IN THE SUPREME COURT OF FLORIDA

No. _____

VICTOR MARCUS FARR,

Petitioner,

v.

WALTER McNEIL,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

JAMES C. LOHMAN
Florida Bar #0570214
Attorney at Law
1806 East 39th Street
Austin, Texas 78722
(512) 542-9947

LINDA McDERMOTT
Florida Bar No. 0102857
McClain & McDermott, P.A.
141 N.E. 30th Street
Wilton Manors, FL 33334
(850) 322-2172

COUNSEL FOR PETITIONER

PRELIMINARY STATEMENT

This is Mr. Farr's first habeas corpus petition in this Court. Article 1, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed to address substantial claims of error, that demonstrate Mr. Farr was deprived of his right to a fair, reliable, and individualized sentencing proceeding and that the proceedings which resulted in his conviction and death sentence violated fundamental constitutional imperatives.

Citations to the record shall be as follows:

References to the record on appeal from Mr. Farr's original plea and sentencing in 1991 are denoted as "R." followed by the corresponding page number in the record.

References to the record on appeal from the 1993 re-sentencing proceeding are denoted as "SR." followed by the page number in the supplemental record.

All other references will be self-explanatory or otherwise explained.

INTRODUCTION

Significant errors in Mr. Farr's trial-level capital proceedings were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. This petition presents significant violations of Mr. Farr's Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights warranting habeas relief.

Appellate counsel's failure to present the meritorious issues discussed in this petition constituted "serious and substantial" deficiencies. Fitzgerald v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). Appellate counsel's failure to raise these issues demonstrates that his performance was deficient, and the deficiencies prejudiced Mr. Farr. "[E]xtant legal principle[s] ... provided a clear basis for ... compelling appellate argument[s]," which should have been raised in Mr. Farr's appeal. Fitzpatrick, 490 So. 2d at 940. Neglecting to raise such fundamental issues, as those presented here, "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Had counsel presented these issues, Mr. Farr would have received a new trial, or, at a minimum, a new penalty phase.

Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 969 (Fla. 1984), the claims omitted by appellate

counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original). As this petition explains, Mr. Farr is entitled to relief.

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Mr. Farr respectfully requests oral argument.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. The petition presents issues which directly concern the constitutionality of Mr. Farr's conviction and sentence of death.

Jurisdiction in this action lies in the Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Farr's direct appeal. See Wilson, 474 So. 2d at 1163; Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Farr

asserts that his capital conviction and sentence of death were obtained and then affirmed, by this Court, in violation of his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

MR. FARR WAS DENIED AN ADEQUATE MENTAL HEALTH EXAMINATION IN VIOLATION OF AKE v. OKLAHOMA AND THE FIFTH,SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL.

A. Mr. Farr was entitled to assistance of a competent expert mental health assessment.

Due process has long required the State to provide an indigent defendant "the 'basic tools of an adequate defense or appeal.'" Ake v. Oklahoma, 470 U.S. 68, 77 (1985), quoting Britt v. North Carolina, 404 U.S. 226, 227 (1971). In Ake, the Supreme Court explained that:

> This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle [is] grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness . . . in a judicial proceeding in which his liberty is at stake.

Ake, 470 U.S. at 76-77 (footnote and parallel citations omited).

The Court further explained that "mere access to the courthouse

doors does not by itself assure a proper functioning of the adversary process" and "fundamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system.'" Id. at 77 (citation omitted).

The Supreme Court recognized that indigent defendants are entitled to independent experts when the assistance of such experts "may well be crucial to the defendant's ability to marshall a defense." Ake, 470 U.S. at 80. The Court conducted a Fourteenth Amendment due process analysis, id. at 87, and held that without independent experts, defendants could be denied "meaningful access to justice." Id. at 76-77. An expert mental health assessment is required when a defendant's mental or psychological status is at issue, in order to assist the fact finder, "who generally has no training in [mental health] matters," so it may "make a sensible and educated determination" about the contested mental health issues. Id. at 81; see also Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1990), cert. denied, 474 U.S. 998 (1985).

B. Mr. Farr did not receive the assistance of a competent expert mental health evaluation as required by Ake.

1. Procedural and Factual Background.

The trial court granted the defense motion to appoint Dr.

Umesh Mhatre to examine and evaluate Mr. Farr in an Order dated February 7, 1991. (R. 145-8) The court ordered Dr. Mhatre to conduct a psychiatric examination of Mr. Farr in accordance with Florida Rule of Criminal Procedure 3.211(1) and to report to the court on Mr. Farr's competence (pursuant to Section 916.12(1), Florida Statutes) and Rule 3.211(a), Florida Rule of Criminal Procedure. Dr. Mhatre was further ordered to evaluate Mr. Farr's sanity at the time of the offense and to address criteria for involuntary commitment (Id.).

Accordingly, pursuant to the trial court's order, Dr. Mhatre evaluated Mr. Farr on February 19, 1991, for (1) sanity at the time of the alleged offense; (2) competency; and (3) criteria for involuntary commitment.

In determining that Mr. Farr was competent to proceed, Dr. Mhatre relied largely on Farr's self-report (R. 261-3). The only collateral source contacted by Dr. Mhatre was Farr's uncle, Frank Romine, who confirmed Farr's chronic drinking problem (Id.). Trial counsel did not provide Dr. Mhatre with *any* background materials or mental health records. Likewise, trial counsel never provided Dr. Mhatre with Mr. Farr's bizarre and self-destructive letters to the prosecutor and court that were made a part of the record on appeal(e.g., R. 208, 244-45, 219-222) or consulted Dr. Mhatre in any way.

Mr. Farr informed Dr. Mhatre that on the afternoon of the

offense he drank at least twelve beers prior to being dropped off at Tom's Bar. (R. 264) According to Dr. Mhatre's report: Mr. Farr remembered "walking into Tom's but did not remember anything else until being in a car with a girl. He remember[ed] telling her to get out of the car and then remembering the police chasing him. He knew 'I had done something wrong because the girl should not have been in the car that didn't belong to me'. Afraid that he would get arrested he kept speeding until he had a wreck but claims that he does not really remember the actual accident occurring." (R. 264).

Mr. Farr provided his recollection of the offense to Dr. Mhatre on February 19, 1991, the day before he began writing his bizarre letters and requesting the death sentence. Trial counsel never followed up with Mhatre about the letters, in particular, concerning the glaring discrepancies between the version of events reported to Mhatre and that contained in Mr. Farr's letter to ASA Coleman asking to receive the death penalty. R. 244-45.

During the first sentencing proceeding, trial counsel did not present any mitigating evidence. The trial court did not consider Dr. Mhatre's report other than Mhatre's finding that Mr. Farr was competent.

2. Farr was never evaluated for mitigation.

On appeal, this Court reversed, remanded and ordered the

trial court to consider mitigation, irrespective of Mr. Farr's desire not to present any. See Farr 621 So.2d at 1370. Nevertheless, on remand Mr. Farr again did not receive the assistance of a mental health expert in presenting mitigation at the resentencing, thus rendering that proceeding fundamentally unfair as well. Dr. Mhatre **never evaluated Mr. Farr for mitigation**. Dr. Mhatre was ordered to evaluate Mr. Farr only for competency, sanity and involuntary commitment criteria - not for statutory or non statutory mitigation. The trial court relied on Mhatre's inadequate report in assessing mitigation. Dr. Mhatre charged only $250 for his brief evaluation, and devoted a grossly insufficient amount of time for evaluating a defendant for mitigating circumstances in a capital sentencing proceeding. Dr. Mhatre only consulted with one collateral witness and did not review any mental health records, despite Farr's informing him that he had been admitted to a psychiatric hospital. Dr. Mhatre did not conduct or request any testing of Mr. Farr. (R. 261-6).

3. A constitutional, individualized sentencing of Mr. Farr would have included expert psychiatric assistance.

In his interview with Dr. Mhatre, Mr. Farr disclosed a wealth of information that should have led to further investigation for mitigation. Remarkably, one day after being interviewed by Dr. Mhatre, Mr. Farr wrote to the Assistant State

Attorney in his case and requested that the State seek the death penalty. Dr. Mhatre was never provided with Mr. Farr's letter or similar letters that followed, nor was he consulted by defense counsel or the court to provide his expert opinion regarding the mental health implications of the letters or Farr's questionable claims that he had fabricated the mitigating evidence that was so crucial to this Court's reversal and remand for resentencing. Rather, the trial court took it upon itself to assess mitigation without expert assistance.

This Court's mandate that the trial court consider evidence of mitigation at Farr's second penalty phase was thus meaningless absent the proper expert assistance both to identify mitigating circumstances and to explain their significance. The lawyers and the trial judge failed to recognize obvious evidence of statutory and non-statutory mitigation and failed to understand its relevance. The trial court lacked the expertise necessary to "make a sensible and educated determination" regarding mitigation. Ake, 470 U.S. at 81.

Mr. Farr's sentencing proceedings demonstrate dramatically the importance of expert mental health assistance when a defendant's psychological status is at issue and why the lack of such assistance is fundamentally unfair. Appellate counsel was ineffective for failing to raise this claim on direct appeal, as this Court surely would have found its remand – expressly for the

purpose of considering mitigation – was meaningless without the assistance of a competent mental health professional to explain the presence and significance of mitigating circumstances.

4. Appellate counsel should have raised an Ake Claim on direct appeal.

Appellate counsel was ineffective for failing to raise Mr. Farr's Ake claim on direct appeal. This Court has ruled that, where possible, claims under Ake v. Oklahoma must be raised on direct appeal. Davis v. State, 928 So. 2d 1089, 1122 (Fla. 2005)(appellant's claim that he was deprived of his right to an evaluation by a competent mental health expert pursuant to Ake was procedurally barred in postconviction because it could have been raised on direct appeal).

CLAIM II

THE TRIAL COURT VIOLATED MR. FARR'S DUE PROCESS RIGHT TO BE COMPETENT TO STAND TRIAL WHEN IT PROCEEDED WITH THE PLEA HEARING AND THE SENTENCING, DESPITE MR. FARR'S BIZARRE LETTERS, WITHOUT FIRST CONDUCTING A COMPETENCY EVALUATION AND HEARING. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL.

A. Due process requires competency.

Due process requires that a criminal defendant have sufficient ability to consult with counsel with a reasonable degree of rational and factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402 (1960). Even when the defendant is competent at the beginning of criminal proceedings, the court must remain alert to circumstances suggesting a change in mental condition that would render him incompetent. Drope v. Missouri, 420 U.S. 162, 181 (1975).

B. Establishing incompetency after the fact.

Establishing incompetency to stand trial retrospectively, in postconviction proceedings, requires a showing that, "the state trial judge ignored facts raising 'bona fide doubt' regarding the petitioner's competency to stand trial." Medina v. Singletary, 59 F.3d 1095, 1106 (11th Cir. 1995) quoting James v. Singletary, 957 F.2d 1562, 1572 n. 15 (11th Cir. 1992); Pate v. Robinson, 383 U.S. 375, 385 (1966).

C. Factual circumstances raising a "bona fide doubt" regarding Mr. Farr's competency.

Dr. Mhatre evaluated Mr. Farr for competency pursuant to the trial court's Order and concluded that Mr. Farr was competent to proceed. Dr. Mhatre determined that Mr. Farr understood the charges against him and the possible penalty; understood the function of the judge and jury; was capable of withstanding the stress of incarceration; and was capable of cooperating with his

lawyer in his own defense and in challenging prosecution witnesses (R. 265). Literally one day after Dr. Mhatre's evaluation, however, Mr. Farr deteriorated mentally as evidenced by his suicidal letters, the first of which was written to ASA Coleman the day after Mhatre's evaluation. The letters, in addition to other circumstances throughout the proceedings, should have raised doubts as to Mr. Farr's competence to stand trial. Specifically, Mr. Farr's competency was seriously in question given: (1) the fact that Mr. Farr requested that the State Attorney charge him with premeditated murder and recommend the death penalty before the State had even stated an intention to seek death; (2) that Mr. Farr requested the death penalty in a case where the homicide resulted from an automobile accident; (3) that Mr. Farr agreed to plead guilty only in exchange for the state seeking death; (4) that Mr. Farr waived a penalty phase jury; (5) that Mr. Farr sought to waive presentation of any mitigation; and (6) that Mr. Farr viewed his judicial adversaries, e.g., the prosecutor and the Chief of Police, as his legal allies, referring to them in letters as his "friends" who were trying to "help" him. Mr. Farr's bizarre letters provided powerful evidence of his incompetency.

Florida Rule of Criminal Procedure 3.211 (2)(A)(iv) states that examining experts "shall" consider the defendant's capacity to "disclose to counsel facts pertinent to the proceedings at

issue." Farr's letters were inconsistent and demonstrated an inability to distinguish reality from unreality. He was plainly unable to provide pertinent facts regarding the offense or relevant facts concerning mitigating circumstances. The trial court and counsel should have been alerted to the need for another, more thorough competency evaluation.

Competency is not necessarily a permanent state and is considered to be "fluid." It can change at any time, especially in an individual with Mr. Farr's history of mental instability. "Even if a defendant is mentally competent at the beginning of trial, the trial court must continually be alert for changes which would suggest that he is no longer competent." Medina, 59 F.3d at 1106 quoting Drope v. Missouri, 420 U.S. 162, 180 (1975).

Mr. Farr's bizarre letters and behavior should have triggered the trial court's duty to stay the proceedings against him and to conduct a competency evaluation on its own motion. "Where evidence raised a 'bona fide doubt' as to defendant's competency to stand trial, the judge on his own motion . . . must conduct a sanity hearing." Pate v. Robinson, 383 U.S. 375, 385 (1966). In this case, there were reasonable grounds to doubt Mr. Farr's competency, and the trial court's failure to suspend the proceedings for a competency evaluation mandates a new trial and penalty phase. Pate, 383 U.S. at 386.

Further, trial counsel was ineffective in failing to consult

an expert about Mr. Farr's letters and denials of mitigation after the initial competency evaluation. Trial counsel never consulted with Dr. Mhatre about the letters, nor did he consult with Dr. Mhatre about Mr. Farr's 180-degree reversal as to the veracity of important evidence of mitigation contained in Dr. Mhatre's report. Trial counsel had an obligation to determine conclusively that his client was competent to proceed and provide the trial court with relevant information about Mr. Farr's competency. To ensure a proper competency determination, effective counsel would have provided the letters to a mental health expert and consulted the expert about Mr. Farr's disavowal of mitigation.

Much of this information was in the record. Appellate counsel was ineffective, therefore, for failing to raise this issue on direct appeal. Had he done so, Mr. Farr's death sentence would have been vacated by this Court.

CLAIM III

MR. FARR'S WAIVERS OF HIS RIGHTS TO A PENALTY PHASE JURY AND TO PRESENT MITIGATING EVIDENCE WERE NOT KNOWING, INTELLIGENT AND VOLUNTARY, IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL.

A. A defendant's waiver of his right to present mitigation cannot be "knowing, voluntary, and intelligent" where defense counsel fails to investigate.

A defendant's waiver of his right to present mitigation at the penalty phase cannot be "knowing, voluntary, and intelligent" where defense counsel failed to adequately investigate mitigating circumstances. See Deaton v. Dugger, 635 So. 2d 4 (1993); Blanco v. Singletary, 943 F.2d 1477 (1991). Defense counsel's failure to investigate mitigating circumstances for Mr. Farr's capital proceedings constituted ineffective assistance of counsel - irrespective of Mr. Farr's instructions to trial counsel not to present mitigation or rebut the State's presentation of aggravating circumstances. See id.

The direct appeal record demonstrated that trial counsel's performance was grossly ineffective as to both prongs - "deficient performance" and "prejudice" – required by Strickland v. Washington, 466 U.S. 668, 687 (1984); Williams v. Taylor, 120 S.Ct. 1495, 1511 (2000)("[D]eficient performance requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth

Amendment" and prejudice results when "counsel's errors were so serious as to deprive the defendant of a fair trial" with a "reliable result".).

Under Deaton v. Dugger, 635 So. 2d 4, and Blanco v. Singletary, 943 F.2d 1477, when analyzing a purported "waiver" of the capital defendant's right to present mitigating circumstances, the determinative issue in assessing Strickland prejudice is whether the waiver met constitutional standards; if not, and there is evidence (including mitigation) that defense counsel failed to investigate, **the prejudice *is* the ensuing involuntary waiver**.

In Deaton, this Court rejected the State's argument that Strickland requires the trial judge to consider "whether there was a reasonable probability that, absent the errors, the balance of the aggravating and mitigating circumstances did not warrant death." Deaton, 635 So. 2d 8. Rather, the Court held that when a defendant waives mitigation, **"the record must support a finding that such a waiver was knowing, voluntarily, and intelligently made."** Id. Because "clear evidence was presented that defense counsel did not properly prepare for the penalty phase proceeding[,] counsel's shortcomings were sufficiently serious to have deprived Deaton of a reliable penalty phase proceeding." Id. at 8-9. Moreover, because "evidence presented in the rule 3.850 evidentiary hearing established that a number of mitigating

circumstances existed," counsel's failure to adequately investigate "was prejudicial." Id. at 8-9.

Mr. Farr's request not to prepare or present evidence of mitigation is irrelevant in assessing trial counsel's total failure to research and uncover mitigating circumstances. Blanco, 943 F. 2d at 1501. In Blanco, as in Mr. Farr's case, the defendant told the trial court "he did not want any evidence offered on his behalf." Id. The Court of Appeals for the Eleventh Circuit found both deficient performance *and* prejudice because counsel "could not have advised Blanco fully as to the consequences of his choice not to put on any mitigation evidence" due to counsel's failure to investigate mitigating circumstances. Id.

In Deaton and in Lewis v. State, 838 So.2d 1102, 1112 (2002), this Court found that the defendant's waiver of his rights to testify and call witnesses to present evidence of mitigating circumstances was not "knowing, voluntary, and intelligent" because trial counsel failed to adequately investigate mitigation. "The rights to testify and to call witnesses are fundamental rights under our state and federal constitutions. Although we have held that a trial court need not necessarily conduct a *Faretta* type inquiry in determining the validity of any waiver of those rights to present mitigating evidence, clearly, the record must support a finding that such a

waiver was knowingly, voluntarily, and intelligently made." State v. Lewis, 838 So.2d 1102, 1112 (2003)(citation omitted). "[A]defendant cannot knowingly, intelligently, and voluntarily waive his or her right to present mitigating evidence during the penalty phase when his or her defense counsel does not have adequate time to investigate all mitigating circumstances or witnesses." Id.

B. Defense counsel's deficient performance.

1. The legal standard for deficient performance.

Mr. Farr's counsel had a duty to conduct the "requisite, diligent investigation" into Mr. Farr's background for potential mitigation evidence. Williams, 120 S.Ct. 1515,1524. ("trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); State v. Riechmann, 777 So. 2d 342 (Fla. 2000)("an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence").

In Williams, the Supreme Court found deficient performance where counsel failed to prepare for the penalty phase of a capital case until shortly before trial, "failed to conduct an investigation that would have uncovered extensive records," "failed to seek prison records," and "failed to return phone calls of a certified public accountant." 120 S.Ct. at 1514.

The United States Supreme Court further explained the

obligations of trial counsel in capital cases in Wiggins v. Smith, 123 S.Ct. 2527 (2003). In Wiggins, the Supreme Court addressed the reasonableness of counsel's decision to limit the scope of his investigation into potential mitigating evidence:

> [A] court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Even assuming [trial counsel] limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respond to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.

Wiggins, 123 S.Ct. at 2538.

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.). The Supreme Court recognized that it is the defendant's own mental impairment which impacts on his ability to assist counsel in preparing the defense, and, thus, it is crucial to look beyond interviews to records which may contain mitigating evidence. See Wiggins, 123 S. Ct. at 2463.

2. Mr. Farr's defense counsel failed to investigate mitigating circumstances.

In Mr. Farr's case, defense counsel opted not to do any investigation of any kind, including investigation of mitigating

circumstances and guilt phase issues. Under the law and the facts of this case, trial counsel's failure to investigate was unreasonable and constituted deficient performance.

Contrary to defense counsel's claim that he informed Mr. Farr that he "[would] not seek the death penalty" on Farr's behalf, trial counsel in fact assisted in attempting to effectuate Mr. Farr's death wish. (R. 182). Mr. Farr waived a penalty phase jury and requested that trial counsel not present mitigation or challenge the State's aggravating circumstances. Trial counsel unreservedly obliged (SR. 404-5; 456-7, 469). At the resentencing hearing, it was the prosecutor – not Mr. Farr's attorney – who questioned Mr. Farr about mitigating circumstances (SR. 470-87). At the close of the prosecutor's questioning, trial counsel informed the trial court that he had "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." (SR. 488). Counsel's inability to identify mitigating circumstances was due entirely to his failure to conduct any investigation into Mr. Farr's background and to consult with a mental health expert regarding mitigating circumstances. As discussed above, Dr. Mhatre did not evaluate Mr. Farr for mitigating circumstances.

Further, after receiving the report of Dr. Mhatre's initial evaluation, defense counsel failed to follow up with Dr. Mhatre or any mental health professional regarding Mr. Farr's bizarre letters, his ludicrous claim that he purposefully ran into the tree, or his claims that he lied to Dr. Mhatre about mitigating circumstances. Even after this Court remanded the case for a second penalty phase with instructions that the trial court *consider all mitigating circumstances,* trial counsel did not consult with a mental health professional. Counsel's bill for the second penalty phase indicates that he spend a total of .20 hours discussing the case with Dr. Mhatre and spoke with no other witnesses (SR. 427-9).

It is indisputable that the only inquiry trial counsel conducted into Mr. Farr's background was to request the appointment of Dr. Mhatre, yet Mhatre evaluated Mr. Farr only for competency, sanity and involuntary commitment criteria – not for mitigating circumstances. Dr. Mhatre's examination was so brief and cursory that he charged a mere $250 for the "examination" and preparation of his report (R. 156-60). Trial counsel did not provide Dr. Mhatre with any background materials of any sort - no prior records, prior PSI, psychiatric records, school records -- nothing. Trial counsel never informed Dr. Mhatre that the day after his evaluation, Mr. Farr wrote the State Attorney requesting the death sentence. Trial counsel never informed

Mhatre that Farr abruptly changed his account of the offense and claimed to have run into the tree in a suicide attempt or that Farr made dubious claims to have killed others in Texas. Trial counsel did not seek Mhatre's professional opinion on the mental health implications of Farr's efforts to receive the death sentence, which was especially negligent given Mr. Farr's reported history of suicide attempts.

Defense counsel's failure to investigate and provide pertinent information to a mental health expert constituted deficient performance. See Wallace v. Stewart, 184 F.3d 1112, 1116 (9th Cir. 1999)("Does an attorney have professional responsibility to investigate and bring to the attention of mental health experts who are examining the his client, facts that the experts do not request? The answer, at least at the sentencing phase of a capital case, is yes"); Glen v. Tate, 71 F. 3d 1204, 1210 n.5 (6th Cir. 1995)("defense counsel should obviously have worked closely with anyone retained as a defense expert to insure that the expert was fully aware of all facts that might be helpful to the defendant").

Likewise, counsel's decision not to investigate guilt phase issues was objectively unreasonable and undermined his ability to effectively represent Mr. Farr at the penalty phase. Defense counsel filed a Notice of Intent to Participate in Discovery and Motion for Mental Examination to Determine Mental Competency to

Stand Trial on January 24, 1991 (R. 130-1). The prosecutor responded to defense counsel's discovery demand on January 31, 1991, listing forty-seven witnesses; forty statements and numerous exhibits (R. 135-9). Still, trial counsel did not take a single deposition in this complex and most serious case prior to filing Mr. Farr's guilty plea. Trial counsel did not consult with any experts to ascertain whether he could challenge any aspect of the prosecution's case (R. 327-33). The Florida Highway Patrol Traffic Homicide Investigation Report received by the prosecutor's office on January 14, 1991, provided a number of areas requiring follow-up investigation by defense counsel. For example, the report stated that Mr. Farr drove erratically, crashing through a fence, on his way to the Suwanee River Food Store, where he stopped to purchase gas and beer (R. 171). Soon thereafter, according to the FHP report, while being pursued by two police cars - one in front and one behind - Farr "traveled 283 feet before starting to slip-slide in a counterclockwise rotations, creating furrows for approximately 187 feet" before Farr "corrected course and tracked 113 feet straight for a tree. Surface marks showed no signs of braking action prior to collision." (R. 171-3). It was objectively unreasonable for defense counsel to simply accept this report as true and not to hire a defense expert to independently analyze it. At the sentencing, Mr. Farr's own counsel agreed with the prosecution

that, in the event Mr. Farr's case were to proceed to trial, the state would have been able to prove that Farr deliberately ran into the tree. This was based solely on an FHP homicide investigator's observation that marks on the side of the road were not braking skid marks but "acceleration marks" and a letter from Mr. Farr stating that he deliberately ran into the tree in an attempt to kill himself and the victim. Especially considering that Mr. Farr's driving had been highly erratic and that he initially told Dr. Mhatre he did not remember the accident, trial counsel's failure to investigate the circumstances of the offense and to subject the prosecution's theory to a proper adversarial testing was objectively unreasonable and contributed to Mr. Farr's unconstitutional waiver.

Trial counsel's failure to investigate and consult with a mental health expert regarding the facts of the crime and Farr's letters demonstrates that "[t]he ultimate decision that was reached not to call witnesses was not a result of investigation and evaluation, but was instead primarily a result of counsels' eagerness to latch onto [Mr. Farr's] statements that he did not want any witnesses called." Blanco, 943 F.2d at 1503.

Mr. Farr's campaign to receive the death penalty did not excuse defense counsel from investigating mitigation on Farr's behalf. "Uncounseled jailhouse bravado, without more, should not

deprive a defendant of his right to counsel of better-informed advice." Martin v. Maggio, 711 F. 2d 1273, 1280 (5th Cir. 1983)(defendant's "instruction that his lawyers obtain an acquittal or the death penalty did not justify his lawyer's failure to investigate the intoxication defense"). Further, "[a] defendant's desires not to present mitigating evidence do not terminate counsel's responsibilities during the sentencing phase of a death penalty trial: 'The reason lawyers do not "blindly follow" such commands is that although the decision whether to use such evidence is for the client, the lawyer must first evaluate potential avenues and advise the client of those offering potential merit." Blanco, 977 F.2d at 1502 (citation omitted); Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993)(rejecting State's contention that counsel's failure to investigate was reasonable; Heiney's lawyers did not even know that mitigating evidence existed and did not make decisions regarding mitigation for tactical reasons.)

Mr. Farr's waiver of his rights to a penalty phase jury, to present mitigating circumstances, and to rebut the State's aggravators was not "knowing, voluntary, and intelligently." Rather, the waiver was the direct result of defense counsel's failure to investigate mitigation. Due to defense counsel's failure to investigate or consult with a mental health expert on mitigation, counsel was completely unaware that evidence

supporting the statutory mitigator of extreme mental or emotional disturbance existed. Defense counsel's failure to investigate mitigation and utilize the services of a mental health expert prevented counsel, and Mr. Farr, from understanding the effects of the mitigating circumstances on Farr's culpability. Defense counsel's failure to investigate rendered him unable to inform the trial court as to substantial mitigation, as specifically mandated by this Court in its order to consider *all* mitigating circumstances on remand.

The compelling mitigation not considered by the trial court, but contained within Mr. Farr's record, "might well have influenced the [factfinder's] appraisal of [his] moral culpability." Williams v. Taylor, 120 S.Ct. 1495, 1515 (2000); Young v. State, 739 So. 2d 553 (Fla. 1999)(all mitigating factors constitute valid mitigation and undermine confidence in the outcome); See also, Garcia v. State, 622 So. 2d 1325 (Fla. 1993).

The trial court found no mitigation and therefore concluded that "no mitigating circumstances, either statutory or nonstatutory, exist to outweigh or offset the aggravating circumstances." (SR. 511).

Under these circumstances, Mr. Farr has established prejudice. See Rose v. State, 675 So. 2d 567, 572 (Fla. 1996); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Phillips v. State, 608 So. 2d 778, 783 (Fla.

1992); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992); State v. Lara, 581 So. 2d 1288; 1289 (Fla. 1991). Appellate counsel was ineffective for raising this claim on direct appeal. Relief is required.

CLAIM IV

THE TRIAL COURT'S RELIANCE ON MR. FARR'S UNCOUNSELED AND WHOLLY UNRELIABLE SELF-INCRIMINATING STATEMENTS RESULTED IN THE ARBITRARY IMPOSITION OF THE DEATH PENALTY,IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

A. The aggravating circumstances were not supported by competent, substantial evidence.

In its sentencing order (authored by Mr. Farr's prosecutor)[1], the following aggravating circumstances were applied, and subsequently upheld by this Court on direct appeal: (1) the Defendant was previously convicted of another capital felony; (2) the capital felony was committed while the Defendant was engaged in or was an accomplice in the commission of or an attempt to commit or flight after committing or attempting to commit an enumerated felony; (3) the capital felony was committed to disrupt or hinder the lawful exercises of the government; and (4) the capital felony was especially heinous, atrocious or cruel (HAC) (R. 116-9).

None of the aggravating circumstances were supported by competent evidence. Factors (3) and (4) derived entirely from patently unreliable self-incriminating statements by Mr. Farr

[1] Contemporaneous with the filing of this Petition, Mr. Farr's Initial Brief appealing the denial of 3.850 relief is also being filed. Argument VII of the brief addresses the prosecutor's unlawful authorship of the capital sentencing order that condemned Mr. Farr to death. Because that error was not known to or knowable by direct appeal counsel, it is not an issue in this Petition.

rendered after he had decided he wanted to receive the death penalty. The factual basis for finding aggravator (3) was:

> The unrefuted testimony established beyond a reasonable doubt that the Defendant intended to thwart the police's ability to prove that he had kidnapped the Defendant Bryant as evidenced by the Defendant's statement that 'Dead people don't talk.'

(R. 118).

The basis for aggravator (4) was:

> [T]he unrefuted testimony established beyond a reasonable doubt that the Defendant told the Victim Bryant that he was going to kill her; that the Victim Bryant begged for her life several times and was praying; that the Defendant put the gun to Victim Bryant's head several times and pulled the trigger; that the Defendant removed the Victim Bryant's shoes, so she could not escape from him.

(R. 119).

Appellate counsel was deficient for failing to argue more effectively that the trial court's findings were not supported by competent, substantial evidence insofar as they were based entirely on Mr. Farr's preposterous and demonstrably false letters and testimony. Smith v. State, 998 So. 2d 516 (Fla. 2008). As discussed *supra,* the trial court's heavy reliance on Mr. Farr's letters and testimony, without the benefit of any expert mental health assessment of them, was unreasonable and erroneous. The same is true for the trial court's application of aggravating circumstances based on these same bizarre letters and unreliable testimony from Mr. Farr.

Clearly, Mr. Farr qualified for the statutory mitigator of extreme mental or emotional disturbance, which belies the finding that Mr. Farr was acting purposefully to eliminate a witness. Further, statements in the letters demonstrate that Mr. Farr's "recollections" of the offense were totally inconsistent. When he initially discussed the offense with Dr. Mhatre, Mr. Farr was unable to remember the details at all, and in his first letter to ASA Coleman, Mr. Farr stated he "was run off the road." Later, however, after he had decided to commit suicide by death penalty, Mr. Farr claimed that he hit the tree on purpose to end both his and the victim's life (R. 244). Mr. Farr's letters demonstrate that his eventual self-incriminating "recollections" were absurdly untrue and obviously concocted, and no substantial, competent evidence existed to support the HAC aggravator. Appellate counsel was ineffective for failing to present effective argument on this point and sentencing relief is warranted.

B. The trial court's reliance on Mr. Farr's confession in finding Farr guilty of the death penalty violates corpus delicti.

This Court has upheld the long-standing common law principle of corpus delicti to prevent wrongful convictions of mentally unstable individuals such as Mr. Farr. State v. Carwise, 846 So. 2d 1145 (2003). Florida follows the traditional approach of corpus delicti, requiring prosecutors to establish the corpus

delicti before a defendant's extra-judicial confession can be admitted in a criminal case. Franqui v. State, 699 So. 2d 1312 (Fla. 1997).

Corpus delicti requires that "in order to convict the defendant of a crime on the basis of extrajudicial ... confession or admission, the confession or admission must be corroborated by some evidence ... of the corpus delicti." Burks v. State, 613 So. 2d 441, 441 (Fla. 1993)(quoting Wayne R. LaFave & Austin W. Scott, Jr., 1 *Substantive Criminal Law* § 1,4(b), at 24 (1986)).

This Court explained the policy reasons for the corpus delicti rule: "The judicial quest for truth requires that no person be convicted out of derangement, mistake or official fabrication." See J.B. v. State, 705 So. 2d 1376, 1378 (Fla. 1998); see also Smith v. United States, 348 U.S. 147, 152-153 (1954).

The trial court's finding Mr. Farr guilty of the death penalty based on Farr's inconsistent, illogical and downright bizarre confession to intentionally killing Ms. Bryant by running into a tree violates the longstanding principle of corpus delicti. Due to trial counsel's ineffectiveness in failing to conduct any investigation, there was no adversarial testing whatsoever of the prosecution's theory that Mr. Farr purposefully ran into the tree. See infra Claim IV. Appellate counsel was ineffective for failing to raise this argument on direct appeal.

C. The trial court's reliance on unreliable evidence violated Mr. Farr's rights to an individualized sentencing.

The Constitution prohibits the arbitrary or irrational imposition of the death penalty. "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." Spaziano v. Florida, 468 U.S. 447, 460 (1984) (citation omitted). A death sentence is arbitrary where it is not based on the "character of the individual and the circumstances of the crime." Parker v. Dugger, 498 U.S. 308, 322 (1991) citing Zant v. Stephens, 462 U.S. 862, 879 (1993). Mr. Farr's sentence of death is arbitarty. Relief is proper.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Farr respectfully urges this Court to grant habeas corpus relief.

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the petition has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition 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.

Respectfully submitted,

James C. Lohman
Florida Bar #0570214
Attorney at Law
1806 East 39th Street
Austin, Texas 78722
(512) 542-9947

Linda McDermott
Florida Bar #0102857
Attorney at Law
141 N.E. 30th Street
Wilton Manors, Florida 33334
(850) 322-2172

COUNSEL FOR MR. FARR