

strong case. His intoxication is not even a matter of dispute, and is well-documented in the statements of those who drank with him and served him drinks, those who observed him to be intoxicated, and in his high blood-alcohol level measured more than two hours after his last drink. Had counsel informed Mr. Farr of this defense, there is every reason to believe Mr. Farr would have had a completely different understanding of his legal prospects and would not have pleaded as he did. As to the second factor, the plea colloquy was part and parcel of an unconstitutional plea proceeding that was fatally flawed in the numerous respects discussed *supra*. Indeed, the plea process here was so extraordinary that it is difficult to apply the third *Grosvenor* factor sensibly. Here, there was absolutely *no* "difference between the sentence imposed under the plea and the maximum sentence the defendant faced at trial." With counsel's "help," Mr. Farr pled guilty "in return for" the *maximum* possible sentence for the twelve felonies charged: one death sentence, four natural life sentences and thirty years in prison. He could not have done any worse had he gone to trial. On the basis of *Hill v. Lockhart* and *Grosvenor v. State,* there can be little question that Mr. Farr's guilty plea was invalid due to his lawyer's various unreasonable errors and omissions. Accordingly, his convictions and sentences must be vacated.

ARGUMENT II

MR. FARR'S PLEA WAS THE RESULT OF PHYSICAL AND PSYCHOLOGICAL INTIMIDATION, ABUSE, STRESS AND DURESS AND IT WAS THEREFORE INVOLUNTARY, AND HIS CONVICTIONS MUST BE VACATED.

Mr. Farr's plea agreement was not made freely and voluntarily. Early in his jail incarceration, Mr. Farr was harassed and verbally abused by staff at the Columbia County jail (EH 562-3, 671-2, 580-2; D.Exs. 39, 43). He was threatened with beatings, he was denied food, he was verbally abused and was generally kept in a state of high anxiety and intimidation. The court below heard testimony describing the abuse – verbal and physical – to which Mr. Farr was subjected:

> [T]here was one incident that a guard came . . . with a threat for Victor about when he got to Butler [state prison reception center], "they had something for him, to that effect." [The guard] . . was staring Victor down the whole time. . . just, you know, to torment him.

(EH 562-3).

> A: . . . it was pretty obvious they didn't like him . . . they just had it in for him. That was obvious.
>
> * * *
>
> A: We were all treated like inmates, but he was singled out. They always had an attitude with him.

(EH 671-2). *See also* EH 580-2 (Mr. Farr was singled out, for "physical abuse, mental abuse, an almost pinpointed hatred," even among other capital murder defendants).

On February 28, 1991, Mr. Farr was brutally beaten by guards at the jail. He wrote to his lawyer and described the incident in great detail, naming the officers involved and identifying witnesses to his injuries. In his letter to counsel right after the beating, Mr. Farr related a chilling account of being taken from his cell to a holding cell by Sgt. Jones and other guards:

> I walked in and he told me to get down. I set on the floor, he said on your stomack I lay down as told. He then kicked me in the side, in the back, in the back of the head. And then told the two officers to put the cuffs on me. Thay did as he said, I was hog tied. With my hand cuffed to my feet behind me. Then Sgt. Jones nocked my head to the floor, with his boot. I felt the blood start running from my eye. He kept he foot pushing down on my head . And told the officer put them tighter, the officer said they are, Jones said you heard me tighter, the officer did. Thay was biting into my skin. Cuting off the blood. Thay walked out Jones, said I see your ass in the morning . . .
>
> I tryed not to cry out. For I felt if I did it would only be what they wished to hear. .And would only leve me there longer. I held my head on the concret floor pressing the cut to the floor. [Pains in different locations are described.] I stayed there for I believe to be 1 ½ hr. .Inmates seen me covered with blood..

(D.Ex 43). Mr. Farr attached a short "P.S." to his letter, one that captured his level of fear: "Get me out of this jail before thay kill me." (*Id.*). Mr. Farr informed counsel in this desperate letter that the beating was a threat of what would happen to him in the state prison system. Mr. Farr expressed fear of going to a state prison "full of Waldrons who work there." He wrote:

> The girl who was killed in the car's, Mama's people. <u>I've been told I</u> <u>would receive a "nice welcome.</u>" "By a Waldron"

(*Id.*)(emphasis in original). Former cellmates Douglass, Texton and Heath testified at the evidentiary about their observations of the beating of Mr. Farr by jail staff:

A: . . . [A] fellow came up there and brought Victor back out, handcuffed him and took him downstairs and had him for an hour, maybe two. It wasn't much over two. And he had marks on his face and bruised up and blood on his t-shirt and on his shirt, uncuffed him and let him go back in his room.

(EH 564).

Q: . . . What did he say happened down there?
A: On the beating?
Q: Yes, sir.
A: That he was taken down to a room and there was three or more of them and –
Q: Three or more of what?
A: Of the guards. And they just beat him up. . . Just he took a whupping and there was more than one of them and he was handcuffed while it happened.

* * *

A: There was bruises on his face and his lip was split, there was blood on his shirt.

* * *

A: His eyes were blackened.

(EH 566-7).

A: One evening Sergeant Dale Jones came up and got Victor. Dale Jones appeared to be angry. A couple of hours later, maybe an hour and a half, two hours later, Victor came back upstairs and he was a bloody pulp.

* * *

A: It was obvious that Victor had been physically abused.
Q: Why was that so obvious?
A: Because he had swelling, there was blood coming out of his eyes and what have you. There was scars on him, if you will. I mean he was obviously tore up.

(EH 578-9).

A: [T]hey took him out of the cell and you could hear them slamming the doors and going down the staircase. There was some type of scuffle on the staircase we could hear that.
Q: Are you sure those were guards?
A: They were Columbia County sheriff's deputies.
Q: How do you now?
A: Because they were in uniform.

* * *

A: When they brought him back into the cell, he was bloody from head to toe. He had on a white t-shirt that was covered in blood. He had handcuff marks on his hands and his ankles that went I mean unbelievably down into his – it wouldn't surprise me if he had scars.

* * *

A: He was bloody from head to toe, had a big goose egg above his eye that was black and blue, had blood all over him and sharp cuts in his arms and his ankles. And later . . . when he changed clothes, he was black and blue all up and down his ribs.

EH 669-671. Mr. Farr's cellmates testified below as to the effects on Mr. Farr of the verbal intimidation and extreme physical abuse he received from the state agents responsible for his pretrial custody. After the beating, fellow inmate Texton observed "a big noticeable change" in Mr. Farr's

attitude towards his case and its disposition. EH 568. Mr. Farr was clearly worried about "what was going to happen in prison." (EH 569, 579, 673-4).

After being beaten by deputies, and deciding "maybe he's better off with the death penalty" (EH 569) than being "subjected to this kind of abuse for 25 years" (EH 579), Mr. Farr began taking overt steps to avert the possibility of life in prison.

> Q: Did you talk to Victor about ways he could achieve his goal of getting the death sentence imposed on him? . . . And what was the nature of those discussions or efforts?
> A: How he could write the victim's family, how he could write the state attorney's office, specifically Thomas Coleman, how he could write Judge Agner and put information in the letters, make up lies to have the crime appear more brutal, more – I think even somebody used the term premeditated, and he put that in the letter, that he had a conscious intent to kill.
>
> * * *
>
> Q: And how do you know he made that up?
> A: Because Victor would ask me, he said, on different occasions, do you think this would get me the death penalty. I said, yeah, I'm sure it will. You better not play with fire, you might get burned.

(EH 582-3). *See also* EH 674-5.

Mr. Farr was thus living in great fear and trepidation when he agreed to plead guilty and ask for a death sentence. After he was hogtied and kicked and beaten on February 28, 1991, he was in a state of abject terror and post-traumatic stress. It was only five weeks after he was beaten and begged his lawyer to "get me out of this jail before thay kill me" (sic) that Mr. Farr indeed pled guilty. Clearly, the plea was not "free" and "voluntary" in the sense required for the plea to be valid under the law. Mr. Farr's plea was the result of intimidation and duress.

In addition to the physical abuse, Mr. Farr was also subjected to psychological intimidation by jail staff. He was regularly visited by law enforcement personnel and "counseled" on what he should do to "take responsibility" for Shirley Bryant's death. These sessions left Mr. Farr depressed and overwhelmed with remorse and led him to believe that he deserved the death penalty. Given Mr. Farr's psychiatric history and his lifelong struggles with depression and suicide attempts, he was highly susceptible to all of these influences (EH 418, 606).

At the evidentiary hearing, Mr. Farr proved he was intimidated and beaten into pleading guilty and that his plea was not voluntarily. As the direct result of threats and physical abuse, he pled guilty

to twelve major felonies, exactly as charged, in return for one death sentence, four life sentences, and another ninety years concurrent. Mr. Farr's desperation to avoid a lifetime of guard brutality induced him to plead guilty – as charged.

Mr. Farr's plea was clearly the result of duress and coercion, and his convictions, accordingly, must be vacated.

ARGUMENT III
MR. FARR WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY 'S FAILURE TO PRESENT A DEFENSE OF VOLUNTARY INTOXICATION TO THE OFFENSES CHARGED.

M. CONCLUSIVE EVIDENCE OF MR. FARR'S INTOXICATION

It is beyond dispute that Mr. Farr was heavily intoxicated at the time he committed the offenses at issue. Statements from witnesses to his drinking and intoxication and a blood-alcohol test proving extreme intoxication at the time of offenses were all part of the early discovery materials provided by the state. Despite this wealth of evidence, counsel made no use of it in representing Mr. Farr.

The police and troopers at the crash scene initially described the incident in police reports and citations as a negligent vehicular homicide and a DUI case. The first lawyer to interview Mr. Farr, barely thirty-six hours after the accident raised the point explicitly in a memorandum describing his intake interview with Mr. Farr (S.Ex 8). The prosecutor knew intoxication would be a central issue in the case as evidenced by his memos and directives to his own investigators urging them to find evidence to "refute" Mr. Farr's intoxication and to uncover anything they could to "make him 'less drunk' at the time of the crimes." (D.Ex 6). The court-appointed psychiatrist knew intoxication was a key issue in the case and referenced it in his evaluation of Mr. Farr's competency to stand trial. The only individual who did *not* seem to appreciate the crucial importance of Mr. Farr's intoxication was the one individual whose job it was to appreciate it: Mr. Farr's own attorney.

Counsel testified at the evidentiary hearing that the *only* "investigation" he did in Mr. Farr's

case, other than his two visits to Mr. Farr, was to read "discovery" provided to him by the state. *E.g.*, EH 269, 279, 285. Based solely on statements furnished through discovery, counsel must have known that there was abundant proof that Mr. Farr consumed *at least* seventeen drinks and as many as twenty-nine leading up to the death of Shirley Bryant. Witnesses reported to police that Mr. Farr consumed the following amounts of alcohol that day:

> (a) Frog's Restaurant: three (3) 12-oz. Budweiser beers, according to bartender Vera Matthews (D.Ex 14). (Mr. Farr told attorney Jimmy Hunt the day after the tragedy that he'd had about eight beers at Frog's (S.Ex 8)).
>
> (b) William Littleton's house: shared a 12-pack with Littleton who told police that Mr. Farr was "drunk" prior to the two of them sharing a 12-pack and then going to Shenanigans bar (D.Ex 12). Littleton further stated that Victor told him he had "been up at Frogs and he'd drunk about 15 beers." Investigator Carter asked Mr. Littleton, "Well could he stand up and could he walk?" Mr. Littleton stated, "*Yeah, he could walk.*" Investigator Carter inquired further, "O.K. . . he was drinking but you didn't think he was passed out. *He wasn't passed out drunk*?" Mr. Littleton answered, "No." (D.Ex 12).
>
> (c) Shenanigans Bar: Mr. Farr bought two drinks for Littleton and his girlfriend. There was no mention of how much Mr. Farr drank (D.Ex 12).
>
> (d) Frank Romine's house: One six-pack of beer (D.Ex 17).
>
> (e) Tom's Place: two (2) bourbon and cokes at approx 7:20 pm (D.Ex 18).
>
> (f) Suwannee River Food Store: bought one six-pack. Three (3) bottles were found destroyed at crash scene with bottle tops intact, and one (1) bottle was found opened in the car, without top. Two bottles were unaccounted for (D.Ex 28).

It was thus documented that Mr. Farr consumed *at least* fifteen (15) beers and two (2) bourbon and cokes before 7:40 p.m., not including anything he may have consumed at Shenanigan's that was not reported. In addition, his statement to Littleton that day and to attorney Jimmy Hunt two days later, if accurate, would increase that total by five to twelve beers, making a total of at least twenty-two to twenty-nine drinks.[8]

In addition to the above inventory of Mr. Farr's alcohol consumption on the day in question,

[8]The statements as to Mr. Farr's consumption at Frog's and Tom's Place were from bartenders, managers and owners with a legal interest in downplaying Mr. Farr's intoxication. Those statements came a month after the fact and pursuant to the January 4 directive to interview bar employees and "make [Mr. Farr] 'less drunk' at the time of the crimes." (D.Ex 6).

there were numerous eyewitness accounts describing his intoxicated state. Witnesses reported to the police that he "appeared drunk" or "was intoxicated." (D.Exs 9, 10, 11, 12, 51). One of the last people to observe Mr. Farr prior to the collision was Christopher Todd, in whose vehicle Ms. Bryant and Todd were seated when they were approached by Mr. Farr. In his first statement to the police, within two hours of his encounter with Mr. Farr, Todd stated that Mr. Farr was "too drunk to put [the keys] in the ignition." In another statement that evening, Todd stated that Mr. Farr "appeared to be intoxicated . . and [was] unable to get the car started." Shirley "had to put the keys in the ignition" for him, and he "could not get the headlights on." (D.Exs 9, 10). One week later, on December 18, Todd reaffirmed: "I thought maybe he was really drunk. . .I tried to blow him off like you know, 'You're drunk. You're crazy.'" (D.Ex 11).

In their lawsuits against Tom's Place, Patsy Lynch, Cindy Thomas, and Shirley's father, Jerry Bryant, alleged:

> 7. On December 11, 1990, a patron, Victor M. Farr ("Farr"), entered TOM'S PLACE. Upon entering, Farr was personally observed by Defendant STINSON to be intoxicated. After being served alcoholic beverages, *Farr was assisted by Defendants and their employees in operating a "juke-box" because* ***Farr was too intoxicated to select the songs and operate the machine.***
>
> 8. At the time Farr entered TOM's PLACE, *Farr was obviously intoxicated* and had already been refused service at another lounge due to *his state of* ***excessive intoxication.***

(D.Ex 51)(emphasis added).

In addition, at 10:56 p.m. on the night of the crash, Hamilton County Hospital tested Mr. Farr's blood alcohol level "due to suspects driving observed by officers and a strong odor of alcohol on his breath." The test results established conclusively that some two hours and fifteen minutes after the crash, and some three and one-half hours after the escapade began, Mr. Farr had a blood alcohol level (BAC) of .21% (D.Exs. 27, 28). Because Mr. Farr's blood was drawn more than two hours after his last drink, his BAC would have dissipated considerably in the period before his blood was taken. At the evidentiary hearing below, the Court heard unrebutted testimony from Jeffrey Danziger, M.D., concerning Mr. Farr's high level of intoxication:

> A: If you extrapolate backwards two hours, given that the average individual metabolizes alcohol at a rate of 15 milligrams per hour, an estimate is that at two hours earlier, his blood alcohol level would have been around 240 milligram percent. This is three times the legal limit. Someone with a blood alcohol level of 240, that is consistent with significant intoxication on alcohol.
>
> * * *
>
> And it's my opinion that with a blood alcohol level of approximately 240 milligram percent, that would significantly impair somebody's thinking, judgment, reasoning, intellectual faculties, yes.

(EH 629-30). The legal importance of Mr. Farr's intoxication is evident in a letter sent on January 4, 1991, from prosecutor Tom Coleman to Lt. David Albritton of the Columbia County Sheriff's Office. Coleman then listed eight priorities for Albritton to investigate, six of which specifically concerned Mr. Farr's intoxication and how the state might "refute" it:

> **I anticipate that he will try to use a voluntary intoxication defense**. When we get that blood alcohol back, if it is a high reading, **we can expect the defense to use it against us.**

(D.Ex 6).

The 3.850 court also heard testimony from neuropsychologist Barry Crown. Dr. Crown, a certified addiction specialist stated:

> . . . in a person such as Mr. Farr, a smaller amount of substance has a greater effect.
>
> Meaning that it doesn't take that much to really increase his level of confusion. It's my understanding that he had been consuming throughout the day. A smaller amount of substance has a greater effect meaning that people might go out and have a couple of cocktails and get on with their life, but for someone with these kind of [neurological] problems, a couple of cocktails may just be the beginning and set them over the ledge to begin to act impulsively and angrily.

(EH 411). Dr. Crown's assessment is entirely consistent with the evidentiary hearing testimony of people who knew Mr. Farr and who observed how "totally different" he is when he consumes alcohol. *See e.g.*, EH 479 ("His system can't handle alcohol. . . It's not so much the quantity, it's just that his system can't handle – it makes him go crazy. He has no concept of reality."); EH 721 (he is "totally different" when he drinks); EH 722 ("When he drank, he just made a 180-degree turn . . . he was just a totally different person when he was drinking."); EH 779 ("When Victor would drink he would be a totally different person . . . it was like his personality would change.").

In sum, there was an abundance of evidence of Mr. Farr's high level of intoxication at the time

of the offenses.

B. LEGAL BASIS FOR VOLUNTARY INTOXICATION INSTRUCTION

Over a century ago, this Court ruled that whenever specific intent is an essential element of a criminal offense, intoxication is a relevant matter for the fact-finder's consideration, to the extent it may have affected the capacity of the accused to form the particular intent required. *Garner v. State*, 9 So. 835, 845 (Fla. 1891)(first degree murder case). The *Garner* court distinguished voluntary intoxication from insanity, explaining that while the effect of intoxication is to render a person "temporarily insane," voluntary intoxication does not excuse criminal behavior. Rather, it reduces the degree of the defendant's culpability because of its effect on the defendant's capacity to form a premeditated design or other requisite intent. The Court ruled that intoxication was therefore relevant to negate the specific intent required for certain crimes. All twelve felonies at issue here are specific intent crimes to which Mr. Farr's heavy intoxication was an affirmative defense. *See e.g., Gardner v. State*, 480 So. 2d 91 (Fla. 1985)(robbery with a deadly weapon); *Gurganus v. State*, 451 So. 2d 817 (Fla. 1984) (kidnaping); *Graham v. State*, 406 So. 2d 503 (Fla. 3d DCA 1981) (robbery); *Harris v. State*, 415 So. 2d 135 (Fla. 5th DCA 1982) (first-degree burglary); *Heathcoat v. State*, 430 So. 2d 945 (Fla. 2d DCA 1983)(burglary and robbery); *Link v. State*, 429 So. 2d 836 (Fla. 3d Dist. Ct. App. 1983)(theft). There was more than sufficient evidence here to support an inference that Mr. Farr was intoxicated at the time of the offenses, and jury instructions on voluntary intoxication were warranted on every charge.

Indeed, when specific intent is an element of the crime charged, evidence of voluntary intoxication is always relevant. Consequently, when there is evidence sufficient to support an inference that the accused consumed alcohol, it is proper for an expert to testify as to the effect of a given quantity of inebriants on the accused's mental state. *Gurganus*, at 823.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

There was no *reasonable* tactical justification for counsel's failure to pursue a voluntary intoxication defense to the numerous charges against Mr. Farr. None of the usual strategic rationales

for not raising intoxication applied, e.g., where evidence is lacking or where the defendant contends he did not commit the crime. *Cf. Williams v. State*, 797 So. 2d 1235 (Fla. 2001); *Rivera v. State*, 717 So. 2d 477, 485 (Fla. 1998); *Dufour v. State,* 904 So. 2d 42 (Fla. 2005).

Here, there was abundant proof of Mr. Farr's excessive consumption and intoxication from many sources other than Mr. Farr himself. Counsel readily admitted that Mr. Farr was "heavily intoxicated" at the time of the offenses (EH 246), and he recalled that documentation as to Mr. Farr's consumption of some eighteen drinks "was about right." (EH 249). Nevertheless, counsel "recommended" against an intoxication defense when he met with Mr. Farr during the course of the final plea discussion (EH 250). Counsel was insistent that a voluntary intoxication defense would *require* that Mr. Farr testify:

> *I recommended we not proceed with it* for the reasons that, number one, *to do so , you're going to have to get on the stand . . .*
> I also told him that if he were to go with that, then *he would be subject to cross examination* . . . subject to be impeached [on his different versions of what happened]. . . . I told him that he would be *subject to impeachment because of his prior criminal history . . .*
> Q: Was it your opinion that *he would have to testify?*
> A: *Absolutely.*
> Q: And that the six or eight or ten people that drank with him and that saw him staggering around that night wouldn't have sufficed in terms of intoxication defense?
> A: I think not.

(EH 250-1)(emphasis added). Counsel's insistence that Mr. Farr "would have to get on the stand" in order to present his viable and well-substantiated intoxication defense is not reasonable and certainly not a valid tactical reason for failing to advance such a defense. Nevertheless, the court below found that counsel's decision "not to pursue" a voluntary intoxication defense "was a reasonable strategic decision." (PC 7:126). The court was mistaken, and this Court must vacate Mr. Farr's convictions and grant him a new trial.

ARGUMENT IV

MR. FARR WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S FAILURE TO INVESTIGATE THE FACTS AND CIRCUMSTANCES OF THE COLLISION AND TO PRESENT EVIDENCE THAT THE CRASH WAS AN ACCIDENT.

Mr. Farr's prosecutor informed the trial court at the time of Mr. Farr's guilty plea that Mr. Farr admitted he "deliberately ran into this tree in an attempt to kill himself and Ms. Bryant at the end."

(PH 29). Mr. Farr's attorney, who conducted no independent investigation in the case, responded: "Those facts would be consistent with my own investigation." (*Id.*). Had counsel performed effectively, he would have known that it was impossible to have driven into the tree deliberately.

Initially, there was little question that the collision in which Shirley Bryant died was an accident, based on the crime scene itself and Mr. Farr's statements to law enforcement officers the following morning and afternoon. In his first statements, Mr. Farr did not even know that Shirley had been injured and asked about her condition (D.Exs 7, 8). He first found out she had died when he was visited at the Columbia County jail by assistant public defender Jimmy Hunt some thirty-six hours after the crash (S.Ex 8). During Mr. Farr's first month in jail, everyone assumed the collision was an accident, as borne out by the crash site and circumstances – a right angle curve on a dark two-lane highway; heavily intoxicated driver unfamiliar with the unlit road, being pursued by two emergency vehicles with flashing lights when it went off the road. The Florida Highway Patrol (FHP) "Accident Report" prepared on December 12 by Trooper M.D. Childress summarized accounts by Florida DOT employee Robert Avery and Game and Fish Commission officer Edward Cates of their pursuit of the vehicle immediately before the crash:

> V#1 then accelerated away from both officers. V#1 failed to negotiate a curve and left the roadway onto the north shoulder. V#1 traveled 583 feet before striking a tree with its front.

(D.Ex 27). The speed limit on the road was 55 miles per hour, but the curve where the car went off the road was a .7 mile stretch, marked at either end by a 35 m.p.h. caution sign, with a double solid yellow center line indicating a no passing zone:

> . . . Officer Cates passed V-1 and got in front of V-1 and rode his brakes in an attempt to slow V-1. V-1 then passed Officer Cates on the right and accelerated away from him at a high rate of speed. Officer Avery stated that approximately one mile later, V-1 was approximately 400 yards ahead of them when he observed a cloud of dust as V-1 rounded a curve. He stated that as he rounded the curve, he suddenly had to stop because Officer Cates had suddenly stopped. He . . . observed V-1 on the westbound shoulder of County Road 158. V-1 had struck a pine tree.

(*Id.*). Trooper Childress concluded:

> PRE-CONCLUSION
>
> . . . It is the opinion of this investigator, based upon all known evidence, that these officers in

no way caused this crash to occur, but it was caused by D-1's insatiable desire to avoid apprehension.

CONCLUSION

. . . He further caused her death, trying to avoid apprehension by operating B-1 in a careless manner. It is the opinion of this investigator, coupled with the fact that Mr. Farr's blood alcohol level was .21 percent, and his careless operation of the vehicle in violation of FSS 316.1925. He was also in violation of FSS 316.193(3)(C)(3) DUI/Manslaughter.

(Id.). Childress' conclusion that the "officers in no way caused this crash to occur" was highly speculative and probably incorrect. The conduct of the officers, in truth, violated the "high speed pursuit" policies of the Florida Department of Transportation and the Game and Fish Commission, the agencies that employed officers Avery and Cates, respectively. Game and Fish Commission Policy GO-64, III.D provides: "In the course of pursuit . . .running roadblocks, or driving alongside the pursued vehicle while it is in motion is prohibited." (D.Ex 23). The "running roadblock" or "moving roadblock," explicitly prohibited by agency policy, is precisely what the officers did when they surrounded the pursued vehicle, with one car in front and one car behind, and then tried to get the vehicle to slow down by riding the brakes. Indeed, according to the report of Cates:

> We were traveling at about 45-50 mph. I turned my blue lights and siren on, and followed the subject for about 1/4 - 1/2 mi with no change in speed. I then passed the car on the left side and rode the brakes in an attempt to slow the vehicle. Bobby Avery, a officer with Dept of Transportation was behind the subject. I was in front of the car for about 30 secs to 45 secs. The subject then passed me on my right and accelerated leaving me at a high rate of speed. About a mile down 158 (later) the subject was 200-300 yards ahead of me. I saw the subject hit his brakes and disappear. I then saw a cloud of dust and thought he had turned on a dirt road.

(D.Ex 25). Avery reported the identical information in a virtually verbatim report (D.Ex 24).[9] The

[9]In 1997, Officer Cates was reprimanded for violating the high speed pursuit procedures of his agency, specifically: GO-64, III.D, which prohibits "running roadblocks, or driving alongside the pursued vehicle while it is in motion." He was also charged with violating GO-64, IIIB.1.c, which provides that an officer can pursue a vehicle believed to be involved in a crime only "when the officer has reason to believe such pursuit can be successfully concluded within a short distance and time, with little risk or no risk to persons or property."

Officer Avery, after numerous reprimands over the years for "rudeness" and "failing to follow instructions," was dismissed by the Florida Department of Transportation on December 5, 2000, for violations of § 839.25, F.S. (Official Misconduct) and § 837.012, F.S. (Perjury When not in an Official Proceeding); and 14-17.012(4)(a)32 F.A.C. (Lying or Falsification of Records, Documents),14-17.012(4)(a)12 F.A.C. (Violations of ethical conduct), 14-17.012(4)(a)25 F.A.C. (Unauthorized use or misuse of state personnel), 14-17.012(4)(a)13 F.A.C. (Conduct Unbecoming a Public Employee).

collision was thus regarded as an accident until February 20, 1991, when Mr. Farr wrote a letter to prosecutor Tom Coleman in which he claimed that he had intentionally driven into the tree to cause the death of himself and Shirley Bryant.

At the evidentiary hearing below, Mr. Farr presented testimony and a power point presentation from a highly qualified expert in automobile crash reconstruction, engineer George Bryant Buchner, chief engineer and owner of Quest Engineering in Tallahassee. Mr. Buchner testified that he has analyzed over 2000 automobile accidents since 1991 as a specialist in accident reconstruction. He thoroughly reviewed all reports, diagrams, photographs and accounts of the collision that resulted in the death of Shirley Bryant. In addition, he carefully surveyed, photographed and analyzed the site of the accident. Copies of the slide show were submitted into evidence (D.Ex 62).

Based on his comprehensive analysis of the evidence, Mr. Buchner reached a number of definitive conclusions about the collision, most notably that Mr. Farr *could not possibly have* driven into the tree intentionally. Mr. Buchner presented unrebutted testimony as to the following conclusions reached:

A. <u>The tree was not visible</u>.

Mr. Buchner displayed photographs of the nearly 90-degree leftward curve where Mr. Farr drove off the road, and he described the road and the conditions:

> The vehicle was basically traveling too fast for the curve because it had gotten one tire off in the grass and it couldn't make the curve and it slipped or slid down into a ditch and that ditch funneled it right towards the tree. The tree wasn't visible when it went in – before it ran off the road, the tree wasn't visible while the car was in the ditch, but this ditch leads to it and that's where the car was going to end up impacting.

(EH 529). Mr. Buchner emphasized that the tree would only have been visible for the last *two seconds* before the collision:

> And then in the last 150 feet, it straightened out and hits the tree. And from this bottom cone here, you're about 100 feet out. And at this point is when it's really trying to get straight, and that's about two seconds from hitting the tree. If you have a video camera in the car, I think you literally would only have been able to see this tree for two seconds, and that would have been the last two seconds.

(EH 538). *See also* EH 544. The tree was around the curve to the left and therefore not in the car's line of vision at the time the car left the road. In addition, there was no lighting on the street, so the tree would not have been illuminated:

> And remember this photo was taken right where it leaves the road and that tree is just barely visible around the corner. And once again, this is a daytime photo and it's essentially invisible. At night, there's no way headlights could have – you couldn't even really tell anything except maybe the two buildings up there, up in this region.

(EH 540).

> To find this pine tree around this curve, I really don't think you could do it because your headlights aren't good enough to illuminate the pine tree.

(EH 543).

B. <u>The vehicle was out of control</u>.

Mr. Buchner explained that the vehicle was completely out of control from the time it left the road until it collided with the tree only a moments later.

> But coming straight down the ditch like that, so it's definitely an out-of-control vehicle. There's no way to drive a vehicle at this degree of side slip at this angle.

(EH 532).

> No doubt the vehicle came in here and gets caught, kind of kicked over a little bit and feeds right down to the tree. It would have kept going sideways, but when the back end hit right here, it slowed the backing up and brought the front end around and aligned it.
>
> Physically there's no way that – the vehicle is completely out-of-control at this point in time. It's yawed at 45 degrees. It's way past any physical limit of being able to reasonably control it, especially on a 16-degree slope with variable traction and the back end dragging on the far end of the ditch.

(EH 537).

> When a vehicle . . goes non-linear, . . . there is no firm correlation between movement of the steering wheel and the car's response. . . So when a vehicle is at the limit, like it was in this turn, even a car on asphalt would have been in the non-linear range here, and it means that it takes extremely good and practiced driving skills to have even a chance to hold it.

(EH 541).

> On this terrain, it was totally non-linear and totally not predictable and I don't think it was controllable. I mean I don't think you could have – you could not have made the car do what you wanted it to do it was in such a non-linear range.

(EH 542).

C. <u>The driver attempted to brake</u>.

According to crash reconstruction expert Buchner, there is evidence that the vehicle attempted to brake – not speed up – before hitting the tree (EH 535). At the time Mr. Farr went into the curve and the vehicle left the road, he was going roughly 70 miles per hour. At the time he hit the tree, he was going only 30-35 miles per hour, which is a "very easy" calculation, for such experts:

> [T]his vehicle was only traveling about 30 to 35 miles per hour when it hit the tree. . . it's very easy for us to do that calculation.
>
> So it had started into the turn, in my opinion, at just under 70 miles an hour, but by the time it made it to the tree, its speed was down to between 30 and 35 miles an hour.

(EH 533).

> As I said earlier, this is a little over a tenth of a mile from where it runs off the road to where it hits the tree. We had almost 70 miles an hour right here, 30 to 35 right here. . . . If he stayed on the road, he probably would have been able to do it [negotiate the curve].

(EH 539). There was no indication of "acceleration marks" anywhere, and eyewitnesses reported seeing the driver hit the brake lights in the fatal vehicle before it crashed (EH 544).

D. Conclusions.

Mr. Buchner concluded that Mr. Farr ran off the road accidentally, and in a matter of seconds the out-of-control vehicle was "funneled" into the tree. The collision simply could not have been intentional:

> The vehicle was basically traveling too fast for the curve . . . and that ditch funneled it right towards the tree. The tree wasn't visible when it went in – before it ran off the road, the tree wasn't visible while the car was in the ditch, but this ditch leads to it and that's where the car was going to end up impacting.

(EH 529).

> And what happened in this case is there was so much speed and the curve was so tight, that the curve had to be negotiated almost perfectly. And I believe what happened is the right side tires got on the grass, and after that, the scene just took over. If we took 50 cars and shot them down this road, I think, you know, 35 or 40 of them would hit this tree. The others would bounce off in some other way.

(EH 543).

> It would have been impossible for me to have hit that tree intentionally because, A, I never could have known that tree was there, and B, once it left the road, where it was going to end up was a function of the terrain not of what the driver was doing. . . . It was out of control.

(EH 546).

Reasonably effective counsel would have investigated the automobile crash that was at the heart of this case. Trial counsel admitted in his testimony that he did not conduct any such investigation.

The court below determined that counsel was not ineffective "in light of Farr's various written assertions that he had intentionally run into the tree. . ." and "[H]ad litigation continued on, there were many areas to be investigated. However, Farr insisted on resolving this matter before those matters could be pursued." (PC7:127).

Counsel's representation was indeed ineffective and this Court can not allow Mr. Farr's convictions and sentences to stand.

ARGUMENT V

THE PROSECUTOR'S DELIBERATE WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE VIOLATED *BRADY V. MARYLAND* AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.

The state withheld from Mr. Farr and/or his attorney several key pieces of exculpatory evidence and information. The failure to disclose these items was not known or knowable at the time of Mr. Farr's plea or his direct appeals and thus violated *Brady v. Maryland,* 373 U.S. 83 (1963), and its progeny, and Mr. Farr's rights under the constitutions of Florida and the United States.

N. THE WITHHOLDING OF EXCULPATORY INFORMATION THAT MR. FARR'S SELF-INCRIMINATING STATEMENTS AND ADMISSIONS WERE NOT TRUE.

For at least a month after Mr. Farr's arrest on December 12, 1990, no one believed that the collision in which Shirley Bryant died was anything but an accident. After more than two months in jail, harassed and threatened by guards, and ignored by his lawyer, Mr. Farr wrote to the prosecutor claiming that Shirley's death was intended: "I could have missed the tree . . . [b]ut instead I hit it center of the car. . . I plained to kill. And ment to kill. And will again." (sic)(R. 217-8). He also stated that when he shot Cindy Thomas, he was "aiming at her heart. . . Because I mean to kill her and the lady in the parken lot."

This letter to prosecutor Coleman, and its highly self-incriminating contents, became the crux

of the state's case against Mr. Farr. It was *the only evidence of any intent* on Mr. Farr's part for the most serious of the offenses charged. The letter was relied upon at Mr. Farr's Plea Hearing on April 2, 1991, and the first sentencing proceeding on May 13, 1991 (along with a similar letter written to the trial judge dated April 25, and another letter to the prosecutor dated April 12). Based largely on these letters, Mr. Farr was sentenced to death. The letters were invoked and judicially noticed, along with still more self-incriminating letters, at Mr. Farr's resentencing on December 8, 1993. The letters were specifically referenced in the capital sentencing order (unlawfully written by the prosecutor, *see* Argument VII) as an important basis for the death sentence. Anything that would have tended to impeach or undermine the credibility of the letters would have been exculpatory.

It is now known that *the state knew Mr. Farr was fabricating his involvement in crimes*. On March 7, 1991, Mr. Farr wrote a letter to the San Angelo, Texas Police Department taking credit for an unsolved jewelry robbery and murder that he "was never found out for." *See* EH 768; D.Ex 29. In something of a disclaimer, he added that there was a "lot I can't remember for it's been so long ago and I've tryed to forget." Two weeks later, Mr. Farr was transported to the state attorney's office in Live Oak for a polygraph examination to determine whether he was being truthful about his participation in the Texas robbery-murder. Two police officers from San Angelo, Texas, traveled to Florida to interview Mr. Farr and assist with preparations for the examination. Mr. Farr's lawyer was not present and there is no indication he was ever informed of the examination. A report of the examination was disclosed for the first time to Mr. Farr during post conviction public records inspection (D.Ex 29).

The polygraph examiner concluded that Mr. Farr was not telling the truth in his responses to the three questions that were put to him. He was untruthful in answering "no" when asked (a) whether he deliberately lied to the officers in Texas about the jewelry store robbery; (b) whether he falsified any part of the statement he gave the officers from San Angelo; and (c) whether he told the truth about how many shots were fired in the jewelry store robbery. The polygraph examiner specifically noted that Mr. Farr might have been "*creating his involvement in the Texas robbery and*

homicide for some other purpose. . . . he said he wanted to die in the electric chair for the homicide he is charged with in Florida." (D.Ex 29)(italics added). The report established that Mr. Farr had in fact fabricated his involvement in the Texas crime. This information would necessarily have cast doubt on Mr. Farr's admissions concerning the Florida charges, especially given his drastic transformation while in jail from a remorseful DUI/manslaughter defendant into someone claiming to be a deliberate killer. The state had an unambiguous obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), to provide the polygraph report regardless of whether Mr. Farr knew about the test being conducted or the results thereof. *Kyles v. Whitley*, 514 U.S. 419 (1995). Mr. Farr was clearly prejudiced by the state's unlawful failure to disclose the results of the polygraph examination. The outcome of the case probably would have been different had the results and the report been provided to effective defense counsel.

O. THE WITHHOLDING OF EXCULPATORY EVIDENCE THAT SHOOTING VICTIMS LYNCH AND THOMAS WERE UNABLE TO IDENTIFY MR. FARR AS THE PERSON WHO SHOT THEM.

On January 3, 1992, Mr. Farr was indicted for twelve major felonies, based on the events of the evening of December 11, 1990. The day after Mr. Farr was indicted, prosecutor Coleman wrote a letter to Lt. Albritton of the Columbia County Sheriff's Office noting: "After the Grand Jury yesterday, it became apparent that we need to do more work in the investigation." (D.Ex 6). The letter directed Albritton to interview various individuals about aspects of the case that were still problematic. The prosecutor's files contain several pages of typed notes that pertain to preparation for the grand jury proceedings at which Mr. Farr was indicted (D.Ex 4, 5). The notes consist mostly of typed summaries of statements made by certain witnesses to law enforcement. One page among these notes consists of a list of fourteen items the prosecutor flagged for follow up investigation, such as "call FDLE for . . . gun report," "Call FHP for Blood Alcohol level of VMF." One of the items on the list is:

"PROBLEM OF VICTIM'S (sic) IDENTIFYING THE DEFENDANT."

Neither Mr. Farr nor his counsel were informed that the prosecution had a "problem" with

identification of Mr. Farr by any victims in the case. Had they known of such a problem, Mr. Farr probably would not have pled guilty to a crime where such an identification was necessary. Prosecutor Coleman was asked about these issues during his testimony at the evidentiary hearing. With regard to his notation to "tell Jerry about the grand jury evidence problem," Mr. Coleman did not recall what "the problem" was (EH 26-7). As for the "problem with the victim identifying the defendant," Mr. Coleman was similarly unable to recall what he had meant (EH 27-8). In any event, the "problems" – whether with "the grand jury evidence" or "identifying the defendant" – were potentially exculpatory and should have been disclosed to the defense under *Brady et al.*

P. THE WITHHOLDING OF EXCULPATORY EVIDENCE THAT STATEMENTS MADE TO THE POLICE CONCERNING MR. FARR'S ALCOHOL CONSUMPTION AND LEVEL OF INTOXICATION WERE DELIBERATELY SKEWED TO "MAKE HIM LESS DRUNK AT THE TIME OF THE CRIMES."

Mr. Farr's level of intoxication was a potential issue in this case. *See also* Arguments I.C. and III. His mental state at the time the offenses was or should have been a major issue for both the guilt phase and penalty phase of the case. The legal importance of Mr. Farr's intoxication was emphasized in a letter from prosecutor Tom Coleman to Lt. David Albritton of the Columbia County Sheriff's Office dated January 4, 1991. Coleman listed eight priorities for what he wanted Albritton to investigate, including six items specifically concerning Mr. Farr's intoxication and how the state might "refute" it:

> First, I need the other employees of Tom's interviewed. . . . In particular, I need to know what, if anything, Farr had to drink there. . . . I would like to know if they thought that he was intoxicated, too. . . .
>
> Third, I need someone to interview Farr's father, Eddie Farr . . . . I need to know . . . if Farr had anything to drink in his presence.
>
> Fourth, I need the owner and the worker in Frogs interviewed. Look at the Defendant's statement to Chief Owens. *I want to refute the part where he says that he drank in Frogs that day*.
>
> Fifth, somewhere I got the idea that Farr worked at Ken's and went to work on the 11th. If he did, *I want some witnesses that can testify that he was there, if he was sober*, and when he left work that day.
>
> Sixth, it may be too late, but we need to try to account for the six pack of beer that Farr

> bought at the Suwannee River Food Store after he kidnaped Bryant. By that I mean try to recover the cans and determine how many he drank. . . .

(D.Ex 6)(italics added).

Coleman concluded his letter to Lt. Albritton by speculating that Mr. Farr's intoxication would be a key component of his defense:

> *I anticipate that he will try to use a voluntary intoxication defense.* When we get that blood alcohol back, if it is a high reading, *we can expect the defense to use it against us.* If Farr drank those six beers that he bought at the store, they will contribute to that blood alcohol level. If we can show that, it will *make him "less drunk" at the time of the crimes.*

(*Id*.). As a result of this directive, witnesses were apparently coached to tell investigators that Mr. Farr was not drunk, as absurd as that was, given everything else that was known. It simply can not be a mere coincidence that *after* Coleman's instructions to "make him 'less drunk'", the tavern personnel and patrons suddenly started to report that Mr. Farr was not intoxicated. The statements taken pursuant to the prosecutor's January 4, directive were flagrantly contrived.

These statements were provided to the defense in pretrial discovery. Reading these statements without knowing they were crafted to depict Mr. Farr as "less drunk at the time of the crimes" than he actually was, Mr. Farr and his counsel had a distorted view of the potential evidence against him. Had the defense known that Mr. Farr intoxication was deliberately and falsely minimized in numerous witness statements, Mr. Farr probably would not have pled guilty.

D. LEGAL ANALYSIS

> There are three components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the state, either wilfully or inadvertently; and prejudice must have ensued.

Strickler v. Greene, 527 U.S. 263 at 281-82 (1999). In Mr. Farr's case, all three elements are met. First, it would have helped Mr. Farr's defense to know that his self-incriminating statements in another case were disproven and regarded by his prosecutors as fabrication, that victims in the case had a problem identifying Mr. Farr as the perpetrator, and that statements asserting that Mr. Farr did not appear to be intoxicated were contrived as part of a prosecution strategy. Second, the above materials were plainly within the control of the state. Third, Mr. Farr was manifestly prejudiced by

the state's withholding of the exculpatory materials since his plea and his convictions were predicated on his self-incriminating letters and on statements by the victims and other witnesses implicating Mr. Farr. There is not "strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death," had the defense known of and had access to the withheld materials. 527 U.S. at 294. In *Strickler*, the Supreme Court noted the appropriate "standard that [a habeas] petitioner must satisfy in order to obtain relief":

> He must convince us that "there is a reasonable probability" that the result of the trial would have been different if the suppressed documents had been disclosed to defense. . . . . "The question is . . . whether in [the] absence [of disclosure], he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."

527 U.S. at 289-90, quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). "[T]he question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Strickler*, 527 U.S. at 290, quoting *Kyles*, 514 U.S., at 435.

This case meets the above test. Even suppressed evidence of "relatively minor importance" can be material where the appropriateness of the outcome is as close as Mr. Farr's. *See Agurs*, 427 U.S. at 112-113. The suppression of exculpatory evidence "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also United States v. Agurs*, 427 U.S. 97, 110 (1976). "[U]nder *Brady*, an inadvertent nondisclosure has the same impact on the fairness of the proceeding as deliberate concealment." *Strickler v. Greene*, 527 U.S. at 288. Although "good faith" does not excuse the suppression of exculpatory evidence, "deliberate" suppression should be evaluated under a lower standard of materiality. *See Hughes v. Bowers*, 711 F.Supp. 1574, 1580 (N.D. Ga. 1989)(deliberate suppression of evidence invalidates a conviction unless the misconduct was "harmless beyond a reasonable doubt"), *aff'd* 896 F.2d 558 (11th Cir. 1990). Here, the facts support the inference that the state deliberately suppressed the items in question.

ARGUMENT VI

MR. FARR WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS LAWYER'S UNREASONABLE FAILURE TO INVESTIGATE AND PRESENT READILY AVAILABLE EVIDENCE OF MITIGATING CIRCUMSTANCES.

Capital defense counsel "has a duty to conduct reasonable investigation, including investigation of the defendant's background for possible mitigating circumstances." *Ventura v. State*, 794 So. 2d 553, 570 (Fla. 2001), quoting *Rose* 675 So. 2d 567, 571 (Fla. 1966); *Ragsdale v. State*, 794 So. 2d 713, 719 (Fla. 2001). "Under Florida law, defense counsel in a capital proceeding has a fundamental obligation to both diligently investigate and present evidence of mitigation . . ." *Williams v. Florida*, 987 So. 2d 1, 11 (Fla. 2008). A decision not to pursue an avenue of mitigation, must be made "after reasonable investigation," and "must flow from an informed judgment." *Harris v. Dugger*, 874 F.2d 756, 763 (11th Cir. 1989)(per *Strickland v. Wainwright*, 466 U.S. 668 (1984)). Counsel's failure to present or investigate mitigation evidence cannot be the result of "neglect." *Id*.

"Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable." *Strickland,* 466 U.S. at 688-89, quoted in *Wiggins,* 539 U.S. 510, 524 (2003)(ellipses in *Wiggins*.) Counsel has an "*obligation* to conduct a *thorough investigation of the defendant's background.*" *Wiggins, supra,* quoting *Williams,* 529 U.S. 362, 396 (2000), citing ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980)). The Supreme Court has explicitly held that ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989)

> applied the clear requirements for investigation set forth in the earlier Standards to death penalty cases and imposed a similarly forceful directive.
> . . . Our decision in *Wiggins* made precisely the same point in citing the earlier 1989 ABA Guidelines, 539 U.S., at 524 ("The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence . . .'" (quoting 1989 ABA Guideline 11.4.C (emphasis in original))).

Rompilla v. Beard, 545 U.S. 374, 387 (2005), n.7.

"'The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.' 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)." *Rompilla, supra,* at 387. Guideline 11.4.1 of the ABA requirements for capital counsel expressly provides:

> GUIDELINE 11.4.1 INVESTIGATION
>
> 9. Counsel should conduct independent investigations relating to the guilt/innocence

phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.

10. The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.

11. The investigation for preparation of the penalty phase should be conducted *regardless of any initial assertion by the client that mitigation is not to be offered*. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989), Guideline 11.4.1, "Investigation" (italics added). The duty to investigate exists when a client does not want to present mitigation:

> *Counsel has a duty to investigate the case before recommending that a guilty plea be taken (or sought)* or proceeding to trial. This duty is intensified (as are many duties) by the unique nature of the death penalty . . . The need for a standard mandating investigation for the sentencing phase is underscored by cases in which counsel failed to recognize the importance of this aspect of death penalty litigation. . . . . *Counsel's duty to investigate is not negated by the expressed desires of a client.*

"Commentary" to Guideline 11.4.1. (italics added).

This Court has likewise made clear that

> a defendant's waiver of his right to present mitigation *does not relieve trial counsel of the duty to investigate* and ensure that the defendant's decision is fully informed. See e.g., State v. Lewis, 838 So. 2d 1102, 1113 (Fla. 2002) (" . . . *counsel must first investigate all avenues and advise the defendant* . . . to make an informed, intelligent decision.")

Grim v. Florida, 971 So. 2d 85 (Fla. 2007)(counsel not ineffective where he "testified that, despite his client's wishes, he recognized he still had a duty to develop mitigation.") *See State v. Pearce*, 994 So. 2d 1094, 1102 (Fla. 2008)(affirming finding of counsel ineffectiveness:"Counsel must first investigate . . . so that the defendant reasonably understands what is being waived. . . and the ramifications of the waiver.") Of special relevance here, the 1989 Guidelines require that counsel "strive to prevent a (perhaps depressed or suicidal) client from pleading guilty where there is a likelihood that such a plea will result in a death sentence." Guideline 11.6.3(B)(3). This Court has cited and embraced the 1989 ABA standards for capital representation in numerous cases. *See Peterka v. State*, 890 So. 2d 219 (2004)(citing 1989 ABA guidelines and *Wiggins* for requirement that capital defense counsel make

efforts to discover mitigating material from "such sources as medical history, educational history . . . family and social history," among others)(emphasis in original); *Armstrong v. State*, 862 So. 2d 705 (Fla. 2003)(relying upon ABA Guidelines in ordering new penalty phase of capital murder trial); *Henry v. State*, 937 So. 2d 563 (Fla. 2006); *Parker v. Florida*, 3 So. 3d 974 (Fla. 2009).

At the evidentiary hearing below, Mr. Farr's trial attorney testified that he conducted *no investigation whatsoever* of Mr. Farr's life and background. Counsel had no investigator or mitigation specialist working on the case with him (EH 257, 292). Counsel *never* did an actual intake interview with Mr. Farr concerning his background or his account of the offense itself. He considered such an interview "unnecessary." (EH 210). Counsel took no depositions (EH 263). In counsel's view, "investigation" consists only of "review of discovery materials [and] interview of the client, those two things." (EH 279). Counsel testified that the only person he *ever* talked to about Victor Farr's life was a "woman who came to my office purporting to be his aunt . . . I probably did not talk to anyone else." (EH 258).

Because he conducted *no* background investigation, counsel, by his own admission, did not know whether the mitigating evidence relied on by this Court in remanding Mr. Farr's case for resentencing was accurate or whether Mr. Farr's disavowal of the evidence at his resentencing was true or false. Counsel testified that he did not even believe he had a duty to investigate Mr. Farr's background:

> Q: And did you know which was true? Did you have any way to know whether his first account to Doctor Mhatre, which had all this mitigation, was correct or whether his disavowal was correct?
> A: Other than what he told me, no, sir, I wouldn't.
> * * *
> Q: And did you feel any duty to do some digging around and see you know, what the truth was here?
> A: No, sir.

(EH 269). Because he did no investigation, counsel did not know that Mr. Farr was indeed abused as a child, had indeed attempted suicides, grew up hungry and in poverty with a mentally ill mother – or anything else about Mr. Farr's life. For all counsel knew, Mr. Farr made it all up. Consequently, when Mr. Farr testified at his resentencing that he *had* made it all up, counsel, ignorant about his

client's life, was at a total loss. Counsel admitted below that he would not have allowed Mr. Farr to testify as he did had counsel known that all the mitigating circumstances renounced by Mr. Farr were, in fact, true:

> Q: And you didn't know whether it [the mitigating evidence] was fabricated or not?
> A: No, sir, I did not.
> Q: Suppose you had known that it wasn't fabricated?
> A: Sir?
> Q: Suppose you had known this [mitigation] was all true, it was not fabricated?
> A: Okay.
> Q: Would you still have let him get up on the stand and say he fabricated it?
> Q: No, sir, . . . – I wouldn't let him do that, no I don't think I would.

(EH 270-1). Counsel readily admitted that he did not take *any* steps to "obtain names of collateral persons or sources to verify, corroborate, explain or expand upon information" about Mr. Farr's life, as required by 1989 ABA Standard 11.3.E (EH 290). He did not obtain any releases from Mr. Farr "for securing confidential records relating to any relevant histories," as required by ABA Standard 11.3.D (*Id.*). Counsel did not even *consider* presenting or investigating anything about Mr. Farr's background (EH 296). Counsel did not request Mr. Farr's psychiatric records in Texas, *despite* Mr. Farr's request that he do so, and he could offer no valid or reasonable explanation for failing to do so:

> Q: Didn't Victor ask you in a letter to obtain his psychiatric records from various institutions in Texas?
> A: He did at one point, yes.
> Q: Why didn't you do that?
> A: Because, sir, this is, how do you say it, a very fluid situation. One day he wants it, the next day he doesn't....
> Q: What would have been the downside of having his psychiatric records?
> A: Probably nothing.

(EH 298-9). Notwithstanding legions of cases and ABA standards to the contrary, Mr. Farr's trial attorney testified that preparation of a capital case is not "markedly different" from any other case:

> Q: How is it [capital representation] different from a defense preparation standpoint?
> A: Not markedly. In my estimation, not markedly different in the way you go about preparing for it . . .
> Q: But basically the preparation is not that much different? That's what you just said.
> A: Yeah, I think that's true.

(EH 195-6; EH 278). Counsel testified that it would not have mattered to him that Mr. Farr's mother "had received several psychiatric hospitalizations" or that Victor "grew up in extreme poverty [and]

many times had nothing to eat." (EH 289). Counsel even opined that such deprivation "wouldn't have been a mitigating factor" at all if Mr. Farr "didn't know" such life circumstances were "unusual." (*Id.*). Counsel testified repeatedly that ABA guidelines for defense representation do not apply to his representation of Mr. Farr. Counsel testified:

> Q: Are you aware that in 1989 there were such standards that would have governed basically your performance in 1991 as a capital attorney?
> A: No, sir, I'd say they wouldn't govern my performance because they're ABA standards, not Florida Bar standards.

(EH 276). Mr. Farr's counsel steadfastly refused to accept ABA Standard 11.4.1.C (1989), which provides that capital counsel should investigate for a penalty phase notwithstanding an assertion by the client that he wants to forego mitigation:

> A: . . .I understand what the standard says, but I don't represent the ABA, I represented Victor Marcus Farr.

(EH 284).

> Q: Did you do that [investigate Mr. Farr's "life history" per the ABA guidelines for capital cases]?
> A: No, because my client instructed me not to do so.
> Q: Well, doesn't one of those standards say that you shouldn't go by that?
> A: Sir, it may well say that, but, again, I was not representing the ABA, I was not representing the Supreme Court of the United States, I was representing Victor Farr.

(EH 291). Counsel's attitude towards the ABA Standards were perhaps best captured by his testimony:

> In this case, I would say that by and large *those guidelines would have to go out the window*.

(EH 371).

Without doing anything proactive, counsel had in his file a variety of sources of mitigating evidence, e.g., a presentence investigation from 1980 when Mr. Farr was only nineteen years old (D.Ex 1); an interview report by public defender Jimmy Hunt the day after Mr. Farr's arrest (S.Ex 8); and a report from psychiatrist Mhatre contained in the original record at R. 261-6, D.Ex 52). Indeed, enough mitigating evidence seeped out between the lines of Mr. Farr's 1991 sentencing to require a reversal and remand from this Court on direct appeal.

At the evidentiary hearing, Mr. Farr presented mitigation testimony from fourteen people to demonstrate what reasonably effective counsel would have done on behalf of Mr. Farr: *Tommy Farr*, Mr. Farr's half-brother, the only high school graduate of the five children in the family, a college graduate and Air Force veteran (EH 489-523); *Susan Boone Johnson*, the sister of Mr. Farr's mentally ill mother, a retired nurse (EH 787-815); *Irene McGuffee*, the sister of Mr. Farr's maternal grandmother and a caretaker of Mr. Farr at different times of his life (D.Ex 63); *Guillermo "Willie" Garcia*, a former step-father of Mr. Farr's (EH 471-89); *Mary Samanieto Szymkowiak*, a former wife of Mr. Farr's (EH 772-87); *Morris Williams*, a veteran of the Columbia County school system, retired principal who liked Victor as a youngster, appreciated his difficult circumstances and gave him much-needed positive attention (EH 682-91); *Marion Taylor*, a justice of the peace in Devine, Texas who was familiar with Mr. Farr's family and had him committed to a mental hospital after he was found bleeding in a motel room from self-inflicted wounds (EH 715-32); *Mindy Baker*, a childhood friend (EH 763-72); *Susan Cary*, a public defender who visited Mr. Farr on death row some 15 to 20 times between his original sentencing in 1991 and his resentencing in 1993 (EH 733-61); *Dr. Barry Crown*, neuropsychologist; and *Dr. Jeffrey Danziger*, M.D., psychiatrist.

The above-mentioned witnesses provided a wealth of mitigating material. These witnesses and/or others like them were readily available in 1990-93 to provide compelling evidence of the following mitigating circumstances:

A. Mental illness.

Mr. Farr has suffered throughout his life from depression and a bipolar disorder. He has a history of suicide attempts and psychiatric treatment. His mother was institutionalized for psychiatric illness and his grandmother had psychiatric symptoms. All four of his siblings are being treated or have been treated for mental illnesses of one kind or another. Both mental health experts testified at the evidentiary hearing that Mr. Farr met the criteria for the two mental health-based mitigating circumstances in the Florida capital statute, sections 941.121 (b) and (f) (EH 426, 629-30). *See also* Argument VIII, *infra*, which addresses counsel's ineffectiveness with regard to mental health

defenses.

B. Organic brain damage.

Mr. Farr has organic brain damage. This, too, is discussed in detail in Argument VIII, *infra.*

C. Child abuse.

As a child, Mr. Farr was the victim of severe physical and mental abuse by his mother and step-father. His mother regularly hit him with objects (broomsticks, extension cords, EH 781) and threw things at him. She continually berated Victor and called him names, told him he was "worthless" and a "bastard." *See* testimony of Willie Garcia (EH 474-5)(she was verbally and physically abusive to her children; would "throw things," break dishes and had to be "restrained physically"), Tommy Farr (500-2, 505, 509), Mindy Baker (764-7), Mary Szymkowiak (775-7, 781), Dr. Crown (420, 427), and Dr. Danziger (603, 611).

> Victor's childhood friend, Mindy Baker testified that his mother, Virginia:
> was mean to him, hateful, she hit on him. And I seen it myself. I mean he didn't have to tell me, but I knew that he had been abused. I seen the abuse, I knew he was hurt and he would just come to me emotionally and crying because he wanted help. And I was a child myself so there wasn't much I could do.

(EH 767). Virginia put the head of Victor's brother, Lewis, through a wall. Their step father "was real upset because he had to fix the drywall before the landlord found out." (EH 505). Mr. Farr and the other children received whippings with a leather belt from his step father, Eddie Farr. Sometimes the buckle would hit them and leave welts (EH 500-1). Victor, who was not Eddie Farr's biological son, received worse beatings than the others (EH 502).

Child abuse is a mitigating circumstance under Florida law. *Hallman v. State*, 560 So. 2d 223(Fla. 1990); *Stevens v. State*, 552 So. 2d 1082, 1086 (Fla. 1989).

D. Poverty and hunger.

Mr. Farr grew up in extreme poverty and he frequently went without food or adequate clothing (EH 497, 810). They lived "hand to mouth." (EH 805). He and his siblings "collected Coke bottles down in the ditch . . . to buy us some peanuts or something for lunch." (EH 498). The children started working in 4th grade, chopping tobacco and at other jobs (EH 497-8). The children were often

hungry and ate hotdogs for "breakfast, lunch and dinner." (*Id.*). At various times they lived in a hunting camp with no electricity (EH 496), and a trailer park where the conditions were "horrendous . . . horrible" (EH 497) or "they would go homeless and even lived for a while in a tent that a black man in Florida was kind enough to lend them." (D.Ex 63, para. 22). Victor slept on the floor (EH 503).

They wore clothes pieced together from "scrap pieces of material" discarded by a nearby factory (EH 503).

> Often they went hungry and they wore nothing but rags. They did not even have shoes much of the time. It was truly pitiful. When they would visit us, they would show up with no shoes on their feet, dirty and hungry. They would see food in our pantry and just go crazy.

(D.Ex 63, para. 22-3). Impoverished childhood is a mitigating circumstance. *Campbell v. State,* 571 So. 2d 415 (Fla. 1990); *Bassett v. State,* 541 So. 596 (Fla. 1989).

E. Traumatic chaos and instability.

Mr. Farr's early life was extremely chaotic and unstable. He was the second of five children born to his mentally ill mother, Virginia Boone. She was never healthy physically or mentally. She was born anoxic, i.e., without oxygen, which causes brain damage (EH 789). As a child, she had polio and a prolonged fever of 106 degrees with long term consequences. "The right side of her body did not develop equally to her left side," and she always had learning disabilities (EH 790). She was hospitalized several times for psychiatric disorders and was diagnosed as "paranoid schizophrenic."

Virginia had her first son, Lewis, the day after her 16th birthday, and her second son, Victor, the day before her 18th birthday. Virginia's parents were so concerned about her inept parenting that they made arrangements for Victor to be adopted by some "very close friends of theirs. . . [who] attended worship with [them]." (EH 800). But some time before Victor was born, "they decided it might not be the best idea because of Virginia's mental status . . . so they backed out" of adopting Victor (*Id.*). By the time Virginia was 23 years old, she had five children. Only one of the five children, Tommy, graduated from high school. One of their homes was flooded forcing them to live for a year in a relocation camp with no electricity (EH 496). Another home, a trailer in north Florida,

was burned down by their disturbed mother "because she wanted to move back" to Louisiana (*Id.*). Virginia was "very irrational." (EH 807). She "had kind of a problem grasping reality sometimes." (EH 474). She took "way too many" prescription pills and would have tantrums "like a child." (EH 476). At times, she "just went haywire." (EH 497). Virginia was prone to just up and disappear (EH 510). She would dump her kids with whomever would take them. Half-brother Tommy had the benefit of his Aunt Sarah and Uncle Raymond to take care of him when Virginia was not up to it:

> [Aunt Sarah] would always come – send for me on holidays, I would go, or she would send for me to stay there during the summer and she would always make a couple times a year special trips to be here with me.

(EH 498). Virginia's parents "took Lewis underneath their wing for some reason but wouldn't Victor."

Virginia's Aunt Irene loved Victor and would take him in:

> Virginia would literally dump the boys on our doorstep. She would leave them here with no shoes and nothing but tattered clothes on their backs. We would buy them shoes and clothes. We felt so sorry for them! Then, out of the blue, she would show back up and take them away. I never really liked Lewis but we adored Victor and even offered to take Victor off her hands, but we would not agree to his going back and forth like that, so finally, she just took him back.

(D.Ex 62, para. 28). Mr. Farr's step father Eddie Farr was a severe alcoholic who drank "like a fish." (EH 802). By age 9, Tommy would have to take the steering wheel with his "brother and sister in the back seat and my dad drunk in the passenger seat." (EH 501). Eventually, Eddie Farr was supplanted in Virginia's life by another alcoholic step father, Willie Garcia, with whom Virginia would have knockdown-dragout fights (EH 717, 765).

Difficult and traumatic childhood is a mitigating circumstance under Florida law. *Brown v. State*, 526 So. 2d 903, 908 (Fla. 1988); *Hollsworth v. State*, 522 So. 2d 348, 354 (Fla. 1988).

F. Unknown paternity.

No one has ever known the identity of Mr. Farr's biological father. His mother was with a lot of men, and there are many theories as to who fathered Victor. "Virginia started running with boys by the time she was 11 or 12. I am sure she was having sexual intercourse by the time she was 13." (D.Ex 63, para. 16). At the time Virginia became pregnant with Victor, she was being stalked by

Lewis' father, Denis Gros (EH 795) and she was seeing three other boys in the neighborhood: David Cherry, Corky Vinson and David Powe (*Id.*). There is also a persistent family rumor that Victor's father is his great uncle, Merlin McGuffee (EH 797). Of the five children born to Victor's mother, he is the only one whose paternity was always a mystery. He was teased, ostracized and stigmatized as a result of his uncertain lineage. He was, pure and simple, "the odd stepchild" (EH 478), the "odd man out," (493) "the bastard of the family." (*Id.*).

"Victor sort of went off the deep end after he found out [Eddie Farr] wasn't his dad." (EH 499). "I would say he was very unhappy because he never knew his real dad." (EH 478).

Lack of a father is a mitigating factor under Florida law. *Herring v. State*, 446 So. 2d 1049, 1057 (Fla. 1984).

G. Alcoholism and other forms of self-medication.

As early as adolescence or preadolescence, Mr. Farr used inhalants to self-medicate (EH 408). "Huffing is inhalation of gasoline, glue, solvents. It's the fastest pathway to the brain and the fastest pathway to brain damage." (EH 421). Mr. Farr started drinking when he was about 12 or 13 years old (EH 508-9). At approximately that age, he would smoke marijuana and drink with a married couple who lived next door to his family in Pineville, Louisiana.

Individuals with bipolar disorder, such as Mr. Farr, have a "fifty percent concordance with substance abuse . . . in large part because of an effort to self-medicate." (EH 608). They also have a "15 percent risk of death by suicide."

Mr. Farr is one-eighth Native American (EH 788; D.Ex 62, para 13). Like many Native Americans, Mr. Farr has a toxic reaction to alcohol. "His system can't handle alcohol." (EH 479). "It's not so much the quantity, it's just that his system can't handle – it makes him go crazy. He has no concept of reality." (*Id.).* He is "totally different" when he drinks (EH 721). "When he drank, he just made a 180-degree turn . . .he was just a totally different person when he was drinking." (EH 722). "When Victor would drink he would be a totally different person . . . it was like his personality would change." (EH 779).

Alcohol and chemical dependency are mitigating circumstances under Florida law. *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990); *Buckrem v. State*, 355 So. 2d 111 (Fla. 1978).

H. Childhood sexual abuse.

Mr. Farr has a history of sexual abuse (EH 420). At the tender age of 12 or 13, he was having sex with a married couple who lived next door (EH 509). "His brother Lewis was very mean to him. . . . Lewis was physically, emotionally and sexually abusive to his little brothers and sister. He raped [their sister] Felicia and also sexually molested Victor." (D.Ex 62, para. 22). At age 14, he was sexually molested by an adult stranger (R. 261-6; D.Ex 52).

Childhood sexual abuse is a mitigating circumstance under Florida law. *Robinson v. State*, 574 So. 2d 108 (Fla. 1991); *Castro v. State*, 547 So. 2d 111 (1989).

I. His mother's tragic and brutal death.

Although Mr. Farr was severely abused by his mother, both physically and mentally, he was very devoted and attached to her. "Just in simple terms, he was pretty crazy about his mother, pretty protective of her also." (EH 721). "Victor was the closest to her of all her children. The others did not want to have much to do with her." (D.Ex 62, para. 29).

In January of 1986, Victor Farr's mother was shot to death by an ex-boyfriend who had been stalking her. In the parking lot of a truck stop in Von Ormy, Texas, "he pulled a 9 mm pistol and emptied it in her." (EH 720). Virginia had sought help from a local justice of the peace, Marion Taylor, because the man had been "making threats that if she left, he would do something." (EH 719).

After his mother was murdered, Mr. Farr went to pieces. Judge Taylor, whose name was given by Mr. Farr to his trial lawyer as a potential mitigation witness, testified in November of 2007. He described Mr. Farr's reaction to the violent death of his mother:

> Q: Now after his mother was murdered, did Louis come to you about Victor?
> A: Yes. Louis came to me talking about some mental problems Victor was having and Louis felt like he needed to be put in a mental hospital. He was drinking very heavily at that time and using all sorts of drugs. . . just about anything he could get his hands on.
> And I recall that Victor cut himself up real badly in a motel room, lost a lot of blood. And I . . .do recall that Louis I believe made application for an emergency mental evaluation or emergency mental detention for Victor to get him examined by a psychiatrist at the state hospital.

> And I contributed the paperwork and issued an emergency mental commitment – mental detention warrant for Victor and the sheriff's department transported him to the state hospital.

(EH 722-3). Emotional strain and death of a parent is a mitigating factor under Florida law. *Magill v. State,* 428 So. 2d 649 (Fla. 1983).

J. His good qualities: kindness, generosity and a loving nature.

Mr. Farr is a person with many good and redeeming qualities. Many of the witnesses spoke of these qualities at the evidentiary hearing. *See e.g.*, testimony of childhood friend Mindy Baker, EH 765-6 ("sober, I mean he's a perfect person, warm-hearted, kind. . . . He was a good person, a very good person, he was very kind, honest, he would do anything for a friend. He'd give the shirt off his back or his last dollar."); ex-wife Mary Samanieto Szymkowiak, EH 779 ("sober, he was kind-hearted – he'd do anything for anybody. He has a heart.").

The Court heard testimony from Morris Williams a retired school administrator, teacher, guidance counselor, assistant principal and principal in the Columbia County school system. Mr. Williams remembered Victor vividly from when he was a student in the mid-1970's at Lake City Junior High School. Mr. Williams "liked him a lot" (EH 684), "and felt sometimes that he was a very poor self-advocate" (EH 686). He could tell Victor did not get much positive attention at home, so he "would just give him work to do in my office . . . stack books or sharpen pencils and he always seemed very pleased when he did a job successfully and we praised him for that." (EH 686).

Notably, Mr. Williams recalled:

> I remember that Victor was always very nice and polite to me and others.
>
> He was usually very quiet. In terms of his discipline, there were never any issues that involved violence. Sometimes he would be late to school or late to class. He would forget to bring his materials, his pencils, his books and so on. He was very quiet. As I said, I liked him a lot, but he seemed not to have strong self-esteem.
>
> * * *
>
> . . . [H]e always said yes, sir, he said no, sir, he said please. He was very mannerly.

(EH 683-6). Several witnesses testified that he was a "good hard worker." (EH 480, 507, 778). Good character and good deeds are mitigating factors under Florida law. *Floyd v. State,* 569 So. 2d 1225 (1990); *Fead v. State*, 512 So. 2d 176 (Fla. 1987).

K. Extreme remorse for the death he caused.

Mr. Farr was truly consumed with remorse over the death of Shirley Bryant. Statements by Mr. Farr to his cell mates consistently demonstrated his profound remorse over what had happened. Three former cell mates testified at the evidentiary hearing and described Mr. Farr's remorse.

> A: Victor was remorseful. He said it was an accident. In fact he said that the law enforcement officer, I believe it was a game warden, had forced him off the road. He had no control over what happened at the time.
> Q: How did he feel about what happened to the girl?
> A: He didn't mean to cause the accident he didn't mean to have the accident and he was remorseful. He couldn't believe that she got killed from her injuries and he just received some scratches . . .
> Q: How often did he express these kinds of feelings?
> A: Throughout our incarceration together.
> Q: On a daily basis?
> A: Pretty much, yes.

(EH 575-6).

> Q: . . . When you first met Victor, can you describe his attitude or his statements concerning how he felt about the offense?
> A: He was very depressed and very – almost like someone in mourning apparently. There had been an accident and a girl was killed. . . And he felt like it should have been him that was killed in the accident instead of her.
> Q: Would you say that he was remorseful?
> A: Very, yes.

(EH 668-9).

> Q: Was he upset that it happened? Did he feel bad about it?
> A: Yes, I believe so.
> Q: Did he say he was really sorry that the girl had died.
> A: More than on one occasion.
> Q: And did he say he hadn't meant for it to happen?
> A: Yes, it was clear that he didn't mean it to happen.

(EH 565). The court also heard testimony from Susan Cary, an assistant public defender who visited Mr. Farr on death row some 15-20 times between his original sentencing and his resentencing. She testified about meeting with Mr. Farr after he was served with a civil complaint from the Bryant family in which "he was named as a defendant with the insurance company about the vehicle death of Shirley Bryant." Ms. Cary described Mr. Farr's desire to do what he could to help the victim's family:

> Q: Okay. And what was his concern?
> A: He didn't know what he should do. He was very concerned about wanting to help in any way that he could.

> Q: Help who?
> A: Help the Bryant family, if there was anything he could do ... He had no resources, he had no money, so he didn't know if there was something he could do to help.

(EH 744). Remorse is a mitigating factor under Florida law. *Songer v. State,* 544 So. 2d 1010, 1011 (Fla. 1989); *Campbell v. State,* 571 So. 2d 415 (Fla. 1990).

L. Intoxication at the time of the offense.

It is beyond dispute that Mr. Farr was heavily intoxicated at the time of the offense. *See* D.Exs 9, 10, 11, 12, 14, 15, 17, 18, 19. Mr. Farr's blood-alcohol content was tested more than two hours after the collision and was determined to be .21%, which would have made it at least .24% at the time of the offenses (EH 629). Intoxication at the time of offense is a mitigating factor under Florida law. *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990); *Buckrem v. State,* 355 So. 2d 111 (Fla. 1978).

Conclusion.

Counsel had a clear and unambiguous duty to investigate and present mitigating evidence on behalf of Mr. Farr's life. Counsel conducted no investigation at all, however, and presented nothing in mitigation. Indeed, counsel told the court at Mr. Farr's resentencing:

> I would represent to the Court that I have gone through the entire record on appeal, as well as the entire court file, as well as my entire office file, and other than those matters that have been addressed here today, *I am unable to find anything that I would characterize as even potentially mitigating or – as a potential mitigator in this case.*

(R. 488)(italics added.) As shown, there was much trial counsel could have presented that "probably would have resulted in a different outcome." *Strickland et al.* Accordingly, this Court must vacate Mr. Farr's death sentence.

ARGUMENT VII
THE SENTENCING ORDER WAS IMPROPERLY AUTHORED BY MR. FARR'S PROSECUTOR; THE TRIAL COURT FAILED TO INDEPENDENTLY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES AND PROVIDE ITS REASONING FOR REVIEW ON APPEAL; AND TRIAL COUNSEL WAS INEFFECTIVE IN PERMITTING THIS TO OCCUR.

On direct appeal, this Court remanded Mr. Farr's case for resentencing "because the trial court failed to consider all of the available mitigating evidence." Farr v. State, 621 So. 2d 1368, 1370 (Fla. 1993). The Court ordered the trial court to "conduct a new penalty phase hearing in which it weighs

all available mitigating evidence against the aggravating factors." *Id.* "The court then shall determine the proper penalty in accordance with Florida law." *Id.*[10]

This Court's dictate was not followed. As proven at the evidentiary hearing below, the findings in support of Mr. Farr's death sentence were made entirely by the prosecutor. The facts are clear and undisputed:

On November 12, 1993, prosecutor Coleman sent trial counsel a "proposed order" entitled "Judgment and Sentence." (D.Ex 22). The "Judgment and Sentence" was a detailed eight-page order written by Coleman purporting to be the trial court's reasons for resentencing Mr. Farr to death (*Id.*). Coleman informed Slaughter that the order went "as far as it can at this stage," that he had "apprised" Judge Agner of "what we are doing " and that the judge "seemed to appreciate it." (*Id.*). Coleman's memo concluded:

> I told him that I would need some time on a computer to finish it on the day of the hearing.

(Id.). On November 15, Coleman, by memo, informed the State Attorney for the Third Judicial Circuit, Jerry Blair, "I need your thoughts on the proposed order. . ." (D.Ex 31). Blair informed Coleman in a handwritten note that "there are cases which hold it is improper for the Court to delegate to the state the drafting of the Judgment and Sentence." (*Id.*). Blair suggested that it "might" be more prudent to submit a "sentencing memorandum with the proposed language." (*Id.*). On November 30, Coleman mailed Judge Agner a minor variation of his draft "Judgment and Sentence," now captioned "State's Memorandum of Law Regarding Sentencing," consisting of the same eight pages of proposed findings in support of a death sentence that comprised the proposed "Judgment and Sentence" Coleman had drafted and circulated two weeks earlier (D.Ex 33).

None of the aforementioned documents, proposed orders and findings nor any of the correspondence to court and/or opposing counsel, were filed in the court record in the case. Thus,

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[10]The Court stressed the requirement that credible uncontroverted mitigating evidence "*must* be considered and weighed" by the trial court. The Court emphasized further that this "requirement applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence." *Id.* at 1369.

none of these items were "of record" in this case for purposes of Mr. Farr's direct appeal. In his testimony at the evidentiary hearing, prosecutor Coleman could not explain why he did not file the proposed order.

On December 8, 1993, Mr. Farr's resentencing was conducted. Before the court proceeding commenced, prosecutor Coleman and defense counsel Slaughter audibly discussed with each other the fact that Coleman had written the judge's findings in support of sentencing Mr. Farr to death and that the judge's findings "were going to be the same." (EH 752). At the conclusion of the resentencing proceeding, Judge Agner stated that he would retire to chambers "to consider this matter some while" but would be returning "to announce the decision of the Court with respect to the sentence." (R. 493; Resentencing Transcript 47).

> Upon returning approximately an hour after recessing, Judge Agner announced:
>
> THE COURT: Being persuaded that the proper way to impose sentence is to read the sentence that has been reduced to writing in open court, the judge of the court will now embark on that endeavor.

(R. 493-4). The judge then proceeded to read, virtually verbatim, the order that had been written by the prosecutor several weeks earlier. *See* D.Exs 30, 33, R. 414-21. The order contained so-called "Findings" as to various "possible mitigating factors viewed *by this Court.*" (R. 418)(italics added). The only difference between the order read by the sentencing court and the order drafted several weeks earlier by the prosecutor was the inclusion of a single sentence added to the end of each "finding," incorporating Mr. Farr's cursory, self-defeating and completely inaccurate testimony at the resentencing hearing, e.g., "finding" that Mr. Farr had no history of suicide attempts, that he was not rejected by his family, that the murder of his mother caused no more than "normal grief" for him, that his previous psychiatric treatment was merely an attempt to avoid prosecution, that he was actually never sexually abused in his youth, that intoxication was not a factor in the offense, and that there was nothing mitigating whatsoever about his life or the tragic night in question. *See* D.Ex 30, 33, R. 414-21. These few sentences were inserted by the prosecutor, during the court recess (EH 126-27).

The conclusion of the sentencing order read by the sentencing court was identical to the order

written by prosecutor Coleman. *See* D.Exs 30, 33, R. 414-21. Despite the prosecutor's total control and authorship of the order, all findings and opinions were attributed to the court, creating the false impression that the court had independently considered and weighed mitigation. The order concluded with the following:

> Based upon the preceding findings, *the Court* again *finds* that there are sufficient aggravating factors existing to justify the sentence of death. . . . *The Court is mindful* that the sentence must be a matter of reasoned judgment rather than an exercise in discretion. *Having considered* the entire record of this case, including all matters presented at the original sentencing hearing, *it is the Court's reasoned judgment* that no mitigating circumstances, either statutory or nonstatutory, exist to outweigh or offset the aggravating circumstances which have been proven *to the Court* . . .

(R. 421)(italics added).

At the time of Mr. Farr's resentencing proceeding in 1993, it was well established that the trial judge was required to independently weigh the aggravating and mitigating circumstances:

> Notwithstanding the recommendation of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> > (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
> > (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records if the trial and sentencing proceedings. . . .

Fla. Stat. § 921.141 (3) (1993). In *State v. Dixon*, 283 So. 2d 1, 8 (Fla.1973), *cert. denied* 416 U.S. 943 (1974), this Court explained that: "The trial judge actually determines the sentence to be imposed – guided by, but not bound by, the findings of the jury. . . . The fourth step required by Fla. Stat. § 921.141, is that the trial judge justifies his sentence in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required . . . " *See also Patton v. State*, 784 So. 2d 380, 388 (Fla. 2000)(sentencing order is "a statutorily required personal evaluation by the trial judge of aggravating and mitigating factors" that forms the basis for a sentence of life or death); *Morton v. State*, 789 So. 2d 324, 333 (Fla. 2001)("The

sentencing order is the foundation for this Court's proportionality review . . . If the trial judge does not prepare his or her own sentencing order, then it becomes difficult for the Court to determine if the trial judge in fact independently engaged in the statutorily mandated weighing process.").

Long before Mr. Farr's sentencing and resentencing, the Court emphasized the importance of the trial judge's independent weighing of aggravating and mitigating circumstances in *Patterson v. State*, 513 So. 2d 1257 (Fla. 1987). In *Patterson*, the Court found that the trial judge failed to engage in any independent weighing process. There, as here, the prosecutor was responsible for composing the trial court's order and making the findings that would commit the capital defendant to death:

> [W]e find that the trial judge improperly delegated to the state attorney the responsibility to prepare the sentencing order . . . Section 921.141, Florida Statutes (1985), requires a trial judge to independently weigh the aggravating and mitigating circumstances to determine whether the death penalty or a sentence of life imprisonment should be imposed upon a defendant.

Patterson, 513 So. 2d at 1261 (emphasis in original). Following *Patterson*, and prior to Mr. Farr's resentencing proceedings, this Court announced the proper procedure for sentencing capital defendants, directing the court to hold a hearing at which both sides may be heard and present additional evidence. Additionally:

> [s]econd, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then in accordance with Section 921.141. Florida Statutes, the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order.

Spencer v. State, 615 So. 2d 688, 691 (Fla. 1993). The procedures set forth in *Spencer* were prospective and required at the time of Mr. Farr's resentencing. The court in *Spencer* made clear that drafting the sentencing order prior to the required hearing is not appropriate. In *Spencer*, the Court also "held that the trial court may not request that the parties submit proposed orders and adopt one of the proposals verbatim without a showing that the trial court independently weighed the aggravating and mitigating circumstances." *Valle v. State* 778 So. 2d 960, 965 (Fla. 2001), *citing Spencer v. State*, 615 So. 2d 688 (Fla. 1993). In Mr. Farr's case these mandates were clearly violated. While in Mr. Farr's case, the trial court did not specifically "request" proposed orders, the court knew what the

prosecutor was "doing with the order" and the judge "seemed to appreciate it." (D.Ex 30).

In *State v. Riechmann,* the State prepared the order sentencing the defendant to death. This Court held:

> We therefore approve the evidentiary hearing judge's findings and conclusion, which he summarized as followed:
>
> > **When the cumulative effect of the trial counsel's deficiency is viewed in conjunction with the improper actions of the trial judge and prosecutor during the penalty phase,** the Court is compelled to find, under the circumstances of this case, that confidence in the outcome of the Defendant's penalty phase has been undermined, and that the Defendant has been denied a reliable penalty phase proceedings [sic].

State v. Riechmann, 777 So. 2d 342, 352 (Fla. 2000) (citations omitted)(emphasis added). In *Riechmann,* the Court cited its remand in *Card v. State*, 652 So. 2d 344 (Fla. 1995), in which the same error was found during the evidentiary hearing and a re-sentencing ordered. The State did not appeal.[11] As in the above-cited cases, the trial court failed to conduct an independent, reasoned weighing of aggravating and mitigating circumstances. At a minimum, resentencing is required. More appropriately, because the court did not conduct independent weighing at the time of sentencing, a life sentence is required.

The United States Supreme Court has recognized the independent obligation of the trial court to determine the appropriate punishment in Florida. *See Lambrix v. Singletary*, 520 U.S. 518 (1997). *See also Proffit v. Florida*, 428 U.S. 242, 250-2 (1976)(approving Florida's capital sentencing scheme in part due to this safeguard).

[11]Rule 3.850 relief was also granted in another case from the same prosecutor's office as Mr. Farr's, *State v. Lindsey*, Cir. Ct. No. 91-398-CF (3rd Jud. Cir., Columbia County). There, it was shown that the State had drafted the findings in support of the death sentence and the State agreed to imposition of a life sentence. Similar relief was granted in *State v. Holton*, Cir. Ct. No. 86-8931A (13th Jud. Cir., Hillsborough County), where the State confessed error in its authorship of the findings in support of the death sentence. For the same reasons, Mr. Farr's death sentence cannot stand.

Without objection, counsel permitted the prosecutor to draft the sentencing order, failed to ensure that the "findings" submitted to the sentencing court were accurate and failed to challenge the grossly incorrect findings in any way. The "findings" as to the aggravators were clearly not supported beyond a reasonable doubt, and contradictory evidence was in the possession of trial counsel.[12] Likewise, much evidence existed to demonstrate that the "findings" concerning the mitigators were inaccurate.[13] Trial counsel's performance with regard to the prosecution's submission of its proposed capital sentencing order – or its so-called "sentencing memorandum" -- was clearly deficient representation. Accordingly, Mr. Farr is entitled to Rule 3.851 relief.

The court below found this claim to be "procedurally barred" because it should have been raised on direct appeal, despite the court's recognition that the state-authored sentencing order "did not get made a part of the original record." (PC7: 136). The court rejected the ineffective assistance aspect of this claim asserting that "inaccuracies in the factual findings" in the order should have been resolved on direct appeal." (PC7:138). Clearly, the court was wrong on this point since direct appeal counsel could not possibly have corrected "factual inaccuracies" that were completely outside the record.

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[12]The prosecutor's finding that "The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws" was based entirely on Mr. Farr's preposterous statement –once he decided to seek the death penalty for himself – that "Dead people don't talk." (R. 415). As discussed throughout this brief, the evidence overwhelmingly showed that Ms. Bryant's death was an accident. The finding that: "The capital felony was especially heinous atrocious or cruel" was likewise based entirely on Mr. Farr's self-reports made *after* he requested the death penalty -- at which time the prosecutor was not even seeking the death penalty. Effectively functioning counsel would have known the self-incriminating details were concocted.

[13]As to the mitigators, the finding that Mr. Farr's capacity to appreciate the criminality of his conduct was not established because of his "clear memory" of the events was easily rebutted by Dr. Mahtre's report, *see* S.Ex. 1; by Mr. Farr's and other witness statements, *see* D.Exs. 5, 7, 9, 10, 11 and 18; and the lab report that established Mr. Farr's blood alcohol content at the time of the offense as at least three times the legal limit, *see* D.Ex 19. The findings that no other mitigation existed simply because Mr. Farr said so, *see* R. 418-21, was belied by record evidence, e.g., Dr. Mhatre's report, S.Ex. 1; the prior presentence report from 1980, D.Ex 1; and by easily accessible documents and many witnesses, *see* D.Exs. 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 52, 63, 64; EH 471-88; 489-520; 682-9, 715-31; 763-71; 772-86; 787-812.

ARGUMENT VIII

MR. FARR WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S FAILURE TO INVESTIGATE MR. FARR'S PSYCHIATRIC HISTORY, TO CONDUCT A PROPER MENTAL HEALTH ASSESSMENT, AND TO PURSUE APPROPRIATE MENTAL HEALTH DEFENSES.

Reasonably effective capital counsel representing Victor Farr in 1991 and 1993 would have developed and presented viable and meritorious mental health defenses on his behalf, both for conviction purposes as well as for mitigation of punishment. As demonstrated at the evidentiary hearing, mental health defenses were readily available, and counsel's failure to investigate and present such defenses was manifestly ineffective per *Strickland* and its progeny. (*See* discussion of *Strickland* and ineffectiveness standards in Arguments I and VI, *supra*.)

A. COUNSEL'S DEFICIENT PERFORMANCE

Mr. Farr's attorney testified that he did *no* investigation of Mr. Farr's background, requested no records of Mr. Farr's life and spoke with no one about Mr. Farr's life and background with the sole exception of a "woman purporting to be [Mr. Farr's] aunt" who "showed up" at counsel's office one day (EH 255, 257, 290-1). Counsel was unable, therefore, to verify what Mr. Farr reported about his life, and when Mr. Farr later recanted a wealth of mitigating facts at his 1993 resentencing, counsel was at a total loss (EH 269-70, 275, 285). Counsel did not know, for example, that Mr. Farr was an abused child, that he had a history of suicide attempts or that he was hospitalized after his mother was murdered (EH 270-3). He did not know Mr. Farr's mother had a history of psychiatric hospitalizations (EH 289). Counsel *never* even interviewed Mr. Farr about his life and background (EH 208-10). As a result of counsel's total failure to obtain any information about Mr. Farr, he provided no background materials whatsoever to Dr. Mhatre to assist in the doctor's assessment (EH 255). *See also* D.Ex 48 (letter from counsel to Dr. Mhatre).

Clearly, counsel's performance was deficient.

B. *STRICKLAND* PREJUDICE

As shown at the evidentiary hearing, there were many readily available sources of information

about Mr. Farr's life and background. Although his attorney never interviewed him about his life, Mr. Farr honestly and candidly reported intimate details of his life to anyone interested enough to ask. *e.g.,* the assistant public defender who went to see Mr. Farr the day after the collision (State's Ex. 8), or psychiatrist Mhatre who visited him by court-appointment more than two months later (R. 261-6; D.Ex 52). Mr. Farr had laid it all out in letters to his lawyer: that he had a psychiatric history, as did his mother; that he had prior suicide attempts; that he had a difficult, chaotic and abusive childhood; that he only completed 7th Grade; that he was an alcoholic, among other mitigating facts (D.Ex 38, 39). Counsel thus had plenty of information to work with. Had counsel investigated Mr. Farr's background and properly utilized expert mental health assistance, he would not have permitted his mentally ill client to get on the witness stand and misinform the sentencing court about how "good" his life had been.[14]

A proper mental health assessment would have included, at a minimum, thorough interviewing of Mr. Farr concerning his life and background; exploring collateral sources of information, e.g., records of all kinds (medical, psychological, educational, employment, marital, legal, etc.), interviews with family, friends, and others about all aspects of Mr. Farr's life; and properly informed clinical interviews by mental health experts. Had counsel performed these requisite capital defense functions, he would have obtained crucial evidence *that would have changed the outcome of this case*. A proper mental health examination would have disclosed:

1. Evidence of bipolarity.

Mr. Farr suffers from a bipolar disorder that was likely inherited from his mother (EH 412, 605-15; 625-8; 654; D.Exs. 52, 53). His history of depression was largely unrecognized and

[14]At his resentencing in 1993, Mr. Farr testified falsely that he was "raised good with lots of love and understanding;" that he had never attempted suicide but had lied about it to "get out of trouble;" that the murder of his mother had no great effect on him other than "just being sad or depressed about it;" that his psychiatric hospitalization in fact had nothing to do with his mother's death and occurred before she died; that he had actually never been abused as a child or sexually abused; that he never had a blackout from alcohol or the DT's; that he lied in statements in his Pre-Sentence Investigation report concerning his alcohol and drug abuse; and he lied to Dr. Mhatre about not remembering the night of the crash due to his intoxication (R. 471-86).

untreated. His genetic predisposition to bi-polarity was exacerbated by the long term depressing effects of alcohol and drug abuse and by the destructive internalization of the physical, sexual and emotional abuse he was subjected to as a child (EH 611).

2. Organic brain damage.

Mr. Farr has organic brain damage, and a correctly performed mental health examination of Mr. Farr would have disclosed that he has pronounced neuropsychological impairments (EH 401, 412-3, 418). It is likely Mr. Farr had brain damage "beginning very early in his life." (EH 418). These impairments "likely contributed to him dropping out of school" after 7th grade (EH 406). This condition was exacerbated by "early substance abuse" including alcohol and "huffing" of fumes in preadolescence and early adolescence. These substances "are contributory to brain damage." (EH 408).

3. The role of alcohol in this offense.

A proper mental health inquiry would have disclosed not only that Mr. Farr had been drinking heavily since the age of 13, as Dr. Mhatre reported, but it would have addressed the implications of severe progressive alcoholism on Mr. Farr's functioning at the age of twenty-nine, when the offenses occurred (EH 478-80; 507-9; 721-2; 765-6; 779).

4. Mental mitigation.

A proper mental health assessment would have disclosed a wealth of relevant mitigating information. First and foremost, Mr. Farr met the criteria for the mental mitigating factors in Florida's capital sentencing statute, Fla. Stat. secs. 921.141(b) and (f) (EH 426; 630). Second, a proper background inquiry would have revealed that Mr. Farr experienced a significantly traumatic childhood (EH 611). *See also* Argument VI (his childhood was one of great chaos and instability; he never knew the identity of his father; his mother was very unstable and the family moved frequently, at least once every year throughout his life; by the time she was twenty-three years old, his mother had five children by three different men; Mr. Farr and his brothers and sister were abandoned several times by their mother for months and even years at a time; she was explosive, unpredictable and

physically abusive, hitting Mr. Farr with objects and causing serious injuries that required hospitalization; Mr. Farr's step-father was alcoholic and was physically abusive to the children, with Victor bearing the brunt of it, relative to the three youngest children who were the step-father's biological children; Mr. Farr was sexually abused as a child and adolescent by older family members and by strangers at the age of fourteen; Mr. Farr lived most of the time in poverty, sometimes without food, often with just barely enough to eat; he would be beaten for eating from the meager food supplies at home, and frequently his only food was what he was provided at school; his clothing was always old and worn-out, and even in the relatively impoverished environs of rural Louisiana, Mississippi, and Florida, Victor and his siblings were stigmatized for being poor; if one of the children required medical attention, they would be beaten later for causing an expense to the severely limited family budget – much of it earmarked for the step-father's drinking; Mr. Farr's education was severely hampered by a combination of negative factors, in particular his neurologically-based deficits in auditory selective attention and in receiving and processing information, the instability of his home life and emotional hardships he endured away from school, and the early use of alcohol and inhalants).

5. Impaired memory of the offense.

A proper assessment would also have disclosed that Mr. Farr likely would have remembered little about the offenses. In light of Mr. Farr's auditory selective attention deficits, his history of alcoholism and drug abuse, and his ingestion of at least seventeen and as many as twenty-nine drinks during the afternoon and evening in question, it is extremely unlikely that he would have had a clear or accurate recollection of the tragic events of that evening. This is borne out by his early statements in which he stated he was unable to remember much of what happened. Over the ensuing months and years, he would have heard and read many accounts of the events, and over time it would have been difficult or impossible for him to distinguish what he remembered independently from what he learned from secondary sources and discovery materials describing the offense. Any aggravating details he came up with long after the fact were clearly fabrications and effective counsel would have

known that.

6. Incompetency to plead guilty.

Perhaps most important, Mr. Farr's bipolarity and his history of depression and suicide attempts should have been a "red flag" to reasonable counsel that Mr. Farr's ambivalence about his defense and his sporadic requests for the death penalty were symptoms of mental illness, not of reasoned or sound judgment (EH 606). Effective counsel never would have allowed or facilitated Mr. Farr's use of the judicial system as a means of trying to commit suicide. Counsel admitted that Mr. Farr's suicidal history "definitely had a bearing on his desire" to plead (EH 383). "I even told him that what he's trying to do is have the State accomplish his goal of suicide." (EH 384).

C. LEGAL ANALYSIS

A criminal defendant is constitutionally entitled to competent and appropriate expert psychiatric assistance. *Ake v. Oklahoma*, 470 U.S. 68 (1985); *Morgan v. State*, 639 So. 2d 6 (Fla. 1994). What is required is a "psychiatric opinion developed in such a manner and at such a time as to allow counsel a reasonable opportunity to use the psychiatrist's analysis in the preparation and conduct of the defense." *Blake v. Kemp*, 758 F.2d 523, 533 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." *United States v. Fessel*, 531 F.2d 1278, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, *see O'Callaghan v. State*, 461 So. 2d 1354 (Fla. 1984), and to assure that the client is not denied a *professional and professionally conducted* mental health evaluation. *See Fessel; Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991); *Mason v. State*, 489 So. 2d 734 (Fla. 1986).

The mental health expert must also protect the client's rights, and the expert violates these rights when he fails to provide competent and appropriate assistance. *State v. Sireci*, 502 So. 2d 1221, 1224 (Fla. 1987); *Mason v. State*. The expert also has the responsibility to obtain and properly

evaluate and consider the client's mental health background. *Mason*, 489 So. 2d at 736-7. The United States Supreme Court has recognized the pivotal role that the mental health expert plays in criminal cases:

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

Ake, 105 S. Ct. at 1095 (citations omitted). Counsel for Mr. Farr failed to address the obvious mental health issues in this case. But for counsel's unreasonable omissions, there would have been no guilty pleas and no death sentence. Accordingly, Mr.Farr's convictions and sentences must be vacated.

ARGUMENT IX
MR. FARR'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE STATE'S IMPROPER, UNETHICAL AND UNLAWFUL DIRECT CONTACTS AND COMMUNICATIONS WITH MR. FARR, KNOWING HIM TO BE REPRESENTED BY COUNSEL.[15]

[15] As announced at the evidentiary hearing, *e.g.,* at EH 828, Mr. Farr abandoned any part of this claim that relies on facts or occurrences *after* his December 1993 resentencing (*see* EH 816-35, 852-3, 856-7, 860-1, 863-4, 868) because anything occurring thereafter is not relevant to the issues here. *See also* Motion to Continue Evidentiary Hearing and/or Supplement the Record or, in the Alternative, Motion to Strike (PC6:6-29).

As detailed in Arguments I and II, *supra,* Mr. Farr had a history of depression and suicide attempts and was overwhelmed with remorse over his responsibility for the loss of Shirley Bryant's life. He was isolated and mistreated in jail, and his lawyer paid him no attention whatsoever, refusing to visit him at all or write to him for months following his arrest. Under such circumstances, Mr. Farr was highly susceptible to anyone who gave him attention and support, such as Lake City Police Chief Frank Owens and prosecutor Thomas Coleman. Despite their friendly overtures to Mr. Farr and his receptivity to them, they were his legal *adversaries* in the criminal justice system and their goals were antithetical to his best interests.[16]

Chief Owens interviewed Mr. Farr at least three times. The first occasion was at the Hamilton County jail the morning after the wreck. After a preliminary off-the-record discussion, a lengthy statement was recorded, although Mr. Farr had injuries to his throat, chest and head that made it hard for him to talk. Mr. Farr was able to recall little about the accident or what preceded it, stating, "I mean I know I wrecked it but that's all I remember." During the entire interview, and even when it was over, he did not know that Shirley had been injured in the wreck, let alone killed (D.Ex 7).

More than a month later, on January 17, 1991, Owens visited Mr. Farr at the Columbia County jail, ostensibly at the request of Mr. Farr, who had not yet received a single visit from his own lawyer and was beginning to turn elsewhere for basic information about his case. In a three-page taped statement taken by Owens, Mr. Farr expressed extreme remorse over what happened and took "all the blame for that girl's death." He told Owens he did not want to drag her family "through it over and over again, through the trials and everything." Victor mentioned it was the fifth anniversary of his own mother's murder, and he was greatly upset that the man who murdered her was already out on parole, adding:

> I, I, I still believe he should have received the death penalty. He took her life away you know. He ended her life and it ain't right. That's why I feel that I should [receive the death

[16]One of the criteria for competency to stand trial is "the defendant's capacity to understand the adversary nature of the legal process." F. R. Cr. P. 3.211(a)(2)(iii). *See also* Claim VIII. It is certainly questionable whether Mr. Farr had that capacity. The prosecutor, as an instrument of justice and sworn seeker of truth, had a duty not to exploit or take advantage of that incapacity. *See infra.*

penalty, too] you know.

(D.Ex 20). Again, Mr. Farr told Owens, as he had the day after the tragedy, "I wish I could remember the rest of the night, that night, I, I wish I could remember. I don't know how I'm ever gonna do it, but I am sorry for it." Both of these statements, on December 12 and January 17, were provided to Mr. Farr's attorney in discovery.

Chief Owens' third visit to Mr. Farr, on February 20, 1991, was perhaps the most important, although it was not recorded, memorialized, provided or referenced in any way in discovery. In fact, it appears that defense counsel was not informed of the visit or given notice. *See* discussion at EH 5. Significantly, it was on February 20, after the visit from Chief Owens, that Mr. Farr wrote to prosecutor Coleman asserting for the first time that he intentionally drove into the tree "wishing to end both lives," and that when he shot Cindy Thomas that night, he "was aiming at her heart." He said he meant to kill Shirley "and the lady in the parken lot." (sic) (S.Ex 6). Mr. Farr's February 20, 1991, letter to the prosecutor, written right after he was visited by Chief Owens, became the lynchpin of the state's case against Mr. Farr. The letter was submitted into the court file in Mr. Farr's case more than once (R. 217-8, 244-5), and was specifically relied upon at Mr. Farr's plea hearing, his sentencing to death, his resentencing to death, and in the order explaining his resentencing to death. It is obvious on the face of the letter itself that the visit from Owens prompted Mr. Farr's decisive change-of-heart and led him to write to the prosecutor and ask for the death penalty. Right in the letter, Mr. Farr noted he was taking the extraordinary action of writing to the prosecutor "after tolking (sic) with Frank Owens today. I trust him."

In addition to Mr. Farr's pivotal February 20 letter to the prosecutor immediately after his meeting with Chief Owens, Mr. Farr wrote several more letters to prosecutor Coleman at key points in the proceedings. He wrote to the prosecutor on April 12, after he had pled guilty and prior to his May 13 sentencing, expanding some on his earlier letter, adding more ridiculous claims like "I was not at first going to hit the tree," followed by an account of telling Shirley she was going to die and then "getting control of the car again . . . pressed the gas. Heading straight for the tree." It is clear

from the crash site that Mr. Farr could not possibly have even *seen* the tree for more than two seconds given the curvature of the road, the lack of visibility at night, and distances involved (*see* Argument IV), not to mention his state of extreme intoxication. Mr. Farr's April 12, 1991, letter to Mr. Coleman also became part of the record and part of the basis of his death sentence and resentencing (R. 219-22). Even after he was first sentenced to death in 1991, Mr. Farr continued writing actively to prosecutor Coleman, two more letters in May after he was sentenced to death, and three more letters in November and December of 1991 (S.Exs 5, 11, 12, 13).

As detailed in Arguments I and II, *supra*, Mr. Farr's guilty plea was induced by intimidation, verbal and physical threats, and even extreme physical abuse in the jail. Mr. Farr was susceptible to manipulation as an alcoholic with lifelong chemical dependencies; as a suicidally depressed former mental patient with a bipolar disorder and brain damage; as a severely abused child who never knew his father's identity and was frequently abandoned by his mother; as one who sought desperately to please male authority figures; and, most of all, as someone who was experiencing devastating remorse that he had caused the death of another person.

"A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." Model Rules of Professional Conduct R 3.8 (2002), commentary. It is the prosecutor's duty not simply to get convictions, but to "do justice." *See* American Bar Association, *Standards for Criminal Justice*, Chapter 4, "The Prosecution Function" (1984). The Florida Bar has adopted the ABA standards and instructs attorneys to consult the ABA standards for guidance. Standard 3-1.2, "The Function of the Prosecutor," provides that "the prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions. The duty of the prosecutor is to seek justice, not merely to convict."

The state improperly and unethically communicated with Mr. Farr while he was represented by counsel, exploiting his vulnerability, and manipulating him into pleading guilty. Mr. Farr's convictions and sentences were thus the result of prosecutorial misconduct and were obtained in violation of his due process rights. This Court must correct the error and vacate his convictions and

sentences.[17]

ARGUMENT X

MR. FARR WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO OBJECT TO, CHALLENGE AND CONFRONT PROSECUTORIAL MISCONDUCT AS DETAILED IN ARGUMENTS V, VII AND IX, *SUPRA*, IN VIOLATION OF MR. FARR'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

As detailed in Arguments V, VII and IX, *supra*, numerous forms of misconduct were committed by Mr. Farr's prosecutor. The prosecutor unlawfully wrote the capital sentencing order that purported to set out the trial court's reasons and justifications for sentencing Mr. Farr to death. The prosecutor withheld from Mr. Farr and/or his counsel material exculpatory evidence that probably would have changed the outcome of this case. The prosecution and law enforcement had improper contacts with Mr. Farr, unbeknownst to his counsel, when he was in jail and for many years after he was first sentenced to death. For these reasons, and for other reasons set out in Arguments V,

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[17] At the evidentiary hearing, the Court, over strenuous defense objection, admitted evidence that came into existence *after* the December 1993 resentencing that is the subject of this litigation. The Court likewise allowed testimony concerning post-resentencing matters from trial prosecutor Coleman as to the following: In 1994, after Mr. Farr was resentenced to death and condemned to death row, Mr. Coleman wrote Mr. Farr at least three letters, and in 1995, at least three more (D.Exs. 77, 78, 82, 94, 95, 96). In another letter, to an assistant attorney general assisting in the case, Coleman discussed how he might "put some pressure on Farr to dump" his post conviction lawyers and to keep him with the program of not fighting his execution (D.Ex 104).

At the evidentiary hearing, prosecutor Coleman testified that he visited Mr. Farr on death row on two occasions and did numerous "favors" for him after he was condemned to death row (EH 900, 963, 975). With regard to his ethical obligation to contact counsel for Mr. Farr, Mr. Coleman made it abundantly clear that he *never made any effort to contact Mr. Farr's attorney* during his several years of corresponding with and visiting Mr. Farr (EH 916). "I wasn't concerned about it." (EH 921). Most remarkable, Mr. Coleman testified that he brought autopsy photographs of the victim, 17-year old Shirley Bryant, to death row for Mr. Farr to view, at Mr. Farr's request. Mr. Farr had written to Mr. Coleman asking for the photographs to keep the victim's image in his mind and maintain his resolve to face execution. In a letter on June 28, 1995, Mr. Farr wrote to Mr. Coleman:

> I need to see her photo again to remind myself why I pick to face this. With her in mind I can face this for I know I should. . . . I would like you to bring the two photos so I clearly know why I've waived other appeals and I can stand fast to them resons (sic).

(EH 954). Incredibly, the prosecutor testified that his numerous "favors" for Mr. Farr and his obliging Mr. Farr's desire to see photographs of the victim was simply to be "fair" to Mr. Farr and out of respect for Mr. Farr's "rights." (EH 994). *See also* EH 872; EH 879. It is axiomatic that a lawyer is not allowed to communicate about a legal matter "with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." Rules of Professional Conduct Rule 4-4.2. The prosecutor violated this Rule repeatedly in his many communications with Mr. Farr.

VII, and IX, taken individually or cumulatively, Mr. Farr was convicted and sentenced to death in violation of the constitutions.

Should the court determine that any of the asserted prosecutorial misconduct was known to defense counsel, and therefore not violative of *Brady* or of Mr. Farr's due process rights, Mr. Farr submits, in the alternative, that counsel was ineffective for failing to object to, challenge, refute or otherwise confront the misconduct and for allowing Mr. Farr to be prejudiced thereby. For example, should the court determine that defense counsel knew the State wrote the capital sentencing order, or knew police were interviewing Mr. Farr in the jail and polygraphing him, or knew Mr. Farr's admissions of guilt were fabrications, then counsel was ineffective for allowing Mr. Farr's constitutional rights to be violated, and for allowing him to be prejudiced thereby. Accordingly, the Court must vacate Mr. Farr's convictions and sentences.

ARGUMENT XI

THE CIRCUIT COURT ERRED IN DENYING MR. FARR'S MOTION FOR JUDICIAL DISQUALIFICATION AND IN DENYING MR. FARR HIS RIGHT TO A FULL AND FAIR POST CONVICTION HEARING, IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THEIR FLORIDA COUNTERPARTS.

Throughout the Rule 3.850 evidentiary hearing, the circuit court manifested bias against Mr. Farr and for the State. Among other things,[18] the court: (a) refused to allow counsel for Mr. Farr to make arguments; (b) disparaged and refused to allow Mr. Farr to introduce important relevant evidence, e.g., testimony as to multi-generational mental illness in his family (EH **491**,**493**,747); (c) refused to allow Mr. Farr even to *proffer* evidence and/or testimony that the court would not admit (EH 665,758,**898**); (d) instructed the State to object to questions the court considered "leading" (EH 566) and did the State's job for it (EH 849);(e) admonished and stifled defense witnesses and was discourteous to them and counsel (EH 579,**584**,688,670,674,683,763); (f) made abusive and derisive comments to Mr. Farr's counsel simply for being zealous advocates

[18] Examples of the court's bias are innumerable. Some examples are cited here, with the most glaring noted in bold type.

(EH172-175,177,242,**256**,264,291,**299**,**303**,464,589-590,**647**,**916**,928,959; (g) disparaged and reprimanded counsel for being "shrill" and "hysterical" when she merely noted that "Mr. Farr's life is at stake" in arguing the egregious unfairness of the court's permitting the State to rely on letters from Mr. Farr written long after his 1993 resentencing and then *not* allowing the defense to use the very same letters. (EH 833-**834**); (h) allowed the state to cross examine a key defense expert utilizing a document from its own files and then refused to allow counsel for Mr. Farr to introduce the very same document into evidence, requiring the *defense* to authenticate the document utilized by *the state* (EH 826-830); and (i) made numerous comments and rulings that evidenced bias (EH 128,875,896,902,931,943,965). During the evidentiary hearing, Mr. Farr filed a motion to disqualify the judge. EH 841; PC4-194-198. The court denied the motion in error, and reversal is required.

Due process guarantees the right to a neutral, detached judiciary "to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." *Carey v. Piphus*, 425 U.S. 247, 262 (1978); *Taylor v. Hayes*, 418 U.S. 488, 501 (1974); *State v. Steele*, 348 So.2d 398 (Fla. 3d DCA 1977).

See also Cannon 3B of the Code of Judicial Conduct, which provides:

> D. *A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers,. . .*
>
> E. A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice,. . . .
>
> . . .
>
> **G.** A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer *a right to be heard* according to law.

Due to the circuit court's rulings, Mr. Farr was prevented from presenting evidence and argument in support of his claims. The circuit court's rulings denied Mr. Farr due process, including the right to a full and fair evidentiary hearing. See Roberts v. State, 840 So. 2d 962, 971 (Fla. 2002). Reversal is required.

CONCLUSION

For the foregoing reasons, it is incumbent upon the Court to vacate Mr. Farr's convictions and sentences.

CERTIFICATION OF TYPE SIZE AND STYLE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Defendant's Initial Brief of Appellant has been furnished by U.S Mail to Charmaine Millsaps, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050, this 12 day of June, 2009.

Attorney