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

REPLY BRIEF OF APPELLANT

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ARGUMENT I

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

A. The unconscionable plea.

As the state suggests, to prevail on this claim, Mr. Farr must establish that he probably would not have pled guilty "but for counsel's errors." Answer Brief of Appellee ("Answer") at 11, quoting *Zackrzewski v. State*, 866 So. 2d 688, 694 (Fla. 2003).[1] A "reasonable probability" is determined by looking at the "totality of the circumstances surrounding the plea." *Id.,* quoting *Grosvenor v. State,* 874 So. 2d 1176, 1181-82 (Fla. 2004). Among these circumstances are the likelihood of a successful defense at trial, the form and content of the plea colloquy between the court and defendant, and "the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at trial." *Id.*

First, it is highly significant that there was *no difference whatsoever* between the sentence imposed under the plea and the maximum possible sentence at trial. Mr. Farr pled guilty explicitly in return for a sentence of *death.* In fact, here, the maximum possible

[1] The State's Answer brief will be referred to in this Reply as "Answer." References to the Plea Hearing are denoted as "PH_" and references to the original pretrial record-on-appeal are denoted as "R_." References to the Rule 3.851 evidentiary hearing testimony are denoted as "EH_" and defense exhibits from that hearing as "Def. Ex._." References to the circuit court's Order denying relief are denoted as "Vol 7:___."

sentence may even have been *less* than that imposed under the plea, since Mr. Farr was not even facing the death penalty prior to the plea agreement, according to correspondence from his attorney. Def. Ex. 47. It was not until his own attorney drafted the extraordinary plea agreement providing for a death sentence that Mr. Farr actually faced the death penalty.

As for the plea colloquy, Mr. Farr pled to facts that were not only unsubstantiated and unprovable, he pled to facts that were patently false – from his educational level (incorrectly elicited as "*through* junior high school," PH 7-8, which he never completed), to the circumstances of the offense, e.g., that Mr. Farr had attempted to kidnap Cindy Thomas and Patsy Lynch and take their vehicle, PH 27, (for which there was not a scintilla of evidence); that Mr. Farr was *not* being pursued at the time of the fatal crash, PH 28 (flatly contradicted by prosecutor Coleman who testified at the evidentiary hearing that Mr. Farr *was*, in fact, being pursued at the time, EH 22, 887), among other significant errors of fact. In addition, no consideration was given by counsel or court to Mr. Farr's history of suicide attempts and psychiatric treatment prior to accepting his pleading guilty to a death sentence.

Third, regarding "whether a particular defense was likely to succeed at trial," this is an additional basis on which to conclude there was a "reasonable probability" Mr. Farr would not have pled guilty had his counsel functioned effectively. Indeed, reasonably effective counsel, had he performed even a minimally adequate investigation would have informed Mr. Farr of the viability of numerous defenses to capital murder, e.g., that the fatal crash was an accident, that Mr. Farr was extremely intoxicated, and that there were numerous mitigating factors that would have precluded the imposition of the death sentence.

B. Counsel's inexcusable refusal to meet with Mr. Farr.

The circuit court incorrectly found that "Farr's decision to plead guilty was a firmly held decision." Vol 7:125, Answer at 12. The court, it is respectfully submitted, was demonstrably wrong on this point. It is clear, from Mr. Farr's numerous letters to counsel during his first two months in jail following arrest, that he was determined to challenge the case against him and to defend himself actively. Mr. Farr wrote to his attorney repeatedly asserting that the collision was an accident, pleading with his attorney to perform various defense functions,

and requesting that counsel visit him and discuss his potential defenses. Mr. Farr asked about specific measures that he wanted counsel to take on his behalf such as requesting psychiatric records and filing discovery motions. Mr. Farr's marginally literate letters were introduced into court and discussed at length in testimony and briefing, yet they were totally ignored by the circuit court. *See* Def Exs. 34 ("I never meant to kill her . . The police man run me off the road."), 36 (requesting that counsel file motions), 38 ("I need someone to tolk to. I'm about to lose my mind."), 39 (asking counsel to obtain his psychiatric records, describing threats of "ass kicking" from jail staff), 40 (asking counsel to file motions for discovery and statement of particulars), 41 (asking counsel to file "Defence of Insanity," stating "I was truely not in my right mind that night" and suggesting that counsel should withdraw from the case), 43 ("And by you not comeing to the jail (ever) to tolk I felt I lost the case. No one had tryed to explain what I cold fight with. So I've had to read for myself. . . I don't feel we are ready for court. . . We need to tolk.")

Two months after his arrest, Mr. Farr had still not received a single visit from his lawyer. Despite his many letters and pleas, all Mr. Farr received in return – more than two months after his arrest – was a solitary letter from counsel saying "there is no need for a face to face conference at this point."

One week later, nearly 10 weeks after his arrest, Mr. Farr wrote to counsel that he had been beaten and kicked by jail guards until he was "covered with blood." He wrote to counsel that he feared for his life and that he was threatened by jail officials with a life of abuse in prison at the hands of the crash victim's family members who worked throughout the prison system. It was only *then,* due *entirely* to counsel's neglect of Mr. Farr and abdication of his professional duty that Mr. Farr decided to throw in the towel and, in effect, commit suicide by capital punishment. There is little question that Mr. Farr would not have reached such a point of abject defeatism had his attorney given him a modicum of attention and responded to his requests for a mere visit and personal explanation of his legal situation.

The circuit court applied a frightfully low standard to capital counsel's duty to communicate with his client, and one that is not

consistent with professional norms or case law. The court found it entirely sufficient that counsel "had written Farr twice and had at least one phone conversation in the first sixty days of his appointment." Vol 7:125. The court found "the fact that Slaughter did not visit Farr more often" to be "hardly surprising or unusual." *Id.* More remarkable, the court held that "a face-face-to-face meeting" between a defendant facing the death penalty and his attorney "simply does not rise to the level of a professional obligation." Vol 7:126. The state finds these conclusions to be "sound" (Answer at 15), despite their patent inconsistency with professional standards of practice, as embodied, for example in the ABA Guidelines for capital representation that specifically state that "trial counsel should maintain close contact with the client throughout preparation of the case." Guideline 11.4.2, ABA Standards (1989). "Counsel always has a duty to interview the client." *Id.* Indeed, "counsel's general duty to maintain client contact is compounded in a capital case. . . Furthermore, counsel may have to try to keep a client from making suicidal choices about the case." *Id.*

Irrespective of the question of the dispositive and binding authority of the ABA guidelines, they undeniably reflect a well-accepted standard of care and practice in the legal profession and should at least be *considered* by a court that is assessing counsel's performance in the context of a Sixth Amendment claim of ineffective assistance. Here, the circuit court embraced the unequivocal testimony of trial counsel that the guidelines do not apply to him. The court did not even consider the most comprehensive and authoritative professional standards for capital representation in deciding Mr. Farr's claims. The court's refusal to acknowledge the 1989 ABA guidelines and to recognize counsel's overt defiance of professional norms should not be approved by this Court, lest the Court put its seal of approval on flagrant disregard for professional standards repeatedly applied by this Court in its review of such claims.

C. Counsel's patently unreasonable rejection of an intoxication defense.

The state contends that counsel's failure to pursue an intoxication defense was reasonable based on counsel's "professional opinion [that] a voluntary intoxication defense would not prevail unless the defendant testified." Answer at 17. The state suggests that "the mere fact that Appellant was intoxicated, even highly intoxicated, would not have been sufficient for a viable voluntary intoxication defense." *Id.* The state correctly notes that "the defendant must come forward with evidence of intoxication at the time of the offense," quoting *Linehan v. State*, 476 So. 2d 1262 (Fla. 1985), but seems to suggest *incorrectly* that such evidence must come from the mouth of the defendant. The state's argument is mistaken for two primary and obvious reasons: (1) case law on voluntary intoxication holds exactly the opposite – that the defendant's testimony alone, without objective corroborating evidence, is insufficient to support a claim of intoxication; and (2) here, there was an enormous amount of independent evidence of Mr. Farr's intoxication: police reports documenting Mr. Farr's consumption of at least seventeen and as many as twenty-nine drinks the afternoon of the fatal collision and, most compellingly, a blood sample taken from Mr. Farr in a hospital two hours after the collision (during which period he was unconscious and no longer consuming alcohol) documenting a blood-alcohol content (BAC) two hours after his last consumption of .21%. Taking into account the normal rate of matabolization of alcohol, Mr. Farr's BAC at the time he got behind the wheel of the vehicle would have been roughly .24% or three times the limit for intoxication. In addition, virtually everyone who saw Mr. Farr within minutes of the offense described him as being totally drunk.

In short, testimony from Mr. Farr was wholly unnecessary on the intoxication issue. Counsel's belief to the contrary was plainly unreasonable, and the circuit court's finding to the contrary is one of the court's many patently incorrect findings.

D. Counsel's unreasonable failure to conduct *any* independent investigation whatsoever. The circuit court found trial counsel's decision to draft and enter a plea of guilty on Mr. Farr's behalf – in return for a death sentence – entirely proper, despite the fact that counsel admitted conducting *no* independent investigation whatsoever

of the offense circumstances *or* Mr. Farr's background. Remarkably, the court found:

> As Slaughter freely acknowledged, had litigation continued on, there were many areas to be investigated. However, Farr insisted on resolving this matter before those matters could be pursued. No deficiency has been shown.

Vol 7:126-127, Answer at 19.

Here, again, the circuit court's reasoning flies in the face of established Sixth Amendment law and standards. It is axiomatic that 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).

Significantly, and of enormous relevance here: 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.*

Though disparaged by trial counsel in his evidentiary hearing testimony and completely ignored by the circuit court, "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.

Even had Mr. Farr knowingly and intelligently instructed counsel to expedite his suicide-by-execution – which, it is respectfully contended, he did not – counsel *still* had a professional duty to investigate. "'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.

Despite the foregoing well-established authority, the circuit court actually held that it "is fairly far-fetched" for Mr. Farr to suggest that counsel was ineffective in failing to investigate the case facts. Vol 7:127.

E. The circuit court's categorical rejection of sworn testimony from three totally disinterested witnesses concerning Mr. Farr's beating at the hands of jail guards was clearly erroneous.

On February 28, 1991, Mr. Farr wrote his attorney a detailed account of being beaten by jail guards on that date. Mr. Farr provided the names of officers involved and the names of inmates who saw him removed from his cell and returned to it several hours later covered with blood. The letter did not even warrant a jail visit from counsel to check on his client's emotional and physical well-being.

Seventeen years later, Mr. Farr presented live testimony from the three former jail inmates who he identified in his letter to counsel as witnesses to the beating. These three neutral and disinterested witnesses testified in chilling detail about the beating of Mr. Farr by those charged with his custody.

Their unrebutted testimony was calm, unemotional, factual and eminently credible. Nothing occurred during their direct or cross examination to cast so much as a hint of doubt as to the veracity of their accounts. The testimony speaks for itself.

Despite the unrebutted and wholly consistent testimony

of witnesses Douglass, Heath and Texton, and no basis whatsoever on which to disbelieve them, the circuit court dismissed their gripping accounts gratuitously and with no support, stating:

The Court finds that these three witnesses were incredible. Their stories appear totally concocted and fabricated.

Vol 7:127-28. Nothing whatsoever was introduced, alleged or insinuated at the evidentiary hearing to suggest that the testimony from these three disinterested individuals – seventeen years after the fact – was "concocted" or "fabricated" and undersigned counsel take vehement exception to the use of those accusations with no basis of any kind.

Because these is absolutely *no* "competent substantial evidence" to support the circuit court's credibility finding as to these three unrelated witnesses, individuals who had no contact or connection with Mr. Farr or each other for seventeen years, this Court, respectfully, should find that the circuit court's conclusion is erroneous and unacceptable.

F. Conclusion.

Mr. Farr's unprecedented and unheard of "plea to death" was drafted and effectuated by defense counsel. Counsel put more hours into drafting the suicidal plea agreement than he spent in the entire previous three months of his representation of Mr. Farr. Counsel conducted no independent investigation of any kind concerning the circumstances of the offense or Mr. Farr's life and background before allowing his client to plead guilty expressly in return for a death sentence. In addition, counsel had almost no contact with Mr. Farr during the entire three-month period between his arrest and his plea agreement. Counsel's total neglect of Mr. Farr included a failure to respond at all to pleas for legal help, advice and protection from threats from his jail custodians. Because of counsel's failure to be an advocate, Mr. Farr, who had a history of psychiatric treatment and numerous suicide attempts, became increasingly despondent and frightened and eventually gave up completely.

Counsel's performance with regard to Mr. Farr's extraordinary plea agreement was patently ineffective and the plea should be

invalidated. The circuit court found nothing remiss in counsel's performance. The circuit court's factual findings were not supported by the record and the court's application of relevant law was clearly erroneous. Accordingly, the court's decision must be reversed.

ARGUMENT II

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

As discussed in Arguments I and II of the Initial Brief, Mr. Farr was verbally threatened and physically abused while he was housed at the Columbia County jail. He was threatened with further beatings if he served life in prison and was warned that relatives of the crash victim, Shirley Bryant, worked throughout the prison system and would wreak revenge on Mr. Farr for causing her death. He wrote to his attorney concerning these threats and his eventual beating at the hands of jail guards. The physical and emotional abuse, coupled with counsel's total neglect of Mr. Farr, culminated in Mr. Farr's loss of will and accession to pressure from jail personnel and Chief of Police Frank Owens to plead guilty and accept that he deserved the death penalty.

Mr. Farr presented live testimony concerning the physical abuse and coercion to which he was subjected. The circuit court "rejected [the] testimony as totally incredible." Vol 7:128-29.

The state contends that "there is no evidence accepted by the court as credible other than Appellant's self-serving letters that Appellant was beaten, or . . . that these beatings compelled him to plead guilty to the offenses." Answer at 27.

Competent substantial evidence was presented at the evidentiary hearing that Mr. Farr's guilty plea was, in fact, the direct result of his being threatened and beaten by jail staff. After he was beaten, Mr. Farr told fellow prisoners that "maybe he'd be better off with the death penalty" (EH 569) than being "subjected to that kind of abuse for 25 years" (EH 579). Mr. Farr then took steps to convince the authorities that the collision and Shirley's death were intentional and that he deserved the death penalty. EH 582-83, 674-75.

Thus, the circuit court was incorrect in its finding that there was "no basis to say that the plea was involuntary or the result of coercion." Vol 7:128-29. Accordingly, this Court should vacate the plea and vacate Mr. Farr's conviction and sentences.

ARGUMENT III

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

As discussed above in Argument 1.C., trial counsel testified, and the circuit court found, that counsel's refusal to consider a voluntary intoxication defense was reasonable primarily because "it would be especially difficult to prove without Appellant's testimony at trial." Answer at 30. As discussed *supra*, this logic was patently unreasonable because (1) to be successful, an intoxication defense requires evidence *extrinsic* to the defendant -- not *from* the defendant; and (2) in Mr. Farr's case, there was a plethora of independent objective evidence of his high level intoxication including numerous witnesses to his massive alcohol consumption, numerous witnesses to his heavily intoxicated state, and even a blood test indicating a blood-alcohol content that was three times the legal limit. Accordingly, the circuit court erred in denying relief on this claim.

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.

There is virtually no question that the fatal automobile collision in which Shirley Bryant died was an accident and not an intentional act. No one even considered the possibility that

the crash was deliberate until Mr. Farr abruptly claimed after several months in jail that he drove into the tree with the intention of killing Miss Bryant.

Mr. Farr's attorney made no effort to get to the bottom of this critically important issue. Instead, counsel accepted at face value Mr. Farr's preposterous post-beating claim that he intended to drive into the tree, and counsel proceeded to craft a plea agreement whereby Mr. Farr would be put to death for a vehicular homicide.

At the evidentiary hearing on Mr. Farr's 3.851 motion, Mr. Farr presented the testimony and unrebutted scientific findings of a highly qualified and experienced crash reconstruction engineer. The expert, Bryant Buchner, made an exhaustive study of the crime scene and circumstances and concluded that it was totally *impossible* for anyone to have driven off the road and into the tree deliberately. Indeed, the tree would have been visible for *shorter than two seconds* given the known speed of the vehicle, the curvature of the road, the dark night time conditions and the location of the tree.

While the circuit court did not specifically reject the findings of Mr. Buchner, the court relied exclusively on "Mr. Farr's various written assertions that he had intentionally run into the tree and his insistence that his attorney not do any further investigation" in finding that counsel's performance as Mr. Farr's capital defense attorney was not ineffective. Vol 7:126-27. The court noted, in addition, that "as Slaughter freely acknowledged, had litigation continued on *there were many areas to be investigated,* "yet the court found "no deficiency" in counsel's pleading Mr. Farr guilty to a death sentence without conducting any further investigation. *Id.* (Italics added.) The state accordingly contends: "If the case had proceeded further, Slaughter might have pursued *any number of lines of defense.* "Answer at 33.

The circuit court's finding that counsel had no duty to investigate further before crafting the plea whereby Mr. Farr would be

executed was clearly wrong. This Court should reverse the circuit court on this issue and vacate Mr. Farr's conviction.

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.

Mr. Farr relies on the argument in his Initial Brief in

support of this claim.

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.

In denying relief on this claim, the circuit court made findings that were internally inconsistent and contrary to law.

For example, the court found, on the one hand, that "the defendant presented a large volume of legally admissible mitigation evidence at this [evidentiary hearing] proceeding" and that it was "quite clear that [trial counsel] had not thoroughly investigated any of these areas." Vol 7:133-34.

On the other hand, the circuit court found that "none of this ['large volume of mitigating'] evidence established that Farr lied at the resentencing hearing" (Vol 7:133) when he "refuted or minimized" (Vol 7:132) the same mitigating evidence from the witness stand.

Although Mr. Farr testified that he had a good happy childhood "full of love," that the murder of his mother did not really affect him, and that his psychiatric history was essentially a ruse to keep from going to prison – all of which was proven at the evidentiary hearing to be untrue, the court nevertheless found that "Farr credibly established that there was no substantial mitigation" in his background. Vol 7:132. Accordingly, the court concluded "in the final analysis" that trial counsel's failure to conduct any mitigation investigation "was not professionally unreasonable." Vol 7:133.

The circuit court mistakenly absolved trial counsel of the duty to investigate his capital client's background finding that counsel "could not have been ineffective for following his client's dictates." Vol 7:131. This determination is clearly erroneous for several reasons. First, it is crucial to note that Mr. Farr did not interfere with the presentation of mitigating factors at his first sentencing in 1991. Indeed, it was the presentation of Dr. Mhatre's scant but accurate and compelling mitigating findings in 1991, unimpeded by Mr. Farr, that caused this Court to reverse Mr. Farr's death sentence initially and remand the case for the proper consideration of mitigation by the trial court. Counsel's failure to conduct *any* investigation of Mr. Farr's life, either in 1991 or in 1993, left counsel unable to know fact from fiction, truth from fabrication. Because counsel knew literally nothing about the true facts of Mr. Farr's life (or the circumstances of the offense), counsel accepted Mr. Farr's 1993 disavowal of the 1991 mitigation at face value, allowing his mentally ill client to hide from the trial court and this Court the facts that would have proved him ineligible for and undeserving of the death sentence.

Second, this Court has made clear that notwithstanding a capital defendant's determination to forego the presentation of mitigating evidence, counsel "should not do so blindly." *State v. Pearce*, 994 So. 2d 1094, 1102 (Fla. 2008). Here, counsel did just that: allowed Mr. Farr to proceed blindly towards execution without the slightest effort to investigate his troubled and mentally disturbed background. Counsel's contention "that he was simply following the wishes of his client . . . would be more persuasive if defense counsel had

actually given [his client] a complete explanation of the purpose of mitigation . . . and if the client had then made *an informed decision* to forego" it. *Hurst v. State,* ___ So. 3d ___ , 2009 WL 2959294 (Fla. 2009) (italics added), at *26. Here, as in *Hurst,* "counsel did not make any investigation to determine whether a decision to forego mental mitigation . . . was *fully informed." Id.* (Italics added.)[2] *See also Rose v. State,* 675 So. 2d 567, 572-73 (Fla. 1996) (reversing death sentence because counsel's mitigation decisions were "neither informed nor strategic" and "there was no investigation of options or meaningful choice.")

Third, it bears repeating that Mr. Farr actively sought to defend himself for two months following his arrest, as reflected in numerous letters to his attorney requesting a mere visit, a mere letter, the vigorous pursuit of discovery and proactive efforts by counsel to obtain records of his psychiatric history.

It was not until two months passed without so much as an attorney visit, with but a solitary letter from counsel saying there was "no need for a face-to-face conference," and after verbal threats and intimidation and a physical beating, that Mr. Farr's resolve to defend himself in court dissolved into hopelessness and defeatism.

The state asserts that "this Court has also held that counsel is not ineffective for failing to investigate mitigation where a defendant waived presentation of mitigation." Answer at 49. The state points to three opinions of this Court that purportedly substantiate this

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[2] In its Answer Brief, the state relies on *Schriro v. Landrigan,* 550 U.S. 465, 127 S. Ct. 1933 (2007), for its contention that a capital defendant "may not waive the presentation of mitigation then claim ineffective assistance of counsel for failing to investigate and present mitigation." Answer at 48. The state likewise argued the applicability of *Landrigan* in its briefing to this Court in *Pearce, supra.* Appellant's brief in *Pearce,* at 81-83. Clearly, this Court did not find the reasoning in *Landrigan* inconsistent with or preclusive of its holdings in *Pearce* and subsequently in *Hurst, supra*, that counsel should not "blindly" allow a capital client to waive mitigation without conducting sufficient investigation to make such a decision after being "fully informed."

It is also worth noting that unlike Mr. Farr's case, Landrigan's case was strongly aggravated. Mr. Farr had a relatively minor criminal record prior to the instant offense. Landrigan, by contrast, was serving a sentence for second degree murder, stabbed and nearly killed another inmate, then escaped and committed another murder while on escape. Thus, considering the "weak" mitigation in *Landrigan*, Answer at 47, n. 5, combined with the heavy aggravation, a comparison with Mr. Farr's heavily mitigated and far less aggravated

assertion: *Grim v. State,* 971 So. 2d 85 (Fla. 2007), *Lamarca v. State,* 931 So. 2d 838 (Fla. 2006), and *Hannon v. State,* 941 So. 2d 1109 (Fla. 2006)

None of the cases cited in the state's Answer apply to the circumstances here. On the contrary, the cases actually support Mr. Farr's position. In *Grim,* this Court stated expressly:

> We have recognized 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) "Although a defendant may waive mitigation, he cannot do so blindly; *counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived* and its ramifications and hence is able to make an informed, intelligent decision."). However, unlike other cases where we have concluded that counsel's failure to adequately investigate mitigation rendered the defendant's waiver invalid, e.g., Lewis, 838 So. 2d at 1113-14, the record here does not support a claim of failure to investigate.

Grim, 971 So. 2d at 100. (Italics added.) Furthermore, despite Grim's desire to waive mitigation, his attorney presented numerous mitigating circumstances after explaining the process carefully to his client. As this Court explained, Grim's attorney:

> proffered the following mitigation evidence: testimony and a report from Larson that two statutory mental mitigators applied; testimony from Larson as to nonstatutory mitigation, including various aspects of Grim's childhood; testimony from two of Grim's supervisors as to his good employment history; testimony from Grim's mother, sister, and stepfather as to his "chaotic childhood," that he was a good student, and that he was loving and caring; and testimony as to stress in Grim's life at the time related to his marriage. Grim confirmed that he understood the process and had discussed aggravators and mitigators with

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circumstances is unpersuasive.

counsel, that they had thoroughly discussed his case with him.

Id. By contrast, Mr. Farr's attorney conducted absolutely *no* investigation and even told the sentencing court he was "unable to find anything that [he] would characterize as even potentially mitigating or – as a potential mitigator in this case." R 488.

In *Lamarca,* similarly, the trial court ascertained that

counsel had conducted the requisite investigation of mitigating factors and adequately informed the defendant prior to accepting a waiver of the defendant's right to present mitigation. As this Court described:

> In Koon,[619 So. 2d 246(Fla. 1993)] this Court recognized that defense counsel is not ineffective for honoring a criminal defendant's request that mitigating evidence not be presented in his case *if counsel adequately investigated the potentially mitigating factors.* 619 So. 2d at 249-50. To ensure that counsel has adequately investigated mitigation, this Court requires defense counsel to "inform the court on the record of the defendant's decision [not to present mitigating evidence]," indicate whether counsel believes mitigating evidence exists and, if so, briefly describe that mitigating evidence to the court. Id. at 250.

Lamarca, 931 So. 2d at 250. (Brackets in original.) By contrast, Mr. Farr's attorney conducted *no mitigation investigation whatsoever.*

In *Hannon*, counsel made a strategic decision not to present mitigating evidence because it would contradict Hannon's claim of innocence at the first phase of trial. This decision was made after close consultation with Hannon and his family. 941 So. 2d at 1126-28.

Clearly, Mr. Farr's alleged "waiver" of mitigation did not remotely comport with the requirements consistently mandated and enforced by this Court for such a life-and-death waiver to be valid. In Mr. Farr's case, the result was especially unfair and unreliable given the extraordinary facts of the offense: Mr. Farr's evident lack of intent to cause the death of the victim, Mr. Farr's extreme and abundantly documented intoxication at the time, the tremendous amount of potential mitigation and counsel's total failure to investigate mitigation or function as an effective capital counsel.

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). Counsel was cavalier in claiming that he had no duty to investigate Mr. Farr's background:

> 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. Consequently, when Mr. Farr testified at his resentencing that he had made it all up, counsel was in the dark. Counsel admitted below that he would not have allowed Mr. Farr to testify as he did had he 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 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: 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.*) Remarkably, the circuit court embraced this peculiar reasoning in its Order denying post conviction relief:

> For instance, although others may view Farr's childhood as deprived, it is certainly not necessarily wrong for Farr to view it as "a cop to say that that [childhood] played any part in that night for it did not." [Resentencing transcript, December 8, 1993 - page 26) A large segment of the population would certainly share Farr's views.

Vol 7:133 (Brackets in original.)

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. The witnesses presented undeniable evidence of numerous compelling mitigating factors, including: long term mental illness in Mr. Farr and all of his siblings, his mother and grandmother; organic brain damage; severe child abuse; extreme poverty and hunger as a child; traumatic chaos and instability throughout his childhood; unknown paternity; alcoholism and other forms of self-medication; childhood sexual abuse; his mother's tragic and brutal death; extreme remorse for the death he caused; severe intoxication at the time of the offense; and many good qualities: kindness, generosity and a loving nature.

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.

There is simply no disputing the fact that the capital sentencing order in this case was written by the prosecutor – not by the trial judge as the law requires. The state attempts vainly to dismiss this claim with hair-splitting, inapplicable comparisons to other cases and incorrect assertions of procedural default.

The circuit court conceded in its Order that "the bulk of the [trial court's] findings were identical" to those drafted by the prosecutor. Vol 7:136. Nevertheless, the court dismissed the claim because: (1) "Judge Agner did in fact take time to independently weigh the circumstances and the proposed findings" (Vol 7:137); (2) "no objection was interposed as to the order or the process followed" (Vol 7:136) and there was "no basis to say that Slaughter was deficient in not objecting" (Vol 7:137); and (3) the claim should have been raised on direct appeal and is thus procedurally barred. Vol 7:136, 138.

As to the first point, the fact that Judge Agner may have spent an hour in chambers reading over the prosecutor's memorandum in

no way negates the state's authorship of virtually the entire sentencing order. The *only* alterations made in the prosecutor's draft was the addition of one short sentence at the end of each mitigating circumstance to reflect Mr. Farr's retraction of each mitigator. These modifications were expressly inserted into the prosecutor's draft order by the prosecutor himself during a recess. EH 126-27. Thus, there was actually no "independent weighing" of any kind by the sentencing court unless independent weighing includes reading the prosecutor's submission and then signing it.

It was established at the evidentiary hearing that no drafts or correspondence concerning the prosecutor's authorship of the sentencing order were put in the court record. Nevertheless, the circuit court held:

> The Court specifically rejects the defense contention that because the sentencing memorandum did not get made a part of the original record, there was no basis to appeal.

Vol 7:136. The court failed to explain how the issue could have been raised on appeal if there was nothing about it in the record. Only matters "of record" are cognizable on direct appeal, and appellate counsel can hardly be expected to raise an issue that he had no way of knowing about.

The state quotes extensively in its Answer from *Walton v. State,* 847 So. 2d 438, 446-47 (Fla. 2003). Answer at 53-54. *Walton* has little or no applicability to Mr. Farr's case, however, for several obvious reasons. First, in *Walton,* the trial court merely "considered" the state's submission before writing its sentencing order, and unlike here there was "no evidence contained in the record supporting Walton's contention that *the State created or originated the sentencing order." Id.* at 446-47. (Italics added.)

The state mistakenly contends that Judge Agner did not "adopt the State's memorandum verbatim." Here, the state's submission was far more than a mere "template." It was virtually identical to the court's "findings" in support of death as this Court will readily observe in comparing the state's draft with the actual findings filed by the court after the prosecutor personally typed in the minor addenda referred to

above. *See* Def. Exs. 33 (prosecutor's 8-page draft submission) and 30 (the 8-page findings filed by the court after the prosecutor typed in a couple of sentences).

This Court must not countenance circumvention of its legion of cases that require a capital trial court to independently weigh aggravating factors and make *its own* findings for this Court to review as part of the Court's crucial supervisory role in Florida's death sentencing scheme. Accordingly, the Court must vacate Mr. Farr's death sentence.

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.

Early in his post-arrest incarceration, Mr. Farr wrote to his attorney asking him to obtain psychiatric records from Texas. Counsel never did so. Counsel did go through the motions of having a psychiatrist appointed to evaluate Mr. Farr, but he did nothing to inform the expert about Mr. Farr's psychiatric history, including prior treatment, suicide attempts and his mother's psychiatric hospitalizations. As a result, the evaluation was incomplete and wholly inadequate. It did not result in 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). The circuit court mistakenly held that "there is simply no basis to suggest that Slaughter should have done any further mental health investigation." Vol 7:138.

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. *Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991); *Mason v. State*, 489 So. 2d 734 (Fla. 1986).

Had counsel performed effectively, he would have learned that Mr. Farr suffers from a bi-polar disorder likely inherited from his mother; that he has organic brain damage; that he was incompetent to plead guilty to a sentence of death; and that the mental mitigating factors in the Florida statute were clearly applicable. Counsel's failure to ascertain these key facts about his client irreparably prejudiced Mr. Farr. But for counsel's unreasonable conduct, Mr. Farr would not have been convicted of capital murder or sentenced to death. This Court, accordingly, must vacate his conviction and sentences.

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.

As noted in the Initial Brief, Mr. Farr expressly sought to abandon this claim at the evidentiary hearing to the extent it relied on letters and communications between Mr. Farr and his prosecutor subsequent to his resentencing in 1993. Despite this attempt on Mr. Farr's part, the circuit court allowed the state to introduce post-resentencing letters from Mr. Farr as ostensible retrospective proof of his alleged intention to bring about the death of Shirley Bryant by vehicular homicide. Because the court permitted the post-resentencing evidence, Mr. Farr has continued to argue this claim.

At the evidentiary hearing, Mr. Farr presented evidence that his dramatic turnaround after two months in jail without a visit from his lawyer coincided, to the day, with a visit he received from Lake City Police Chief Frank Owens. Owens knew of Mr. Farr's extreme remorse, having taken a three-page statement from him a month earlier in which he took "all the blame for that girl's death."

It was on February 20, 1991, after another visit from Owens, that Mr. Farr first wrote to prosecutor Coleman claiming that he had driven into the tree "wishing to end both lives" – his and Shirley's. For the next six years – leading up to his resentencing in 1993 and continuing for years afterwards – Mr. Farr corresponded and met with the prosecutor who was responsible for condemning him to death. The prosecutor testified at the evidentiary hearing that he visited Mr. Farr *twice* on death row, even obliging Mr. Farr's request to see autopsy

photos of 17-year old Shirley Bryant. Subsequent to these unusual visits, Mr. Farr maintained a position of not pursuing post conviction remedies until such time as he was diagnosed by prison doctors with a bipolar disorder and started receiving medication. (EH 612, 635) Since being medicated, he has never wavered on the issue of fighting his execution and attacking the underlying plea and conviction.

Mr. Farr has contended in post conviction that his contacts with his prosecutor were highly inappropriate and were intended specifically to guarantee that Mr. Farr would maintain his resolve to walk voluntarily to his death as sentenced. The circuit court found these allegations to be "absurd on their face," determining instead that prosecutor Coleman's two trips to death row to visit the man whose death he sought to bring about was "out of human decency." Vol 7:139-40.

Mr. Farr respectfully contends that the more "absurd" proposition is that Mr. Farr's prosecutor visited him on death row and obliged his desire to wallow in autopsy photographs "out of human decency." This claim demonstrates that Mr. Farr's condemnation to death was not a principled, judicious or reliable application of the Florida capital statute. Rather, the entire process, from arrest to plea to post conviction waivers to the denial of post conviction relief has been fraught with caprice and arbitrariness. This Court should afford the appropriate and necessary remedy by vacating Mr. Farr's convictions and sentences.

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.

Mr. Farr relies on his Initial Brief in support of Argument

X.

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.

The evidentiary hearing transcript documents that Mr. Farr's attorneys were nothing but professional, courteous and respectful at all times during the proceedings. The presiding judge had no cause at any point to assert or maintain "control [of] the courtroom" or to "preserve good order and dignity," as suggested in the state's Answer as a rationale for the court's admonitions and derisive remarks throughout the proceedings. Answer at 70.

As set forth in Mr. Farr's mid-hearing motion for judicial disqualification, the circuit court demonstrated actual bias against Mr. Farr and his case and the judge should have recused himself when presented with a facially sufficient motion.

CERTIFICATION OF TYPE SIZE AND STYLE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by U.S Mail to Thomas D.

Winokur, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050, this 17 day of November, 2009.

Respectfully submitted,

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