IN THE SUPREME COURT OF FLORIDA
CASE NO. SC08-589

MICAH NELSON
Appellant,
v.
STATE OF FLORIDA
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT FOR POLK COUNTY,
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

RICHARD E. KILEY
Florida Bar No. 0558893
Assistant CCC

JAMES VIGGIANO
Florida Bar No. 0715336
Assistant CCC

ALI ANDREW SHAKOOR
Florida Bar No. 669830
CAPITAL COLLATERAL
REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544
813-740-3554 (Facsimile)

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Nelson lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Nelson accordingly requests that this Court permit oral argument.

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

On December 10, 1997, a Polk County grand jury indicted the Appellant, Micah Louis Nelson, for first-degree murder, kidnapping, sexual battery, burglary, and grand theft (auto). On December 19, 1997, he was charged by information filed in Highlands County with brglary and sexual battery.

Nelson was tried by jury, in Polk County, the Honorable J. Michael Hunter, Circuit Judge, presiding. The jury found Nelson guilty as charged on December 14, 1999. On December 22, 1999, following the penalty phase of the trial, the jury recommended death by a nine to three vote. A Spencer hearing was held February 8, 2000. The judge sentenced Appellant to death on March 17, 2000. His sentencing order was filed the same date. He sentenced Appellant to four

consecutive life sentences for burglaryof a structure, sexual battery, kidnapping and burglary of a conveyance, as well as a consecutive 15-year prison term for grand theft, and four concurrent 60- month terms for violation of probation, to run consecutive to the 15-year term.

The Appellant filed a timely Notice of Appeal on April 13, 2000. On July 10, 2003 the judgments and sentences were affirmed on direct appeal in Nelson v. State, 850 So.2d 514 (Fla. 2003). On August 7, 2003 a mandate was issued by the Florida Supreme Court. On October 8, 2003, Appellant filed with the United States Supreme Court a Petition for a Writ of Certiorari. The Petition was denied by the United States Supreme Court on December 15, 2003.

The Appellant filed on September 16, 2004 his Motion for Post Conviction Relief. A competency hearing was held on September 27, 2006. An evidentiary hearing was held on October 16 and 17, 2007. The circuit court denied the Appellant's Motion for Post Conviction Relief on February 12, 2008. Appellant timely filed his Notice of Appeal on March 7, 2008. This appeal follows.

EVIDENTIARY HEARING FACTS

A. Testimony of Robert John Trogolo

Robert Trogolo represented Micah Nelson at his trial. (PCR Vol. I p.6). His co-counsel was Julia Williamson and although both counsels had responsibilities in

guilt and penalty phase, Mr. Trogolo was primarily responsible for the penalty phase of Mr. Nelson's trial. (PCR Vol. I p. 7). Dr. Dee was the retained expert when Mr. Trogolo was assigned to the case. He further testified that Dr. Dee first saw Mr. Nelson on June 15, 1998. (PCR Vol. I p. 8). Mr. Trogolo further testified that he was aware that Micah Nelson had made an attempt to take his own life by cutting his throat. Subsequent to the suicide attempt by Mr. Nelson,Dr. Dee recommended that Mr. Nelson be treated at the State Hospital because he was not responding to medication given to him at the jail. (PCR Vol. I p. 9). Regarding the pretrial conference on March 11, 1999, the following questions were asked and answered at the evidentiary hearing:

> Q. Um, sir, are you aware of a pretrial conference on March 11th, 1999–
> MR. KILEY: Counsel that's on FSC ROA Volume one, page 5253.
> Q. – where the following statement was made by Mr. Bob Mack?
> MR. MACK; Judge, I'm covering this for Mr. Trogolo. There were just a couple of points Mr. Trogolo asked me to advise the Court of. One, was that we have had our client seen by an expert adviser and apparently he found our client to be marginally competent at this time.
> THE COURT: Okay.
> MR. MACK: However he did say that he's recommending that a second expert adviser be involved on this follow and Mr. Trogolo intends to follow through on that. Were you aware of that conversation, sir?
> A. I'm aware of that conversation because I have read the transcript.

> Q. Do you remember at all telling Mr. Mack to cover a hearing for you?
> A. I'm sure I did.
> Q. Subsequent to March 11th, 1999, and prior to November 30th, 1999, was any formal competency evaluation done on Mr. Nelson?
> A. No.
> Q. Was anything ordered by you, the State, or the Court?
> A. No competency evaluation, no. (PCR Vol. I p. 10-11).

Regarding the psychotropic instruction, Mr. Trogolo testified that if the Court did not give it, grounds for appeal may exist and he did not make the motion frivolously. (PCR Vol. I p. 11). His concern was that Mr. Nelson needed to stay on the medication for courtroom behavior and to "help him maybe understand a little more of what was going on". (PCR Vol. I p. 12). He also testified that Mr. Nelson was acutely depressed and also that this depression was the reason for the suicide attempt, a suicide attempt that was serious and not made for attention. (PCR Vol. I p. 13). Mr. Trogolo was aware that Micah Nelson was depressed beginning at the age of 11 and Mr. Trogolo agreed that the testimony of Dr. Dee indicated that Mr. Nelson was under extreme mental or emotional disturbance at the time of the crime. Trogolo was aware that Nelson was untreated before he was arrested. (PCR Vol. I p. 13-14). Regarding further diagnosis of Mr. Nelsons's mental state the following questions were asked and answered at the evidentiary hearing:

> Q. How about brain damage?

> MR. KILEY: Counsel, this is on FSC ROA volume 25, page 3143.
> Q. – Doctor Dee testified that Mr. Nelson suffered brain damage?
> A. I believe Doctor Dee testified to that.
> Q. And do you recall that?
> MR. KILEY: Volume 25, page 3146 to 3147.
> Q. Doctor Dee opined that Mr. Nelson had issues of depression, or schizophrenia and low IQ?
> A. I believe he did testify to that.
> Q. Do you recall Doctor Dee testifying that a person with these problems would not be particularly competent in any given occupational skills or tasks, had limited academic abilities, and that as a result of cerebral dysfunction would do things without sufficient thought or deliberation?
> A. I believe he testified to that.
> Q. Sir, would you as a trained capital attorney consider that as evidence of extreme mental or emotional disturbance?
> A. I would. (PCR Vol. I p. 14-15).

On cross-examination of Mr. Trogolo, the State questioned Mr. Trogolo on the procedure usually followed by him regarding competency. (PCR Vol. I p. 31-34). Mr. Trogolo further testified that Howardene Garret had previously worked on the case and had retained Dr. Dee Trogolo kept Dr. Dee on the case. (PCR Vol. I 34-35). Mr. Trogolo testified that Dr. Dee had already been retained when Howardene Garret was the previous attorney handling Mr. Nelson's case. (PCR Vol. I p. 34). He also testified that Dr. Dee, prior to Trogolo being assigned to the case, had been provided with school records and DCF records.(PCR Vol. I p. 37-38).

Mr. Trogolo testified he learned that the jail psychologist had been administering medication to Mr. Nelson "fairly close to trial". (PCR Vol. I p.39). Mr. Trogolo further testified that he had no conversations with Doctor Mark Ashby prior to him appearing in court and testifying to what medications were prescribed to Mr. Nelson. (PCR Vol. I p. 41). Mr Trogolo testified that he had never called a jail psychiatrist to testify at trial. (PCR Vol. I p. 42). He had, however,considered calling Dr. Kremper regarding his report that was authored back in 1992. (PCR Vol. I p.42-43). Mr.Trogolo testified that he was worried about certain bad conduct of Mr. Nelson coming into the penalty phase through the testimony of Kremper. (PCR Vol. I p. 43). During his representation of Mr. Nelson, Trogolo testified that he "probably met with him weekly or biweekly except if he was doing another trial. (PCR Vol. I p. 44). Mr. Trogolo described Nelson as being very quiet and rarely spoke. (PCR Vol. I p.45). He testified that he never got to the point of filing a motion to have the court appoint a panel, he was aware that the suicide attempt was genuine and that suicide attempt happened before he got on the case. (PCR vol. I p. 46). Mr. Trogolo testified that he was aware that Dr. Dee wanted Mr. Nelson to go to the State Hospital for treatment and in order to do that, Mr. Nelson had to be found incompetent. (PCR Vol. I p. 47). Trogolo was unsure whether Dr. Dee wanted Mr. Nelson to go to the State Hospital for treatment or that

he felt that Nelson was incompetent. (PCR Vol. I p. 48). Mr. Trogolo testified that during the year of Mr. Nelson's trial, Trogolo had been through two prior penalty phases with Judge Hunter; Harry Davis Jr. as one, and the third would have been Stephen Norris. (PCR Vol. I p. 53). Mr. Trogolo testified that he believed that being on medication "helped Mr. Nelson understand a little more of what was going on." (PCR Vol. I p. 54). Mr. Trogolo did not call Mr. Nelson to testify at his trial. He did not think that Mr. Nelson could have added to the facts or help challenge the facts. (PCR Vol. I p. 56-7). Mr. Trogolo testified that "he was marginally competent. I thought he could talk to them in a marginal fashion, I don't think he would have made a good impression on the Jury." (PCR Vol. I p. 58).

Mr. Trogolo admitted that he did not introduce the records of treatment which Micah Nelson received by Dr. Kremper at the Spencer hearing. (PCR Vol. I p.63-64). Trogolo testified that he was aware that in the sentencing order, Judge Hunter recommended death on the fact that Nelson had no history of mental problems. Trogolo had the ability to provide Judge Hunter with evidence on Nelson's mental problems and did not do so. (PCR Vol. I p. 64). Mr. Trogolo then testified that three murder cases in a year's time was a lot of cases and that the specially crafted jury instructions were denied by Judge Hunter. (PCR Vol. I p. 65-67). Mr. Trogolo testified that although he did not get the requested instruction

delineating each and every non-statutory mitigator upon denial of his motion, he still did not request the statutory mitigators even though he was entitled to them. (PCR Vol. I p. 70-71).

B. Testimony of Dr. Mark Ashby

Dr. Mark Ashby was qualified as a medical doctor with an expertise in psychiatry. (PCR Vol. I p. 75). Dr. Ashby was the jail psychiatrist for the Polk County Jail . Dr. Ashby treated Micah Nelson from the time of his arrest, November 17th 1997 until his trial in 1999. (PCR Vol. I p. 77). Dr. Ashby testified that he had diagnosed Mr. Nelson with schizo affective disorder. He would have diagnosed him when Ashby initially evaluated him in the jail. Dr. Ashby testified that depending on the severity of the symptoms and the history they present with, he generally tries to get them seen within a period of less than a week. (PCR Vol. I p. 79). Dr. Ashby then explained that schizo affective disorder is a combination of schizophrenia and depression superimposed on each other. Primarily it is a psychotic disorder involving impairment in processing thoughts. Typically delusions and hallucinations, such as auditory hallucinations such as hearing voices. There would be a significant depression component to it also, feelings of sadness, lack of energy, and lack of interest in things. But most importantly it would be a thought disorder which is characterized by unusual associations, idiosyncratic

associations. Dr. Ashby also described psychosis as a break with reality. Dr. Ashby also testified that the initial prescription for Mellaril twice a day was an antipsychotic medication which blocks the chemical of dopamine in the brain which is believed that an excess of that chemical causes the hallucinations. The purpose of the prescription of Mellaril would be to stop the hallucinations which Mr. Nelson was suffering from. (PCR Vol. I p. 80-1).

The following questions were asked and answered regarding Micah Nelson's symptoms:

> Q. I had you also prescribe a drug called, Imipramine, I-M-I-P-R-A-M-I-N-E?
> A. Yes and that's an antidepressant.
> Q. Doctor, as part of your diagnosis of schizo affective disorder did you find that Mr. Nelson suffers from auditory hallucinations?
> A. Yes, that was one of the symptoms that led me to form that diagnosis.
> Q. What were some of the other symptoms that led me to form that diagnosis.
> A. The thought disorder. A blunted affect, not showing an emotional response to things would be a way to summarize that particular symptom. His processing of information, like we made allusion to the idiosyncratic references, overall his processing of information seem to be deficient. (PCR Vol. I p.82-83)

When asked if Mr. Nelson appeared to exhibit any symptoms of schizo affective disorder, Dr. Ashby replied that it was hard to say, that Micah looked a bit withdrawn, but Dr. Ashby would have to examine him in more detail to tell what is

going on with him. Dr Ashby also testified that it is possible to have the condition and also be lucid at times. (PCR Vol. I p. 83). Dr. Ashby further testified that if Mr. Nelson was not treated for his condition it is probable it would reoccur as schizo affective disorder is generally considered to be a progressive deteriorating illness. (PCR Vol. I p. 84-5). Dr. Ashby opined that a person suffering from schizo affective disorder would be under extreme mental or emotional disturbance. (PCR Vol. I p. 86).

C. Testimony of Dr. Henry Dee

Dr. Dee is a clinical neuro psychologist who was qualified by the court and evaluated Micah Nelson. (PCR Vol. I p.100). He was directed by trial counsel for a neuro psychological evaluation and competence to proceed and if possible mental state at the time of the offense. (PCR Vol. I p. 101). Dr. Dee first met with Mr. Nelson on June 15, 1998. The duration of the initial interview lasted about 30 minutes when Dr. Dee discovered that Micah Nelson was mute or appeared to be mute as Nelson was frequently unresponsive to questions. As a consequence of that he sent Nelson back to the jail. Dr. Dee thought that at the time Mr. Nelson was frightened, because he was mute and was unresponsive to many of the questions. However, it turned out the muteness was, as it often is, a symptom of his depression, and that was the very day Mr. Nelson attempted suicide when he got back to the jail.

(PCR Vol. I p. 101-102). Dr. Dee next saw Mr. Nelson on July 7, 1998, at which time he was able to carry on a more adequate interview and did administer tests, both psychological and neurepsychological tests. He also did some interviewing. Dr. Dee then saw Nelson on the 23rd of July 1998, the 24th and again on September 14th and for continued interviewing on 11/24/99. Dr. Dee him in September of 1998. There was also a visit on the 28th of July, 1998, October 13 of 1998, and February 1st of 1999. For the sake of completeness, Dee was to see him again in 2004 and 2006. In 2004 he did an evaluation and in 2006 he simply did an interview. (PCR Vol. I p. 102-03). Dr. Dee was aware of the many psychotropic and anti-depressant medications prescribed by the jail psychiatrist at Polk County Jail. (PCR Vol. I p. 103). Regarding Micah Nelson's history, Dr. Dee testified that :

> Well, he had a long history of psychiatric treatment, also was in some special educational programs. None of the psychiatric treatment lasted long. There was some visits to Marge Brewster Center. I think two. And he was also seen as a juvenile when he was involved in a sexual battery case. Um, and I think he was interviewed at Lancaster Correctional, certainly on his admission he would have been, but he was interviewed a couple of times in there. A lengthy history, but as I recall he wasn't administered no significant psychiatric medications during that stay. He was out of there, he had been about three months before the incident offense occurred, and that was when I saw him of course. (PCR Vol. I p. 103-104).

Dr. Dee further testified that based on the testing and history, he believed that Micah Nelson showed certain features that looked to him that Micah had sustained brain damage and that the medication that Nelson was taking was consistent with schizo affective disorder. (PCR Vol. I p. 104). Dr. Dee further testified that sometimes Nelson was "almost vegetatively depressed , that he was not responsive at all." Dr. Dee also noted psychotic disorder characterized by hallucinations. (PCR Vol. I p. 105). Based on his evaluation and meeting with Micah Nelson, Dr. Dee recommended to the Public Defender's Office that Mr. Nelson be sent to the State Hospital. (PCR Vol. I p. 106). His recommendation was made because of Nelson's condition and that he wasn't responding adequately to the medications he was being given. Mr. Nelson continued to show evidence of psychosis and hallucinations and Mr. Nelson had already demonstrated he was suicidal. Dr. Dee had never appeared in court to address competency issues regarding Mr. Nelson, but Dr. Dee was concerned and suggested that he be sent to the State Hospital more than once. Sometimes he was better than others, when he was at his worst he was unresponsive and mute and at other times seemed to be responding to or having internal stimuli. At times when he seemed open and easy to talk, those were times where Dr. Dee would deem him to be somewhat competent, and at other times when he was reticent and mute it appeared to Dee that he was incompetent to stand trial.

Dr. Dee had expressed his concerns regarding Nelson's competence to his attorneys. He expressed his concerns to the attorneys several times. (PCR Vol. I p. 106-108). When Dr. Dee first became associated with the case, Mr. Trogolo was not Defense Counsel, Howardene Garret was. (PCR Vol. I p. 109). Dr. Dee further testified that he did have an actual face to face meeting with the attorney, while there he discussed the issues of competency, the insanity defense, and what he felt could be testified to in terms of mitigation. However, regarding opinions, Dr. Dee considered this case a rather difficult case because Mr. Nelson "waxed and waned". At some times he seemed quite competent and at other times incompetent. Dee further testified that he communicated this to the defense team. (PCR Vol. I p. 112).

Dr. Dee attempted to communicate or contact Doctor Ashby because Mr. Nelson seemed to wax and wane so much. Although it is not unusual for patients with psychotic disorders to be variable in presentation, Dr. Dee opined that Mr. Nelson was exhibiting an unusual amount of variation, and he wanted Dr. Ashby to know about it. Dee remembered thinking that perhaps the medications needed to be increased at times; that might obviate some of the waxing and waning. (PCR Vol. I p. 116). Regarding Dr. Dee's recommendation that Mr. Nelson be sent to the State Hospital, the following questions were asked and answered at the evidentiary

hearing:

> Q. Doctor, what would be the purpose of sending Mr. Nelson to the State Hospital?
> A. Well, he had already demonstrated he was dangerous to himself. He slashed his throat with a razor blade. That would normally be sufficient to get a person admitted to he hospital under the Baker Act because he was dangerous to himself and others. Secondly, so that he might receive more types of treatment, longer observations, and more careful observations of the medication because it is more closely observed in the psychiatric hospital. That would be standard with somebody clearly dangerous to themselves.
> Q. Now, you did meet with Mr. Nelson after the trial, is that correct?
> A. Yes, in May of 2004.
> Q. Do you– you characterize Mr. Nelson as waxing and waning?
> A. Yes.
> Q. And you did characterize him throughout the preparation for trial. Does your opinion at all change than it did back before trial, as to whether he waxes and wanes?
> A. No, I'm sure that he does.
> Q. Your opinion today based upon your meeting with him after the trial and before this Hearing, you again would say he is marginally competent.
> A. As of the last time I saw him, no. The last time I saw he feels psychotic again, angry about what I don't know. Um, and I felt that the last time I saw him in 2006 he was at that point clearly incompetent to proceed.
> Q. Clearly incompetent?
> A. Yes. (PCR Vol. I p. 125-6)

D. Testimony of Julia Williamson.

Julia Williamson represented Micah Nelson in his homicide trial in 1999.

(PCR Vol. I p. 129). Ms. Williamson testified that although she was the guilt phase attorney in this case, she also helped prepare the penalty phase. (PCR Vol. I p. 130). She testified that she did not deal with Micah Nelson the whole time he was incarcerated; rather she dealt with him just six months before the trial began. (PCR Vol. I p. 131). Regarding the environment of the Public Defender's Office at the time of Mr. Nelson's trial, the following questions were asked and answered at the evidentiary hearing:

> Q. Okay. Could you describe for the Court the type of environment that you and Mr. Trogolo were under in preparing for Mr. Nelson's case?
> A. Um, we took over the division from two other lawyers. I remember when Mr. Trogolo left the division we had 24 First Degree Murder cases pending. That was after we resolved Micah. So when I went in there, there was a lot of murder cases, a lot higher number than they normally carried. There was some backlog. We have a division that we had an investigator assigned to our division, a secretary assigned to our division. And at one point Tony Maloney was the forensic specialist; but, I don't recall if whether she was involved in this case. She left our office when I was just into the D team. So, she might have early on been involved with Micah, but I don't think she was involved during the trial level, but she may have been. I just don't remember her involvement at all. (PCR Vol. I p. 131-2).

Regarding Dr. Ashby's diagnosis of schizo affective disorder, the following questions were asked and answered at the evidentiary hearing:

> Q. Ma'am, were you aware that Doctor Ashby testified

about diagnosing Mr. Nelson as schizo affective disorder?
A. Yes.
Q. And so you are aware that schizo affective disorder is a combination of mood disorder as well as psychotic disorder?
A. Yes.
Q. Were you aware that Doctor Ashby testified that Mr. Nelson had auditory hallucinations which meant that he heard voices?
A. Yes.
Q. And were you aware at the initial evaluation at the jail Doctor Ashby initiated treatment with a hundred milligrams of a drug called Mellaril? Were you aware of that?
A. Yes.
Q. For – Mellaril is for his auditory hallucinations?
A. I don't recall that, but it makes sense to me, you know.
Q. Again, ma'am this hearing took place prior to the actual trial?
A. Right.
Q. But you were present for the testimony that I just mentioned?
A. Yes. (PCR Vol. I p. 134-35).

Attorney Williamson testified that she did not recall a well structured plan of a theory of defense. The theory of defense was based on information from the police reports and information from the State Attorneys Office as opposed to what a client tells the defense team as to the client's version of what happened. (PCR Vol. I p. 136).

Ms. Williamson further testified Micah Nelson wouldn't talk and was very introverted. Mr. Nelson would not talk about the facts of the case; he was quiet and

not responsive. (PCR Vol. I p. 137-8). Although Ms. Williamson , as the guilt phase attorney, would ask Mr. Nelson specific questions about the facts of the case itself on more than one occasion, Mr. Nelson would not speak. (PCR Vol. I p. 138-9). Ms. Williamson testified that due to her inability to elicit information pertaining to the case in chief itself regarding Mr. Nelson, in retrospect she testified that she would have ordered a competency evaluation of Mr. Nelson. (PCR Vol. I p. 139). Attorney Williamson also testified that the opening statement was made by her and in this case, due to Mr. Nelson's rage at the world, the jury should consider Second Degree Murder. (PCR Vol. I p. 140). In closing argument, Ms. Williamson requested the jury to consider finding Mr. Nelson guilty of Second Degree Murder based on his state of mind. She did not remember telling the jury that Mr. Nelson was under the influence of psychotropic medications pursuant to the jury instruction. Ms. Williamson testified that calling Dr. Ashby as a witness would have helped give credence to her theory of defense. (PCR Vol. I p. 141-2). Ms. Williamson testified that Mr. Nelson was prejudiced by her decision not to call Dr. Ashby and that Mr. Nelson was prejudiced by the failure to get a competency evaluation. She also recalled that Dr. Dee found Micah Nelson marginally competent and she did not know why the defense team went one way and not the other. (PCR Vol. I p. 143-4).

Ms. Williamson then testified as to the transition period that the Public Defender's Office was undergoing in the following manner:

> Q. Um, briefly, ma'am, you testified that when you joined this case the office was in a bit of a transition period, at the Public Defender's Office in the capital division?
> A. Yes. One of the lawyers that was there before, um, had quit the office and gone to another State and she was doing the death penalty work, and I think I came into her place. And Mr. Trogolo came into Howardine Garret's place, because there would be two lawyers. And I believe Tony Maloney quit during that time period because I recall Mr. Trogolo and myself and Deborah Carroll went to his aunt's house . Tony Maloney was not involved. And at some point I talked to Mr. Moorman about a mitigation specialist and he said the lawyers needed to do that work. I specifically remember that conversation. And then there were secretarial changes where we didn't have as good a secretary. And I don't know when the secretary change happened. But the more I think about it, Tony Maloney was not involved in the trial aspects of this case. She might have been involved in the first two years or something, but she had left before we tried Micah Nelson's case.
> Q. Considering the fact that this was your first capital case and the office was in transition, do you think perhaps the stress and the craziness of the time might have caused you all not to call Doctor Ashby as a witness?
> A. I don't know why we didn't think about calling Doctor Ashby as a witness. There was never any discussion about calling Doctor Ashby as a witness in the case in chief.
> Q. Do you think perhaps –
> A. There was, I felt pressure that this case needed to be tried because it was four years old. I was new into the division so I wasn't making the same kind of decisions I would be making now. As a first chair lead counsel now

> I would be much stronger in my opinion or disagreement with co-counsel or whatever might be going on to say, I don't think we should go forward on Mr. Nelson's case until we have a second or third doctor see him.
> Q. On the issue of competency?
> A. Correct.
> Q. So, lastly, the fact that you were new to the capital crimes and the office was in transition and there was a rush to get this case done because it was four years old?
> A. Yeah, at that time it seemed like it was not a good case. It was the worst case we had in the office as facts go. You know, nobody wants to try, nobody will ever want to try it. That seemed to me to be the attitude. He has been sitting here four years, we need to try it.
> Q. So, in retrospect you certainly would have requested a competency evaluation?
> A. Knowing what I know now. After this case I tried one, not a death case but a First Degree Murder in Highlands County. The client turned out to be retarded. We did the trial. He turned to me and said what happened when the verdict came back and I had him evaluated right then. And he was found to be incompetent based on retardation. So, you learn from –
> Q. Absolutely?
> A. – so I feel like the dealings with Micah, if I had a client now that was that nonresponsive there is no way I wouldn't have him evaluated again. (PCR Vol. I p. 144-147).

The trial court informed the parties that although Micah Nelson was not in jail for four years, the trial court had tried three cases in 1999 with Micah Nelson being among them. (PCR Vol. I p. 148-9). Ms. Williamson also testified that the defense team was unable to determine who the individual was who gave Micah Nelson gonorrhea. (PCR Vol. I p. 168-9). Ms. Williamson also testified that there

was never a time where the defendant would just candidly talk to her about what took place that evening at Ms. Brace's house. (PCR Vol. I p. 180). Attorney Williamson testified that based on Micah Nelson's nonresponsiveness and his demeanor she would have asked the Court to appoint a panel to evaluate Mr. Nelson for competency before she went to trial. She detailed the standard procedure for the appointment of a panel to determine competency to proceed. Mr. Nelson's refusal to communicate with his attorneys and his suicide attempt would have been a factor in seeking appointment of a panel of experts. (PCR Vol. I p. 187-194). Ms. Williamson also testified that the energy around the office was that the case needed to be resolved. (PCR Vol. I p. 197). Attorney Williamson testified that knowing what she knows now in light of seven more years of experience, if a doctor told her that a client should be treated at a State Hospital, she would be more inclined to request a competency panel. (PCR Vol. I p. 200).

E. Testimony of Dr. Michael Maher.

Dr. Michael Maher is a physician and psychiatrist licensed to practice medicine in the State of Florida and was so qualified by the court. (PCR Vol. II p. 208). Dr. Maher testified that by treating people clinically it is possible to prevent them from entering the forensic system. (PCR Vol. II p. 209). Dr. Maher was retained by post-conviction counsel initially to evaluate Micah Nelson's case for

statutory and nonstatutory mitigation. (PCR Vol. II p. 210). Dr. Maher was provided with legal documents reporting the nature of the offense, police reports, evaluations of other doctors, information regarding contact and behavior while Mr. Nelson was incarcerated at various different facilities. He was also supplied with the Direct Appeal opinion, depositions from Doctor Dee, reports from Doctor Kremper, HRS reports, and records of activity regarding Mr. Nelson from Union Correctional Institute. (PCR Vol. II p. 211-212). A dependency petition, a DCF evaluation, Doctor Kremper's report, another HRS report, and a juvenile report were entered into evidence and evaluated by Dr. Maher. (PCR Vol. II p. 212-3).

Regarding this material, Dr. Maher was asked the following questions and gave the following answers at the evidentiary hearing:

> Q. What does that indicate to you, sir?
> A. Um, the history in this case is of the individual, Micah Nelson, and his family who struggled to maintain and provide for the children and each other a stable and consistent living environment. And who had problems with basic issues of illness and social adjustment as a chronic, ongoing, and continuous part of their lives. So that puts all of the children in this family a substantial risk, and Mr. Nelson in particular.
> Q. Does it indicate or not indicate that Mr. Nelson was the victim of incest at an early age?
> A. Yes, it does specifically make that statement and allegation.
> Q. Sir, what affect would being the victim of incest at a very early age have upon a person?
> A. It is a fundamental and deep assault to one's

> developing sense of identity and integrity as a human being, being introduced in that manner to adult sexuality while in childhood is very often devastating to a person's development of their identity, their sense of conscious, and sense of appropriate sexual boundaries, what is and what is not allowable and appropriate in a sexual manner. It also tends to inculcate a feeling of anger and rage in an individual, um, which is sometimes manifest as aggress ion and sometimes is manifest as depression. (PCR Vol. II p. 213-214).

Dr. Maher testified that in this case he considered depression a major mental illness and it is indeed something that Mr. Nelson suffers from. (PCR Vol. II p.214).

Regarding the incest and the schizo affective disorder, the following questions were asked and answered at the evidentiary hearing:

> Q. Doctor, could you say whether or not that this, um, Mr. Nelson being victimized by incest, really, did it have any effect on him or would it have any effect on him for the rest of his life?
> A. It would be my opinion that it certainly did have an effect on him, and it have an effect that is continuing to this day and will all probability continue throughout the rest of his life. He never received any intervention or treatment for it which would have ameliorated the negative effect of it.
> Q. What does ameliorate mean?
> A. Reduced or diminished or allowed him to overcome the negative effects of it.
> Q. Doctor, I call your attention to Doctor Kremper's report. Did that report, sir – do you see it, sir?
> A. I have that in front of me.
> Q. Does that report indicate, anything in that report indicate to you that Micah Nelson had some significant problems, even at age 16?

A. Yes, there are a number of things that are consistent with significant problems.
Q. Let me call your attention, first, to the second to the last page, quote: Micah was considered in need of long term out patient treatment for sexual deviancy. Treatment needed to be long term because of his denial, lower level cognitive functioning. What does that mean, sir?
A. In this case based on my reading of the report he is referring to his overall intellectual ability and academic achievement which is low. His full scale IQ is 78, with normal being approximately 100 and the cut off for mental retardation being 70.
Q. Very well, sir: Placement within a general mental health program was likely to be helpful in terms of increasing his assertiveness and relationship skills, though is not likely to have any significant impact on deviant sexual thoughts. Arousal and behavior. Do you see that passage, sir?
A. Yes.
Q. What does that tell you?
A. Essentially the doctor is offering the opinion that placing him in an environment which is positive and socially structured would likely help him to develop some of the social skills and maybe even some of the confidence to function in a social environment and work environment more normally. But it would not address the underlying problems related to the incest and the manner in which that distorted this, at the time young man's psycho sexual development. So that it might allow him to function in a day-to-day superficial social environment in a way that appeared more normal; but, it would not address the underlying issues of his sexual disorder and the associated problems.
Q. And, Doctor, calling your attention to the third to the last page, last paragraph under assessment results, do you see it, sir?
A. Yes.

Q. Quote: Micah responses on the MMPI reflected extreme use of denial, poor insight, lack of sophistication, severe behavioral problems were suggested. Treatment efforts with such individuals were likely to be longer and associated with guarded prognosis. Such individuals had difficulty expressing their feelings, were resistant to psychological interpretations. What does that mean, sir, psychological interpretations?
A. Um, what the Doctor is referring to here is that most people have an ability to reflect on their inner thoughts, feelings, and state of mind, if you will. Um, and to understand how those processes are related to their feelings, their emotions, their actions, their decisions, their urges, their ability to do the right thing when they know what the right thing is. Psychological interpretations address those issues of internal thought, feeling, and being, if you will, process. Um, an individual such as Micah Nelson tends to be behaviorally oriented, not thought oriented. And for that reason–
Q. Can you explain the difference between the two?
A. — for that reason, psychological interpretations tend not to be very useful in the treatment process. One has to rely more on, um, behavioral structuring, learning paradigms, conditioning, and –
Q. Doctor, you got to forgive me. I'm just a lawyer. If you could break this down to regular, plain, simple English I personally would be very grateful?
A. What I'm trying to express, and maybe not as clearly as I could, is that the treatment in this kind of individual needs to be focused on actions and behavior rather than psychological terminology or insight. And there are very few opportunities and programs that are focused in that way, in a consistent manner, that can help an individual with his type of childhood history.
Q. And how about this: Such youth were typically unassertive, insecure, self-doubting, and often seen as social isolates. These interpretations need to be viewed carefully as item responses were inconsistent with

interview data. For example, during the interviews he denied auditory hallucination and excessive use of alcohol although admitted these on the MMPI. He denied ever having been in trouble because of sexual behavior. Doctor, in light of the fact that Micah Nelson was 16 at the time of this evaluation by Doctor Kremper, and serious mental illness usually presents itself later in life, is that fact significant to you regarding Mr. Nelson?
A. Yes.
Q. What is significant about that?
A. One of the things that I need to clarify a bit is that when an individual professional, such as Doctor Kremper, writes a report like this and uses the word denial they are using it in two different manners. One is an unconscious psychological process of denial and another a conscious process, saying, no I didn't do that or I don't feel that. What he is describing here in this inconsistency is that both of those processes, a very unconscious process of not knowing oneself well enough to recognize what is there, an unconscious denial process is present. And in addition there also appears to be a conscious denial process. So, that's one of the problems in getting an individual such as Micah Nelson engaged in any type of treatment and it is one of the large barriers to any kind of treatment having an effect on him.
Q. Well, at such an early age do you find it unusual that he is exhibiting these symptoms?
A. No. Because he has a variety of factors that put him at risk. The family background, generally, the history of incest, specifically, the low intellectual and academic capabilities, and it is also my opinion that later life events reveal the clear presence of a psychotic illness which I believe had an earlier phase which was not recognized. A phase which began in late or mid adolescence.
Q. To paraphrase so I can understand it, Mr. Nelson was off to a flying start in exhibiting signs of serious mental illness at age 16?
A. Certainly at age 16 this evaluation reflects an

> individual who is already very damaged.
> Q. Now, Doctor, if the jail psychiatrist, Doctor Ashby, testified that Mr. Nelson was treated for schizo affective disorder, do you know how he could determine that Mr. Nelson was schizo affective?
> A. I know what the criteria for diagnosis are and I have reviewed his reports and so on, yes.
> Q. What are the criteria for schizo affective disorder diagnosis, sir?
> A. Essentially the elements of the diagnosis are that there are indications of social and relational dysfunction, that a person is isolated, has very substantial lack of capacity to form healthy relationships, and that the person has distortions of thinking that rise to the level of being psychotic, out of touch with the reality. Those are the two elements of schizo affective diagnosis and they are indeed both present in Mr. Nelson's case. (PCR Vol. II p. 214-221).

Regarding Mr. Nelson's demeanor, Dr. Maher characterized his demeanor as withdrawn and not engaged. (PCR Vol. II p. 221). After reviewing the Union Correctional Institution records, which show that Micah Nelson rarely leaves his cell, never engages in conversation with other inmates, and never goes to the rec yard in all the years Mr. Nelson has been incarcerated there, Dr. Maher opined that Mr. Nelson is more isolated than even the average individual in that environment. (PCR Vol. II p. 221-22).

In addition to the isolation, Dr. Maher opined that Mr. Nelson has distortions that are inconsistent with reality. Mr. Nelson can deal with reality on a superficial social level but his understanding of reality is very distorted. (PCR Vol. II p. 222).

Dr. Maher also testified as to the other signs that schizo affective disorder presents itself to a psychiatrist. It often presents itself with unusual or bizarre behavior, sometimes particularly when the individual lives in an environment where antisocial forces are present, it presents as bad behavior or misbehavior, breaking of rules. (PCR Vol. II p. 223). Dr. Maher further testified that schizo affective disorder is generally evident in the late teenage years, and diagnosed in their early 20's. It is almost always possible to see antecedents, that is precursors to the obvious illness that are present in the early teenage years, 13 or 14. Mr. Nelson's antecedents are reported in Doctor Kremper's report; the problems with school, difficulty with sleep, changes in his patterns of behavior, inconsistent patterns of behavior, generally school failure, inconsistent report of symptoms, sometimes reporting symptoms, for example, reporting something on the MMPI and denying it on a fact-to-face interview. Dr. Maher testified that if left untreated, an individual with this type of disorder will become completely disabled and dysfunctional. They tend either to become involved in some situation where they are victimized or they victimize someone else. They tend to get involved in escalating and deteriorating relationships, so that sooner or later something bad happens. They hurt somebody or somebody hurts them. (PCR Vol. II p. 224-25). Dr. Maher then testified that he evaluated Mr. Nelson for competency to proceed and found him extremely

withdrawn. Nelson responded with information which was often not relevant to his legal circumstances. He didn't seem to have the capacity to reasonably and rationally address the issues of his conviction, his incarceration, his sentence, and various legal processes and appeals which were or might be available to him. Nelson's isolated and withdrawn state is a chronic, continuous, and ongoing state which is very consistent. (PCR Vol. II p. 225-26). Regarding a previous evaluation where the evaluator opined that since Mr. Nelson refused to respond, he must be malingering, Dr. Maher answered the following questions at the evidentiary hearing:

> A. There are lots of reasons why people don't respond and why people may appear to be refusing to respond. Malingering is but one of those. In this case there is, in my opinion, an overwhelming amount of documentary, long term, credible evidence that he suffers from a major psychiatric disorder; so, it would certainly not be my conclusion that his communication problems, whether they appear to be voluntary or not are related to malingering. It would rather be my conclusion that they are related to his fundamental brain disease.
>
> Q. So that is, knowing what you know and researching the data what is abnormal behavior for others, without Mr. Nelson's condition, Mr. Nelson acts like that all the time, sir, correct?
>
> A. Essentially, all the time, yes.
>
> Q. Doctor, is there – again and your diagnosis was what? He was competent or incompetent to proceed?
>
> A. It was my opinion and conclusion that he was not competent..
>
> Q. And that's based on your review of the records?

> A. Yes, the review of the records and my evaluation of him. (PCR Vol. II p. 226-27).

Dr. Maher opined that Mr. Nelson was under extreme emotional disturbance and that Nelson was not in a state of mind where he had the capacity to realistically and reasonably appreciate the wrongfulness of his behavior, his ability in that regard was substantially impaired. Dr. Maher based his opinion on the fact that upon his arrest, Micah Nelson was placed on Mellaril, a powerful anti-psychotic medication. Dr. Maher opined that without the Mellaril, Nelson was experiencing auditory hallucinations. (PCR Vol. II p. 227-29). Although Mr. Nelson was treated with psychotropic drugs from the time of his arrest until after his trial, he has never received any treatment at Union Correctional Institution. (PCR Vol. II p. 230-1). Dr. Maher also testified that if treated with medication, Nelson could regain some degree of competency although the prognosis is poor. (PCR Vol. II p. 232).

On cross examination, Dr. Maher explained his method and rationale for his finding of incompetentency to proceed regarding Micah Nelson:

> A. The primary method that I use is to compare the nature of my face-to-face interaction with the individual with their long term history, background, and records. It is very, very difficult for an individual to maintain a false front on a continuous and ongoing basis over a period of weeks, months or years. So this very withdrawn state, this lack of communication, this, um, tendency to respond with short phrases which have an ambiguous and questionable relevance to anything other than the very

> immediate circumstances, such as, here is a chair have a seat, is present in his record in some manner or another from the time he is 16 years old. And certainly throughout the more documented record after his arrest, all of that leads me to believe that he presented himself to me in a manner which is consistent with his usual state of mind and not a malingered or falsified state. (PCR Vol. II p. 237-8).

On cross examination, Dr. Maher testified that Mr. Nelson did understand the wrongfulness of his actions and this did not reach the level of insanity. Rather, his ability to understand the wrongfulness was impaired or diminished. Nelson's capacity to appreciate the horror and the terror of this crime is very blunted and limited. That is a chronic long term manifestation of his illness. In Maher's opinion, his capacity to appreciate the wrongfulness of this impaired is substantially impaired, and it is because of illness, not because of his choice. (PCR Vol. II p.247-8). When asked to define the term "marginally competent" Dr. Maher testified that if there is any deterioration in their condition, even the deterioration that might occur during the course of an average stressful trial, they are likely to dip below what Dr. Maher would consider to be the threshold of competency. If Dr. Maher says someone is marginally competent, he means that it is very close to the edge, and that a little bit of deterioration, a significant amount of stress is likely to impair them to the point that they are no longer competent. (PCR Vol. II p. 256). When asked about Nelson's competency to proceed at the trial itself, Dr. Maher

testified that a competency determination to proceed to trial should have been made before the trial. Since there was some question of his competency then, it would have been appropriate to have Mr. Nelson professionally evaluated. (PCR Vol. II p. 257). Regarding the testimony at the competency hearing of September 27, 2006, the following took place:

> THE COURT: You may proceed.
> MR. KILEY: For the record the document I'm about to read to Doctor Maher is in evidence, in that it was entered into evidence at the Competency Hearing.
> THE COURT: Okay
> Q. Doctor, I'm going to read to you the diagnosis of a mere psychologist regarding Mr. Nelson?
> THE COURT: Okay.
> Q. Doctor, quote: Based upon the available information as well as my evaluation of the Defendant, I'm of the opinion that the probability that he is competent to proceed in the pending matter and that he is feigning amnesia and confusiion is very high. And that the probability that he is experiencing some sort of atypical memory impairment and/or mental disorder is extremely low. His presentation is simply not consistent with how mental illness or brain damage is typical or atypically expressed. His claiming not to know what year he was born, and his choosing the incorrect year when given the correct choice and alternative choice, and his giving his age incorrectly is simply not credible. Similarly, you would expect an individual with well documented brain damage or mental illness to recognize important facts when they are spoken to him. Clearly he is not mute neither does he appear to be chronically mentally ill or brain damaged. You see anything wrong with that?
> A. I don't agree with those opinions.
> Q. Why not?

> A. The primary reason is that there is this long documentation of problems and symptoms. There are two primary ways in which I don't agree with the opinion as you just read it. One he is offering the opinion that there is no substantial underlying psychiatric or psychological illness. And number two that he is offering the opinion that the current manifestation of that as is evident behaviorally is faked or malingered. The first or fundamental disagreement I have is it is hard for me to imagine that the records in this case don't apply and credibly document the presence of major psychiatric illness. That is the first place I disagree and the second place I disagree, then, in terms of symptoms as presented, while they may not be typical and in some respects they are not typical, his situation and circumstances are not typical either. We don't have a good clinical diagnostic manual for individuals who are on death row.
>
> Q. Sir, also this quote here: Similarly you would expect an individual with well documented brain damage or mental illness to recognize important facts when they are spoken to him. Would you expect someone with mental illness to recognize important facts when they are spoken to him?
>
> A. It depends on the nature of the mental illness.
>
> Q. How about this guy's mental illness?
>
> A. It depends on the particulars of the facts. I wouldn't necessarily take issue with that statement because it is such a general statement. Applying it in a particular way to support the conclusion that he doesn't suffer from mental illness and that he is competent and that he is malingering, I would disagree with. (PCR Vol. II p.260-62).

Although Dr. Maher testified that Mr. Nelson was incompetent to proceed now, and that he is suffering from a major psychiatric illness, in his professional practice, he has never reconstructed the issue of competency at the time of trial. (PCR Vol. II p

263-64). The time to determine competency to proceed to trial is obviously before the trial takes place.

THE LOWER COURT'S ORDER.

SUMMARY OF THE ARGUMENT

1. Trial counsel was ineffective in failing to move for a determination of competency to proceed and the trial court erred in not conducting a hearing to determine if Appellant was competent to proceed to trial pursuant to Florida Rule of Criminal Procedure 3.210 (b). Due process was violated pursuant to the holding in Pridgen v. State, 531 So.2d 951 (Fla. 1988) and Drope v. Missouri, 420 U.S. 162, 174 95 S.Ct. 896, 904 (1975).

2. Appellant was denied his substantive due process rights because he was tried and convicted while mentally incompetent pursuant to the holding in James v. Singletary, 957 F.2d 1562, 1571 (11th Cir. 1992). As differentiated from the previous claim, pursuant to Dusky v. United States, 362 U.S. 402, 403 80 S.Ct. 788, 789 4 L.Ed.2d 824 (1960), Appellant must be retried upon a determination of competency.

3. Trial counsel was ineffective in failing to call a witness in both the Guilt phase and penalty phase to establish that Appellant lacked the necessary ***mens rea*** in guilt phase and the statutory mitigation in penalty phase. Trial

counsel's "strategic decision" was based on ignorance of the established case law and therefore Appellant is entitled to relief.

4. Trial counsel was ineffective in the investigation and preparation of the penalty phase. The trial court placed little weight on the statutory and non-statutory mitigation in that the trial court was under the misapprehension that Appellant had no previous history of mental illness when in fact Appellant did have such a history. Trial counsel's failure to introduce evidence of Appellant's juvenile history of abuse and mental illness which resulted from the initial sexual abuse, deprived Appellant of a reliable adversarial testing of the evidence. Relief is proper.

5. Trial counsel failed to request the Court to instruct the jury on statutory mitigation at the penalty phase. Trial counsel's made a tactical decision to move the court to delineate 12 statutory and non-statutory mitigators for the jury' consideration. Upon denial of counsel's motion to delineate; trial counsel failed to request the statutory mitigators which he was entitled to under the established case law. The penalty phase jury was left with a vague catch-all instruction which failed to provide them with adequate guidance to render a life or death decision.

ARGUMENT I

Mr. Nelson's Constitutional rights under the 6th, 8th, and 14th Amendments of the United States Constitution and the corresponding amendments to the Florida Constitution were violated during the guilt and penalty phases of his trial. Trial counsel was ineffective in failing to move for a determination of competency to proceed and the trial court erred in not conducting a hearing to determine if Mr. Nelson was competent to proceed.

On June 15, 1998, during the pretrial stages of hiscase, Mr. Nelson tried to commit suicide by cutting his throat. Mr. Nelson was placed on suicide watch on March 2, 1999. This suicide watch lasted until June 5, 1999.

During a pretrial conference held on March 11, 1999, Mr. Nelson's competency to stand trial became a matter of record when the following exchange took place between trial counsel and the court:

> MR.MACK: Judge, I'm covering this for Mr. Trogolo. There were just a couple points Mr. Trogolo asked me to advise the court of. One was that we've had our client seen by an expert advisor, and apparently he found our client to be **marginally competent** at this time.
>
> THE COURT: Okay.
>
> MR. MACK: However, he did say that he's recommending that a second expert advisor be involved on this, and Mr. Trogolo intends to follow through on that.
>
> THE COURT: Okay. (Emphasis added) (See ROA Vol.I p.52-53)

On September 14, 1999, a memorandum was issued by trial counsel. The memorandum addressed a meeting between defense counsel and their mental health expert Dr. Henry Dee. Although competency to proceed was not addressed, sanity at the time of the offense was. Numerous mental health issues regarding Mr. Nelson's state of mind were explored including: (1) fetal alcohol syndrome; (2) Mr. Nelson's low average IQ; (3) Mr. Nelson's hallucinations; (4) that Mr. Nelson was under the influence of extreme mental or emotional disturbance; (5) that the capacity of the defendant to appreciate the criminality of his conduct to the requirements of law was substantially impaired; (6) Mr. Nelson's reported brain damage; (7) Mr. Nelson's alcoholism since the age of 12; (8) and probably most importantly, Mr. Nelson's "Psychosis based in schizophrenic." The memorandum shows that questions regarding Mr. Nelson's competency were not lurking subtly in the background, but were readily apparent, as his mental issues, statutory mental mitigation, and psychosis were very much at the heart of the defense both in guilt phase and penalty phase.

There is no indication in the record that a competency evaluation was ordered for Mr. Nelson prior to the commencement of his trial on November 30, 1999 or before jeopardy attached upon swearing of the jury.

On December 6, 1999, at trial and before opening statements were given, the

issue of Mr. Nelson's competency to proceed was brought before the court during a discussion about a jury instruction regarding Mr. Nelson being on psychotropic medications:

> THE COURT: Doctor, are you familiar with the defendant in this case, Micah L. Nelson?
> DR. ASHBY: Yes, I've treated him at the jail.
> THE COURT: And what are you currently treating him for?
> DR. ASHBY : His diagnosis is schizo-effective disorder.
> THE COURT: And would you explain briefly what a schizo – what was it?
> DR. ASHBY: Schizo-effective is a diagnosis that constitutes a combination of a mood disorder as well as a psychotic disorder.
> THE COURT: Okay. And what kind of mood disorder would you describe Mr. Nelson has had?
> DR. ASHBY: He has had intermittent episodes of depression.
> THE COURT: Okay. And the psychotic part of that, how would you describe that?
> DR. ASHBY: He has had auditory hallucinations, hearing voices.
> THE COURT: Okay. Have you as a result of your diagnosis prescribed any medication for the defendant?
> DR. ASHBY: Yes, I have.
> THE COURT: And what have you prescribed for him?
> DR. ASHBY: The initial evaluation initiated treatment with Mellaril 100 milligrams twice a day.
> THE COURT: And what kind of medication is that?
> DR. ASHBY: That's an antipsychotic medicine that would be used to stop auditory hallucinations.
> THE COURT: Okay. Would you describe that as a psychotropic medication?
> DR. ASHBY: Yes, it is. (ROA Vol. XV p. 1439-1440)

After this brief colloquy, Mr. Nelson's trial proceeded.

Once Mr. Nelson attempted suicide, his competency was at issue. Furthermore, once trial counsel announced that it was the opinion of the defense mental health expert that Nelson was "marginally competent" and another expert should be consulted, the trial court was on notice that Mr. Nelson's competency to proceed to trial was at issue. Either the State, trial counsel, or the trial court on its own motion, sua sponte, should have moved for a complete evaluation to determine whether or not Mr. Nelson was competent to proceed. No prejudice need be shown.

In James v. Singletary, 957 F.2d 1562, 1571 (11th Cir. 1992), the court distinguished and explained the two types of incompetency claims in the following manner:

> In sum, there are two kinds of incompetency claims. First, a petitioner may allege that the trial court denied him or her due process by failing sua sponte to hold a competency hearing. This is a *Pate* claim. Second, a petitioner may allege that he or she was denied due process by being tried and convicted while incompetent. This is a substantive claim of incompetency. To put it bluntly, a *Pate* claim is a substantive incompetency claim **with a presumption of incompetency and a resulting reversal of proof burdens** on the competency issue. Id. at 1571-2. (Emphasis added)

As stated in James, with regard to the Pate claim, Mr. Nelson is presumed to be

incompetent and the burden shifts to the State to prove that Mr. Nelson was competent at the time a competency hearing should have been held.

In Pate, the Supreme Court of the United States held that:

> In any event, the record shows that counsel throughout the proceedings insisted that Robinson's present sanity was very much at issue. He made a point to elicit Mrs. Robinson's opinion of Robinson's 'present sanity.' And his argument to the judge, he asserted that Robinson 'should be found guilty and presently insane on the basis of the testimony that we have heard.' Moreover, the prosecutor himself suggested at trial that 'we should have Dr. Haines' testimony as to his opinion whether this man is sane or insane.' With this record we cannot say that Robinson waived the defense of incompetence to stand trial...Having determined that Robinson's constitutional rights were abridged by his failure to receive an adequate hearing on his competence to stand trial, we direct that the writ of habeas corpus must issue and Robinson be discharged, unless the State gives him a new trial within a reasonable time..... If he were found competent, the judgment against him would stand. But we have previously emphasized the difficulty of retrospectively determining an accused's competence to stand trial. Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). Id. at 384, 386-87 *842, 842-43.

In Mr. Nelson's case, a competency evaluation should have been ordered after the March 11, 1999 hearing. Attorney Mack, announcing that Mr. Nelson was found to be "marginally competent," put the Court and all parties on notice that Nelson's competency was at issue. The procedure for setting a competency evaluation is set forth in Fla. R. Crim. P. 3.210 (b) which provides:

> If before or during the trial the court of its own motion, or upon motion of counsel for the defendant or for the State, has reasonable ground to believe that the defendant is not mentally competent to stand trial the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition. Which shall be held no later than 20 days after the date of the filing of the motion, and shall order the defendant to be examined by no more than three nor fewer than two experts prior to the date of said hearing. Attorneys for the State and the defendant may be present at the examination.

This procedure should have been implemented immediately upon learning that Mr. Nelson may have been incompetent to proceed.

In Drope v. Missouri, 420 U.S. 162, 174 95 S.Ct. 896, 904 (1975) 43 L.Ed. 103, the United States Supreme Court held:

> In the present case there is no dispute as to the evidence possibly relevant to petitioner's mental condition that was before the trial court prior to trial and thereafter. Rather, the dispute concerns the inferences that were to be drawn from the undisputed evidence and whether, in light of what was then known, the failure to make further inquiry into petitioner's competence to stand trial, denied him a fair trial. In such circumstances we believe it is 'incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured'. Id. at 174-5 * 905.

In Mr. Nelson's case, the undisputed facts that: (1) trial counsel's own expert found Nelson to be "marginally competent"; (2) the expert recommended that the competency question be further explored; (3) Nelson demonstrated bizarre actions

during the crime and awaiting trial (the suicide attempt); and (4) the evidence of Nelson's psychosis clearly demonstrate, according to Drope, that the failure to make further inquiry into his competence to stand trial denied him a fundamental constitutional right to a fair trial. Mr. Nelson did not have the benefit of an analysis of these facts in order that his appropriate federal rights were assured. Instead, he was tried and convicted without proper and legal inquiry as to whether he was even competent to proceed to trial.

In Pridgen v. State, 531 So.2d 951 (Fla.1988), this Court held:

> However, Pridgen's competency to stand trial by the time of the penalty proceedings is another matter. In *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), the United States Supreme Court held that due process was violated when the court failed to suspend the proceedings for psychiatric evaluations when the defendant who had previously exhibited bizarre behavior shot himself in the foot on the second day of the trial. The Court said:
> "The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestation and subtle nuances are implicated. ... When a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances

> suggesting a change that would render the accused unable to meet the standards of competence to stand trial". *Id.* at 180-81, 95 S.Ct. at 908.
>
> Florida courts have also held that the determination of the defendant's mental condition during trial may require the trial judge to suspend proceedings and order a competency hearing. *Scott v. State*, 420 So.2d 595 (Fla. 1982); *Holmes v. State*, 494 So.2d 230 (Fla. 3d DCA 1986). *See Lane v. State*, 388 So.2d 1022 (Fla. 1980) (finding of competency to stand trial made nine months before does not control in view of evidence of possible incompetency presented by experts at hearing held on eve of trial). Id. at 954.

In Mr. Nelson's case, jury selection began on November 30, 1999. Approximately eight months elapsed from the time that the trial court was put on notice on March 11, 1999 that Mr. Nelson was "marginally competent." There was never a definite finding of competency. Mr. Nelson's suicide attempt and marginal competency required that further inquiry be conducted into Nelson's competency. No further inquiry was ever done even though there was eight months within which to conduct an evaluation. Delay in the trial proceedings, although never a valid reason for denying an accused fundamental constitutional rights, could not be credibly raised where there was eight months to do the evaluation. Mr. Nelson was denied his fundamental rights under the United States Constitution because proceedings were not suspended for psychiatric evaluations.

In Hill v. State, 473 So.2d 1253 (Fla. 1985), this Court held:

> The trial court failed to properly address the issue of whether the evidence necessitated a hearing on Hill's competence to stand trial. We totally reject the contention of the state that there was no evidence before the court that was sufficient to raise a bona fide doubt as to Hill's competency to stand trial. We find that any objective evaluation of the facts in this case establishes beyond question that a hearing on Hill's competency to stand trial was constitutionally required and that the failure to do so deprived him of the right to a fair trial. As was determined in *Drope* and *Robinson*, this type of competency hearing to determine whether Hill was competent at the time he was tried cannot be held retroactively because, as was stated in *Drope* , "a defendant's due process rights would not be adequately protected" under that type of procedure. 420 U.S. at 183, 95 S.Ct. at 909. Id. at 1259.

In Mr. Nelson's case, the court was aware of suicide attempts, and more importantly, the opinion of the defense mental health advisor that Mr. Nelson was only "marginally competent." The expert opinion and awareness of the suicide attempts was sufficient to raise a bona fide doubt as to Nelson's competency to stand trial.

In Tate v. State, 864 So.2d 44 (Fla. 4th DCA 2003), the court held:

> The record reflects that questions regarding Tate's competency were not lurking subtly in the background, but were readily apparent, as his immaturity and developmental delays were very much at the heart of the defense. It is also alleged that his I.Q. of 90 or 91 means that 75% of children his age scored higher, and that he had significant mental delays.
>
> Applying the principles enunciated in *Robinson* and

> *Hill*, we conclude that it was error to fail to, sua sponte, order a competency hearing pre-trial... Id. at 50

The Tate case is directly on point with the facts of Mr. Nelson's case. Mr. Nelson's I.Q. of 79 was considerably lower than was defendant Tate's I.Q. of 90 or 91. Mr. Nelson's psychosis, brain damage, statutory mitigation, and alcoholism far outweighed the "developmental delays" which defendant Tate suffered. Furthermore, when defense counsel announced in open court that Mr. Nelson was "marginally competent"and another expert was to be consulted, everyone was put on notice that a competency issue had reared it head. All parties to this action, the court, the state and the defense must share in the error of taking an incompetent defendant to trial. A new trial is the remedy.

The trial court erred in denying this claim. The trial court recognized that "[Mr. Trogolo] said he was concerned about the suicide attempt that occurred before [he] got on the case. He said that Dr. Dee had said he was marginally competent to proceed, and considering Dr. Dee's statement and his contacts with Mr. Nelson, he thought the Defendant was marginally competent to proceed. He said that the defense talked with Dr. Dee about contacting the jail and Dr. Ashby and talking with him about medication to deal with competency concerns. He said that Dr. Dee wanted Mr. Nelson to go to the State Hospital for treatment, but his understanding was that it was necessary for a defendant to be found incompetent before he could go

to the State Hospital. He could not just go to the State Hospital because he needed counseling, treatment or medication. He said if Dr. Dee had clearly said to him that the Defendant was incompetent to proceed, he would have filed a motion for competency." These findings alone are sufficient reason to show that a competency hearing should have been conducted.

Because Mr. Nelson was not granted a competency hearing before proceeding to trial, he should be granted a new trial at such time he is competent to proceed.

ARGUMENT II

Mr. Nelson was denied his substantive due process rights under the 6th, 8th, and 14th Amendments to the Constitution of the United States and the corresponding provisions of the Florida Constitution because he was tried and convicted while mentally incompetent.

The Due Process Clause of the Fourteenth Amendment prohibits the states from trying and convicting a mentally incompetent defendant. Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788,789 4 L.Ed.2d 824 (1960) In Dusky, the Supreme Court of the United States held:

> [I]t is not enough for the district judge to find that 'the defendant (is) oriented to time and place and (has) some recollection of events,' but that the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - - and whether he has a rational as well as factual

> understanding of the proceedings against him.'
>
> In view of the doubts and ambiguities regarding the legal significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioner's competency as of more than a year ago, we reverse the judgment of the Court of Appeals affirming the judgment of conviction, and remand the case to the District Court for a new hearing to ascertain petitioner's present competency to stand trial, and for a new trial if petitioner is found competent. It is so ordered. Id. at 403 *789.

Through the deposition of Dr. Dee and the on the record pre-trial testimony of Dr. Ashby, Mr. Nelson presents clear and convincing evidence to create a real, substantial, and legitimate doubt as to his competency to stand trial at the time of the trial. It is the State's burden to prove that Mr. Nelson was competent at the time of trial.

Mr. Nelson has been on Florida's death row since his conviction on these charges. His date of commitment was March 22, 2000. If the Supreme Court of the United States can acknowledge the doubts and ambiguities inherent in a retrospective determination a defendant's competency of "more than a year ago," surely, a similar determination of competency in Mr. Nelson's case would be even more doubtful and ambiguous. The only remedy to Mr. Nelson, pursuant to Dusky, would be a competency evaluation and a retrial.

The James case further elucidates the differences between a Pate claim and a

substantive incompetency claim which Mr. Nelson raises in this claim. The James court stated that:

> In order to make out his substantive incompetency claim, petitioner need not, and does not allege any error on the part of any state actor. For example, petitioner does not complain of the trial judge's failure (1) to appoint an expert to assess petitioner's competency to stand trial, (2) to conduct a competency hearing, either sua sponte or upon request, or (3) to declare him incompetent as a result of a competency hearing. Similarly, petitioner does not complain of defense counsel's performance. Nowhere does petitioner assert that defense counsel failed (1) to request an expert for the purpose of assessing petitioner's competency, (2) to request a competency hearing or otherwise to alert the trial court to the petitioner's potential incompetency, (3) to notice indications of petitioner's incompetency, or (4) to investigate indications of petitioner's incompetency. This absence of any allegation of error committed by a state actor differentiates substantive incompetency claims from other challenges deriving from a defendant's alleged incompetency, including *Pate* claims and Sixth Amendment claims of ineffective assistance of counsel.
>
> The Fourteenth Amendment prohibits states from denying defendants due process of law by trying them while incompetent. Unlike other amendments, including the First and Sixth Amendments, the Due Process Clauses of the Fifth and Fourteenth Amendments do not establish an affirmative right. Instead, they prohibit the states from engaging in certain activities, namely depriving persons of their life, liberty, or property, in a certain manner namely without due process of law.
>
> It has long been established that the conviction of an incompetent defendant denies him or her the due process of law guaranteed in the Fourteenth Amendment.

See Pate, 383 U.S. at 378, 86 S.Ct. at 838 (citing *Bishop v. United States*, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956) (per curiam opinion summarily vacating the judgment and remanding to the district court for a competency hearing)). A defendant's allegation that he or she was tried and convicted while incompetent therefore claims that the state, by trying him or her for and convicting him or her of a criminal offense, has engaged in certain conduct covered by the Fourteenth Amendment, namely deprivation of life, liberty, or property, in a way prohibited by the Fourteenth Amendment, namely without due process of law. Accordingly, in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed. 2d 333 (1980), the United States Supreme Court recognized that "a state criminal trial, a proceeding initiated and conducted by the State, is an action of the State within the meaning of the Fourteenth Amendment."*Id*. at 343, 100 S.Ct. at 1715.

A substantive incompetency claim implicates the Fourteenth Amendment's prohibition against deprivations of life, liberty, or property without due process of law by identifying a specific deprivation. While such a claim assigns responsibility for the deprivation to the state, it need not assign responsibility for the absence of due process to the state as well. To try an incompetent defendant makes for an undue process regardless whether or not any person, state actor or not, could or should have diagnosed the defendant's incompetency. This absence of due process blossoms into a constitutional violation if it occurred during a proceeding in which the state deprived a person of life, liberty, or property. In short, a substantive incompetency claim based on the Due Process Clause of the Fourteenth Amendment requires an allegation of state action, not of state misconduct.

We now return to the case at hand. According to precedent in our circuit, a petitioner is entitled to an evidentiary hearing on a substantive incompetency claim if he or she "presents clear and convincing evidence to create a 'real, substantial and legitimate doubt'" as to his or

> her competency. [FN17] *Fallada,* 819 F.2d at 1568 n.1 (quoting *Adams v. Wainwright,* 764 F.2d 1356, 1360 (11th Cir. 1985), *cert. denied,* 474 U.S. 1073, 106 S.Ct. 834, 88 L.Ed.2d 805 (1986)). A defendant is considered competent to stand trial if "he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and [if] he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States,* 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4L.Ed.2d 824 (1960). Id. at 1572-74.

As stated in James, in his substantive incompetency claim, Mr. Nelson need not allege any error on the part of any state actor. Mr. Nelson need only show: (1) clear and convincing evidence raising a substantial doubt as to competency to stand trial, in that; (2) he could not consult with trial counsel with a reasonable degree of rational understanding of the proceedings, and; (3) that he did not have a rational as well as factual understanding of the proceedings. Id.

Mr. Nelson, at the evidentiary hearing, proved that: (1) Dr. Dee recommended that Mr. Nelson be treated at the State Hospital because he was not responding to medication given to him at the jail; (2) Mr. Trogolo was concerned that Mr. Nelson stay on medication for courtroom behavior and to "help him maybe understand a little more of what was going on"; (3) Mr. Nelson was acutely depressed and that was the reason for the suicide attempt; and (4) Mr. Trogolo was aware that Dr. Dee wanted Mr. Nelson to go to the State hospital for treatment. The evidence presented at the evidentiary hearing raises a substantial doubt as to Mr. Nelson's

competency to stand trial.

Although the constitutional due process claims detailed in Claims I and II do not require a showing of prejudice, the prejudice is obvious. Mr. Nelson, an incompetent defendant, was tried and convicted at the trial level. The Court was on notice, as was defense counsel, that Mr. Nelson's competency was at issue. Due to his documented psychosis, his auditory hallucinations, his low I.Q., his suicide attempt, and the opinion by the defense expert that Mr. Nelson was only "marginally competent," there existed a bona fide doubt as to Mr. Nelson's ability to appreciate the charges or allegations against him. Mr. Nelson also lacked an appreciation of the range and nature of possible penalties, if applicable, that may be imposed in the proceedings against him. Finally, Mr. Nelson did not have an understanding of the adversarial nature of the legal process, or an ability to disclose to counsel facts pertinent to the proceedings at issue, or a capacity to manifest appropriate courtroom behavior and to testify relevantly.

The trial court erred in denying this claim. The facts produced at the evidentiary hearing and as recited by the court were that "Dr. Henry Dee testified at the evidentiary hearing that he advised defense counsel that with regard to competency, Mr. Nelson waxed and waned. At some times he was quite competent and at other times incompetent. He said that his opinion he gave to counsel was that

Mr. Nelson was marginally competent to proceed. He testified that he saw Mr. Nelson shortly before he went to trial, and at that time Mr. Nelson seemed clear and gave him a lot of information that suggested it was one of his better times." A competency evaluation should have been conducted before trial began. Had a competency hearing been conducted before trial, there would have been a determination that Mr. Nelson was incompetent to proceed to trial. Since it was never determined that Mr. Nelson was competent, relief is proper. Mr. Nelson should be granted a new trial after a competency hearing.

ARGUMENT III

MR. NELSON WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL IN VIOLATION OF MR. NELSON'S 5TH, 6TH, 8TH, AND 14TH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO CALL A WITNESS IN BOTH THE GUILT AND PENALTY PHASES OF THE TRIAL TO ESTABLISH THAT MR. NELSON LACKED THE *MENS REA* IN THE GUILT PHASE AND TO ESTABLISH STATUTORY MENTAL MITIGATION IN THE PENALTY PHASE.

THE STANDARD OF REVIEW

Under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

THE LOWER COURT'S ERROR

The lower court in its ORDER DENYING 3.851 MOTION FOR POSTCONVICTION RELIEF held on page 57:

" Mr. Trogolo did not call Dr. Ashby or Dr. Dee to testify in the guilt phase of the trial because the law only allows defense counsel to argue diminished capacity in the guilt phase if the defense raises an insanity defense. See Gurganus v. State, 451 So.2d 817 (Fla. 1984), and Chestnut v. State, 538 So.2d 820 (Fla. 1989). The defense made a strategic decision that the best approach would be to pursue a defense theory of arguing for second-degree murder based on the Defendant's state of mind." This was error. Failure to present a defense that could result in a conviction of a lesser charge can be ineffective and prejudicial. Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990).

In the defense opening statement trial counsel made the following statements:

> In fact, my closing – excuse me, opening is going to be much shorter than Mr. Wallace's. And in fact, a lot of the witnesses we will not cross-examine or we will do a very brief cross-examination of their testimony. Because the

> major facts in this case are undisputed.
>
> The facts that you need to pay attention to and that are going to be heard are facts like Mr. Nelson said that he was angry at the world and he had a rage because his brother was horseplaying or picking at him.
>
> And you have to keep an open mind because the Court is going to explain to you what the law is at the end of this case and you might not have explanations for everything such as the rage at the world or why this murder happened.
>
> The most important thing you're going to have to decide is what type of murder was this.
>
> And at the end of the case the Judge is going to read you jury instructions and in that he's going to explain what depraved mind means, what indifference to human life means, evil intent.
>
> He's also going to explain premeditation which was talked about in jury selection and also felony murder which was talked about in jury selection.
>
> And you again have to keep an open and fair and honest mind concerning those issues until the end of the case. And that's going to be one of your most important jobs is not to preconceive what premeditation felony murder or second-degree murder are based on some facts that you don't like that you hear in evidence.(ROA Vol. XVI p 1539-40).

Mr. Nelson contends that the defense opening statement was urging the jury to make Mr. Nelson's state of mind the focal issue of the guilt phase of the trial. However, trial counsel failed to provide the jury with testimony as to how this "rage at the world" and a depraved mind came to become a part of Micah Nelson's psychological makeup.

At the evidentiary hearing, Dr. Ashby diagnosed Mr. Nelson with schizo-

affective disorder after Mr. Nelson's arrest. Since Mr. Nelson's arrest occurred shortly after the crime Dr. Ashby's testimony would have been critical in establishing Mr. Nelson's state of mind. Dr. Ashby prescribed Mellaril which is an antipsychotic medication. Dr. Ashby testified that Nelson was suffering from psychosis which is a break with reality. (See PCR Vol. I p.79-81). That psychosis *was* an integral facet of Mr. Nelson's depraved mind.

In Wise v. State, 580 So.2d 329 (Fla. 1st DCA 1991), the court held:

> Wise sought to present the expert testimony of Dr. Walker, a forensic psychiatrist, that a blow to the head can cause a seizure, including the type known as "the running fit," which "is the psychomotor, partial complex epilepsy in which people will continue to engage in what appears to be purposeful behavior but they don't know what it is that they are doing." Wise would have amnesia concerning his behavior during the seizure, although he may have had a subconscious awareness of his surroundings, and would vomit once the seizure was over. Dr. Walker opined that within a reasonable degree of medical certainty, Wise experienced this type of seizure when he was struck in the head during the brawl. Dr. Walker based this opinion on Wise's history of seizures and stated he was "confident" that Wise suffered this type of injury. The court ruled that unless Wise was planning an insanity defense, this testimony was inadmissable under *Chestnut v. State*, 538 So.2d 820 (Fla. 1989). In doing so the court erred. Id. at 329.

In Bunney v. State, 603 So.2d 1270 (Fla. 1992) the Florida Supreme Court held:

> Although this Court did not expressly rule in *Chestnut* that evidence of any particular condition is admissible, it is

> beyond dispute that evidence of voluntary intoxication or use of medication is admissible to show lack of specific intent. *See Gurganus v. State*, 451 So2d 817 (Fla. 1984). If evidence of these self-induced conditions is admissible, it stands to reason that evidence of certain commonly understood conditions that are beyond one's control, such as those noted in *Chestnut* (epilepsy, infancy, or senility), should also be admissible. In the present case, Bunney simply sought to show that he committed the crime during the course of a minor epileptic seizure. A jury is eminently qualified to consider this. Id. at 1273.

Mr. Nelson's schizo-affective disorder and his psychosis was beyond his control. He was not medicated for this condition until *after* his arrest when Doctor Ashby diagnosed him and treated him at the jail. Obviously, trial counsel knew of Nelson's condition because Dr. Ashby was called before the jury was seated to detail the medication that Mr. Nelson was under at the time of trial.

The prejudice is obvious in that the jury never heard a true portrayal of Mr. Nelson's depraved state of mind due to his untreated psychosis at the time of the crime.

Legal argument

Ineffective Assistance of counsel at the guilt phase

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688.

To establish that counsel was ineffective, Strickland requires a defendant to demonstrate (1) unreasonable attorney performance, and (2) prejudice. Id. Counsel's strategic choices made after thorough investigation of law and facts relevant to plausible options are not usually ineffective. However, if counsel fails to investigate before adopting a strategy, and that failure results in prejudice to the defendant, counsel's failure is ineffective assistance. Id. No tactical motive can be attributed to an attorney whose omissions are based on ignorance, or on the failure to properly investigate or prepare. Id., Williams v. Taylor, 529 U.S. 362 (2000).

Reasonable attorney performance obliges counsel to "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668, 685 (1984). "One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial." Magill v. Dugger, 824 F.2d 879, 886 (11th Cir. 1987); "pretrial preparation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps , the most critical stage of a lawyer's preparation." House v. Balkom, 725 F.2d 608, 618 (11th Cir. 1983), cert. denied, 469 U.S. 870 (1984); Weidner v. Wainwright, 708 F.2d 614,616 (11th Cir. 1983). As stated in Strickland, an attorney has a duty to undertake reasonable investigation or "to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. Even

if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 622 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 106 S.Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981) (counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979) ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"). An effective attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970); see also Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990) (en banc) (ineffective assistance in failure to present theory of self-defense); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978). This error also violates defendant's right to present a meaningful defense. See Crane v. Kentucky, 476 U.S. 683 (1986). Failure to present a defense that could result in a conviction of a lesser charge can be ineffective and prejudicial. Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990).

In Helton v. Secretary for the Department of Corrections, 233 F.3d 1322, 1327 (11th Cir. 2000), the court held:

> The defense provided by the gastric evidence had the potential of being persuasive proof of Helton's innocence. Counsel incorrectly believed that advancing this theory would derogate from the other theories he was offering. At bar was a purely circumstantial evidence conviction. The prosecution had no inculpatory physical evidence against Helton. The gastric evidence defense could have provided Helton with exculpatory physical evidence. Defense counsel's uninformed decision to ignore this issue at trial manifestly falls below any objective standard of reasonableness. There was a failure herein to meet the sixth amendment minimal standard for the performance of defense counsel. We agree with the district court that Helton has met the first prong of the *Strickland* analysis. Helton likewise easily satisfies the second prong of this analysis. At trial, a criminal defendant need only submit evidence sufficient to create a reasonable doubt. As the district court noted, the gastric evidence could have provided that doubt. Counsel's failure, therefore, to even investigate, much less present the gastric evidence, obviously prejudiced Helton's trial. Accordingly, the district court did not err in holding that Helton received ineffective assistance of counsel at the trial stage and it properly granted Helton's petition for a writ of habeas corpus. Id. at 1327.

It should be noted in the interest of full disclosure that upon rehearing, Helton was ultimately denied relief in that his petition was untimely filed with the federal court. However the legal reasoning cited above remains sound.

In Mr. Nelson's case, the presentation of Dr. Ashby's testimony before the

jury could not have derogated from the other theories she was offering. *There were no other theories.* Counsel's opening statement focused on what kind of murder this was. Dr. Ashby's testimony that Mr. Nelson was "hearing voices" and being given anti-psychotic medication to combat the voices would have created a reasonable doubt in the jury's collective mind that perhaps Mr. Nelson was not acting on his own free will, but rather was acting on behest of the "voices." Trial counsel was ineffective in failing to present the testimony of Dr. Ashby to the guilt phase jury. The presentation of the testimony of Dr. Ashby would have resulted in a conviction of a lesser charge. Mr. Nelson is entitled to relief pursuant to Chambers v. Armontrout.

The court in Jackson v. State, 711 So.2d 1371 (Fla. 4th DCA 1998) discussed the failure of trial counsel to call witnesses in this manner:

> However, the failure to call witnesses can constitute ineffective assistance of counsel if the witnesses may have been able to cast doubt on the defendant's guilt, and the defendant states in his motion the witnesses' names and the substance of their testimony, and explains how the omission prejudiced the outcome of the trial. *See Sorgman v. State,* 549 So.2d 686 (Fla. 1st DCA 1989). Appellant's motion met these requirements, and no record attachments refuted his allegations. Id. at 1372.

In Mr. Nelson's case, Dr. Ashby's testimony had already been proffered outside the presence of the jury. Trial counsel was ineffective for not presenting his testimony

in the actual trial. The verdict of guilt for first degree murder was the prejudice.

In Jancar v. State, 711 So.2d 143 (Fla. 2nd DCA 1998), the court held:

> Rule 3.850 motions must be sworn. Naturally, movants must exercise caution when contemplating alternative theories of relief. But in this case we see nothing inappropriate about these apparently inconsistent claims being advanced in Jancar's motion. The contradiction was not between the underlying evidentiary facts alleged in the motion, but between the alternative ultimate conclusions that could be derived from the single set of underlying facts. Id. at 144.

The underlying evidentiary fact was that Dr. Ashby, although available, was not called as a witness in the guilt phase of the trial. As a result of Dr. Ashby not being called, Mr. Nelson was deprived of a reliable adversarial testing. If Dr. Ashby had been called as a witness the outcome would have been different in the guilt phase.

In Putman v. Head, 268 F.3d 1223, 1243 (11th Cir. 2001), the court discussed the standard of reviewing strategic decisions by counsel:

> For performance to be deficient, it must be established that, in light of all the circumstances, counsel's performance was outside the wide range of professional competency. *See Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. In other words, when reviewing counsel's decisions, "the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.'" *Chandler v. United States* 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc) (quoting *Burger v. Kemp* 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 129

> (2001). Furthermore, "[t]he burden of persuasion is on a petitioner to prove, by a preponderance of competence evidence, that performance was unreasonable. *Id.* (citing, *Strickland* 104 S.Ct. at 2064). This burden of persuasion, though not insurmountable, is a heavy one. Id. at 1243.
> Therefore, "counsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken "might be considered sound trial strategy' Id.

The Putman court further stated on page 1244: "For a petitioner show deficient performance, he "must establish that no competent counsel would have taken the action that his counsel did take."

In Mr. Nelson's case, trial counsel makes mention in opening statement that the most important thing the jury will have to decide is "what type of murder was this." Further in the opening statement, trial counsel makes mention that the "Judge is going to read you jury instructions and in that he's going to explain what depraved mind means, what indifference to human life means, evil intent." In closing argument, trial counsel made the following noteworthy statements:

"And I'm going to focus on the evidence as to the murder charge and why it is second-degree murder as opposed to first-degree murder" and "Micah Nelson did not intend or think about killing her. When he was driving around he was in a rage. And that rage isn't for your consideration because there's no evidence as to why." Also, " In his depraved mind he had to kill her. And he took what he found in the

car. And it seems very brutal the way he killed her." Further, " And I submit to you again the law isn't about how the killing took place, which weapons were used or how they were used to make Ms. Brace die, but the law is about what was going on in Mr. Nelson's head when he decided to do this and if he decided to do this." Additionally trial counsel stated: "He panicked so much he was willing to admit he committed the horrible crime of murder but not of rape. And again, that goes to his state of mind and his panic and his depraved mind and evil intent at the time of the killing." Finally: "And I submit to you that you need to listen to he instructions the Court gives you and truly define those words and really discuss and think about this because when you do you'll come back with a verdict of second-degree murder. Because second-degree murder is what was committed." In both opening and closing, trial counsel makes numerous reference to "depraved mind", "second-degree murder as opposed to first-degree murder", "state of mind" "Panic", evil intent," yet, counsel failed to call a witness (Dr. Ashby) who could have clarified and documented Mr. Nelson's psychosis, his auditory hallucinations, his state of mind which was so depraved that counsel could have argued, if she had put Dr. Ashby on, that there is a reasonable doubt that Nelson decided to commit this crime or rather the "voices" told him to commit the crime of second-degree murder. In light of the numerous references to Mr. Nelson's state of mind, trial counsel' failure

to call the only witness who could have explained Nelson's state of mind before he was medicated *for* a disease or defect of that mind, establishes the contention that no competent counsel would have taken the action that his counsel did take. In light of the information available to trial counsel, and the obvious benefit Dr. Ashby's testimony would have been to Mr. Nelson, clearly trial counsel's actions in not calling Dr. Ashby was unreasonable. But for trial counsel's error, the outcome of the guilt phase would have been different.

Ineffective assistance of counsel in the penalty phase

Effective counsel would have called Dr. Ashby in the penalty phase of the trial or at the *Spencer* hearing. Dr. Ashby could have provided the same testimony adduced at the evidentiary hearing. Dr. Ashby was a medical doctor, certified in the field of forensic psychiatry, Dr. Dee was not. Dr. Ashby could have detailed the diagnosis and treatment of schizo-affective disorder and the accompanying psychosis. As he did at the evidentiary hearing, Dr. Ashby could have detailed the drugs that Mr. Nelson should be taking to improve his mental state. This testimony, in light of the 9 to 3 recommendation, would have made the difference between life or death. Mr. Nelson is entitled to relief pursuant to Chambers v. Armontrout. Relief is proper.

ARGUMENT IV

Mr. Nelson was deprived of his right to a reliable adversarial testing due to ineffective assistance of counsel at the penalty phase of his capital trial, in violation of his 5th, 6th, 8th, and 14th Amendment rights under the United States Constitution and his corresponding rights under the Florida Constitution. Trial counsel was ineffective in the investigation and preparation of the penalty phase. Trial counsel failed to call a witness to establish statutory mitigation in the penalty phase.

THE STANDARD OF REVIEW

Under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

THE LOWER COURT'S ERROR

The lower court in its ORDER DENYING 3.851 MOTION FOR POSTCONVICTION RELIEF held on page 59:

"In addition, the court notes that the jury was provided with extensive information regarding mitigating factors from Dr. Dee. Even had they heard additional testimony from Dr. Kremper or another mental health professional, the Court does not find a reasonable probability that the mitigation evidence would have resulted in a life sentence. Claim IV of the Defendant's Motion is denied."

This was error. At the evidentiary hearing the following questions were asked and

answered:

> Q. Um, what about Doctor Kremper? Did you ever think about the possibility of calling Doctor Kremper to testify at the penalty phase for mitigation?
> A. Yes.
> Q. And you had the advantage of having his report that was authored back in 1992, in the other situation?
> A. Right.
> Q. Do you recall having some contact with Doctor Kremper to discuss with him the possibility of whether he could testify to mitigation?
> A. I'm pretty sure I talked to Doctor Kremper and I'm almost pretty sure that I consulted with him in his in his office. It is possible I did it on the phone in this case, Mr. Nelson's case and his evaluation.
> Q. And after consulting with Doctor Kremper, obviously, you made the decision not to call him at the penalty phase?
> A. Correct.
> Q. Do you recall what factors went into your and co-counsel"s minds in making that decision?
> A. If I recall we were worried about certain bad conduct of Mr. Nelson coming into the penalty phase by bringing out the circumstances of the evaluation of Doctor Kremper. (PCR Vol. I p.42-43)

On the re-direct examination of Mr. Trogolo, the following questions were asked and answered:

> Q. Mr. Trogolo, you just testified to the eminent counsel for the sovereign, that you did not want Doctor Kremper's report or the treatment that Mr. Nelson received by Doctor Kremper to be known by the Jury, is that correct, sir? Did you just say that to him?
> A. I'm not sure that is exactly what I said. I said I was worried about the baggage or the circumstances that

evaluations had.
Q. The baggage being Mr. Nelson was accused of molesting a five year old, I believe?
A. I think that is correct.
Q. Yet you did have a Spencer Hearing, didn't you?
A. Yes. And you didn't introduce the records of Doctor Kremper to Judge Hunter?
A. If you say I didn't, I didn't . I don't recall.
Q. The transcript reflects that the records were never introduced in evidence at the Spencer Hearing?
A. Okay.
Q. Would you dispute that, sir?
A. No.
Q. So, you – were you aware of what the records said in regards to this man's mental health?
A. I'm sure I had a copy of them, and read them, and knew what they said.
Q. Are you aware that ultimately in the sentencing order Judge Hunter denied relief or recommended death based on the fact that this man had no history of mental problems?
A. I think that is in the sentencing order.
Q. Yet, you had the ability to provide Judge Hunter with the evidence of his mental problems, did not do so, sir?
A. That's correct.

At the evidentiary hearing, Dr. Michael Maher M.D. testified as to the prior mental history of Micah Nelson in this manner:

Q. Doctor Maher, I want to give you back Exhibits Two and One, which are the Dependency Petition, and the DCF evaluation, also, I ask you to hold onto this report, Doctor Kremper's report. This HRS report and the juvenile report form the authorities, what does that indicate to you, sir?
A. Um, the history in this case is of the individual, Micah Nelson, and his family who struggled to maintain and

provide for the children and each other a stable and consistent living environment. And who had problems with basic issues of illness and social adjustment as a chronic, ongoing, and continuous part of their lives. So that puts all of the children in this family at substantial risk, and Mr. Nelson in particular.

Q. Does it indicate or not indicate that Mr. Nelson was the victim of incest at an early age?

A. Yes, it does specifically make that statement and allegation

Q. Sir, what affect would being the victim of incest at a very early age have upon a person?

A. It is a fundamental and deep assault to one's developing sense of identity and integrity as a human being, being introduced in that manner to adult sexuality while in childhood is very often devastating to a person's development of their identity, their sense of conscious, and sense of appropriate sexual boundaries, what is and what is not allowable and appropriate in a sexual manner. It also tends to inculcate a feeling of anger and rage in an individual, um, which is sometimes manifest as aggression and sometimes is manifest as depression.

Q. Would you consider depression a severe mental or emotional disturbance?

A. In the circumstance of identifying it as an illness, yes I would. Sometimes people use it simply as a description of a symptom, in which case it might be distinguished. But we speak of it generally as the name of an illness. And in that case I certainly would consider it a major mental illness and it is indeed something that Mr. Nelson suffers from.

Q. Doctor, could you say whether or not that this, um, Mr. Nelson being victimized by incest, really, did it have any effect on him or would it have any effect on him for the rest of his life?

A. It would be my opinion that it certainly did have an effect on him, and it have an effect that is continuing to this day and will all probability continue throughout the

rest of his life. He never received any intervention or treatment for it which would have ameliorated the negative effect of it.
Q. What does ameliorate mean?
A. Reduced or diminished or allowed him to overcome the negative effects of it.
Q. Doctor, I call your attention to Doctor Kremper's report. Did that report, sir – do you see it, sir?
A. I have that in front of me.
Q. Does that report indicate, anything in that report indicate to you that Micah Nelson had some significant problems, even at age 16?
A. Yes, there are a number of things that are consistent with significant problems.
Q. Let me call your attention, first, to the second to the last page, quote: Micah was considered in need of long term out patient treatment for sexual deviancy. Treatment needed to be long term because of his denial, lower level cognitive functioning. What does that mean, sir?
A. In this case based on my reading of the report he is referring to his overall intellectual ability and academic achievement which is low. His full scale IQ is 78, with normal being approximately 100 and the cut off for mental retardation being 70.
Q. Very well, sir: Placement within a general mental health program was likely to be helpful in terms of increasing his assertiveness and relationship skills, though is not likely to have any significant impact on deviant sexual thought, arousal and behavior. Do you see that passage, sir?
A. Yes.
Q. What does that tell you?
A. Essentially the doctor is offering the opinion that placing him in an environment which is positive and socially structured would likely help him to develop some of the social skills and maybe even some of the confidence to function in a social environment and work environment

more normally. But it would not address the underlying problems related to the incest and the manner in which that distorted this, at the time young man's psycho sexual development. So that it might allow him to function in a day-to-day superficial social environment in a way that appeared more normal; but, it would not address the underlying issues of his sexual disorder and the associated problems.

Q. And, Doctor, calling your attention to the third to the last page, last paragraph under assessment results, do you see it, sir?

A. Yes.

Q. Quote: Micah responses on the MMPI reflected extreme use of denial, poor insight, lack of sophistication, severe behavioral problems were suggested. Treatment efforts with such individuals were likely to be longer and and associated with guarded prognosis. Such individuals had difficulty expressing their feelings, were resistant psychological interpretations. What does that mean, sir, psychological interpretations?

A. Um, what the Doctor is referring to here is that most people have an ability to reflect on their inner thoughts, feelings, and state of mind, if you will. Um, and to understand how those processes are related to their feelings, their emotions, their actions, their decisions, their urges, their ability to do the right thing when they know what the right thing is. Psychological interpretations address those issues of internal thought, feeling, and being, if you will, process. Um, an individual such as Micah Nelson tends to be behaviorally oriented, not thought oriented. And for that reason –

Q. Can you explain the difference between the two?

A. – for that reason, psychological interpretations tend not to be very useful in the treatment process. One has to rely more on, um, behavioral structuring, learning paradigms, conditioning, and–

Q. Doctor, you got to forgive me. I'm just a lawyer. If you could break this down to regular, plain, simple

English I personally would be very grateful?
A. What I'm trying to express, and maybe not as clearly as I could, is that the treatment in this kind of individual needs to be focused on actions and behavior rather than psychological terminology or insight. And there are very few opportunities and programs that are focused in that way, in a consistent manner, that can help an individual with his type of childhood history.
Q. And how about this: Such youth were typically unassertive, insecure, self-doubting, and often seen as social isolates. These interpretations needed to be viewed carefully as item responses were inconsistent with interview data. Fro example, during the interviews he denied auditory hallucination and excessive use of alcohol although admitted to these on the MMPI. He denied ever having been in trouble because of sexual behavior. Doctor, in light of the fact that Micah Nelson was 16 at the time of this evaluation by Doctor Kremper, and serious mental illness usually presents itself later in life, is that fact significant to you regarding Mr. Nelson?
A. Yes.
Q. What is significant about that?
A. One of the things that I need to clarify a bit is that when an individual professional, such as Doctor Kremper, writes a report like this and uses the word denial they are using it in two different manners. One is an unconscious psychological process of denial and another a conscious process, saying, no I didn't do that or I don't feel that. What he is describing here in this inconsistency is that both of those processes, a very unconscious process of not knowing oneself well enough to recognize what is there, an unconscious denial process is present. And in addition there also appears to be a conscious denial process. So, that's one of the problems in getting an individual such as Micah Nelson engaged in any type of treatment and it is one of the large barriers to any kind of treatment having an effect on him.
Q. Well, at such an early age do you find it unusual that

> he is exhibiting these symptoms?
> A. No. Because he has a variety of factors that put him at risk. The family background, generally, the history of incest, specifically, the low intellectual and academic capabilities, and it is also my opinion that later life events reveal the clear presence of a psychotic illness which I believe had an earlier phase which was not recognized. A phase which began in late or mid adolescence.
> Q. To paraphrase so I can understand it, Mr. Nelson was off to a flying start in exhibiting signs of serious mental illness at age 16?
> A. Certainly at age 16 this evaluation reflects an individual who is already very damaged.
> Q. Now, Doctor, if the jail psychiatrist, Doctor Ashby, testified that Mr. Nelson was treated for schizo affective disorder, do you know how he could determine that Mr. Nelson was schizo affective?
> A. I know what the criterial for diagnosis are and I have reviewed his reports and so on. Yes.
> Q. What are the criteria for schizo affective disorder diagnosis, sir?
> A. Essentially the elements of the diagnosis are that there are indications of social and relational dysfunction, that a person is isolated, has very substantial lack of capacity to form healthy relationships, and that the person has distortions of thinking that rise to the level of being psychotic, out of touch with the reality. Those are the two elements of schizo affective diagnosis and they are indeed both present in Mr. Nelson's case. (PCR Vol. II p. 212-21).

The trial court, in its sentencing order, found the statutory mitigating factor that the Defendant was under extreme mental or emotional disturbance at the time of the offense, as not proven. The trial court based its finding in part, that:"there was no indication in Defendant's school records to suggest any mental health problem.

Prior to seeing Dr. Dee in the jail, the Defendant had no history of mental illness. He saw a mental health counselor two times after the incident with his sister. The history of this Defendant suggest that his depression (which was diagnosed after incarceration) may have begun after his arrest and incarceration." (FSC ROA Vol. VII p. 1076-1077).

Regarding the statutory mitigating factor of capacity to appreciate the criminality of his acts and to conform to the requirements of law, the trial court found this statutory mitigating factor to be not proven. The trial court based its finding in part on the lack of history of mental illness and /or brain damage when it held: "Finally, there was no testimony concerning the history of the Defendant, other than Dr. Dee's speculation concerning his mother's alcoholism, to indicate brain damage." (FSC ROA Vol. VII p. 1077).

Regarding the non-statutory mitigating factor of At the time of the offense the Defendant was impulsive and his ability to exercise good judgment was impaired, the trial court found this factor to be not proven and based this finding in part on "The Court previously found that evidence concerning this issue was conflicting, and that based on the Defendant's history and conduct the Court rejected this mitigator." (FSC ROA Vol. VII p. 1078).

Regarding the non-statutory mitigating factor of Defendant did not plan to commit

the offense in advance, the trial court also found this mitigating factor to be not proven. The court stated in its order: "The defense cites Amazon v. State, 487 So.2d 8 (Fla. 1986) in support of this mitigator. In that case, the Supreme Court found that the jury could have concluded that Amazon acted under extreme mental or emotional disturbance and a "depraved mind." The Court also found that the Defendant had taken drugs on the night of the murder, and the murders were committed in an "irrational frenzy" Id. at 12. This Court finds Amazon not analogous to this case and thus rejects this mitigator." (FSC ROA Vol. VII p. 1078). It is interesting to note that trial counsel used the "depraved mind" argument in an attempt to secure a conviction for second degree murder rather than a first degree murder in both her opening, (FSC ROA Vol. XVI p. 1539-45), and during the closing argument. (FSC ROA Vol. XXII p. 2660-66). It is clear from a reading of the sentencing order that the trial court was concerned about the lack of history of mental illness in Mr. Nelson's past.

The two statutory mitigating factors cited above were never read to the jury in penalty phase. (FSC ROA Vol.XXVI p. 3345). However, although the penalty phase jury was never given the statutory mitigators, Mr. Nelson received an advisory sentence of 9 to 3 in favor of death. (FSC ROA Vol. VI p.881).

Trial counsel was ineffective in that they failed to properly investigate and prepare

Mr. Nelson's penalty phase trial. Effective counsel would have called a qualified psychiatrist (like Dr. Maher) to evaluate the report of Dr. Kremper and the Department of Health and Rehabilitative Services report which detailed the incidents of incest when Mr. Nelson was five years old.

The State in its cross examination of Dr. Dee, focused on the inability of the defense to provide documentation of Mr. Nelson's mental illness which would prove that Mr. Nelson was not suffering from depression brought about by his incarceration but rather, his mental illness was evident at an early age. (FSC ROA Vol. XXV p.3181). Significant mitigation information could have been obtained from the report. The report indicates that Mr. Nelson had repeated the third grade. Most significant was the results of Mr. Nelson's MMPI. At the evidentiary hearing, Dr. Maher explained *what should have been explained at the Spencer hearing;* or in front of the penalty phase jury itself. Mr. Nelson was being treated by Dr. Ashby at the county jail for schizo-effective disorder, a combination of a mood disorder as well as a psychotic disorder. Dr. Maher did testify at the evidentiary hearing that individuals with schizo-effective disorder usually are stricken with this disorder, the onset beginning at age seventeen and continuing on into their twenties. Mr. Nelson was sixteen at the time of Dr. Kremper's evaluation, however Dr. Maher did testify at the evidentiary hearing that Mr. Nelson had exhibited all the "warning signs" of

the above mentioned disorder at the time of his evaluation in 1992. The isolation, auditory hallucinations, withdrawal tendencies, inability to relate to others, all of these "warning signs" were detected when Mr. Nelson was but sixteen. Furthermore, Mr. Nelson contends that at the penalty phase of the trial a psychiatrist would have informed the jury of the medication and treatment that Mr. Nelson should have received to make him a productive member of society. Had Nelson received proper treatment, he would not have been sitting in the "prisoner's dock" and Ms. Brace's life would have been spared. The prejudice at the penalty phase trial is obvious. The trial court did not give the statutory mitigating factors, yet Mr. Nelson received a death advisory sentence of 9 to 3 in favor of death based only upon non-statutory mitigation. Effective counsel would have provided the trial court with evidence at the *Spencer* hearing to rebut the presumption that Mr. Nelson's mental problems began upon his incarceration at county jail. Effective counsel would not have allowed their expert to rely upon self-reporting only. They should have provided their expert with the necessary evidence to enable the trial court to clearly find that the statutory mitigators had been proven by a preponderance of the evidence. If the penalty phase jury had heard and considered this compelling statutory mitigation along with the testimony suggested above, the penalty phase jury would have voted for life over death in all probability. At the very least, documenting the mental

history of mental illness should have been done at the Spencer hearing. Relief is proper.

Legal memorandum as to Claim IV

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. To establish that counsel was ineffective, Strickland requires a defendant to demonstrate (1) unreasonable attorney performance, and (2) prejudice. Id. Counsel's strategic choices made after thorough investigation of law and facts relevant to plausible options are not usually ineffective. However, if counsel fails to investigate before adopting a strategy, and that failure results in prejudice to the defendant, counsel's failure is ineffective assistance. Id. No tactical motive can be attributed to an attorney whose omissions are based on ignorance, or on the failure to properly investigate or prepare. Id., Williams v. Taylor, 529 U.S. 362 (2000).

> Reasonable attorney performance obliges counsel to "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." . "One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial." Magill v. Dugger, 824 F.2d 879, 886 (11th Cir. 1987); "pretrial preparation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps , the most critical stage of a lawyer's preparation." House v. Balkom, 725 F.2d 608, 618 (11th Cir. 1983), cert. denied,

> 469 U.S. 870 (1984); Weidner v. Wainwright, 708 F.2d 614,616 (11th Cir. 1983). As stated in Strickland, an attorney has a duty to undertake reasonable investigation or "to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 622 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 106 S.Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981) (counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979) ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"). An effective attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970); see also Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990) (en banc) (ineffective assistance in failure to present theory of self-defense); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978). This error also violates defendant's right to present a meaningful defense. See Crane v. Kentucky, 476 U.S. 683 (1986). Failure to present a defense that could result in a conviction of a lesser charge can be ineffective and prejudicial. Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990).

In Putman v. Head, 268 F.3d 1223, 1243 (11th Cir. 2001), the court discussed the standard of reviewing strategic decisions by counsel:

> For performance to be deficient, it must be established

> that, in light of all the circumstances, counsel's performance was outside the wide range of professional competency. *See Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. In other words, when reviewing counsel's decisions, "the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.'" *Chandler v. United States* 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc) (quoting *Burger v. Kemp* 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 129 (2001). Furthermore, "[t]he burden of persuasion is on a petitioner to prove, by a preponderance of competence evidence, that performance was unreasonable. *Id.* (citing, *Strickland* 104 S.Ct. at 2064). This burden of persuasion, though not insurmountable, is a heavy one. Id. at 1243.
>
> Therefore, "counsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken "might be considered sound trial strategy' Id.

The Putman court further stated on page 1244: "For a petitioner to show deficient performance, he "must establish that no competent counsel would have taken the action that his counsel did take."

In Mr. Nelson's case, trial counsel's ineffectiveness can in no way be deemed strategic. Mr. Nelson had already been convicted of first degree murder. The corroboration of Dr. Dee's evaluation of Mr. Nelson, the basis of said evaluation was primarily self reporting, was critical in order for the trial court to give the statutory mitigators to the penalty phase jury or to the trial court at the *Spencer* hearing. The testimony Dr. Maher regarding the prior history of mental illness would have only

helped not hurt, Mr. Nelson. The jury would have heard that Mr. Nelson was suffering from a long term serious mental illness. Mr. Nelson did not fabricate his illness because he was depressed upon incarceration, rather this was documented and treatment was strongly recommended. Nelson never received that treatment which he so desperately needed. The argument that the failure to present the data adduced from the two reports was a tactical decision in no way excuses trial counsel's ineffectiveness at the *Spencer* hearing. Relief is proper.

ARGUMENT V

Mr. Nelson was denied the effective assistance of counsel at the sentencing phase of his capital trial, in violation of the 6th, 8th, and 14th Amendments. Trial counsel failed to request the Court instruct the jury on statutory mitigators where evidence was presented on statutory mitigation in the sentencing phase of Mr. Nelson's trial. Counsel's performance was deficient, and as a result, the deaths sentence is unreliable.

THE STANDARD OF REVIEW

Under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

THE LOWER COURT'S ERROR

The lower court, in its ORDER DENYING 3.851 MOTION FOR

POSTCONVICTION RELIEF held on page 61:

> Trial counsel, Mr. Trogolo, testified at length concerning his tactical decision not to request jury instructions on the two mental mitigators. Mr. Trogolo testified that he was concerned that the State might successfully argue that the statutory mitigators were not established given the modifying adjectives like "extreme" Mr. Trogolo was concerned that the jury might hot give proper weight to the nonstatutory mitigation if certain mitigation was pointed out as being statutory. Mr. Trogolo was also concerned that the jury might consider the number of statutory aggravators versus the number of statutory mitigators and do a counting process instead of a weighing process. Id at 61
> This was error. On November 8, 1999, trial counsel filed

NOTICE PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.202 (b). (FSC ROA Vol. V p. 719-20). In said notice, trial counsel delineates the two statutory mitigators in 921.141 and also, under section III, lists 10 non-statutory mitigators which trial counsel intended to argue during the penalty phase of Mr. Nelson's capital trial.

At the evidentiary hearing on October 16, 2007, the following questions were asked of and answered by Mr. Trogolo:

> Q. But you were unable after requesting a detailed specially crafted instruction regarding nonstatutory mitigations, you were unable to delineate to the penalty phase Jury, correct sir?
> A. Are you asking did we get the instruction on specific nonstatutory ?
> Q. Yeah.

A. I don't think we did.
Q. You didn't.
A. Right.
Q. So, were unable to delineate the specific nonstatutory mitigations that you wanted the penalty phase Jury to consider?
A. I mean you can still point that out in your argument.
Q. Yes, but you didn't get the specific mitigations in, right?
A. I think that the mitigations was in. The same amount of mitigations came in. I guess I don't understand your question.
Q. Okay. You asked for a specifically crafted jurors instructions to delineate nonstatutory mitigations. Right?
A. Right.
Q. And you did not get that?
A. Right.
Q. So you got one jury instruction regarding nonstatutory mitigation only?
A. Right.
Q. And made a tactical decision not to ask for the statutory mitigators, mental mitigators?
A. Correct.
Q. However you also testified earlier that you were unaware of the holdings in, specifically in these cases, correct, sir?
A. Correct.
Q. Correct?
A. Correct.
Q. So , are you aware, sir, that a tactical decision can never be based on ignorance?
A. I think that is correct. (PCR Vol. I p. 70-71).

At the evidentiary hearing, trial counsel admitted that he did not know if he had read: Bryant v. State, 601 So.2d 529, (Fla. 1992); Stewart v. State, 588 So.2d

416 (Fla. 1990); and Smith v. State, 492 So.2d 1063 (Fla. 1986) (PCR Vol. I p. 12-13).

Legal argument

Counsel's strategic choices make after thorough investigation of law and facts relevant to plausible options are not usually ineffective. However, if counsel fails to investigate before adopting a strategy, and that failure results in prejudice to the defendant, counsel's failure is ineffective assistance. No tactical motive can be attributed to an attorney whose omissions are based on ignorance, or on the failure to properly investigate or prepare. *See*, Williams v. Taylor, 529 U.S. 362 (2000).

Reasonable attorney performance obliges counsel to "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668, 685 (1984). "One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial." Magill v. Dugger, 824 F.2d 879, 886 (11th Cir. 1987). Clearly, trial counsel's failure to read landmark cases regarding penalty phase mitigation is deficient performance of trial counsel. Obviously, failing to become familiar with the issues that trial counsel would have to argue to the trial court and the penalty phase jury falls outside professional norms.

In Bryant v. State, 601 So.2d 529 (Fla. 1992), The Supreme Court of Florida

held:

> We have previously stated that the "Defendant is entitled to have the jury instructed on the rules of law applicable to this theory of the defense *if there is any evidence* to support such instructions." *Hooper v. State*, 476 So.2d 1253, 1256 (Fla. 1985), *cert. Denied*, 475 U.S. 1098, 106 S.Ct. 1501, 89 L.Ed. 2d 901 (1986) (emphasis added) *Smith v. State*, 492 So.2d 1063 (Fla. 1986). Regarding mitigating factors dealing with extreme mental or emotional disturbance, we have stated that where a defendant has produced any evidence to support giving instructions on such mitigating factors, the trial judge should read the applicable instructions to the jury. *Toole v. State,* 479 So.2d 731 (Fla. 1985). It is clear from this record that Bryant presented sufficient evidence in the penalty phase to require the giving of these instructions to the jury. Id. At 533.

In Stewart v. State, 588 So.2d 416 (Fla. 1990), The Supreme Court of Florida held:

> To allow an expert to decide what constitutes "substantial" is to invade the province of the jury. Nor may a trial judge infect into the jury's deliberation his views relative to the degree of impairment by wrongfully denying a requested instruction. "The Legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors. *If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted.* The jury's advice would be preconditioned by the judge's view of what they were allowed to know." *Floyd v. State,* 497 So.2d 1211, 1215 (Fla. 1986) (quoting *Cooper v. State*, 336 So.2d 1133, 1140 (Fla. 1976) (emphasis added) *cert. Denied* 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed 2d 239 (1977)). We are unable to say beyond a reasonable doubt that the

> failure to give the requested instruction had no effect on this jury's recommended sentence. *See State v. DiGuilio* 491 So.2d 1129 (Fla. 1986). This error mandates a new sentencing proceeding. Id. At 420-21.

Clearly, trial counsel's concern about the modifying adjectives like "extreme" was based on ignorance of the applicable law in this case. Mr. Nelson was entitled to have both instructions read to the jury. Furthermore, trial counsel's strategy of having all the mitigators outlined in his notice, (FSC ROA Vol. V p. 719-20), was vitiated when the trial court, acting within its discretion, refused to delineate the 12 statutory and non-statutory mitigation for consideration of the penalty phase jury. Instead, Mr. Nelson was left with a vague "any and all" aspects of the defendant's character or case, instruction. Effective counsel would have, after his tactic was vitiated, requested what, under the law, his client was entitled to. Trial counsel's initial "strategic decision" was based on ignorance. When this tactic failed, his further decision to go along with the catch all instruction was again based on ignorance. Furthermore, the questioning of Mr. Nelson, (a drugged, schizo -affective incompetent) (FSC ROA Vol XXIV p. 2921-22) in no way validates trial counsel's ignorance of the law and the consequences that arose therefrom. Relief is proper.

CONCLUSION

In light of the facts and arguments presented above, Mr. Nelson never received a fair adversarial testing of the evidence. Confidence in the outcome is

undermined and the judgement of guilt and subsequent sentence of death is unreliable. Mr. Nelson requests this Honorable Court to vacate the convictions, judgments and sentences including the sentence of death, and order a new trial.

CERTIFICATE OF SERVICE

HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this_____, day of October, 2008

RICHARD E. KILEY
Florida Bar No. 0558893
Assistant CCC

JAMES VIGGIANO
Florida Bar No. 0715336
Assistant CCC

ALI ANDREW SHAKOOR
Florida Bar No. 669830
CAPITAL COLLATERAL
REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544
813-740-3554 (Facsimile)

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing **Initial Brief,** was generated in a Times New Roman 14 point font, pursuant to Fla. R. App. P.9.210.

RICHARD E. KILEY
Florida Bar No. 0558893
Assistant CCC

JAMES VIGGIANO
Florida Bar No. 0715336
Assistant CCC

ALI ANDREW SHAKOOR
Florida Bar No. 669830
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544
813-740-3554 (Facsimile)

Copies to:

The Honorable J. Michael Hunter
Circuit Court Judge
255 N. Broadway Avenue
Bartow, FL 33831
863-534-4670
863-534-5824 (fax)

Stephen D. Ake
Assistant Attorney General
Office of the Attorney General
Concourse Center 4
3507 E. Frontage Rd., Suite 200
Tampa, FL 33607-7013

Paul R. Wallace
Assistant State Attorney
Office of the State Attorney
Post Office Box 9000, Drawer SA
Bartow, FL 33831-9000

Micah L. Nelson
DOC #535168l P5117S
Union Correctional Institution
7819 NW 228th Street
Raiford, FL 32026