IN THE SUPREME COURT OF FLORIDA
CASE NO SCO08-941

JAMES WINKLES
Appellant,
v.
STATE OF FLORIDA
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT FOR PINELLAS COUNTY,
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

RICHARD E. KILEY
Fla. Bar No. 0558893
STAFF ATTORNEY
JAMES VIGGIANO, JR.
Fla. Bar No. 0715336
STAFF ATTORNEY

ALI A. SHAKOOR
Fla. Bar No. 0669830
STAFF ATTORNEY
CAPITAL COLLATERAL REGIONAL COUNSEL
MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
(813) 740-3544

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Cites:

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Winkles 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. Winkles accordingly requests that this Court permit oral argument.

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

The Pinellas County Grand Jury indicted James Delano Winkles on March 25, 1999, for Count One, the first-degree premeditated murder of Elizabeth M. Graham between September 9, 1980, and July 3, 1981, and Count Two, the first-degree premeditated murder of Margo C. Delimon between October 3 and October 21, 1981.

Court appointed defense counsel filed a motion to declare the Florida capital sentencing statute unconstitutional pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 583 (2002). The court heard and denied this motion on April 1, 2002.

On April 3, 2002, Mr. Winkles pled guilty to both counts of first-degree murder and waived his right to a jury for the penalty phase trial, while preserving for

appeal the denial of his motion to declare the Florida capital sentencing statute unconstitutional. The court adjudicated him guilty.

The penalty phase trial was conducted before Circuit Judge Richard Luce on February 17, 2003. The court held a Spencer hearing on March 31, 2003.

On April 14, 2003, the court sentenced Mr. Winkles to death for both counts of first-degree murder. The court found that four aggravating circumstances had been proven beyond a reasonable doubt as to each murder: (1) prior convictions of another capital felony (the other first-degree murder in this case) and of other violent felonies (assault with intent to commit robbery and attempted robbery in 1963, kidnapping, armed robbery, and aggravated assault in 1982) (great weight); (2) capital felony committed while engaged in a kidnapping (great weight); (3) capital felony committed to avoid arrest (great weight); and (4) capital felony committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification (great weight).

The court found that no evidence of any statutory mitigation circumstance had been presented, and none was found anywhere in the record. Regarding non-statutory mitigating circumstances, the court found: (a) Winkles confessed to the cold-case, unsolved murders and cooperated with the police (considerable weight); (b) consecutive life sentences would result in Winkles dying while incarcerated (little weight); (c) life sentences would save taxpayer money because

no direct or collateral appeals would be filed - rejected by the court because Winkles could still file collateral attacks, court would give no weight if this was a valid mitigating factor; (d) Winkles waived several appellate issues by pleading guilty (very little weight); (e) Winkles pled guilty, saving the victims' families from sitting through a trial and saving the State the expense of a trial - the court found that the families were not spared from learning the horrific acts committed against their loved ones (no weight); (f) Winkles' confessions provided the families with finality and closure, but the court found that they were exposed to the disturbing details of the crimes and the bragging manner in which Winkles gave those details (little weight); (g) good conduct while incarcerated for twenty years, evidenced only by a letter from a former prison worker and tried to do his job well to please his supervisor (no weight); (h) Winkles was raised by relatives because of the untimely death of his mother - not proven; and (I) Winkles served in the Alabama National Guard for eight months of a six-year enlistment and was honorably discharged following a conviction by civil authorities - the court found that a good military record had not been proven and that the honorable discharge was entitled to no weight because of the brevity of service.

Defense counsel filed a timely notice of appeal on May 14, 2003. The appeal was affirmed in Winkles v. State, 894 So.2d 842 (Fla. 2005).

On September 20, 2006, Mr. Winkles filed his 3.851 Motion for

Postconviction Relief was filed. On October 18, 2006, the State's Response to Motion for Postconviction Relief was filed. On December 13, 2006, Mr. Winkles' Amended 3.851 Motion for Postconviction relief was filed. On December 18, 2007, an evidentiary hearing was held, The hearing was continued until February 22, 2008.

The trial court denied the post-conviction motion on April 17, 2008. Mr. Winkles filed his notice of appeal on May 12, 2008.

EVIDENTIARY HEARING FACTS

A. Testimony of Dr. Henry L. Dee PH.D

Dr. Dee is a clinical neuropsychologist who was qualified by the lower court as an expert in the field of forensic psychology. (PCR Vol. IV p. 376). Dr. Dee testified at the evidentiary hearing that he did a neuropsychological evaluation and conducted a number of interviews with Mr. Winkles. (PCR Vol. IV p. 386).

Dr. Dee was provided with school records, discovery material, depositions taken of people who knew and/or evaluated Mr. Winkles, and excerpts from the trial itself. (PCR Vol. IV p. 377). Dr. Dee saw Mr. Winkles over three days at Union Correctional Institute. On the first occasion, he introduced himself, explained to Mr. Winkles what he was going to do, took a brief history, and conducted a neuropsychological evaluation. The second and third days that Dee saw Winkles, which were July and September of 2005, Dr. Dee continued the interview in much

more depth. The majority of the testing was done on the first day because it takes several hours to do, and the balance of the time was spent interviewing. (PCR Vol. IV p. 377-780). Dr. Dee gave Mr. Winkles a complete neuropsychological battery of tests beginning with the Wexler Adult intelligence Scale, Third Edition. This test was designed, constructed, and validated to be a neuropsychological battery to assess the adequacy of functioning of various parts of the brain. (PCR Vol. IV p. 378). The purpose of administering the test is two-fold. One is to assess the adequacy of functioning of various areas of the brain, and secondly, to provide a baseline against which the other tests may be compared. (PCR Vol. IV p. 378-9). The Wexler battery yields three scores that are useful in the assessment of the adequacy and mental functioning, a verbal intelligence IQ, performance or non-verbal IQ and a full scale IQ. The reason for that is that the left hemisphere, mediates verbal functioning in a human being. The right hemisphere mediates non-verbal, spacial abilities. (PCR Vol. IV p. 379).

Mr. Winkles' performance on that battery yielded a verbal IQ of 119, a performance IQ of 102, and a full scale IQ of 112. Psychologists group IQ scores into performance levels. The verbal IQ, for example, is described as being in the bright-normal range, as is the full scale. That's any IQ between 110 and 120. The performance IQ and verbal IQ differed by 17 points. The difference of that magnitude is presumed to reflect impairment in right hemisphere functioning, which

is a fairly straightforward interpretation, and a difference of that magnitude is not very controversial. (PCR Vol. IV p. 379).

Dr. Dee also used the Denman Neuropsychology Memory Scales which is a companion instrument that is designed to have the same mean and standard deviation. This is important because it gives the evaluator an idea of the relative intact memory function and general intellectual functioning. The reason that is important is that memory impairment is one of the two most common aftereffects of any kind of brain lesion or brain illness or disease. (PCR Vol. IV p. 380).

In Mr. Winkles' case, the memory quotient was 88. That should be compared with a full scale IQ, and a difference of that magnitude would indicate that rather than being a person who is endowed with simple, dull-normal memory, he is a man with bright-normal, to superior intellectual functioning, with marked impairment of memory because of the discrepancy between the two scores, 112 and 88 respectively. (PCR Vol. IV p. 380). The final diagnosis is that Mr. Winkles is brain damaged and Dee can detail certain areas of dysfunction. (PCR Vol. IV p. 382). Mr. Winkles' memory dysfunction would be very significant in everyday life and in places where an individual is trying to learn new material and new skills. (PCR Vol. IV p. 383).

Dr. Dee also testified that people with frontal lobe damage have been described since the 1850s as suffering from moral insanity; that is to say that's a

deterioration in their functioning, and they do things that are inappropriate, sometimes even shocking. They do and say things without adequate deliberation or thought. So sometimes they shock people in their personal conversations, and they do and say things that seem outrageous given the social context that they're living in. Commenting, for example, on the state of the happiness of their marriages over casual dinner talking about the physical personality and sexual characteristics of a spouse without any appreciation of how that's going to affect the people at the dinner table. It's such a striking syndrome. It's kind of difficult to describe, but it's pretty apparent when you see it. (PCR Vol. IV 383-4).

Dr. Dee then testified about the clinical history of Mr. Winkles. Dee testified that Mr. Winkles was born in a small town in Alabama in 1940. His mother passed away when she was 17 years old. He lived with his paternal grandmother and two paternal aunts, sometimes all together and sometimes separately. He was eventually to leave school after the 8th grade and did not complete the 9th grade. He was held back in 1st grade. (PCR Vol. IV p. 385). Dr. Dee testified that Mr. Winkles told him that he was caught stealing a car in the 8th grade which caused a good deal of embarrassment in such a small community. Dr. Dee also testified that Winkles told him that he'd had a most unusual childhood and that he had been engaged in consensual sex with his grandmother and aunts beginning as early as 9 years of age. Some of those relationships didn't end until he was 32 or 33 years of

age. (PCR Vol. IV p. 386). Dr. Dee also testified that there was very little discipline in the household. This is fairly typical of a child who's being sexually abused. This is because people doing the abuse frequently don't censure and discipline the child very well because they're concerned about the child revealing publicly what's been going on at home so they get very little in the way of adequate structure or discipline. (PCR Vol. IV p. 386-7). Dr. Dee further testified that Winkles had started high school in Alabama, he then dropped out of high school. (PCR Vol. IV p. 387). When asked why, Winkles commented that he didn't really feel he fit in because he had so much carnal knowledge, it made him uncomfortable, and while his peers wouldn't have known about it, it made him feel very separate from them. (PCR Vol. IV p. 388). Winkles then joined the Air Force at 15 because his grandmother wanted him out of the house. (PCR Vol. IV p. 389). In 1961, Mr. Winkles married for the first of his three marriages. It did not last long as his wife ran away with another man. Mr. Winkles came to Florida in 1962 and married Edith Wren. She had a child in Florida and Winkles returned her to Alabama and came back to Florida. (PCR Vol. IV p. 389-90). He then got into trouble for car theft in Florida, spent three and a half years in prison, got out of prison in 1967 and stayed out of prison until 1982. (PCR Vol. IV p. 390). He married for the third time to Mary Thomas about a year after his second marriage was over. One child is the product of that union. Mr. Winkles told Dr. Dee that the reason why he hadn't

respected women very much was that he thought probably it was because of the treatment he received at the hands of his grandmother and aunts led him to demean women and think all of them as promiscuous in one fashion or another. (PCR Vol. IV p. 390-1). Dr. Dee testified that after listening to his comments about his aunts and grandmother, he gave a clear impression that he was unconvinced that they had any genuine affection for him. (PCR Vol. IV p. 391). Mr Winkles characterized his entire family as being oversexed, something he viewed as a family trait. (PCR Vol. IV p. 392). At age 10 Winkles had made a new friend. A new acquaintance had moved into that rural community, and he befriended him. His grandmother brought him into the kitchen and put his hand over the sink and cut him with a butcher knife across his hand, warning him, threatening him not to tell anyone outside the family what was going on in the home, and then, strangely, took him to the bedroom and had sex with him. (PCR Vol. IV p. 393). Dr. Dee testified that Mr. Winkles talked about his female relatives in a derogatory fashion. He had few positive memories of them, and he felt that it kind of underlayed his poor opinion of women. Another example of this poor opinion is the way Winkles talked about his last wife when he said she would prostitute herself for money, and he could get her to do that just by asking her to do it. She also made pornographic tapes. (PCR Vol. IV p. 393-4). It was apparent to Dr. Dee that Mr. Winkles was very conflicted about women and is detailed. (PCR Vol. IV p. 394). Dr. Dee testified that Mr.

Winkles did not use alcohol or illegal drugs and detailed Mr. Winkles' medical history and problems. (PCR Vol. IV p. 395-7). Dr. Dee opined that the major findings from the interviewing of Mr. Winkles are the lengthy and very significant sexual abuse at the hands of those family members that continued far into adulthood. (PCR Vol. IV p. 397-8).

Regarding the presentation of non-statutory mitigation based on Dr. Dee's evaluation the following questions were asked and answered at the evidentiary hearing:

> Q. Okay. Based upon your history and evaluation of Mr. Winkles, could non-statutory mitigation have been presented to a jury, had a jury been impaneled?
> A. Oh, I think so. Yes.
> Q. And specifically, Doctor, what mitigation could have been presented based upon your evaluation?
> A. Well I – I think the most significant of it is the extensive sexual abuse and exploitation that he suffered at the hands of his two aunts and his grandmother from an early age. Certainly it would have an impact and would be relevant to an individual who is tried for the murder of two women and the sexual abuse of these women.
> Q. And that mitigation may have explained his behavior?
> A. Might certainly help us understand how this perversion developed. (PCR Vol. IV p. 398-99).

Dr. Dee, when discussing the memory impairment on cross examination noted that Mr. Winkles' remote memory, like others with memory problems, is typically well preserved. It's the short-term, immediate, and recent memory that would be most impaired. (PCR Vol. IV p. 409). Dr. Dee opined that regarding the potential

non-statutory mitigation which could have been used, (the sexual abuse by his grandmother and aunt) "rang true". (PCR Vol. IV p. 411). Dr. Dee also testified that Mr. Winkles was sleeping with two aunts up to the age of 32. (PCR Vol. IV p.412). At that point, the sexual relationships could be termed consensual. (PCR Vol. IV p. 413).

Dr. Dee also spoke with J.C.Winkles. (PCR Vol. IV p. 143).

B. Testimony of J.C. Winkles

J.C. Winkles was the uncle of J.D. Winkles and testified at the evidentiary hearing. J.C. Winkles is a retired attorney and a veteran of the United States Army in World War II. (PCR Vol. IV p. 427). He left home at approximately 18 years of age and testified that Mr. Winkles' mother died within weeks or months after he was born. (PCR Vol. IV p. 429). She was buried out in a rural community about 10 miles from Oakman, Alabama. (PCR Vol. IV p. 430). J. C. Winkles testified that Defendant Winkles's father was worthless; he took very little interest in Jimmy and did not have anything to do with his raising or providing money for him or anything as far as he knew. (PCR Vol. IV p. 431).

Prior to the time that Jimmy was born, Lena and Orrine had both been convicted of bootlegging and both were sentenced to the women's prison at Alderson, West Virginia. (PCR Vol. IV p. 431). Shortly after Jimmy was born, Lena and Orrine were released from prison to take care of him. (PCR Vol. IV p.

432). J. C. Winkles described growing up in this manner.

> But she was – in retrospect, I can see that she was not a good mother. She did not enforce discipline. We were encouraged to do things that were unlawful, like stealing, and anything that – and sexual morals were not known in our house. There was a lot of promiscuity, and as soon as my sisters were old enough, they got into the same situation, both of them.
> Q. Mr. Winkles, was your mother also promiscuous?
> A. Was she what?
> Q. Was she also promiscuous growing up?
> A. I'd have to say yes. It might depend on how you'd define promiscuous, but she had a number of lovers.
> Q. Okay. What were the finances like in the home?
> A. What was what like?
> Q. What were the finances like?
> A. Well, they were quite good after Mr. Hawk was living, but that was only a year or so, and he was drawing a disabled veteran's pension. And it took perhaps a year for mama to qualify and start drawing a widow – a veteran's widow's pension. And during that interim there, nobody was more poverty-stricken than we were.
> Q. Okay.
> A. We–we I had no underwear until I was able to start mowing grass and cutting hedges, about 12 years old. And a lot of times, there would be hardly anything to eat.
> Q. You mentioned that your mother was not much of a disciplinarian?
> A. Not at all.
> Q. Did she – do you know what type of disciplinarian she was involving Jimmy?
> A. Probably the same with Jimmy, and she also mostly raised Jimmy's first cousin, Douglas, and Jimmy and Douglas were pretty close in those days. And she – she never disciplined anybody.
> Q. How did she feel about education?
> A. Sir?
> Q. How did she feel about education – was – let me

> rephrase. Was education a priority in your home growing up?
> A. Priority?
> Q. Yeah, was education a priority?
> A. You mean preference towards one or more children?
> Q. Did your mother instill any values in hard work and education in you or either of the children?
> A. No. She only went to about the fifth grade herself, and all of her brothers and sisters went about that far. Education was not a priority in our family but. --
> Q. Okay. And you mentioned stealing. Did she ever encourage stealing, your mother?
> A. Well, let me give you an example of some of the thievery that I was involved in. We burned coal. We cooked with coal in a coal stove and had these coal grates in each room of the house. Of course, we'd only could get enough coal to have it heat in one of the house, and during the wintertime, we didn't have any money to buy any coal. So it was up to Failure and me to go down to the railread tracks and pick up coal along the tracks. And if there wasn't – wasn't very much down there – other people were picking it up, too – I'd climb up on top of the boxcar and throw some off, and we had put that in what we called toe sacks and take it home. We'd make those trips about every night and that enabled us to keep warm. (PCR Vol. IV p. 433-536).

J. C. Winkles left home to join the military before J. D. Winkles was born (PCR Vol. IV p. 436). J. C. Winkles testified that J. D. Winkles was teased about the size of his penis; the other boys in the family were not, only the Defendant was. (PCR Vol. IV p. 438).

J. C. Winkles testified that he has been very active in the Methodist Church all of his adult life and would not lie for anybody. (PCR Vol. IV p. 439).

J. C. Winkles further described his mother in this manner:

> A. – in her way. She was not a good role model. She just did not instill any values in her children. She was – she was just uneducated, unsophisticated woman who'd not had any lessons in parenting, and we had no role models at all. None of my uncles were good role models. They were all either alcoholics or bootleggers or moonshiners. (PCR Vol. IV p. 445).

J. C. Winkles testified that by most people's standards, she, (his mother) was an immoral person. (PCR Vol. IV p. 448). Retired attorney Winkles also testified that "Sometimes I'd get up to go to school and sit at the breakfast table, and there'd be a strange man there, and I knew what was going on." (PCR Vol. IV p. 448).

Retired attorney Winkles also testified that based upon his knowledge of his family, he had no reason to believe that life was different for Jimmy than it was for him. He stated that his mother lived to be 88 and she was the same person. (PCR Vol. IV p. 448-9).

C. Testimony of Michael Maher, M. D.

Dr. Michael Maher is a physician and psychiatrist licensed to practice medicine in the state of Florida. He was qualified by the post-conviction court as a medical doctor and expert in the field of forensic psychiatry. (PCR Vol. IV p. 453).

Dr. Maher testified that he received a variety of materials of what he would characterize generally as legal, medical, and social in nature. Testimony and depositions of various individuals involved in this case for example, Mary Thomas,

Mr. Winkles' third wife. He also received materials that he was not sure if they were actually included in the legal documents, but the channel 8 interviews of two videotapes. Dr. Maher also reviewed sheriff's deputies' reports, investigative reports, legal documents such as the sentencing order that characterized the rationale for sentencing in this case. Dr. Maher reviewed testimony of individuals at the sentencing hearing, including Mr. Winkles. He reviewed a report of Dr. Jerry Brittain. He reviewed school records, corrections records of the State of Florida Department of Corrections. Most recently, he reviewed an affidavit from J. C. Winkles, Mr. Winkles' uncle. (PCR Vol. IV p.455-6). Dr. Maher also testified that he reviewed the actual second phase of Mr. Winkles case where portions of the channel 8 tape were played, the tape was stopped, and civilian witnesses then testified and then other portions of the Marcia Crawley tapes were published to the court. (PCR Vol. IV p.456). Dr. Maher agreed that some of the testimony in the tapes were not presented to the trial court at the penalty phase proceeding. (PCR Vol. IV p. 457). In a visit with Mr. Winkles on November 2nd, 2005, Mr. Winkles told Dr. Maher that he didn't really know why he was the way he was, but he believed that it was primarily because of the way he was raised by his grandmother and the way that he was introduced to sex by his grandmother and his Aunt Pearl. (PCR Vol. IV p. 458-9). Dr. Maher reviewed the tape of the Marcia Crawley interview where Winkles stated that he had the aid and complicity of his

grandmother and aunt throughout all the abductions that ended in his grandmother's house. (PCR Vol. IV p. 460). Dr. Maher thought this was unusual and Winkles explained that he was raised by his grandmother in a way that introduced him to the idea that sexual exploitation was acceptable and even to some extent expected and desirable, and that Mr. Winkles was raised in a way that led to him being an immoral person. (PCR Vol. IV p. 460-1). Mr. Winkles told Dr. Maher that he was introduced to sex before his puberty began, and that he believes it was at approximately age 9 years. (PCR Vol. IV p. 461). Maher further testified that Mr. Winkles told him that his grandmother specifically had been sexually open with him from the time of his earliest memories; that is, nudity was common in the house in all respects. And that at age 7, there was explicit genital sexual contact, which she encouraged and instructed him in. This was oral sex with Mr. Winkles performing oral sex on his grandmother. (PCR Vol. IV p. 461). Dr. Maher further testified that Mr. Winkles told him of relentless continuing sexual abuse of that nature over his entire relationship with his grandmother, he recounted abuse in which he described himself as being disregarded and not respected in a reasonable manner; for example, being teased by his grandmother about the size of his penis. (PCR Vol. IV p. 462). Mr. Winkles recounted poverty, which he described as being made worse by his grandmother's stinginess around miserliness but not in and of itself necessarily being abusive. And he recounted what he didn't call abuse, but what

Dr. Maher would call was seriously problematic in terms of his raising, and that is that he was not disciplined and reasonable expectations about his behavior with regards to school and other social matters and social expectations was not enforced or taught to him by his grandmother. For example, school didn't matter, lying didn't matter. Also that he would be told that he was expected to lie about what occurred inside the home, and that he was expected to keep secrets and engage in behavior which was immoral and not tell people about it. (PCR Vol. IV p. 462). Dr Maher opined that this is tremendously disturbing to a child's normal sexual development, their normal capacity to engage in trusting relationships, whether sexual or non-sexual, and it tends to produce a pattern of tremendous confusion regarding hurtful and exploitive interactions as contrasted with loving and explicitly sexual interactions. It tends to be a breeding ground for sadomasochistic personality traits; that is, wherein one individual experiences pleasure at another individual's pain. It may include sexual pleasure and often does. But it does not necessarily always have to include sexual pleasure. (PCR Vol. IV p. 463).

Dr. Maher had examined or dealt with other serial killers, one Bobby Joe Long for example, and Long had the same pattern of sexualized sadism; experiencing urges and desires that he sought in a sexually gratifying way that were related to humiliating, demeaning, and hurting a woman in the context of a sexual interaction. (PCR Vol. IV p. 464). Regarding the remarkable amount of planning

in both the execution to the crime and the coverup of the crime, Dr. Maher opined that it is certainly characteristic of a subcategory of serial killers probably somewhere around a third to a half of serial killers have an obsessive pattern of thinking about, planning, remembering, sometimes recording in some manner or another their episodes of identifying victims and attacking them. (PCR Vol. IV p. 464-65). According to Dr. Maher, Winkles had an antipathy towards women which was due to his upbringing at a very early age; that was the cause and reason for those personality traits. He doesn't have control over the presence of the urges. He doesn't have control over the personality traits themselves. He has some control over his behavior. He has some control over what he does with those urges, now and in the past. That he has those urges is not something Winkles chooses or has control over. Those are involuntary. (PCR Vol. IV p. 465-6).

Dr. Maher did not find any statutory mitigation in this case. However, the things that Maher testified to regarding Winkles' background and the presence of sexual abuse and this pattern of this sexual perversion that he suffers from which Dr. Maher believes is a legitimate illness are things that Dr. Maher would consider to be non-statutory mitigators. Winkles' terrible pattern of urges and desires that he does not have the moral conscience to inhibit them sufficiently is primarily related to the environment he grew up in. (PCR Vol. IV p. 467). Prior to the testimony of J.C. Winkles, Dr. Maher was reluctant to rely upon Mr. Winkles providing his own

history. But the testimony of J.C. Winkles and the affidavit of J.C. Winkles described the general terms of the family background, led Maher to believe that the essential history of childhood sexual abuse that Mr. Winkles reported to Dr. Maher was sufficiently credible that Dr. Maher could rely on it and form an opinion based on it. J.C. Winkles' description of his mother as an immoral person is powerful corroborating information. (PCR Vol. IV p. 468-69). Dr. Maher also opined that in a house where there is incest going on that not all of the children living there would be subject to incest. Maher testified that it is very common that there will be one child, if there are special circumstances, who will be singled out; and there were certainly special circumstances in this case, both the biological relationships that existed, and the fact that Defendant Winkles' mother died and he, in effect, landed on the doorstep of his grandmother where there was no one else to care for him. (PCR Vol. IV p. 470). Dr. Maher opined that it is his belief that Mr. Winkles lies, and that he continues to lie, and that he's lied his whole life, and that's part of his character, but he also tells the truth at times, and he's told the truth in some shocking and remarkable ways. (PCR Vol. IV p. 498). Dr. Maher also opined that Mr. Winkles' self-history and self-report has an element of reliability and credibility which can reasonably form the foundation for an opinion. (PCR Vol. IV p. 499). Dr. Maher testified that had Mr. Winkles not been molested by his grandmother and aunt, he may have turned out much like his uncle in that the molestation was very

relevant to his personality traits and adult behavior that he was molested and exploited sexually in childhood. (PCR Vol. P. 501-2)

D. Testimony of James Delano Winkles

Mr. Winkles testified that before he confessed to these crimes he was serving a life sentence and has been continuously incarcerated since January 7th, 1982. He confessed to these instant crimes because of nightmares and to give some closure to the families. (PCR Vol. IV p. 508-9). Regarding the guilty plea, Mr. Winkles testified that he was led to believe by trial counsel that his death sentence would be invalidated upon review because of *Ring v. Arizona*. (PCR. Vol. IV p. 510). Regarding mitigation specialist Cheryl Petry, Mr. Winkles testified that trial counsel asked for 10,000$ and only 5,000$ was approved. Mr. Winkles also testified that he told Ms. Petry about his family history. (PCR Vol. IV p. 513). Regarding the visit of Mary Thomas, Mr. Winkles testified that he was not aware he was being taped and although he did not go into specific cases with her, by innuendo and other means, let her know that it was sexual occurrences between his grandmother and both aunts that he was the way he was. (PCR Vol. IV p. 514). Mr. Winkles testified that at age 7 his grandmother began making comments about the size of his penis and that J. C. Winkles was not in the home. Mr. Winkles testified that his grandmother so ingrained oral sex into him that he always brought consensual

sexual partners or even a victim to sexual gratification before he did himself. (PCR Vol. IV p. 515-16). Mr. Winkles detailed the abuse he suffered prior to 1967 at the hands of his aunt Pearl. (PCR Vol. IV p. 519). He also testified that subsequent to his confession to Detective Madden, he called Marcia Crawley and requested an interview. (PCR Vol. IV p. 522-23). Mr. Winkles told Marcia Crawley about his grandmother and aunt, however the interview was redacted for the penalty phase and the sentencing court never heard an explanation about his aunt and grandmother. (PCR Vol. IV p. 523-4). Mr. Winkles testified that due to his grandmother he looked at all women as virtual targets. (PCR Vol. IV p. 525). Mr. Winkles further testified that it was normal operating procedure to bring a victim home to his grandmother's house and that his grandmother never confronted him about that because she was so involved in the incestual part of the relationship. (PCR Vol. Iv p. 526-27). Regarding his grandmother's desire for sex at age 75, Mr. Winkles stated that sexual desires did not diminish with age as he is 68 and still masturbated five times a day. (PCR Vol. IV p. 527). Mr. Winkles testified that when he shot Elizabeth Graham, his grandmother was sitting in the front room and did not come out until Winkles had left with Graham's body. (PCR Vol. IV p. 528-29). Mr. Winkles testified that he never prohibited the testimony about incest from being presented to Judge Luce. He had already told Marcia Crawley, Mary Thomas and all the detectives how he grew up. He had also told his trial counsels who were

more upset about the incest than the crimes themselves. (PCR Vol. IV p. 531-32). Winkles testified that Mr. Brunvand did his best to get him a mitigation specialist. (PCR Vol. IV p. 533). Winkles discussed the dynamics of his urges. (PCR Vol. IV p. 535).

Mr. Winkles, when describing his crimes to Marcia Crawley, took exception to the term "gleeful" and contended that it was a pat on the back for a job well done; that he looked on his victims as objects and actually let some of his victims live. (PCR Vol. IV p. 536-38). Winkles further testified that the reason he killed Elizabeth Graham is that she saw a magazine in his grandmother's house which had the name and address on it and that would lead to his capture. (PCR Vol. IV p. 538). Regarding the Spencer hearing, Mr. Winkles testified that he was told by his counsel that he did not have to appear in court for that hearing. (PCR Vol. IV p. 543).

Mr. Winkles testified that Mr. Brunvand had been working on his case for several years and during that time, Mr. Winkles had told Brunvand about the sexual abuse that he had suffered at the hands of his grandmother and aunt. (PCR Vol. V p. 629). Mr. Winkles testified that the subject came up on numerous occasions and although Winkles would have offered testimony in that vein, Mr. Brunvand and Mr. Hernandez told him that because there were no witnesses; that would be a pointless exercise since there were no relatives as far as they knew at the time that could

substantiate his childhood. (PCR Vol. V p. 629-30).

Mr. Winkles testified that he performed oral sex on his grandmother at around seven years old and based on his life experience since then he does not now consider that an ideal or normal practice for a seven year old child. (PCR Vol. V p. 632-33).

E. Testimony of Bjorn Brunvand

Bjorn Brunvand was a "conflict attorney" who was appointed to represent Mr. Winkles on March 19, 2001, replacing Mr. Charles Lykes as penalty phase counsel. (PCR Vol. V p.566). Mr. Brunvand filed Defense exhibit 3 on 25th of March , 2002 and argued same on April 1, 2002. (PCR Vol. V p. 567- 571). Trial counsel had asked for a continuance in order to see how *Ring* would come out, however that continuance was denied. Trial counsel expected a favorable ruling in *Ring.* (PCR Vol. V p.572). Mr. Brunvand did not tell his client that by voluntarily waiving a jury in his penalty phase, Mr. Winkles may have placed himself out of the class of defendants who would have benefitted from a favorable ruling in *Ring.*

(PCR Vol. V p. 575). Mr. Brunvand testified that he had filed a motion requesting the services of a mitigation specialist and asked that the sum of $10,000 be allocated. (PCR Vol. V p. 575-6). Ultimately, only $5,000 was allocated. (PCR Vol. V p. 577). The trial court's sentencing order finding that Winkles' deprived childhood was not proven was discussed. Mr. Brunvand testified that there was additional work that Petry could have done if she was provided with adequate funding. (PCR

Vol. V p. 580-582). Although Mr. Brunvand and his office staff tried to complete the work Petry was unable to do, they were unable to do so and as a result the primary non-statutory mitigation was that Mr. Winkles came forward and solved two cold cases. (PCR Vol. V p. 582-3). Mr. Brunvand testified that he became aware that Mr. Winkles grew up in poverty and was abused by his grandmother. Furthermore, Mr. Brunvand considered this poverty and abuse a significant non-statutory mitigation. (PCR Vol. V. P. 584).

Mr. Brunvand further testified that he had reviewed the numerous taped confessions that Mr. Winkles gave to police agencies and in those confessions, mention is made about sexual abuse by his grandmother. Also reviewed by Mr. Brunvand, was the Marcia Crawley interview which contained allegations of sexual abuse by his grandmother and aunt. (PCR Vol. V p. 585). Mr. Brunvand testified that during the penalty phase of the trial, the State played certain portions of various tapes. The tape was then stopped and corroborating civilian witnesses would then testify. Mr. Brunvand testified that none of the tapes played for the trial court were played in their entirety, the trial court was unaware of the evidence that Winkles was sexually abused by his grandmother and aunt. (PCR Vol. V p. 586-588). Regarding the prepared statement of Mr. Winkles, Mr. Brunvand testified that he assisted Mr. Winkles with its preparation. (PCR Vol. V p. 588). Furthermore, Mr. Brunvand testified that he knew about the abuse that Winkles

suffered, yet he did not have Mr. Winkles detail the abuse for the sentencing court to consider in the prepared statement. (PCR Vol. V p. 589). Mr. Brunvand also testified that he remembered the "Crawley tapes" and that they were pretty shocking. (PCR Vol. V p. 600). Mr. Brunvand testified that the State did not prevent him from playing any part of the Crawley tape. (PCR Vol. V p. 614).

Mr. Brunvand was aware that what most serial killers share in common with each other is early sexual abuse. (PCR Vol. V p.617). Mr Brunvand explained that although he knew Winkles was a serial killer and had been sexually abused as a child, he did not believe that Mr. Winkles would come across well in the setting he was in although Brunvand did present possible abuse in his sentencing memorandum. (PCR Vol. V p. 618). Yet when presented with the opportunity to have some testimony corroborating the abuse, Mr. Brunvand failed to do so. (PCR Vol. V p. 619).

F. Testimony of Daniel M. Hernandez

Mr. Hernandez was appointed to represent Mr. Winkles in the guilt phase of the case. (PCR Vol. V p. 623). Mr. Hernandez took no part in arguing or preparing the *Ring* motion. (PCR Vol. V p. 624).

LOWER COURT'S ORDER

Final Order Denying Defendant's Motion For Postconviction Relief

THIS CAUSE came before the Court on Defendant's 3.851 Motion for

Postconviction Relief, filed on September 20, 2006, pursuant to Fla. R. Crim. P. 3.851. After considering the motion, response, sworn testimony of witnesses, argument of counsel, the court file and applicable law, this Court finds as follows:

In 1998, while serving a life sentence for a 1982 conviction for kidnapping, armed robbery and aggravated assault, Defendant confessed in great detail to the sexually motivated abduction, torture, and deaths of two women in Pinellas County in 1980 and 1981. On March 25, 1999, Defendant was charged by felony indictment with two counts of murder in the first degree. On April 3, 2002, defendant changed his plea to guilty on both charges of murder and waived his right to a jury for the penalty phase of the trial. The penalty phase of the trial was conducted before Circuit Court Judge Richard Luce on February 17, 2003.

On April 14, 2003, the Court sentenced Defendant to death for both counts of first-degree murder. The Court found four aggravating circumstances had been proven beyond a reasonable doubt as to each murder: (1) prior convictions for another capital felony (the other first degree murder in this case) and of other violent felonies (assault with intent to commit robbery and attempted robbery in 1963; kidnapping, armed robbery, and aggravated assault in 1982); the Court gave these prior convictions great weight; (2) capital felony committed while engaged in a kidnapping; the Court gave this aggravator great weight; (3) capital felony to avoid arrest; the Court gave this aggravator great weight; and (4) capital felony committed

in a cold, calculated, and premeditated manner without pretense of moral or legal justification; the Court gave this aggravator great weight. The Court found no evidence of statutory mitigation and regarding non-statutory mitigating circumstances, the Court found: (1) Defendant confessed to the cold-case, unsolved murders and cooperated with the police; the Court gave this considerable weight; (2) consecutive life sentences would result in Defendant dying while incarcerated; the Court gave this little weight; (3) life sentences would save the taxpayer money because no direct or collateral appeals would be filed; the Court rejected this because Defendant could still file collateral attacks and stated that even if this was a valid mitigating factor the Court would still file collateral attacks and stated that even if this was a valid mitigating factor the Court would still give this very little weight; (4) Defendant waived several appellate issues by pleading guilty; the Court gave this very little weight; (5) Defendant pled guilty, saving the victims' families from sitting through a trial and saving the State the expense of a trial; the Court found that the families were not spared from learning the horrific acts committed against their loved ones and gave this no weight; (6) Defendant's confessions provided the families with finality and closure; the Court found that they were exposed to the disturbing details of the crimes and the bragging manner in which Defendant gave those details and therefore give this no weight; (7) Defendant's claim that he was raised by relatives because of the untimely death of his mother; the Court found this

was not proven; (8) Defendant served in the Alabama National Guard for eight months of a six year enlistment before being honorably discharged; this was given no weight because the Court found a good military record had not been proven and the honorable discharge was given no weight because of the brevity of service. Defendant's judgment and sentences were affirmed on direct appeal and were filed with this Court on February 9, 2005.

On September 20, 2006, Defendant's 3.851 Motion for Postconviction Relief was filed. On October 18, 2006, the State's Response to Motion for Postconviction Relief was filed. On December 13, 2006, Defendant's Amended 3.851 Motion for Postconviction relief was filed; the State's response to Amended Portions of Motion for Postconviction Relief was filed on January 3, 2007. On January 29, 2007, defendant's Second Amended 3.851 Motion for Postconviction Relief was filed and on February 9, 2007, the State's Response to Amended Portions of Second Amended Motion for Postconviction Relief was filed. On December 18, 2007, an evidentiary hearing was held; this hearing was continued until February 22, 2008. The State and Defendant were given until April 4, 2008 to file written closing arguments. On April 4, 2008, the State filed its closing argument.

ANALYSIS

The case of Strickland v. Washington, 466 U.S. 668 (1984), sets forth the analysis required of an allegation of ineffective assistance of counsel. The United

States Supreme Court established in Strickland a two-prong test for reviewing claims of ineffective assistance of counsel, which requires a defendant show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. As to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. 687.

To satisfy the prejudice test the defendant must show that a reasonable probability exists that the outcome would have been different absent the ineffective assistance. Strickland, 466 U.S. at 694; Haliburton v. Singletary, 691 So.2d 466 (Fla. 1997). "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687. The trial court need not necessarily address the deficiency prong first; if the court can determine that defendant cannot establish the necessary prejudice, it need not address or decide the first prong. Strickland, 466 U.S. at 697.

An ineffective assistance of counsel claim involving a guilty plea is determined by the same deficient performance prong as Strickland, while the second prong involves the Defendant demonstrating a "reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have

insisted on going to trial." Grosvenor v. State, 874 Do.2d 1176, 1179 (Fla. 2004) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)). The Court will consider the totality of the circumstances surrounding the plea in evaluating whether a reasonable probability exists that the defendant would have insisted upon going to trial. Grosvenor, 874 So.2d at 1181.

The evaluation of an attorney's performance at trial level requires a consideration of all the circumstances from the attorney's perspective at that time. Downs v. State, 453 So.2d 1102, 1106-07 (Fla. 1984). The legal standard for such an evaluation is "reasonably effective counsel, not perfect or error-free counsel." Tuffeteller v. Dugger, 734 So.2d 1019, 1022 n.14 (Fla. 1999). There is a stronger presumption of reasonableness that must be overcome with any given ineffectiveness claim. Downs, 453 So.2d at 1108. A court considering a claim of ineffective assistance of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied. Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986).

CLAIM I

> Defendant alleges that he was denied effective assistance of counsel at the guilt and penalty phase as counsel advised him that his death sentence would be invalid if he was sentenced by the judge without a jury. Defendant alleges in his motion that based upon these representations he waived a guilt phase jury, pleaded guilty, waived a penalty phase jury and proceeded to a sentencing before a judge. Defendant alleges he was further prejudiced because he was denied a potential Ring/Aprendi claim on appeal because he waived a jury at the guilt and penalty phases.

The Court finds Defendant has failed to establish prejudice. Defendant has not moved to set aside his plea or indicate that he would not have entered a guilty plea but for the advice counsel gave about the validity [of] Florida's death penalty scheme. From the beginning of the case, it was indicated that Defendant did not intend to go to trial. Counsel Brunvand testified that, after Defendant was advised by himself and Counsel Hernandez, he made the determination that he did not want to go to trial. Testimony also indicates that Defendant is a strong-willed individual who had the final say. Defendant's own actions support this characterization as he continuously spoke to law enforcement about the case even after counsel advised against it and sometimes without counsel's knowledge.

When Defendant entered his guilty plea, counsel stated, "Mr. Winkles wishes to enter this plea because he wishes to accept responsibilities for his actions." *See Exhibit A: Change of Plea Hearing pg. 4*. Defendant indicated that he confessed in

order “to salve my conscience and to give some closure to the families.” The Court finds that Defendant has not demonstrated that he entered a guilty plea based upon any erroneous advice from counsel. Testimony adduced at the evidentiary hearing evidences that Defendant entered a guilty plea based on his own perverse need to receive recognition for the horrific acts he committed, act that in his own words “went off perfect.”

Defendant also fails to prove that he waived a penalty phase jury based on counsel’s advice about the validity of Florida’s death sentencing scheme. At the evidentiary hearing Defendant indicated that he decided to forego a penalty phase jury based upon the representation that his cooperation with authorities would be “worth something” to the judge and there “might be a possibility” of a life sentence from the judge. Counsel stated that the strongest mitigation they had to present was the fact that he cooperated with law enforcement. Counsel stated that the strongest mitigation they had to present was the fact that he cooperated with law enforcement. It was believed that this would hold more weight with a judge than it would with a jury. Counsel also stated that the Defendant decided to waive a jury for penalty phase after discussing it with both of his attorneys and contemplating it. Defendant admitted that a judge would “most probably” give more weight to the fact that he came forward. The judge did give considerable weight to the fact that he cooperated with police. The Defendant’s decision to forego a penalty phase jury

was a tactical one, and "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Occhicone v. State, 768 So.2d 1037, 1048 (Fla. 2000). This decision was reasonable given the nature of the mitigation to be presented.

Finally, Defendant has not shown that counsel provided any affirmative misadvice. Counsel expressed an opinion on how a pending United States Supreme Court case could impact capital punishment in Florida. The outcome was by no means certain and counsel demonstrated this knowledge by attempting to continue Defendant's case until the case was decided. When a continuance was not available, he properly preserved the issue for appeal. As Defendant has failed to establish either prong under Strickland, this claim is denied.

CLAIM II A

> Defendant alleges that counsel was ineffective at the sentencing phase of his trial for failing to have him evaluated by a mental health professional licensed and qualified to testify in the state of Florida. It is further alleged that counsel was ineffective for failing to have a qualified mental health professional review the work product submitted. Defendant asserts that he was prejudiced because the mitigation, which could have been presented, would have been weighed and influenced to obtain a life sentence by the trial court.

Defendant was evaluated by a Dr. Brittan, who prepared a lengthy report and

spoke with counsel about his findings. Counsel also retained Dr. Sidney Merin to review Dr. Brittain's findings and discuss then with him. Dr. Merin is qualified to testify in the State of Florida. Counsel also spoke with a Dr. Vernon, who evaluated Defendant for his own purposes and not for trial. After discussing the medical findings, counsel concluded that, from a tactical standpoint, the testimony that would be provided by a mental health professional would not be helpful and would be inconsistent with the plea. Counsel agreed that there is a risk whenever mental health professionals are presented that the door will be opened to many different issues. After ascertaining what evidence mental health professionals would present to the Court, counsel made a decision not to present such evidence, as it would not be beneficial. "The choice by counsel to present or not present evidence in mitigation is a tactical decision properly within counsel's discretion." Brown v. State, 439 So.2d 872, 875 (Fla. 1983). Counsel clearly chose to not present testimony based on the representations of experts he consulted and the focus of their mitigation that Defendant cooperated with law enforcement to solve two cold cases. The decision not to present testimony about Defendant's mental health is not deficient "merely because the defendant now secured the testimony of a more favorable mental health expert." Gaskin v. State, 822 So.2d 1243, 1250 (Fla. 2002) (quoting Asay v. State, 769 So.2d 974, 986 (Fla. 2000)).

The testimony of the new experts indicates that neither Dr. Dee nor Dr. Maher

found statutory mitigation. Dr. Dee diagnosed Defendant with brain damage, which would have caused a deficit in short-term memory and planning skills, neither of which would have influenced Defendant in the committing of the crime. Dr. Dee further testified that it was not possible to determine when this damage occurred. Dr. Maher diagnosed Defendant as having a sexual perversion disorder and stated that, while defendant may not have the ability to control his sexual urges, he did have control over his behavior in response to his urges. Dr. Maher's testimony would not have been available at the time of sentencing, as he did not feel confortable relying on defendnat's self-report of abuse. It is his belief that Defendant lies and has lied his entire life. Therefore, Dr. Maher only relied on Defendant's statements of his abuse after Defendant's uncle "J.C." Winkles verified some of Defendant's reported history, which occurred long after trial.

Counsel was aware of Defendant's claim of sexual abuse as a child by the hands of his grandmother and aunts. Counsel testified that, in order to use Defendant's sexual abuse as a child as a mitigating factor, he believed it would be necessary for Defendant to testify about it. Counsel was not aware of anyone else who could testify to this mitigating factor, and this fact has not changed, as J.C. Winkles was not aware of any sexual abuse. Counsel found Defendant's testifying to be problematic due to his description of what took place and how he presented it as something to be proud of and not a bad thing. He did not believe that Defendant

testifying about this would help persuade the Court that a life sentence was appropriate. Counsel further stated that he advised Defendant of this and Defendant agreed that it was the right course not to go into the issue of abuse. Defendant testified that counsel advised him that it would not be helpful to present this testimony as no one could substantiate it.

The Court finds this to be a reasonable tactical decision made by counsel. The reasonableness of this decision was further supported by the testimony of the Defendant as well as Dr. Dee and Dr. Maher. It was Dr. Dee's belief that at times Defendant made statements to him, which were deliberatly designed to shock him. Dr. Maher commented that, although Defendant lies, he was "told the truth in some shocking — and remarkable ways." Defendant's testimony at his evidentiary hearing confirmed the misgivings counsel had about Defendant testifying during the penalty phase. Defendant did seem to be proud of his early introduction to oral sex provided by his grandmother and even stated that this tutelage resulted in him bringing "even a victim to sexual gratification before I did myself." defendant also made shocking statements and even offered, "I'm 68, and I still masturbate five times a day." Accordingly, this claim is denied.

CLAIM II B

> defendant alleges that counsel was ineffective for failing to obtain the necessary funds from the Court to properly retain a mitigation expert and, due to counsel's inability to do so, mitigation went undiscovered in the penalty phase. Specifically, defendant alleges a proper investigation would have led to the discovery of his uncle J.C. Winkles. As to the claim that counsel was ineffective for failing to obtain the necessary funds for a mitigation expert, this Court finds this claim barred as it was available for direct appeal. The record shows that counsel properly moved for $10,000.00 for Cheryl Pettry but was only granted $5,000.00. See Exhibit B: defendant's Motion for Costs to Retain the Services of a Mitigation Expert/Investigator and See Exhibit C:Orders.

The Court finds Defendant has failed to establish that counsel was ineffective to failing to investigate and find his uncle J.C. Winkles to testify about his early life. Defendant fails to demonstrate that counsel should have known that this witness was available and would have provided beneficial testimony. Defendant stated that as far as he knew everyone was deceased, as he had been in prison for almost 20 years and the last time he had contact with them was in 1980. A mitigation expert conducted about 122 hours of work and was unable to locate J.C. Winkles. Counsel testified that his office triad to complete any additional work that the mitigation expert could not complete due to monetary restrictions.

Defendant's uncle J.C. Winkles could not corroborate Defendant's allegation of sexual abuse and, at times, contradicted statements made by Defendant. J.C.

Winkles would have provided testimony that Defendant's mother died when he was very young and that he was raised by his grandmother, J.C. Winkles' mother, because the Defendant's father took no interest in him. J.C. Winkles admitted that his mother was not a good mother but loved all of her children and would have done anything for them. He stated that his mother was promiscuous and encouraged petty thievery for survival because they were so extremely poor. J.C. Winkles saw no indication that Defendant was abused either physically or sexually and never saw any signs of violence between Defendant and his mother. J.C. Winkles testimony would have supported mitigation that Defendant was raised by relatives because of the untimely death of his mother.

Defendant has not demonstrated that, but for counsel's errors, he probably would have received a life sentence. Gaskin v. State, 822 So.2d 1243, 1247 (Fla. 2000). The Court finds that the mitigation that Defendant was raised by relatives due to the untimely death of his mother would not have resulted in a life sentence due to the heavily aggravating factors in this case. The Florida Supreme Court has upheld the sentence of death in cases where substantial mitigation has been presented. Lawrence v. State, 846 So.2d 440, 454-455 (Fla. 2003); Smithers v. State, 826 So.2d 916 (Fla. 2002). Accordingly, this claim is denied.

CLAIM III

Defendant alleges that execution by lethal injection constitutes cruel and unusual punishment and would deprive him of due process and equal protection of the law in violation of his Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Defendant concedes that an evidentiary hearing is not required on this claim and it is presented in order to be preserved for federal review. Defendant alleges that the Florida procedures for executing by lethal injection run the serious risk of causing excruciating pain to the condemned and will violate the prohibition against cruel and unusual punishment and violate his constitutional right to be free from unnecessary or excessive pain. Defendant goes on to list various scenarios that could occur which would result in unnecessary or excessive pain because Florida's lethal injection law lacks necessary safeguard, procedures and protocols. In particular, the Defendant challenges the training of execution team members, consciousness determination, and labeling of syringes.

Any per se challenge to lethal injection is procedurally barred as it became the method of execution in 2000 and Defendant could have raised this upon direct appeal. See Schwab v. State, 969 So.2d 318, 321-322 (Fla. 2007); Hall v. State, 742 So.2d 225, 226 (Fla. 1999). The specific issues raised by defendant were recently carefully considered by the Florida Supreme Court and found to be without merit. The Florida Supreme Court specifically addressed whether the current procedures are sufficient to ensure proper training and qualification of execution team members, and found that the procedures do so. See Lightbourne v. McCollum, 969 So.2d 326, 349-352 (Fla. 2007). The Court also discussed at length the procedures for assessing and monitoring consciousness of the inmate and intravenous access, also finding the current procedures sufficient in these regards. Id. at 349-352. The Court also discussed at length the procedures for assessing and monitoring consciousness of the inmate and intravenous access, also finding the current procedures sufficient in these regards. Id. at 349-352. The Execution by Lethal Injection Procedures, effective August 1, 2007, addresses the issue of the labeling of syringes to be used during the execution. Accordingly, Defendant's claim is denied, as Defendant does not raise any claims that have not been considered and rejected by the Florida Supreme Court.

CLAIM IV

> Defendant alleges that his Eighth Amendment right against cruel and unusual punishment will be violated, as Defendant may be incompetent at the time of execution. Defendant concedes that this claim is not ripe for review, as a death warrant has not been signed, but raises the issues for preservation purposes. The Court has repeatedly found that no relief is warranted on similar claims. See Hall v. Moore, 792 So.2d 477, 450 (Fla. 2001); Ferrell v. State, 918 So.2d 163, 180 (Fla. 2005); Karmody v. State, 32 Fla. L. Weekly S627 (Fla. Oct. 11, 2007), This claim is denied.

SUMMARY OF THE ARGUMENTS

1. Trial counsel was ineffective in advising Mr. Winkles to enter a plea in guilt phase and to waive presentation of penalty phase evidence before a jury of his peers in the penalty phase. Mr. Winkles was led to believe by trial counsel that his death sentence would be invalidated upon review because of Ring v. Arizona. Trial counsel did not tell Mr. Winkles that by voluntarily waiving a jury in his penalty phase, he may have placed himself out of the class of defendants who would have benefitted from a favorable ruling in Ring. In short, trial counsel Brunvand erroneously induced Mr. Winkles to waive his penalty phase jury.

2. Mr. Winkles was denied the effective assistance of counsel at the sentencing phase of his capital trial as trial counsel failed to adequately challenge the State's case, counsel's performance was deficient and as a result the death sentence is

unreliable. Mr. Winkles was not evaluated by a mental health professional licenced and qualified to testify in the State of Florida and trial counsel failed to obtain the necessary funds from the trial court to properly retain a mitigation expert. Had they done so, the mitigation which the trial court held to be “not proven” in its sentencing order would have been proven by preponderance of the evidence.

ARGUMENT I

MR. WINKLES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS AND THEIR FLORIDA COUNTERPARTS. TRIAL COUNSEL ADVISED MR. WINKLES THAT IF HE WERE SENTENCED BY THE JUDGE AND NOT BY A JURY, THE SENTENCE WOULD BE UNCONSTITUTIONAL AND THUS WOULD BE INVALID.

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.

ARGUMENT

Trial counsel, on March 25,2002, served on the Office of the State Attorney, a motion titled Motion To Declare the Florida Capital Sentencing Scheme Unconstitutional Pursuant to Apprendi V. New Jersey and Ring v.Ariaona. The motion was filed with the clerk dated March 25, 2002.

On April 1, 2002, trial counsel argued the motion at a pretrial motions hearing.

At the motion hearing counsel stated:

> MR. BRUNVAND: Good afternoon, Judge. Judge, the first motion that I would like to address is a motion that I

would like to address is a Motion to Declare the Florida Capital Sentencing Scheme Unconstitutional pursuant to Aprendy (phonetic) versus New Jersey and Ring (phonetic) versus Arizona. As you recall, I did a Motion to Continue on, I believe, it was Thursday of last week and, basically, this is the underlying argument. We are sort of waiting to hear what Ring versus Arizona has to say. But, briefly, Judge, the sentencing scheme on capital cases in Florida is set forth in 921.141, and in this particular case, the State is actually seeking the death penalty. In fact, the Defense has made offers of consecutive life which has been rejected on more than one occasion. The concern, Judge, that's now before the Supreme Court in Ring versus Arizona is that our sentencing scheme is in violation of the United States Constitution based on Aprendi and soon to see, Ring versus Arizona, specifically, in that it does not require the jury to make written findings as to the existence of aggravating circumstances. It does not require the jury to render a verdict that is unanimous and not merely an advisory verdict, that allows the trial court to impose the sentence of death even in the event that the jury recommended life, although it's limited to the circumstances, nevertheless, it allows that, and the statute improperly shifts the burden to the Defense to prove that sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist.

Judge, unfortunately, the – it sort of puts the Court in a difficult position in that I'm basically asking the Court to adopt the discussions of Justice O'Connor in her dissent in Aprendy, basically saying what you are doing here today is going to result in the sentencing schemes of Arizona and Florida to be invalid. The Court, at this time, just like the Supreme Court of Florida has earlier this year, is still faced with Walton versus Arizona, which basically says the way it works right now is okay. But it's my suggestion to this Court that based on what has happened in Ring versus Arizona, based on the fact that the United States Supreme Court has granted Writ of Cert that that's an indication that, in fact, the United States Supreme

> Court is in the process of going along with what Justice O'Connor suggested would happen in Aprendy versus New Jersey. And I would ask this Court to likewise, based on that, declare the Florida Statutes unconstitutional, specifically, 921.141.
>
> THE COURT: Response from the State?
>
> MR. HELLICKSON: Judge, I'd rely upon the arguments I made last Thursday. As of right now, the statute is, in fact, still constitutional and has been found to be so. And. For that reason, I request that the motion be denied.
>
> THE COURT: All right. The motion is denied at this time.

Trial counsel asked for a continuance in order to see how *Ring* would come out, however that continuance was denied. Trial counsel expected a favorable ruling in *Ring.* (PCR Vol. V p.572). Trial counsel Brunvand did not tell Mr. Winkles that by voluntarily waiving a jury in his penalty phase, Mr. Winkles may have placed himself out of the class of defendants who would have benefitted from a favorable ruling in *Ring.* (PCR Vol. V p.575).

After the motion was denied, trial counsel advised Mr. Winkles that if he went in front of a jury, he was going to get the death penalty, but if he went in front of a Judge and pled guilty, the Judge sentencing him to death would be invalidated upon review because of *Ring v. Arizona*. (PCR. Vol. IV - p. 510).

Mr. Winkles entered a plea and was sentenced to death on April 14, 2003. A notice of appeal was filed on May 13, 2003.

On appeal, Mr. Winkles, through his appointed appellate counsel filed a two

issue appeal. The issues on appeal were:

> ISSUE I - THE FLORIDA DEATH PENALTY STATUTE VIOLATES THE SIXTH AMENDMENT RIGHT TO HAVE AGGRAVATING CIRCUMSTANCES FOUND BY A JURY.
>
> ISSUE II - APPELLANT'S RIGHT TO NOTICE OF THE NATURE AND CAUSE OF THE ACCUSATION WAS VIOLATED BY FAILURE TO ALLEGE THE AGGRAVATING CIRCUMSTANCE IN THE INDICTMENT.

The direct appeal was denied in Winkles v. State, 894 So.2d 842 (Fla. 2005).

At the evidentiary hearing, Mr. Winkles testified that he was led to believe by trial counsel that his death sentence would be invalidated upon review because of Ring v. Arizona. (PCR. Vol. IV p. 510). Trial counsel Brunvand did not tell Mr. Winkles that by voluntarily waiving a jury in his penalty phase, he may have placed himself out of the class of defendants who would have benefitted from a favorable ruling in Ring. (PCR Vol. V p. 629). In short, trial counsel Brunvand erroneously induced Mr. Winkles to waive his penalty phase jury.

The trial court erred in denying this claim. Mr. Winkles was prejudiced if only because he waived the opportunity to have a jury consider mitigation evidence and recommend to the court that he receive a sentence of life in prison and not death.

The trial court, in denying this claim, pointed out that Mr. Winkles has not moved to set aside his plea. However, the time for making such a motion is long past. Such a motion would have to been made within thirty days after rendition of the

sentence. Fla.R.Crim.P. 3.179(l). To apply such a standard to Mr. Winkles is to cast upon him the responsibility of his attorneys misadvice and also the responsibility of failing to correct the error. Mr. Winkles was relying upon his attorneys but his attorneys failed him.

Trial counsel was ineffective in that counsel erroneously led Mr Winkles to believe that if he waived a jury trial, pled guilty, and was sentenced to death by a judge only and not by a jury, that the sentence would be invalid, and his case would be reversed on appeal. The advice given by trial counsel was not only wrong, the advice took the case out of any potential for reversal precisely because Mr Winkles waived a jury at both the guilt and penalty phases.

Even if Mr. Winkles had a potential Ring/Aprendi claim, the claim was foreclosed with the waiver of the guilt phase jury, the plea of guilty, the waiver of a penalty phase jury, and the decision to proceed to sentencing by the judge. Trial counsel's ineffectiveness eliminated even the possibility of a viable claim.

Mr. Winkles was prejudiced because he was denied an adversarial testing.

ARGUMENT II

MR. WINKLES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. TRIAL COUNSEL FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE, COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT THE DEATH 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.

ARGUMENT

In Strickland v. Washington, 466 U.S. 668 (1994), 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 process." Strickland requires a defendant to plead and demonstrate (1) unreasonable attorney performance, and (2) prejudice.

Defense counsel must also discharge significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable

prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." Id. At 206.

No tactical motive can be ascribed to an attorney whose omissions are based on ignorance Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. Mr. Winkles' sentence of death is the resulting prejudice. It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trial would have been different if the evidence discussed had been presented to the sentencer. The key aspect of the penalty phase is that the sentence be individualized, focusing on the particularized characteristics of the defendant. Gregg v. Georgia, 428 U.S. 153 (1976). Due to counsel's ineffective assistance, the judge was incapable of making an individualized assessment of the propriety of the death sentence in this case.

State and federal courts have repeatedly held that trial counsel in capital sentencing proceedings have a duty to investigate and prepare available mitigating evidence for the sentencer's consideration. Phillips v. State, 608 So.2d 778 (Fla. 1992).

Counsel's highest duty is the duty to investigate and prepare. When counsel

does not fulfill that duty, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable.

Counsel here did not meet these rudimentary constitutional standards. As explained in Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985);

> In *Lockett v. Ohio*, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the [sentencer] receiving accurate information regarding the defendant. Without that information, a [sentencer] cannot make the life/death decision in a rational and individualized manner. Here the [sentencer] was given no information to aid [him] in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to confidence in that decision. Id. At 743 (citations omitted).

"Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990). In Mr. Winkles' capital penalty phase proceedings, substantial mitigation evidence went undiscovered and was not presented for the consideration of the trial judge who was the sentencer in this case. Mr. Winkles was sentenced to death by a judge who knew very little about him.

A. Trial counsel was ineffective in failing to have Mr. Winkles evaluated by a mental health professional licenced and qualified to testify in the State of Florida; trial counsel failed to have qualified mental health professionals review the work product submitted or in the alternative, to

evaluate Mr. Winkles themselves.

Dr. Jerry L. Brittian, PH.D was retained by trial counsel to evaluate Mr. Winkles. Dr. Brittian was not licensed to practice Neuropsychology in the State of Florida. Dr. Brittian saw Mr. Winkles on March 18 & 19, 2001. Tests were given and interviews were done. Dr. Brittian did not testify at the penalty phase of the trial as he was not licensed to practice in Florida and returned to the state of Virginia.

At the evidentiary hearing, Dr. Henry Dee testified that he did a neuropsychological evaluation and conducted a number of interviews with Mr. Winkles. Dr. Dee was provided with school records, discovery material, depositions taken of people who knew or evaluated Mr. Winkles, and excerpts from the trial.

Dr. Dee gave Mr. Winkles a complete neuropsychological battery of tests including the Wexler Adult Intelligence Scale and the Denman Neuropsychology Memory Scales. The final diagnosis of the testing shows that Mr. Winkles is brain damaged and Dr. Dee was able to detail the area of Mr. Winkles's brain that is damaged. Mr. Winkles brain damage is located in the frontal lobe area which results in a deterioration in functioning.

Dr. Dee also testified about the clinical history of Mr. Winkles. He testified that Mr. Winkles had a most unusual childhood and that he engaged in consentual sex with his grandmother and aunts beginning as early as 9 years age and that some

of those relationships did not end until he was 32 or 33 years of age. There was very little discipline in the household which is fairly typical of a child who is being sexually abused. The sexual abuse left Mr. Winkles with a poor opinion of women and he often talked about women in a derogatory fashion.

Dr. Dee testified that he could have presented to the penalty phase jury that Mr. Winkles suffered extensive sexual abuse and exploitation at the hands of his two aunts and his grandmother from an early age. The presentation certainly would have had an impact and would be relevant to an individual who being tried for the murder of two women. (PCR. Vo. IV p. 398-99). The testimony would help jurors understand how this perversion developed.

The prejudice of trial counsel's ineffectiveness is obvious. Where no mitigation was presented at trial, the mitigation which could have been presented would have been weighed and influenced to obtain a life sentence by the trial court.

B. Trial counsel was ineffective in failing to obtain the necessary funds from the trial court to properly retain a mitigation expert. Due to trial counsel's inability to do so, mitigation went undiscovered in Mr. Winkles' penalty phase.

Charles E. Lykes, the initial attorney appointed to represent Mr. Winkles, moved to withdraw from the case partially but primarily due to his inability to procure the assistance of a mitigation specialist. Attorney Bjorn E. Brunvand was subsequently appointed to represent Mr. Winkles. Attorney Brunvand then filed a

motion for costs to retain the services of a mitigation expert and petitioned the Court to authorize 10,000 dollars to get the job done properly.

Brunvand's motion was granted, however, a cap of $5,000 was imposed. On February 28, 2001 an order to pay mitigation specialist was entered by the trial court. Although Pettry had billed out $5,420.06 she was only paid $5,000.

Mr. Winkles' penalty phase investigation of mitigation was prejudiced by the fact that trial counsel was unable to properly investigate and prepare the mitigation.

Had trial counsel been provided with proper funding with which to conduct a proper investigation, counsel would have discovered J.C.Winkles. J.C. Winkles, the uncle of the defendant, testified at the evidentiary hearing as to the circumstances of Mr. Winkles' mother's death, where she is buried, and established other non-statutory mitigation.

In Ake v. Oklahoma, 470 U.S. 68. 77, 105 S.Ct. 1087, 1093 (1985), the Supreme Court of the United States stated:

> We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, *Ross v. Moffitt,* 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), it has often reaffirmed that fundamental fairness

> entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system," *Id.*,at 612, 94 S.Ct. At 2444. To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal, *"Britt v. North Carolina* 404 U.S. 226, 227, 92 S.Ct. 431, 433, 30 L.Ed 2d 400 (1971), and we have required that such tools be provided to those defendants wh cannot afford to pay for them. Id. At 77

The Ake Court further held:

> These statutes and court decisions reflect a reality that we recognize today, namely, that when the State has made the defendant's mental condition relevant to his criminal culpability **and to the punishment he might suffer,** (emphasis added), the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing part's psychiatrists and how to interpret their answers. Id. At 80, 1095.

Trial counsel Hernandez was ineffective in failing to request additional funds with which to retain an expert witness. Trial counsel received a letter from expert witness Jerry Brittain advising that he could not assist in Mr. Winkles' case. At that point, trial counsel failed to seek out or retain any other mental health professional to assist in mental health evaluation or penalty phase preparation.

Had trial counsel requested funds to retain a mitigation expert and a mental health professional, counsel could have presented to the penalty phase jury evidence of mental health mitigation that went undiscovered.

A mitigation expert would have discovered J.C. Winkles who was the uncle of Mr. Winkles. J.C. Winkles testified at the evidentiary hearing that he is a retired attorney and World War II veteran. He left when he was 18 years old and that his home life was disfunctional. He described his mother as "not a good mother." (PCR Vol. IV p. 432). She was promiscuous and sexual morals were not known in the house. J.C. Winkles said that his mother had a number of lovers. There was a lot of promiscuity, and as soon as his sisters were old enough, they got into the same situation.

Mr. Winkles testified in his own behalf at the evidentiary hearing an said that from a very young age, after his mother died, he was raised by his grandmother, who was J.C. Winkles mother, and his aunts, who were J.C. Winkles sisters.

Mr. Winkles testified that when he was age 7, his grandmother began making comments about the size of his penis. Mr. Winkles described being indoctrinated into sex by his grandmother and aunts when he was very young. He described how his grandmother taught him to perform fellatio upon her and how he regularly serviced his aunts and grandmother at their request. Mr. Winkles described in detail the sexual abuse that he suffered as a child and adolescent, and how the abuse

shaped his feelings of misogyny.

Dr. Michael Maher, a licensed physician and psychiatrist, testified at the evidentiary hearing that he reviewed a variety of legal, medical, and social materials regarding Mr. Winkles' background. Dr. Maher interviewed Mr. Winkles and Mr. Winkles said he didn't know why he was the way he was but he believed that it was primarily because of the way he was raised by his grandmother and the way he was introduced to sex by his grandmother and his Aunt Pearl. Dr. Maher also reviewed the tape of an interview of Mr. Winkles described aid and complicity by his grandmother and aunt throughout all the abductions that ended in his grandmother's house. Dr. Mayer thought this was unusual and Mr. Winkles explained that he was raised in such a way that introduced him to the idea that sexual exploitation was acceptable and even to some extent expected and desirable. Mr. Winkles explained to Dr. Mayer that he was raised in a way that led him to being an immoral person. Mr. Winkles told Dr. Mayer of relentless sexual abuse during the entire relationship with his grandmother.

Dr. Mayer did not find any statutory mitigation in this case, however, he did find the presence of sexual abuse. The pattern of sexual perversion that he sufferes from is a legitimate illness are things that Dr. Mayer considered to be non-statutory mitigation.

In Lockett v. Ohio, 438 U.S. 586, 604 98 S.Ct. 2954, 2964 (1978), the

Supreme Court of the United States held:

> We are now faced with those questions and we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, [FN11] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. [FN12] We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public police enacted into statutes. The considerations that account for the wide acceptance if individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques – probation, parole, work furloughs, to name a few – and various postconviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscored the need for individualized consideration as a constitutional requirement in imposing the death sentence. Id. At 604-5 2964-5*

The penalty phase testimony consisted of the following:

> MR. SCHAUB: At this time then, Your Honor, the People of the State of Florida would rest their case against M. James Winkles.
> THE COURT: All right. Do you want to take a 10-minute break?
> MR. BRUNVAND: judge, I don't know that we need to.

THE COURT: Are you going to be presenting any testimony or evidence this afternoon?
MR. BRUNVAND: Mr. Winkles is going to make a statement.
THE COURT: Okay

MR. BRUNVAND And I'm going to ask that a motion memorandum that I filed this morning and gave copies to the State to be made part of the record and that's the extent of it, Judge.
I would think Mr. Winkles' statement shouldn't take more than five minutes.
THE COURT: Okay. We'll take a little break and then Mr. Winkles can make a statement from the stand. .....
Q. Mr. Winkles, please state your full name.
A. James Delano Winkles.
Q. And have you prepared a statement that you would like to read at this time?
A. Yes, I have.
MR. BRUNVAND: Judge, if he may?
THE COURT: Proceed.
BY MR. BRUNVAND:
Q. Go ahead.
A. Your Honor, I recognize that I've stepped across the line and committed acts that are not acceptable to the laws of society. Punishment is deserved and must be imposed to satisfy society's quest for justice.

In this case vengeance appears to be the motivating factor in pursuit of justice by the State The outrage of the victims' relatives must be assuaged, however, I'm not the same person now that I was when I committed these horrendous crimes.

I've grown both morally and intellectually. My perspectives on crimes in society and life and relationships have changed dramatically in the last 23 years. My incarceration has been total and unbroken for the last 23 years.

During those years I've had to be on guard and unable to relax or feel secure for 18 out of every 24 hours

of each day. When I first entered prison, the only physical problem I had was being overweight.

Within 18 weeks I developed spiking malignant high blood pressure. High weight dropped from 205 pounds to 135. My hair turned white virtually overnight.

All the physical changes took place, I believe, due to the constant tension, stress and pressures of being in an environment which could become deadly in an instant.

I relay the foregoing to the Court so that the Court may be assured that for the last 23 years I have suffered by being confined among the animals and monsters that populate any prison system where every day is an unknown and where your life is a living death.

I ask the Court, what more can you do to punish me besides sentence me to continue this life of living death. I realize the death penalty is a serious option for the Court. However, take this into consideration: I'm 62 years old. No one in my family has ever survived past the age of 69, with the exception of my grandmother. All of my family members have died of heart disease and/or complication from some form of cancer. At this time, I have a severely enlarged heart, a damaged left ventricle, malignant spiking blood pressure plus I have endured two heart caths since 1994.

The last two years I've developed all the classic symptoms of colon cancer. Doctor Bailey, CMO, at the Pinellas County Jail sent me to an outside doctor several weeks ago. The doctor examined me and scheduled me for a colon cancer screening at a local hospital.

So if you feel it's necessary to satisfy society's thirst for vengeance by sentencing me to death consider that I will probably be long dead of natural causes before the State of Florida can extract their pound of flesh and carry out my execution.

I will not try to express my remorse to the victims' relatives in this open venue. Other than to say that I'm truly sorry and wish that I could turn back time and undue what I did.

However, I will meet in total privacy with each of

> the individual families and answer any questions that they put to me if they would desire such a venue. That's all that I have. Your Honor. (See FSC ROA Vol. V p. 837-842).

Because trial counsel was unable to properly investigate, Mr. Winkles was deprived of the individualized sentencing process pursuant to Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976). Defense counsel must discharge significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." Id. at 206. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. Mr. Winkles' sentence of death is the resulting prejudice.

It cannot be said that there is **no** reasonable probability that the results of the sentencing phase of the trial would have been different if the evidence discussed had been presented to the sentencer. The key aspect of the penalty phase is that the

sentence be individualized, focusing on the particularized characteristics of the individual defendant. Gregg at 206. Due to counsel's ineffective assistance, the judge was incapable of making an individualized assessment of the propriety of the death sentence in this case.

State and federal courts have repeatedly held that trial counsel in capital sentencing proceedings have a duty to investigate and prepare available mitigating evidence for the sentencer's consideration.

Phillips v. State, 608 So.2d 778 (Fla. 1992). Counsel's highest duty is the duty to investigate and prepare. When counsel does not fulfill that duty, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable.

The decision in Gregg essentially re-established the legality of the death penalty across the country. The Court was very careful to insure that there were necessary safeguards to insure that the fact finder was given a balanced criteria in determining whether to issue the death sentence. The goal for individualized sentencing can be seen as the Court stated:

> It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner. We have long recognized that "(f)or the determination of sentences, justices generally requires . . . that there be taken into account the circumstances of the offense **together with the character and propensities of the offender**. (emphasis added) *Pennsylvania ex rel. Sullivan*

> *v. Ashe*, 302 U.S. 51, 55, 58 S. Ct. 59, 61, 82 L.Ed. 43 (1937). See also *Williams v. Oklahoma*, 358 U.S. 576, 585, 79 S.Ct. 421, 426, 3 ****2933** L.Ed.2d 516 (1959); *Williams v. New York*, 337 U.S., at 247, 69 S.Ct., at 1083. Otherwise, "the system cannot function in a consistent and a rational manner." American Bar Association on Standards for Criminal Justice, Sentencing Alternatives and Procedures s 4.1(a), Commentary, p. 201 (App. Draft 1968). See also President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 144 (1967); ALI, Model Penal Code s 7.07, Comment 1, 52-53 (Tent. Draft No. 2 1954). Gregg at 189.

In Mr. Winkles' penalty phase he was not given the benefit of the safeguards discussed in Gregg.

The lower court judge was wholly incapable of rendering his decision in an informed manner when the whole mitigation testimony consisted of a single oral monologue conducted by the defendant. Counsel never called a single witness on the defendant's behalf. Counsel did not supplement his mitigation with any witnesses or materials which may have allowed the circuit court to assess the "character and propensities" of Mr. Winkles. The Court in Gregg also discuss the importance of individualized sentencing in more specificity as it stated:

> These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends the sentence. No longer can a Georgia jury do as *Furman's* jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die. Instead, the jury's attention is directed to the specific circumstances of the

> crime: Was it committed for money? Was is committed upon a peace officer or judicial officer? Was it committed in a particular heinous way or in a manner that endangered the lives of many persons? In addition, the jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment? (E.g., his youth, the extent of his cooperation with police, his emotional state at the time of the crime). As a result, while some jury discretion still exists, "the discretion to be exercised is controlled by clear and objective standards so as to produce non-discretionary application." Coley v. State, 231 Ga. 829, 834, 204 S.E. 2d 612, 615 (1974). Id. at 198.

Again, "are there any special facts about this defendant that mitigate against imposing capital punishment?" Id. This key question which was prudently articulated by the court in Gregg was completely ignored by Mr. Winkles' attorney at the penalty phase of his case. Not a single mitigation witness was called on Mr. Winkles' behalf to testify about his youth, and family or educational background. Also, as stated above, counsel failed to offer a licensed doctor from the state of Florida to give any mitigating testimony about Mr. Winkles' mental or physical health. Counsel at the trial court level misadvised Mr. Winkles about his prospects at the appellate level, and then failed to provide the court with any direction to allow for a thorough individualized sentencing process.

Due to the failures of trial counsel at the penalty phase, Mr. Winkles respectfully asserts that relief is proper.

CONCLUSION AND RELIEF SOUGHT

In light of the facts and arguments presented above, Mr. Winkles 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. Winkles 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:

Honorable Richard A. Luce
Circuit Court Judge
14250 49th Street N., Room 7
Clearwater, Florida 33762
727-464-6430

Carol M. Dittmar
Assistant Attorney General
Office of the Attorney General
Concourse Center 4
3507 E. Frontage Rd., Suite 200
Tampa, Florida 33607-7013
813-287-7910
813-281-5501 (fax)

James A. Hellickson
Assistant State Attorney
Office of the State Attorney
P. O. Box 5028

Clearwater, Florida 33758-5028
727-464-6221

James D. Winkles
DOC# 009547; P6217S
Union Correctional Institution
7819 NW 228th Street
Raiford, FL 32026