IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1417

PAUL C. HILDWIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR HERNANDO COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

"R. ___" - Record on direct appeal to this Court from the 1986 trial;

"PC-R. ___" - Record on appeal to this Court from the Rule 3.851 proceedings in which an evidentiary hearing was conducted in 1992;

"R2. ___" - Record on direct appeal to this Court following the 1996 re-sentencing;

"PC-R2. ___" - Record on appeal to this Court from the Rule 3.851 proceedings in Case No. SC04-1264;

"PC-R3. ___" - Record in pending appeal to this Court from the Rule 3.851 proceedings in Case No. SC09-1417;

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

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STATEMENT OF THE CASE

On September 21, 1985, Mr. Hildwin was arrested on charges of uttering a forged instrument in Hernando County, Florida. On November 22, 1985, Mr. Hildwin was indicted for the first degree murder of Vronzettie Cox.[1] On April 22, 1986, the public defender's office withdrew as Mr. Hildwin's counsel due to a conflict. As a result, Daniel Lewan was appointed to represent Mr. Hildwin.[2]

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[1]On the evening of September 12, 1985, Bernice Moore reported her sister, Vronzettie Cox, as missing to law enforcement. Law enforcement began trying to trace Cox's last known activities the next day, September 13, 1985. Coincidently, sometime on September 13th, two men riding motorcycles through the woods discovered a 1984 brown Chevrolet stuck in the mud at the edge of a lake (R. 235-41). The men later notified law enforcement. After the Hernando County Sheriff's Office learned that a car had been seen stuck in the mud at the edge of a lake, deputies responded. Cox's nude body was found in the vehicle's trunk (R. 248-50). A pathologist examining the body concluded that death was a result of strangulation (R. 298).

A laundry bag full of clothes was also found in the car. The State suggested that the clothes on top of the laundry bag were the clothes that Cox must have had contact with right before her death. The State presented forensic evidence that a pair of women's panties found on top of the laundry bag were semen stained, and that a wash rag also located on top of the laundry bag was saliva stained.

Law enforcement discovered that the last check cashed on Cox's checking account was made out to Mr. Hildwin. When the check was cashed at around 12:30 PM on September 9, 1985, the teller wrote information taken from Mr. Hildwin's driver's license on the back of the check (R. 406). As a result, law enforcement contacted Mr. Hildwin. After he was interviewed, he was charged with uttering a forged instrument. Subsequently, he was indicted for the murder on the theory that Cox was murdered by Mr. Hildwin before he cashed the check at round 12:30 PM on September 9th.

[2]At an evidentiary hearing in 1992, Mr. Lewan testified that he had no prior experience with capital cases (PC-R. 3048, 3123-24). Mr. Hildwin's case was the first time that he had been appointed to represent someone in which the State was seeking a death sentence. Besides having no capital experience, Mr. Lewan had no one to assist him in the case. A second chair was not appointed.

Four months after Mr. Lewan was first appointed to represent Mr. Hildwin in his first capital case, the case went to trial on August 25, 1986.[3] Mr. Lewan testified in 1992 that the theory of defense at the 1986 trial was innocence. The window of opportunity for Mr. Hildwin to have committed the murder was narrow (an hour and a half period of time on the morning of September 9, 1985). In that vein, Mr. Lewan looked for ways to shift the time frame. He also was looking for other suspects who committed the murder, primarily William Haverty, the victim's live-in boyfriend.[4]

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[3]Mr. Lewan graduated from law school in December 1982 and was admitted to the Florida Bar the following year (PC-R. 3046). In his first three years as an attorney leading up to his 1986 trial representing Paul Hildwin, Mr. Lewan had handled "about six jury trials" which he recalled were "A couple of DUI's, drug possession &, AG assaults, things of that nature" (PC-R. 3048). Mr. Hildwin was the first death penalty client Mr. Lewan had ever represented (PC-R. 3123). Mr. Lewan represented Mr. Hildwin as a result of his contract with the public defender's office to handle all conflict cases for a year and was provided no assistance by another attorney (PC-R. 3048, 3051). Trial counsel was on the case "approximately four months prior to trial" (PC-R. 3121), and had to complete all his preparation in that period. Counsel had no meaningful experience with death penalty litigation (PC-R. 3123-24). Counsel did not seek the advice of anyone who had experience conducting a capital penalty phase, had never observed a penalty phase, and had never read the penalty phase testimony of a mental health expert (PC-R. 3135).

[4]In his opening statement, Mr. Lewan told the jury:

> Now, we're not going to present all the evidence, the volume of evidence the state has presented. We don't have that []...We're going to show that the victim was a 42 year old female. She was living with a 23 year old man. We're going to show that he [Haverty] had just as equal an opportunity as my client to have committed this crime.

(R. 731-32).

Though the State had not formally charged Mr. Hildwin with sexual assault, it was the State's contention that the murder was committed by Mr. Hildwin either in the course of or following a sexual assault on the victim.[5]

[5]The state explained that it intended to argue that the evidence would provide the State with a basis for arguing that the victim was sexually assaulted by Mr. Hildwin at a side bar:

> Judge, first of all, I feel that the evidence that's going to come out in this case showing this victim unclothed with a ligature around her neck, with her legs bent over her head and forced into the trunk of a car, her clothes found in various areas in the county, a reasonable inference can be made that a sexual assault occurred and we certainly intend to argue that if the evidence supports it.

(R. 1181). Subsequently, the prosecutor elaborated:

> I don't anticipate standing up or Mr. Cole standing up and screaming sexual battery. But when we get to the point in the trial where enough evidence has been put before the jury within a reasonable inference that a sexual battery occurred, we intend to refer to it.

(R. 1185).

In the prosecutor's opening statement, he informed the jury that Paul Hildwin's semen and saliva matched the semen and saliva found on the victim's panties and washcloth located at the crime scene:

> Finally taken from that laundry bag was a pair of women's clothing sitting on top of the laundry bag, a pair of women's panties and a wash rag. Now, on those panties was some semen and it has the same blood characteristics that the defendant has. And there will be an expert from the FBI to testify to you about that. On the wash rag there are characteristics of human sweat that is consistent with this defendant.

(R. 223-4).[6]

During the State's case, it introduced the semen-stained women's panties and a saliva-stained wash rag found on top of the laundry bag in the victim's car (R. 697-99).[7] Evidence was introduced that forensic analysis had determined that the semen and saliva found on these items came from a nonsecretor (i.e., an individual who does not secrete blood typing into other bodily fluids). Evidence was also introduced to show that Mr. Hildwin was a nonsecretor. This meant that the forensic finding was consistent

[6]In testimony presented to the jury by the State, it was advised that the biological evidence matched only 11% of the male population that included Paul Hildwin due to Mr. Hildwin's unique status as a non-secretor.

[7]The State also introduced a brassiere that was found inside the victim's purse (R. 546-48). Evidence was presented that the purse had been found discarded in some brush approximately a quarter of a mile from Mr. Hildwin's home (R. 536). Based upon the condition of the brassiere inside the purse the State asserted that it had been violently ripped off of the victim in the course of a sexual assault by Mr. Hildwin.

with Mr. Hildwin having been the source of the semen and saliva. Testimony was presented that white male nonsecretors "probably" make up only eleven percent of the population. The prosecution used this evidence in closing argument at the original trial to argue that Mr. Hildwin raped and then killed the victim:

> Inside that purse was a lady's brassiere. There's something very interesting about this, and I want you folks to examine this item. This was not taken off. This was not taken off by anyone during a consensual sex act that involved choking. This is not a consensual sex act. Look at the brassiere. This thing has been literally ripped off. There is nothing consensual about this. This is in shreds. You can still see where one of the hooks is still in the eyelet and the other one is torn completely out and the other one is ripped off. This is not a consensual act. This is one of those arrows that Mr. Lewan threw up in the air.
>
> Agent Reem testified about the blood test, the serology test, the secretor/non-secretor evidence, and he told you that some people are what he calls secretors, meaning that they secrete ABO or ABH factors into their other bodily fluids and others don't. Eleven percent-only eleven percent of the white male population are secretors, meaning eighty-nine percent are not. Bill Haverty is a secretor. In other words, his semen and his saliva would exhibit the ABH factors. The defendant, Paul Hildwin, is not a secretor. His saliva and semen would not exhibit the ABH factors. You'll have the little chart that he made and you can look at it.
>
> What's interesting about that is that on these panties were found-these panties were found in the car on top of the laundry, Sergeant Haygood testified to, not in the laundry, on top of the laundry. These panties contained semen that is consistent with the non-secretor 11 percent of the white male population, consistent with the defendant in this case and not consistent with Bill Haverty. This wash rag had saliva from a non-secretor consistent with Paul Hildwin, the defendant, not consistent with Bill Haverty.
>
> And before we go any further, remember the statement that the defendant made to Investigator Phifer that after-after

> Vronzettie Cox was choked to death, the man that did it washed his face with a white rag.

(R. 971-2).[8]

In its closing argument, the State admitted that its case against Paul Hildwin was circumstantial:

> ...you all agreed that circumstantial evidence is good evidence... Circumstantial evidence is good evidence. Circumstantial evidence can prove a case beyond a reasonable doubt, and in this case we have a lot of circumstantial evidence and it is good evidence... that circumstantial evidence buries him.

(R. 933). Later, the State asserted:

> The only issue that's come up in this case was one that came up in the opening statement in the case the defense made. Mr. Lewan stood at this podium and told you ladies and gentlemen, he said, 'Bill Haverty had an equal opportunity to kill Vronzettie Cox.'
> ...Now, when he gets up here to do his closing argument, ask him, Did you prove Bill Haverty did this?' And if you folks think that Bill Haverty did this first degree murder, strangled this woman, then you come back with not guilty. You come back and tell me and Mr. Cole and you tell the judge that he's not guilty, and he'll get up and walk out that back door of the courtroom with all of us.

(R. 937).

The jury found Mr. Hildwin guilty of first degree murder when it returned its verdict on September 4, 1986. The next day, the jury recommended the imposition of a death sentence. The judge

[8]The State did introduce statements made by Mr. Hildwin to law enforcement. However, these statements were not "confessions." Rather, the State argued that Mr. Hildwin's statements were argued as demonstrating that he knew too much and that thus he must have been the one who sexually assaulted the victim and then killer her.

imposed a death sentence on September 17, 1986. On direct appeal, this Court affirmed. Hildwin v. State, 531 So. 2d 124 (Fla. 1988).

On May 17, 1990, Governor Martinez signed a death warrant scheduling Mr. Hildwin's execution for July 17, 1990. Due to the crisis condition that the Office of the Capital Collateral Representative (hereinafter CCR) was in and its inability to handle Mr. Hildwin's case under the exigencies of an active death warrant, this Court issued a stay of execution on June 21, 1990, and it directed CCR to file the appropriate post-conviction pleadings challenging Mr. Hildwin's conviction and sentence of death on or before October 19, 1990. Subsequently, this Court granted an extension until October 24, 1990.

Thereafter, CCR on behalf of Mr. Hildwin filed a timely Rule 3.850 motion (PC-R. 1612). Later, CCR was permitted to amend the motion (PC-R. 1855-2090). Beginning on February 24, 1992, an evidentiary hearing was conducted on three of Mr. Hildwin's claims for relief (PC-R. 3032-3883).

At the evidentiary hearing, Mr. Hildwin presented evidence in support of his claim that he was innocent of the murder for which he had been convicted. Mr. Lewan testified that the State's case against Mr. Hildwin allowed for only an hour or hour and a half window during which Mr. Hildwin could have committed the murder and that any information indicating the victim was alive after this time period "would have effectively destroyed the State's case" (PC-R. 3060).

Mr. Lewan testified that his theory of defense at trial was that the victim's live-in boyfriend, William Haverty, was the actual killer (PC-R. 3063-64).

At the 1992 evidentiary hearing, Mr. Lewan was shown the documents that Mr. Hildwin had alleged in his Rule 3.850 motion contained a wealth of exculpatory information that had either not been disclosed by the State to Mr. Hildwin's trial counsel, or that Mr. Hildwin's trial counsel unreasonably failed to discover and present at Mr. Hilwin's trial.

This exculpatory information that was not heard by Mr. Hildwin's jury included information appearing in police reports reflecting that the victim's nephew had seen the victim alive on the afternoon of September 10, 1985 (Exhibits 18 and 21 from the February 24, 1992, evidentiary hearing). In an interview with law enforcement, the victim's nephew, Terry Moore, was "sure" he had seen the victim at a bar about 11:15 p.m. on September 9, 1985 (Exhibit 18 from the February 24, 1992, evidentiary hearing), more than twelve hours after the time period in which the State contended that the victim had been murdered by Mr. Hildwin. Moore told law enforcement that he had spoken with the victim for 3 or 4 hours at the bar, and then the victim left in her car with her boyfriend. During his conversation with the victim, Mr. Moore observed that her boyfriend "appeared not to be too happy" (Exhibit 18 from the February 24, 1992, evidentiary hearing). A few days earlier before their conversation

late at night on September 9, 1985, the victim had asked Moore "to fix a unknown enemy's car so that it didn't run" (Exhibit 18 from the February 24, 1992, evidentiary hearing). According to Moore, the "unknown enemy" was someone who had lived with the victim.

Mr. Lewan testified at the 1992 evidentiary hearing that the report that detailed what Moore had advised law enforcement regarding his three or four hour conversation with the victim on the night of September 9th contained significant information that would have been very helpful to the defense (PC-R. 3083-85). Moore's account showed that the victim was alive twelve hours after the State contended that Mr. Hildwin had murdered her. Further, Moore's statement demonstrated that the victim was feuding with someone who lived with her and was trying to hire someone to destroy her antagonist's car.[9] This supported Mr. Lewan's theory of defense that Haverty had committed the murder.

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[9]Mr. Lewan testified that the information set forth in the police report concerning Moore's statement was so significant that he would have remembered if he had possessed it and he undoubtedly would have called Moore as a witness at Mr. Hildwin's trial. Mr. Lewan explained:

> A. I know that the contents of this report was not disclosed to me. Something of that significance, that is, the victim being in a bar 12 hours after she was allegedly killed by my client, would have been something I would recall. Especially considering Mr. Moore is apparently related to the victim, he would have personal knowledge of her and be very difficult for him to be mistaken, I would expect.

(PC-R. 3087). Mr. Lewan would have used the information in the report because "this goes directly to the State's case and this elaborate time table that they developed" (PC-R. 3088).

The exculpatory information that was not heard by Mr. Hildwin's jury appearing in yet another police report was the representation that the last time the victim was seen alive was when she was observed in a bar at 2 p.m. on September 10 (Ex. 21 from the February 24, 1992, evidentiary hearing). Mr. Lewan testified that the report "was exactly the kind of information I needed to refute the State's case" (PC-R. 3081).

The exculpatory evidence not heard by Mr. Hildwin's jury also included police reports reflecting suspicious behavior by the victim's live-in boyfriend, William Haverty, after her disappearance (Exhibits 16, 20, and 41 from the February 24, 1992, evidentiary hearing). Two police reports discussed Haverty's suspicious conduct at the time the victim was reported missing and when her body was located. At the time the victim was reported missing, Haverty "did not appear upset, but tried to act important by demanding we check our tow log, the hospital, F.H.P., but said don't bother with city P.D. because she would not be in thier [sic] area" (Exhibit 16 from the February 24, 1992, evidentiary hearing).[10] When the victim's body was located, police noted in a report:

> [Haverty] became somewhat theatrical in his motions temporarily and then appeared to show no remorse or concern whatsoever. During this interview whatever mood everybody else went was the mood that he went to, if you were serious he was serious, if you cracked a joke he laughed along with you. When relating his story in his sequence of times, Mr.

[10]Mr. Lewan testified that this report contained information which would have been helpful to the theory of defense and would have been pursued had he been aware of the report (PC-R. 3063-65).

> Haverty was very quick in his responses almost as though his story had been
> rehearsed. IT SHOULD ALSO BE NOTED that initially when Mr. Haverty was questioned about Monday morning prior to Ronnie leaving the residence to go to the bank and do the laundry he did not mention anything about having sex with her prior to her leaving however, at the and of this interview when he was requested to give hair standards, at that time he made the remark that he had sex with her prior to her leaving therefore teh (sic)
> hair standards would not help. IT SHOULD ALSO BE NOTED when Mr. Haverty was advisd (sic) that on Friday night everybody was looking for him in the Bars in an attempt to talk to him, he spontaneously started to make the remark, "I knew you would be" and then he caught himself and stopped making the remark. Mr. Haverty's body language portrayed him to be very nervous from time to time and then he would mellow out, however he kept wanting to know where the vehicle was found and how she was killed. No mention of this was made to him. Every time you would refer to him being in the area north of Hexam Road, he was very emphatic he would take a short cut to go across to the trailer. The only place he has been in the area out there would be to Took behind Camp a Whyle where he would fish.

(Exhibit 41 from the February 24, 1992, evidentiary hearing).[11]

Another police report contained observations made by the victim's sister of suspicious activity within the victim's trailer days after when the State alleged the homicide had occurred:

> Writer called Mrs. Moore [the victim's sister) and was advised that she went to the victim's trailer on 9/12/85 to look for victim and on 9/13/85 around 11:00 a.m, she went back to the victim's trailer and noticed the victim's watch on a sink. The watch was not on the sink on 9/12/85 according to Moore. She also noticed a knife in a sheath on the kitchen table that she says was not there on 9/12/85. She stated that she belived (sic) Bill Haverty was headed to Ohio. Also

[11]Mr. Lewan testified that this report contained "significant" information which would have been helpful to his theory of defense (PC-R. 3065-67). Had he been aware of the report, he would have investigated further, and presented the information to the jury.

> stated that victim went fishing often at the lake where her body was found.

(Exhibit 17 from the February 24, 1992, evidentiary hearing).[12]

The exculpatory evidence not heard by Mr. Hildwin's jury also included police reports reflecting the discovery of a note in the victim's trailer which she shared with her boyfriend. The handwritten note stated: "Fuck off and die". The note further advised its recipient that if the recipient "didn't like it at the house" the recipient "could leave" (Exhibit 19 from the February 24, 1992, evidentiary hearing). Because the victim shared the trailer with Mr. Haverty, the note seemingly was a correspondence between the two of them. A deputy testified in 1992 that Haverty had told law enforcement that he had been the one who wrote the note, meaning that the victim was the recipient of the note (PC-R. 3728, 3746).[13]

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[12]Mr. Lewan testified that this report contained "helpful" information which supported his theory that the homicide did not occur on Monday, September 9, 1985, but in fact occurred a day or two later (PC-R. 3068-69). Mr. Lewan also testified that the report contained evidence of Haverty's desire to leave the area which may have been used as evidence of flight and hence Haverty's guilt (PC-R. 3069-70). Mr. Lewan testified that he would have presented this information to the jury had he been aware of it.

[13]Mr. Lewan testified that the note would have supported his theory of defense at trial:

> A. Sure. Part of the theory at the defense was that the relationship between the victim and Mr. Haverty had been deteriorating, and this would have been evidence of that deterioration.

However, Mr. Lewan had not seen the note "before just now" (PC-R. 3856). He had "no question" that he would have introduced the note at trial (PC-R. 3858-59).

The exculpatory evidence not heard by Mr. Hildwin's jury also included additional information regarding the victim's troubled relationship with Haverty. Notes from the State's pretrial interview of Tracy George included George's observations of the turbulent relationship between Haverty and the victim and of Haverty's suspicious behavior.[14]

[14]Mr. Lewan testified that had he been aware of the information related by George to the State, he would have presented it at trial because it was consistent with the defense theory that Haverty committed the murder (PC-R. 3079).

George's statement to the State was at odds with the testimony of James Weeks who the State had called at Mr. Hildwin's trial to provide Haverty an alibi for the morning of September 9, 1985. After Haverty testified that Weeks mowed the lawn at the trailer he shared with the victim on the morning of September 9 (R. 840), Weeks was called and testified that Haverty was at the trailer when Weeks mowed the lawn (R. 848-49). However, according to George, who was Weeks' nephew, Weeks actually mowed the lawn on September 2, not on September 9 (PC-R. 3516). George's parents owned the trailer in which the victim and Haverty lived (PC-R. 3851). George was at the trailer on the Thursday or Friday before Labor Day, 1985 (PC-R. 3517). The victim and Haverty were moving in on that day (PC-R. 3518, 3853). George remembered the time the victim and Haverty moved into the trailer because George was arrested and put in jail on Labor Day, September 2, 1985 (PC-R. 3520-21). According to notes of the State's interview with Weeks, Weeks cut the grass at the trailer on the Monday after the victim and Haverty moved in (PC-R. 3647), which was September 2, 1985. Thus, according to this information in the State's possession, Haverty did not have an alibi for the morning of September 9.[15]

[15]In fact, Mr. Lewan testified at the 1992 evidentiary hearing that all of this favorable information had a synergistic effect. Each piece of information amplified and supported the significance of each other:

> I think what you're talking about is weaving a fabric of a defense as opposed to just using individual threads, and each one of these taken individually would be more of a thread of a defense. But put together and woven

The exculpatory evidence presented at the 1992 hearing which had not been heard by Mr. Hildwin's jury included information impeaching the trial testimony of Robert Worgess, a jailhouse informant who claimed that Mr. Hildwin had made inculpatory statements while in jail. What the jury did not learn was that Worgess had reason to curry favor with the State by assisting the State. Indeed, Worgess received benefit from his testimony, and the jury did not know about it. The undisclosed impeachment evidence included the fact that Worgess had been charged with lying to his probation officer. Though Mr. Lewan knew that Worgess had a pending VOP, he did not know that one of the allegations was that Worgess had lied to his probation officer. However, Worgess had also been charged with grand theft (PC-R. 3091-94). Mr. Lewan knew nothing about the pending grand theft charge (PC-R. 3094). The proceedings against Worgess were continued until after Mr. Hildwin's trial. Mr. Lewan was not only unaware of the grand theft charge, he was unaware that it and the sentencing on the VOP was postponed until after Mr. Hildwin's trial. Mr. Lewan was further unaware that at the hearing on Worgess' pending charges, the prosecutor from Mr. Hildwin's trial would appear and request Worgess' immediate release (Exhibits 22, 23, and 42-48 from the February, 1992, evidentiary hearing). Mr. Lewan

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> correctly, I think, yes, you're talking about a bona fide defense theory here that could have been used.

(PC-R. 3079-80). Had he been aware of the police reports and notes, Mr. Lewan testified that he would have presented the information contained in them to the jury.

after reviewing the exhibits testified that the documentation showed "that the State had some understanding with Mr. Worgess. And Mr. Worgess, if he gave his testimony at Mr. Hildwin's trial, then would receive favorable treat to be released" (PC-R. 3098). Had he been aware of the information contained in the documentation, he would have presented it Mr. Hildwin's trial in order to impeach Worgess.

At the 1992 evidentiary hearing, Mr. Hildwin's trial attorney, Mr. Lewan, testified when shown all of the unpresented exculpatory evidence, that he would have presented the favorable information had he known of it because it was consistent with his theory of defense, *i.e.* the victim's boyfriend, Haverty, was the actual killer, and that the murder did not occur at the time alleged by the State (PC-R. 3059-60, 3064-73, 3080-88). However according to Mr. Lewan, the documents that he was shown in 1992 were not disclosed to him by the State prior to or during Mr. Hildwin's 1986 trial (PC-R. 3061, 3066, 3068, 3071, 3080, 3083, 3094).

According to the testimony from members of the prosecutorial team, Mr. Lewan was given access to all of the documents and information in the State's possession at a pre-trial meeting in the State Attorney's Office (PC-R. 3597, 3661, 3724, 3797, 3815). These prosecutorial team members testified that Mr. Lewan only conducted a "limited" review of the materials in which he did not spend

much time conducting the "limited" review, but merely "flipped through" the materials (PC-R. 3599, 3626, 3816).[16]

Following the conclusion of the 1992 evidentiary hearing, the circuit court denied Mr. Hildwin's Rule 3.850 motion. Mr. Hildwin then appealed to this Court. Though this Court affirmed the denial of guilt phase relief, it concluded that relief was warranted on Mr. Hildwin's penalty phase ineffective assistance of counsel claim. This Court explained:

> The trial court found, and we conclude, that trial counsel's performance at sentencing was deficient. Trial counsel's sentencing investigation was woefully inadequate. As a consequence, trial counsel failed to unearth a large amount of mitigating evidence which could have been presented at sentencing. For example, trial counsel was not even aware of Hildwin's psychiatric hospitalizations and suicide attempts.

Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla. 1995). This Court concluded that substantial metal mitigation presented by Mr. Hildwin through the testimony of Dr. Joyce Carbonell and Dr. Michael Maher demonstrated that Mr. Hildwin had been prejudiced by his trial counsel's deficient performance. Hildwin, 654 So. 2d at 110 ("In view of the substantial mitigating evidence presented at the 3.850

[16]Tom Hogan, the lead prosecutor at Mr. Hildwin's trial, testified that he "didn't feel that Mr. Lewan was being very aggressive in his discovery" (PC-R. 3663). As a result, Jane Phifer, an investigator with the State Attorney's Office, arranged the entire prosecutor's file on a table in the State Attorney's Office and had Mr. Lewan come to the office so that he could inspect the documents spread out on the table (PC-R. 3597-99). Employees of the prosecutor's office were available to make copies of any documents that Mr. Lewan wanted a copy of, but he took only "limited" advantage of this opportunity (PC-R. 3599).

hearing, including the testimony of two mental health experts, we find that counsel's errors deprived Hildwin of a reliable penalty phase proceeding.").

After the case was remanded to the circuit court so that a new penalty phase could be conducted, the Public Defender again withdrew due to a conflict of interest. Pursuant to a local contract, private attorneys Richard A. Howard and William H. Hallman, III, were appointed to represent Mr. Hildwin.

The new penalty phase took place September 23 through 26, 1996. The jury recommended the death sentence by a vote of eight to four (R2. 264). The presiding judge reimposed a sentence of death on December 4, 1996 (R2. 463).

Thereafter, Mr. Hildwin's appeal was heard by this Court. Following briefing and oral argument, this Court affirmed the imposition of a death sentence. Hildwin v. State, 727 So. 2d 193 (Fla. 1998).

On January 7, 2000, the Office of the Capital Collateral Representative, Middle Region (CCRC-Middle), filed a "shell" Motion to Vacate Judgment and Sentence with Special Request for Leave to Amend.

On May 2, 2000, the circuit court issued an order requiring Mr. Hildwin to file a fully pled 3.850 motion by October 4, 2000. Subsequently, the deadline for filing a fully pled 3.850 motion was extended to January 16, 2001.

CCRC-Middle filed a Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend on January 16, 2001 (hereinafter the "January 16, 2001 Motion"). CCRC-Middle filed a Successive Motion to Vacate Judgment and Sentence and Consolidated Motion for DNA Testing on June 29, 2001 (hereinafter the "June 29, 2001 Motion").

A Huff hearing was held before the circuit court on August 1, 2001. On September 14, 2001, the circuit court issued an order addressing each of the claims from the January 16, 2001 and June 29, 1001 motions. The January 16, 2001 motion was an original postconviction motion directed at the resentencing proceeding. The first claim dealt with public records requests. The Court relied on an earlier order that dealt with this issue. The Court granted an evidentiary hearing on Claim II, and a "limited evidentiary hearing" on Claim VIII. Regarding Claim III, the Court stated that, although it was styled as a claim of ineffective assistance of sentencing counsel, it was in reality an attempt to relitigate the guilt phase of the trial and was accordingly barred. Claims IV, V, VI, VII, and IX were summarily denied. The June 29, 2001 motion contained six claims, all of which were directed at the original guilt phase trial. The Court summarily denied Claims I, III, IV, and V. Claim II alleged that counsel at the first trial had a conflict of interest. The Court granted a "limited evidentiary hearing" on that claim. Claim VI alleged that newly available DNA testing would show Mr. Hildwin's

innocence. The Court noted that new Fla. R. Crim. P. 3.853 was about to come into effect, and denied the claim "without prejudice to allow Hildwin the opportunity to amend his pleading to plead in conformance with the Rule and statute."

On November 2, 2001, Mr. Hildwin filed a Motion for DNA Testing pursuant to Fla. R. Crim. P. 3.853. DNA testing was performed. The results from the DNA testing excluded Mr. Hildwin as the donor of the semen and saliva found on the clothing on top of the laundry bag which had been introduced at trial as having been deposited by the individual who committed the murder. After the circuit court denied Mr. Hildwin's motion seeking a new trial, Mr. Hildwin appealed. This Court heard the appeal and ultimately issued an opinion affirming the denial of a new trial over the dissent of three justices. Hildwin v. State, 951 So.2d 784 (Fla. 2006).

After this Court's 2006 decision, CCRC-Middle filed a motion for an evidentiary hearing in the circuit court on behalf of Mr. Hildwin on September 21, 2007 (PC-R3. 1761). This motion was premised upon the discussion at a February 4, 2003, status conference regarding a request that the penalty phase ineffectiveness claims be held in abeyance pending resolution of the DNA issues which concerned whether Mr. Hildwin should receive a new trial. The circuit court indicated at the February 4th status that it seemed an evidentiary hearing would be warranted.

On February 20, 2008, a status hearing was held on the motion for an evidentiary hearing, and the parties were directed to file a memoranda of law addressing whether the motion should be granted (PC-R3. 1819). On August 21, 2008, over the State's objection, the circuit court issued an order granting the motion and ordering an evidentiary hearing on Claims II and VII of the January 16, 2001 Motion and Claim II of the June 29, 2001 Motion (PC-R3. 2035). Subsequently, the evidentiary hearing was held on January 20-21, 2009.

At the 2009 evidentiary hearing, Mr. Hildwin's collateral counsel called four witnesses: Drs. Greenbaum and Berland, and the two lawyers who represented Mr. Hildwin in his 1996 resentencing proceedings, William Hallman and Richard Howard. Both sides introduced a number of documentary exhibits. The State did not call any witnesses.

Dr. Richard Greenbaum, a forensic psychologist who has developed an area of expertise in dealing with posttraumatic stress disorder, first examined Mr. Hildwin in 2000. At that time he diagnosed Mr. Hildwin as suffering from a posttraumatic stress disorder. He did not turn his attention to the case again until 2008 because of the intervening DNA litigation. As a component of his evaluation he conducted an extensive review of records, which included relevant depositions and testimony, institutional school and mental health records, and consultation with Dr. Berland. He

reviewed the Florida Supreme Court decisions in these cases and relied on them for their factual findings.

Dr. Greenbaum re-interviewed Mr. Hildwin in 2009 and administered additional psychological tests. At that time, Hildwin was suffering from cancer, which affected the evaluation process. Nevertheless Dr. Greenbaum was able to reach a diagnosis of borderline personality disorder, posttraumatic stress disorder, and underlying paranoid schizophrenia. Dr. Greenbaum discussed the psychological testing administered to Mr. Hildwin in detail at the hearing. According to Dr. Greenbaum, Mr. Hildwin's performance on the tests revealed "marked emotional upset or stress" and evidence of "great upset around the ages of 10 or 11" (PC-R3. 2364-65). The tests showed "a tendency to decompensate; that is, to come apart." They further reflected a "tendency to act out, difficulty in maintaining ... reality/fantasy barriers, no inner security ... depression," and "paranoid projection" (PC-R3. 2365-66). All of Mr. Hildwin's responses were either consistent with or positively indicative of posttraumatic stress disorder. Dr. Greenbaum consulted with Dr. Berland and both said that their clinical impressions were consistent.

Dr. Greenbaum said that posttraumatic stress disorder was an accepted diagnosis in 1996, when Mr. Hildwin's resentencing took place, and in fact he referred to the well known experience of "shell shock" in World War I. "It's been around forever." He indicated that

the battery of tests he administered had been finalized about 40 years ago (PC-R3. 2384).

Mr. Hildwin's responses during Dr. Greenbaum's interview also supported the doctor's diagnosis. Mr. Hildwin's mother died as the result of a coronary artery incident when Mr. Hildwin was around 2 or 3 years old, and his father blamed him for it. His father beat him repeatedly and once threatened to blow out his brains while brandishing a gun. When Mr. Hildwin was around 13, his father abandoned him and his brother on a mountainside in the winter and said: "I'm going to Florida. I can't afford to take you" (PC-R3. 2386). Mr. Hildwin was in a foster home a number of times. His stepmother reportedly threw diaper with feces in it in his face (PC-R3. 2387).

Dr. Greenbaum explained that it is common for those suffering from posttraumatic stress disorder to have substance abuse problems as well, which was well documented in Mr. Hildwin's case. Although Dr. Greenbaum admitted on cross examination that some of the subcriteria for posttraumatic stress disorder were either absent or could be attributed to Mr. Hildwin's present status as a prisoner rather than his circumstances prior to the murder, he stuck with his opinion. He said "I'm sure it's there . . . he's got posttraumatic stress disorder; I don't think there's any question about that" (PC-R3. 2407-08). He was also "sure" that PTSD existed at the time of the murder (PC-R3. 2409). He also noted that he originally

diagnosed Mr. Hildwin with PTSD in 2000, before Mr. Hildwin contracted cancer (PC-R3. 2417).

Dr. Berland testified about the circumstances of his appearance as an expert witness for the defense in 1996 at the second penalty phase proceeding in Mr. Hildwin's case. Overall he said that he had been rushed (PC-R3. 2479). He said that his exclusive contact with the defense team was through attorney Ric Howard and to a lesser extent through the defense investigator, Everett Dick. He never met Mr. Hallman.

Dr. Berland reviewed his time worked log from 1996. Unlike the attorneys in this case, Dr. Berland kept a contemporaneous log of the time he worked on the case, and he agreed that he was motivated to insure that it was accurate and inclusive because that was how he got paid. His log reflected a total of only one hour and thirty minutes devoted to trial preparation with counsel (PC-R3. 2437).

Dr. Berland said that he read both this Court's sentencing order and the Florida Supreme Court's account of his 1996 testimony and that there were assertions in both which had "rankled" him for 13 years (PC-R3. 2439). One of those assertions was that he "had not talked with any lay witnesses [to events] after 1979 as if [he] had made a choice not to do so." He was referring to his admission on cross examination during the 1996 proceeding that he had been unsuccessful in speaking with anybody who had contact with Mr. Hildwin since 1979. He said that he "had, in fact, asked the attorney and

the investigator ... while I was preparing and calling lay witnesses for contact information for the three women who saw him, the defendant, the night of the offense and had been told they were unavailable" (PC-R3. 2441). Dr. Berland explained that lay witness interviews have been a part of "what is considered to be the correct standard of practice for this kind of case" (PC-R3. 2446). He has done it as a routine part of his work in capital cases for 30 years.

The three individuals Dr. Berland wished to interview were Jeannie Fredere (Lucash), Michelle Hope, and Cynthia Wriston. Dr. Berland was able to locate and interview these individuals with the assistance of CCRC in preparation for the 2009 evidentiary hearing (PC-R. 2443). The gist of Dr. Berland's testimony at the 2009 evidentiary hearing was that, while the interviews provided little or no information which would have altered the substance of Dr. Berland's 1996 testimony, his routine practice was such that he would have conducted the interviews at that time if he had been able to do so and would therefore have been able to rebut the inference that his testimony should be disregarded or given less weight because of his failure to do so.

Dr. Berland observed that the kind of information he sought in lay witness interviews was not the kind that could be gleaned from police reports, depositions and the like. For one thing, he did not like going into court relying on the uncorroborated report of the defendant, which is to some extent what happened here (PC-R3. 2443).

His focus was on brain injury and biological mental illness, so his questions were primarily devoted to corroboration and validity of symptoms of psychosis. He said that "those kinds of things are not the kinds of questions that are being asked by investigators, attorneys, or law enforcement" (PC-R3. 2448).

Dr. Berland said that he had standardized questions and gave as examples whether the subject became angry or upset in response to little or no provocation, whether the witness observed suspiciousness or lack of trust, mumbled to himself, thought his name was being called when it was not, heard noises around the house at night from things that weren't there, showed signs of mood disturbance, episodes of sluggishness, and so on (PC-R3. 2446-47). Normally the interviews require "at least" 45 minutes and sometimes up to an hour and a half to conduct (PC-R3. 2455). By reviewing his contemporaneous time logs, Dr. Berland could say that at the time of the resentencing proceedings in 1996 he tried to contact the three individuals he named, but was unable to do so on his own. He said that he did request assistance from Mr. Howard and Mr. Dick, but "the main thing that I remembered was that I had been told those three people that I had been looking for were unavailable" (PC-R3. 2455).

Dr. Berland also referred to a point in his 1996 testimony where he was asked about whether Mr. Hildwin's emotional or mental disturbance could be characterized as "extreme" for purposes of determining the existence of a statutory mitigating circumstance

(PC-R3. 2456). He said that he declined to answer the question because, at the time, he was unaware of the decision in State v. Dixon, 283 So.2d 1 (Fla.1973). Indeed, in Dixon the Florida Supreme Court explained that extreme mental or emotional disturbance "is easily interpreted as less than insanity but more than the emotions of an average man, however inflamed." Dixon, 283 So.2d at 10.

Dr. Berland did not recall ever having a discussion about the matter with anyone on the defense team. William Hallman served as co-counsel during the 1996 proceeding. Rick Howard, lead counsel, had already been working on the case for some time. Mr. Hallman had not had any capital case exposure prior to this case (PC-R3. 2457).

The conflict contract under which both Mr. Hallman and Mr. Howard were appointed in this case did not require that a contemporaneous time worked log be kept, and there is no equivalent documentation with regard to either of them. Both of them repeatedly said that they could not recall events from that long ago and simply deferred to the record.

Mr. Hallman's assignment or focus of attention was Dr. Maher (PC-R3. 2492). He had no recollection of speaking with Dr. Maher prior to the latter's deposition by the State on August 20, 1996. A statement of services rendered reflects that Dr. Maher's first contact with either of the attorneys lasted for only two tenths of an hour, and took place on the day of the deposition (PC-R3. 2495).

Mr. Hallman discussed an exchange of letters between himself and Dr. Maher (Def. Ex. 4). In it Dr. Maher described the deposition as being "unexpected." Mr. Hallman did not recall why the deposition would have been unexpected or why that would have been said (PC-R3. 2499). The letter also referred to a significant amount of work that Dr. Maher anticipated doing prior to the hearing itself, thus indicating that he had not done that work prior to the deposition (PC-R. 2499). According to Mr. Hallman, Dr. Carbonell was Mr. Howard's responsibility (PC-R3. 2504, 2510). Mr. Hallman was merely asked to cover the deposition of Dr. Carbonell that took place on September 6, 1996.

Mr. Hallman testified that Dr. Carbonell expressed surprise that she was to be a witness at the deposition. Mr. Hallman said that he had some concerns about her being a witness as a result of the deposition, but all he did was relay them to Mr. Howard (PC-R3. 2505). However, he could not recall with any specificity what those concerns were. In any event, the attorneys said they still intended to call her as a witness right up until the trial (PC-R3. 2502). The defense had an arrangement with Hernando County to arrange for travel and lodging of witnesses, and this had been done with regard to Dr. Carbonell (PC-R3. 2509). She was not stricken as a witness by the defense until the eve of trial (PC-R3. 2501).

According to Mr. Hallman, Dr. Carbonell was very angry about the way she was served with a subpoena to appear at the penalty

phase (PC-R3. 2508). Mr. Hallman was not sure who called whom, but he related two telephone calls, one at his office and another one at his home, at which Dr. Carbonell complained angrily about the way she had been served. Mr. Hallman could not recall why it was he who participated in these phone calls rather than Rick Howard, but he thought it might be because it was his secretary who initiated a follow up telephone call with Dr. Carbonell to see if she had been served (PC-R3. 2510-11). He relayed the matter to Mr. Howard who took it from there (PC-R3. 2511).

When asked about the defense team's communications with Mr. Hildwin concerning the decision not call certain other witnesses including Dr. Carbonell, Mr. Hallman testified:

> I know that Ric Howard had very good communications with Mr. Hildwin, or I felt that he did. I felt also that I did. But he seemed to communicate well with Mr. Hildwin throughout, and also, Mr. McLane [sic], who was also sitting right behind us to assist with anything we were discussing. Mr. Howard and Mr. McLane had been communicating from very early in this case, so I know there was a lot of communications going on between Everett Dick, Ric Howard, Mr. Hildwin, myself, and to some extent, Mr. McLane, who was sitting right behind us.

(PC-R3. 2518-19).[17]

[17]The Assistant Attorney General representing the State at the 2009 proceedings sought clarification regarding "Mr. McLane":

> Q Mr. Hallman, who is Mr. McLane [sic]?
>
> A He was with the - - he handled the previous proceedings with Mr. Hildwin. He was the attorney.
>
> Q The post-conviction proceedings?
>
> A Yes, sir. Yes, sir, I'm sorry.

However, it should be noted that when undersigned counsel, Martin McClain, was appointed to represent Mr. Hildwin in the pending appeal, he was asked to respond to the State's assertion that if he had been present at the 1996 penalty phase proceedings and assisting the defense as asserted by Mr. Hallman, he would be burdened with a conflict of interest that would preclude him from being able to represent Mr. Hildwin in this appeal. As undersigned counsel explained in his Reply to the Motion to withdraw filed on February 11, 2010:

> 5. I did not participate in Mr. Hildwin's resentencing. I have gone through all records that are available to reconstruct my past representation of Mr. Hildwin. Following the original imposition of a death sentence and its affirmance on direct appeal, the Office of the Capital Collateral Representative (CCR) in Tallahassee undertook Mr. Hildwin's collateral representation in 1990. I had worked for CCR between January of 1988 and May of 1990. Only after my departure in 1990 did Mr. Hildwin's case go to CCR. When I returned to CCR in February of 1991 as the Chief Assistant, my involvement in Mr. Hildwin's case began. I participated as lead counsel at the evidentiary hearing held on Mr. Hildwin's Rule 3.850 motion in February of 1992. When the motion was denied in circuit court after the conclusion of the hearing, I served as lead counsel on Mr. Hildwin's appeal to this Court.
>
> 6. After the submission of briefs and after Mr. Hildwin's appeal was orally argued, this Court reversed his

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Q This would be Martin McLane [sic]?

A Right, Marty McLane [sic].

Q Okay. Formerly of CCRC?

A That's what I understand, yes sir.

(PC-R3. 2519).

> sentence of death and ordered the circuit court to conduct a resentencing before a new jury panel. Once this Court's decision became final in May of 1995, the matter returned to the circuit court where new counsel was appointed to represent Mr. Hildwin. Thereafter, I traveled to Brooksville once to deliver files and records to Mr. Hildwin's resentencing counsel. At that time, I met with the newly appointed lawyer. I shared with him some background of Mr. Hildwin's case in order to facilitate an orderly transfer of responsibility for Mr. Hildwin's legal representation. I was not permitted by CCR to have any involvement with Mr. Hildwin's resentencing beyond my work in arranging the transfer of the case to newly appointed counsel. To the extent that the new attorney had follow up questions and called me on the phone, questions would certainly have been answered based upon my historical knowledge of the case. However, I almost immediately lost contact with the newly appointed attorney. I had no knowledge as to the proceedings in circuit court leading up to the resentencing. In fact, I was unaware of when the resentencing occurred and had no knowledge of what transpired at the resentencing.
>
> 7. The record in Mr. Hildwin's case shows that his resentencing occurred in September of 1996. However, not only was I precluded by my boss at the time, Mr. Minerva (who was then the CCR), from involvement in Mr. Hildwin's resentencing, active warrant litigation was ongoing in addition to an extremely taxing non-warrant litigation schedule that was swamping CCR. The overburdened CCR was recognized as stretched beyond its capacity. As a result, the legislature created separate branch offices while increasing CCR's staffing and budget.
>
> 8. The Governor signed a death warrant in John Bush's case in September of 1996. While I was not lead counsel on behalf of Mr. Bush, I was coordinating the litigation concerning the electric chair and the efforts to obtain a court order directing that the execution be videotaped. This was in addition to the impossible case load I carried in addition to my duties as the Chief Assistant overseeing CCR. I was unaware of Mr. Hildwin's resentencing proceedings when they were ongoing and had no involvement in the preparation for the resentencing, nor was I involved in the tactical decisions made Mr. Hildwin's court-appointed counsel.

Reply to Motion to Withdraw as Counsel filed on February 10, 2010, in Case No. SC09-1417 (footnotes omitted).

Mr. Howard appeared and testified at the 2009 evidentiary hearing. He said that he was appointed lead counsel pursuant to the local public defender conflict contract. The contract paid a flat fee for cases. As a result, neither Mr. Howard nor Mr. Hallman maintained contemporaneous activity logs in Mr. Hildwin's case (PC-R3. 2528).

Mr. Howard retained Dr. Berland to evaluate Mr. Hildwin. Mr. Howard was the one who worked with Dr. Berland throughout the case. However, Mr. Howard was unable to say how much time he actually spent with Dr. Berland doing anything in preparation for the case. "It would be sheer speculation" (PC-R3. 2531).

Mr. Howard was asked about the excerpt from Dr. Carbonell's deposition in which she said that she did not anticipate being a witness at the resentencing (PC-R3. 2536). He said that he did not recall advising her that she was not going to be a witness (PC-R3. 2536). Mr. Howard recounted his understanding of the angry phone exchange between Dr. Carbonell and Mr. Hallman. He thought there might be some "personality" issue involved (PC-R3. 2536-37). As a result, he called her. The ensuing conversation "was not as personally offensive to me on the phone as it was related as she had been to Judge Hallman" (PC-R3. 2539).

After that conversation the defense filed a motion trying to use her former testimony (PC-R3 2537). The basis for the motion was that Dr. Carbonell had adopted a child and that due to her

circumstances, travel and testifying would be a hardship. In his 2009 testimony, Mr. Howard testified that he had concluded that Dr. Carbonell was going to be "hostile" if forced to appear and testify (PC-R3. 2538). According to Mr. Howard, he told both Mr. Hallman and Mr. Hildwin that "she's going to hurt my client. She's going to hurt my client if she has to come down here" (PC-R3. 2538-39).

However, Mr. Howard never testified that Dr. Carbonell in fact threatened to "hurt" Mr. Hildwin or threatened anything at all. Rather, it was merely Mr. Howard's personal opinion or rationalization which served as his justification for jettisoning Dr. Carbonell as a witness and not presenting her testimony which had been found to be so compelling when this Court ordered a new penalty phase on Mr. Hildwin's penalty phase ineffective assistance of counsel claim in 1995. Given Mr. Hildwin's awareness of Dr. Carbonell's 1992 testimony and its importance in obtaining Rule 3.850 relief, Mr. Howard's personal opinion was shared with Mr. Hildwin in order to placate him (PC-R3. 2539).

When questioned about a record reference to the effect that Dr. Carbonell was "hostile" to the attorneys rather than Mr. Hildwin, Mr. Howard said that he would have to rely on the record.

Mr. Howard was questioned about the following excerpt from Dr. Carbonell's 1996 deposition which was introduced at the 2009 hearing:

> Q.[By Mr. Ridgeway]: Would it be your intention to review the records or would you --

> A. [Dr. Carbonell]: I have no idea. I have no idea honestly. I had not planned on testifying. I thought I was not going to. The last time I had spoken to —
>
> THE WITNESS [sic]: It was not you. I spoke to someone else.
>
> MR. HALLMAN: Rick Howard.
>
> THE WITNESS: Rick Howard. He told me he would not use me as a witness. So it hadn't occurred to me to think about reviewing the records. I was startled when your office called me. I assured her that she had made a mistake, that I was probably still on the witness list by mistake. Because I have nothing I can tell you that is not in my deposition and is not in my report.

Deposition of Dr. Carbonell (Defense Exhibit E, at p. 42). After reviewing this excerpt, Mr. Howard disputed Dr. Carbonell's testimony in her deposition:

> She's incorrect ... I didn't tell her I wasn't going to use her as a witness.

(PC-R3. 2540).[18]

Mr. Howard was specifically questioned about Dr. Carbonell's assertion during her deposition that she had a conversation with someone on the defense team to the effect that she would not be called as a witness, that she had therefore not reviewed her file, and that the deposition caught her by surprise. Mr. Howard agreed that her reference to a conversation with someone on the defense team could not have referred to Mr. Hallman (PC-R3. 2540). That was also consistent with what Mr. Hallman's testimony, namely that he was merely covering the deposition for Mr. Howard and had not had any prior contact with her. However, Mr. Howard then suddenly volunteered that:

> It was either myself or Bud Hallman. I don't believe Everett Dick, who's the investigator, A, he would never hold himself out as an attorney, B, I don't know that he ever spoke to her at all.

[18]Of course as it turned out, Dr. Carbonell was correct and Mr. Howard did not call her as a witness. There would appear to be no explanation for the accuracy of her testimony which Mr. Howard disputed as incorrect, unless Dr. Carbonell was clairvoyant.

(PC-R3. 2540).

Clearly, logic dictates that the person that Dr. Carbonell spoke to on the defense team prior to September 6th was Mr. Howard, the attorney who was assigned as the member of the defense team to call her as a witness. Yet, his testimony on the matter concluded with an unequivocal assertion:

> Q That's what I'm getting at. Do you recall a conversation with Dr. Carbonell prior to September 6 of 1996?
>
> A No, I don't. As I recall I had one conversation with her and that was after she had made the comments to Bud Hallman.

(PC-R3. 2541-42).

Mr. Howard also reviewed the bills that he submitted for expert compensation (PC-R3. 2542). There were motions for payment of costs for both Drs. Berland and Maher, but none from the defense for Dr. Carbonell, which seemingly corroborates her testimony at the 1996 deposition that she was told that she was not going to be used at Mr. Hildwin's 1996 penalty phase.

Mr. Howard testified that all such billings would have gone through him (PC-R3. 2542-43). The only evidence of payment in the court file for Dr. Carbonell was made through the State, for her deposition on September 6 (PC-R3. 2542-43). In short, the record, to which Mr. Howard repeatedly deferred, clearly supports Dr. Carbonell's view that she was not going to be a witness for the defense, and was told so by Mr. Howard.

Mr. Howard said in essence that he did not recall anything about what Dr. Berland said about wanting to speak with certain lay witnesses and being told they were unavailable, when in fact they were available (PC-R3. 2547). He said that if Dr. Berland had requested access to certain witnesses that task would have been allocated to the investigator.

Mr. Howard testified:

> I remember when Michelle Hope's name came up. Mr. Hallman had said something to the effect that she was either a victim or defendant or always at the courthouse a lot, and that she was someone who's involved in the criminal justice system.

(PC-R3. 2551). But, the record belies Mr. Howard's testimony. In fact, Michelle Hope had been deposed on August 22, 1996. She had been listed as a witness by Mr. Howard and Mr. Hallman and attended the deposition. She was thus obviously available, and arrangements could have been made for Dr. Berland to interview her.

The record also shows that Cynthia Wriston (McFarlane) was interviewed by Dr. Maher, so she too was obviously available. She was also deposed September 18, 1996. The deposition was attended by Mr. Howard. Yet, Mr. Howard failed to arrange for Dr. Berland to interview Cynthia Wriston as Dr. Berland had requested.

Mr. Hallman also said that anything that involved furnishing institutional records to Dr. Berland would have been delegated to Mr. Dick. Yet, the record shows that Dr. Berland was furnished only minimal institutional records, and the defense

suffered for it. In fact, all of that information was already sitting in the court file from the 1992 proceeding.

On July 10, 2009, the circuit court entered an order denying Mr. Hildwin's motion for post-conviction relief (PC-R3. 2265). As to Mr. Hildwin's ineffective assistance of penalty phase counsel claim, the circuit court stated:

> Defendant's allegation that counsel was ineffective for "failing to adequately investigate, prepare, present, and provide to expert witnesses certain mitigating evidence as to the level of Defendant's mental or emotional disturbance at the time of the offense" simply fails to meet either prong of Strickland, i.e that counsel provided a deficient performance and second, that the deficient performance prejudiced the defendant. In fact, Dr. Greenbaum interviewed Hildwin twice and his testimony was the same, that Hildwin had suffered from post traumatic stress disorder. Dr. Berland testified that even if he had been able to locate and interview the witnesses prior to the re-sentencing his opinions and conclusions would not have changed. Thus, the defendant has failed to demonstrate any prejudice. Further, Dr. Carbonell may have in fact, hurt the defense. Both Hallman and Howard testified that after speaking with Dr. Carbonell her testimony would not be helpful to Hildwin's case if she was called to testify. As such, the Defendant has failed to overcome the burden as set forth by Strickland on this issue.

(PC-R3. 2269).

As for Mr. Hildwin's claim that penalty phase counsel was ineffective for failing to object to portions of the prosecutor's closing arguments, the circuit court relied upon Mr. Howard's testimony that he did not think that the comments made by the prosecutor were "particularly objectionable" (PC-R3. 2269). The circuit court then concluded that trial counsel had made a tactical decision not to object (PC-R3. 2269-70).

Mr. Hidlwin then filed a notice of appeal on July 29, 2009 (PC-R3. 2273).

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving questions of law and fact. Normally, where evidentiary development has been permitted in circuit court, rulings of law are reviewed *de novo* while deference to the trial court is given as to findings of fact. This Court has applied this standard of review as to ineffective assistance of counsel claims in which the claim was denied after the circuit court conducted an evidentiary hearing. Evans v. State, 946 So. 2d 1, 24 (Fla. 2006).

As to findings of historical fact, this Court explained in Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997): "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of witnesses as well as the weight to be given to the evidence by the trial court.'"

SUMMARY OF THE ARGUMENT

1. Mr. Hildwin's penalty phase counsel rendered deficient performance when he failed to present the mental health testimony regarding Mr. Hildwin which had been described by the court as "most persuasive and convincing", and instead chose testimony from a different mental health expert who counsel failed to provide with the readily available institutional records and failed to arrange access to witnesses so that the expert could interview them. Counsel's performance was deficient when he failed to provided the expert with either the relevant information or access to the relevant witnesses which were necessary for the expert's opinion to be "most persuasive and convincing". As a result, Mr. Hildwin was prejudiced when the "most persuasive and convincing" mental health mitigation was not heard by Mr. Hildwin's penalty phase jury, and the weight of the mitigation placed on the life side of scales on which the jury weighed the aggravation against the mitigation was substantially reduced. Moreover, the prejudice analysis requires consideration of the newly discovered evidence, *i.e.* the results of DNA testing which established that Mr. Hildwin was not the donor of the semen and saliva found on the victim's panties and on a wash rag found on the laundry bag in the victim's car. When the proper cumulative analysis is conducted, confidence in the reliability of the outcome of the penalty phase is undermined and the death sentence cannot stand.

2. Mr. Hildwin's counsel rendered deficient performance when he failed to know the law and know regarding the prosecutor's improper arguments in his closing remarks before the jury when seeking to have the jury return a death recommendation. To the extent that counsel not only testified that the prosecutor's remarks were not objectionable, but also that he would not object to improper argument as a matter of strategy because he believed that the jury might ignore an instruction from the jury to disregard the improper comments and instead give the remarks more credence, such a cynical strategy was not reasonable. Mr. Hildwin was prejudiced by counsel's deficient performance because when proper cumulative consideration is given to all of the deficiencies in counsel's performance and to the newly discovered DNA results, confidence in the reliability of the outcome of the penalty phase is undermined.

ARGUMENT

ARGUMENT 1

MR. HILDWIN'S SENTENCE OF DEATH VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE HIS PENALTY PHASE COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PRESENT THE MITIGATING EVIDENCE AT HIS 1996 PENALTY PHASE PROCEEDING.

A. Introduction

In Strickland v. Washington, 466 U.S. 668, 685 (1984), the Supreme Court explained that under the Sixth Amendment, "a fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." In order to guarantee that a constitutionally adequate adversarial testing occurs, constitutional obligations are imposed upon defense attorneys. Failures to function as required will generally warrant a new proceeding where confidence is undermined in the reliability of the outcome of the proceeding as a result of counsel's deficiencies. A specific duty imposed upon defense counsel is a duty to investigate and prepare in order to insure that the adversarial testing process properly functions in the particular case. Strickland, 466 U.S. at 690.

When presenting a challenge to the effectiveness of the representation that he received, a petitioner must show both that counsel's performance was deficient in some fashion and that as a result of the deficiency, the petitioner was prejudiced. In order

to demonstrate that counsel's performance was deficient, a petitioner must establish that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. In other words, the question is whether counsel's performance has the potential to undermine the adversarial process which must properly function under the constitution in order to guarantee that the results reached are reliable.

Second, the defendant must show that any deficient performance that is demonstrated resulted in prejudice to the defendant. This requires showing that counsel's errors actually undermine confidence in the reliability of the outcome of the proceedings in the petitioner's criminal case so as to deprive him of a fair trial and a reliable result. Strickland, 466 U.S. at 687.

As has been explained, to establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. On numerous occasions, the U.S. Supreme Court has addressed how this standard applies in a capital case to the penalty phase portion of the trial. In Wiggins v. Smith, 539 U.S. 510 (2003), the Supreme Court held:

> Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.

Wiggins, 539 U.S. at 538.

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness.

Id. at 535.

In making this assessment, the Supreme Court indicated that a reviewing court "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Id. at 538.

In Williams v. Taylor, 529 U.S. 362, 396 (2000), trial counsel was found to have rendered deficient performance when they only considered a narrow set of sources and did not attempt to introduce evidence of Williams' borderline intellectual functioning, prison records showing commendations, and testimony from prison guards that Williams would not likely be a danger in prison. Citing the commentary to the ABA Guidelines, the Court found that counsel's failures and omissions "clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." Id. at 397. The Court concluded that as a result of counsel's deficiencies, there was "a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence." Id. at 399.

Subsequently, in Rompilla v. Beard, 125 S.Ct. 2456, 2466 (2005), the Supreme Court noted:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.

In Rompilla, the Supreme Court held that "even when a capital defendant's family members and the defendant himself have suggested that no mitigation evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." Rompilla, 125 S.Ct. at 2460. The Supreme Court, in finding that counsel there rendered deficient performance, cited counsel's failure to review Rompilla's prior conviction, failure to obtain school records, failure to obtain records of Rompilla's prior incarcerations, and failure to gather evidence of a history of substance abuse. Id. at 2463. The Supreme Court in Rompilla further found that "this is not a case in which defense counsel simply ignored their obligation to find mitigating evidence, and their workload as busy public defenders did not keep them from making a number of efforts". Id. at 2462. However, despite the scope of this mitigation investigation, the Court still found that counsel rendered deficient performance.

In Rompilla, trial counsel spoke with several members of Rompilla's family and three mental health experts, none of whom had any particularly favorable or useful information. Rompilla himself was not very cooperative, even giving counsel fake leads, thus frustrating the gathering of information. Moreover, even the consultation with the three mental health witnesses who had examined Rompilla prior to trial turned up nothing fruitful. Rompilla, at 2563. And, the Supreme Court recognized that "the duty to investigate does not force defense lawyers to scour the globe on the off-chance that something will turn up; reasonable diligent counsel may draw the line to think further investigation would be a waste." Id. Nevertheless, the Supreme Court rejected the Commonwealth's argument that the information trial counsel gathered from Rompilla and other sources gave them reason to believe that further investigation would be pointless. Instead, the Court concluded that trial counsel's failure to examine the court file on Rompilla's prior conviction was deficient performance. Id.

This Court has been called upon to review numerous claims of ineffective assistance of counsel at a capital penalty phase. As this Court has held: "[A]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000), quoting Rose v. State, 675 So. 2d 567, 571 (Fla. 1996). The Eleventh Circuit has also explained that "[t]he primary purpose of

the penalty phase is to insure that the sentence is individualized by focusing [on] the particularized characteristics of the defendant. By failing to provide such evidence to the jury, though readily available, trial counsel's deficient performance prejudices [a petitioner's] ability to receive an individualized sentence." Cunningham v. Zant, 928 F.2d 1006, 1019 (11th Cir. 1991). Effective representation, consistent with the Sixth Amendment, also "involves the independent duty to investigate and prepare." House v. Balcom, 725 F.2d 608, 618 (11th Cir. 1984).

However, recently in Porter v. McCollum, 130 S.Ct. 447 (2009), the United States Supreme Court specifically addressed this Court's application of the governing standards for determining whether penalty phase ineffectiveness has been demonstrated. In Porter, the Supreme Court concluded that this Court and the Eleventh Circuit had failed to understand and properly apply the governing precedent.

In assessing deficient performance in Porter, the Supreme Court determined that, "It is unquestioned that under the prevailing professional norms at the time of Porter's trial, counsel had an 'obligation to conduct a thorough investigation of the defendant's background.' Williams v. Taylor, 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)." Porter, 130 S.Ct. at 452-53. The Supreme Court concluded that "[t]he investigation conducted by Porter's counsel clearly did not satisfy those norms." Id. at 452-53. The

Supreme Court found that when the proper prejudice analysis was conducted that Porter's death sentence could not stand as confidence in the reliability of the outcome had been undermined by counsel's deficient performance.

B. The factual basis of Mr. Hildwin's claim.

Mr. Hildwin's claim rests upon his counsel's failing in presenting the mental health mitigation which had been the basis for this Court's decision in 1995 to grant Rule 3.850 relief. In the proceedings leading to the grant of relief, Dr. Carbonell had testified in 1992 as to her findings. The presiding judge specifically noted that her testimony was "most persuasive and convincing" and this Court specifically relied upon this observation when vacating Mr. Hildwin's sentence of death. Hildwin, 654 So.2d at 110 n.8.

By contrast, the sentencing judge in 1996 described the testimony of the mental health experts offered at the 1996 penalty phase proceeding as "based on extrapolation, speculation, and conjecture." (R2. 477). According to this sentencing order reimposing a death sentence in 1996, the psychological mitigating evidence was not "particularly compelling." In the sentencing order, the sentencing judge said that the two statutory mitigators and five nonstatutory mitigatory proposed by the defense did in fact exist. However, the judge then critiqued the expert testimony supporting them and gave each of the mitigators only "some weight."

The sentencing judge's findings and rulings in this regard were addressed by this Court in Mr. Hildwin's direct appeal as a part of this Court's proportionality analysis. Indeed, this Court cited the sentencing order verbatim:

> There is also the problem of [the psychological experts] not having talked to sufficient people who knew the defendant around the time of the crime. Dr. Berland testified that he had talked to no one who knew the defendant after 1979, and thus didn't talk to any people who had been around the defendant close to the time of the murder. . . . Next, it should be noted that the experts, though generally agreeing with each other, subtly differ with one another in their analysis. . . Dr. Berland believes that the defendant was under the influence of mental or emotional disturbance at the time of the crime; however, Dr. Berland was not able to say that the defendant was under the influence of "extreme" emotional disturbance at the time, but only classified the defendant as suffering from a "mild to moderate" condition. Dr. Maher says that the defendant was under the influence of an "extreme" mental or emotional defect at the time of the crime. . . Dr. Maher spoke with a woman, Cynthia Wriston, who had known the defendant for some time and was with the defendant the night before the murder, who described the defendant as a "nice guy." Dr. Berland testified that the defendant should not ever be properly described as "a nice guy." Violet Hoyt described the defendant as "always polite." She further said that Paul was okay around her, and never gave her any trouble. Henry Hoyt said the defendant was very nice to him whenever he saw him. Patricia Lee Hildwin, who married the defendant while he was in prison, testified that she had never seen the defendant hit anybody and never saw the defendant with a quick temper. She said that she never observed any truly bizarre behavior from the defendant. Dr. Berland had testified that Ethel defendant would not have been fun to be around, and that he would have been an angry, irritable, volatile, explosive person.

Hildwin, 727 So.2d 193 at 197-98.

Of course, the glaring difference between the glowing description of the mental health testimony at the 1992 evidentiary

hearing and the 1996 penalty phase is the decision by the attorneys representing Mr. Hildwin at the penalty phase to in essence replace Dr. Carbonell's 1992 testimony with testimony from Dr. Berland in 1996.

At the 1992 evidentiary hearing, Dr. Carbonell testified that she had conducted neuropsychological testing and reviewed results from testing conducted by others, and that the testing showed that Mr. Hildwin had organic brain damage (PC-R. 3187-89, 3190-91). In addition, Dr. Carbonell had reviewed the institutional background records that had been compiled by collateral counsel and provided to her. These records were attached to the 1992 motion for postconviction relief as an appendix and are a part of the court file in this case. It is in this context that Dr. Carbonell's testimony, and the testing and record data underlying it, was found "most persuasive and convincing." Hildwin, 654 So.2d at 110 n.8.

On the other hand, Dr. Berland in 1996 unsuccessfully requested that defense counsel obtain and provide him with all institutional records pertaining to the defendant's background. Defense counsel failed to do so despite the fact that most of the records had already been obtained by previous collateral counsel in connection with the 1992 postconviction proceedings and were actually sitting in the court file. The institutional records included:

A. Presentence Investigation for first degree murder.
B. Prior criminal history.
C. Records of placement in foster care in 1965.
D. Placement with the McQuade Foundation, 1974.

> E. Placement in the Hudson State Training School in New York, 1974.
> F. Placement in the Highland State Training School, New York, to age sixteen. Records of a suicide attempt while there.
> G. Placement in a "home for indigents" in Miami, Florida at age 16.
> H. New York state prison records on the defendant from 1978 to 1984.
> I. School records from Arlington Junior High School, Poughkeepsie, New York; last grade completed tenth grade.
> J. Woodbourne Correctional Facility, New York.
> K. Mental health treatment at Astor Clinic in New York in 1971.
> L. Dutchess County Mental Health Clinic in New York.
> M. Hudson State River Hospital: Treatment for drug problems, depression and drug overdoses.
> N. Hudson River Psychiatric Center. Treatment three occasions at ages 11, 13, and 15.

All of these records were of the kind routinely relied on by clinical forensic psychologists, as Dr. Carbonell testified in 1992. All of the records were of the type that reasonably competent defense counsel would have routinely obtained in preparation for a capital sentencing proceeding because they were already part of the record in the case having been introduced into evidence at the 1992 evidentiary hearing. As a result, all of the records could have been easily furnished to Dr. Berland when he asked for them.

In this regard, Dr. Berland testified at the 1996 penalty phase that he was not provided access to the records:

> Q. [Y]ou did not rely upon any records or institutional records that predated this murder in coming to your conclusion?
> A. That's correct. I believe that I had the opportunity to look at some prison records after his incarceration, but nothing before.

(R2. Vol. IV, 162). Indeed, the State relied on the fact that Dr. Berland had not reviewed these records in its sentencing memorandum to attack his testimony:

> The final reason to reject the testimony of the Doctors is the fact that the record contains numerous records reflecting psychiatric examinations of the defendant over a 14 year period, concluding only 17 months before the murder ... The fact that Dr. Berland did not even examine the reports of those doctors, did not interview those doctors and that those experts saw the defendant during the relevant times, severely undermines his opinion.

(R2. Vol. II, 353).

Here, the defense attorneys were in unusual circumstances. They had transcripts of prior proceedings in Mr. Hildwin's case which contained mental health mitigating evidence that had been found "most persuasive and convincing." A road map lay at their feet. One option for them was simply to present what had been found "most persuasive and convincing"; the testimony of the two experts from 1992, including Dr. Carbonell.

Another option was to obtain another mental health expert and provide that expert with the materials that had been provided to the experts in 1992 that had provided a rock solid basis for the "most persuasive and convincing" mental health testimony.

Somehow, the attorneys representing Mr. Hildwin at the 1996 penalty phase managed to fail to do either. Though Dr. Carbonell testified in a discovery deposition that she had been told by the lead defense attorney that he would not be calling her in the 1996

proceedings and that she did not need to prepare to be called, the lead attorney, Mr. Howard, testified in 2009 that Dr. Carbonell was in error in her testimony. Mr. Howard claimed that after the deposition testimony had been given, he contacted Dr. Carbonell, he believed for the first time, to advise her he did want her to testify. However in the course of the conversation, Mr. Howard concluded that Dr. Carbonell was hostile and might give harmful testimony.[19]

Of course, there was significant circumstantial evidence supporting Dr. Carbonell's testimony in the deposition that she had been told that she would not be used by the defense and would not be called to testify at the penalty phase proceeding. Mr. Howard had in fact a contract with another mental health expert, Dr. Berland. At the same time, there was no contract with Dr. Carbonell, nor any billing for time spent working on Mr. Hildwin's case and preparing to testify. And of course, there is the fact that Mr. Howard did not in fact call Dr. Carbonell as a witness.

But setting aside any question of the reasonableness of counsel's actions towards Dr. Carbonell, it is clear that Mr. Howard failed to properly exercise his alternative option. Though he contracted with Dr. Berland to testify in lieu of Dr. Carbonell, he did not provide Dr. Berland with the readily available institutional records that Dr. Berland had requested or provide access to the

[19]How that would be possible given that Dr. Carbonell had already testified in 1992 and had no basis for changing her testimony, was not explained. Mr. Howard just had a bad feeling, and decided that Dr. Carbonell might harm his client, Mr. Hildwin, in the course of her testimony.

readily available witness that Dr. Berland had asked to interview. As a result of the failure to provide the records and/or arrange the interviews of the witnesses, the State attacked Dr. Berland's testimony as without a solid basis.

C. The circuit court's legally faulty analysis.

In denying Mr. Hildwin's penalty phase ineffective assistance of counsel claim, the circuit court first indicated that trial counsel made a strategic decision when he decided not to call Dr. Carbonell because of fear that she would provide harmful testimony. However, the circuit court failed to address whether such a fear was reasonable given that Dr. Carbonell had already testified as to her findings regarding Mr. Hildwin. There is nothing in the record to show that she had any basis for changing her testimony.

As to Dr. Berlin, the circuit court wrote off the significance of the failure to provide Dr. Berland with the institutional records and the access to the witnesses so that he could interview them because "Dr. Berland testified that even if he had been able to locate and interview the witnesses prior to the re-sentencing his opinions and conclusions would not have changed" (PC-R3. 2269). However in this linear analysis, the circuit court overlooked the fact that in the sentencing findings, the weight of Dr. Berland's testimony was substantially diminished by his failure to have reviewed the records and interviewed the witnesses. Thus, the circuit court's reasoning is legally defective and fails to actually address the

prejudice that Mr. Hildwin has alleged, *i.e.* the weight given the mental mitigation was substantially reduced when the aggravating and mitigating circumstances were weighed against each other because penalty phase counsel failed to provide Dr. Berland with the readily available institutional records and arrange a time for him to interview the readily available witnesses that he wanted an opportunity to speak with.

D. Mr. Hildwin's counsel rendered ineffective assistance.

In addressing the importance of counsel's duty to investigate and prepare for the penalty phase of a capital case, this Court has stated:

> Trial counsel's obligation to zealously advocate for their clients is just as important in the penalty phase of a capital proceeding as it is in the guilt phase. There is no more serious consideration in the sentencing arena than the decision concerning whether a person will live or die. When an attorney takes on the task of defending a person charged with a capital offense, the attorney must be committed to dedicate both time and resources to thoroughly investigate the background and history, including family, school, health and criminal history of the defendant for the kind of information that could justify a sentence less than death. I believe that the constitution and the case law from this court and the United States Supreme Court requires no less.

Coday v. State, 946 So.2d 988,1015-16 (Fla. 2006) (Quince, J., concurring).

Moreover, this Court has held that trial counsel renders deficient performance when his investigation involves limited contact with a few family members and he fails to provide his experts with background information. Sochor v. State, 883 So.2d 766, 772

(Fla. 2004). *See also*, State v. Lewis, 838 So.2d 1102, 1113 (Fla. 2002) ("[T)he obligation to investigate and prepare for the penalty phase portion of a capital case cannot be overstated- this is an integral part of a capital case."); Ragsdale v. State, 798 So.2d 713, 718-19 (Fla. 2001) (holding that inexperienced counsel rendered deficient performance when his entire investigation consisted of a few calls made to family members); Rose v. State, 675 So.2d 567, 571 (Fla. 1996) ("An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigation evidence." (quoting Porter v. Singletary, 14 F. 3d 554, 557 (11th Cir. 1994)); State v. Lara, 581 So.2d 1288, 1989 (Fla. 1991) (finding prejudice where counsel failed to present evidence of defendant's abusive childhood).

Here, the institutional records were readily available, but counsel simply failed to obtain the records that had been introduced into evidence in the 1992 hearing and provide those records to Dr. Berland. As a result, Dr. Berland was only furnished minimal institutional records, and the defense suffered for it when less weight was given to his testimony. In fact, all of that information was already sitting in the court file from the 1992 proceeding. These facts alone show an entitlement to relief under Rompilla, 545 U.S. 374 (holding that counsel was ineffective for failing to make reasonable efforts to review the court file on the defendant's prior conviction).

Deficient performance was shown inter alia by the diametrically opposite results of the 1992 and 1996 proceedings, the failure to provide Dr. Berland with records that were sitting in the court file, the failure to provide the expert with access to witnesses even though it was requested and is a standard of practice in this type of case, the failure to supervise the investigator to insure that these things were done, the cavalier and rushed treatment of both experts, resulting in their being obviously unprepared at the time they were deposed and Dr. Berland's being admittedly unprepared at the time of trial (a fact that the State was able to capitalize on and that was cited by the Court), and the failure to develop and present evidence of PTSD and organic brain damage.

The deficiencies alleged here are mostly evidenced by references in the record cited in the pending postconviction motion and incorporated in this argument. The evidentiary hearing is often the forum where counsel can explain apparent deficient performance as a tactical maneuver, but the fact that the attorneys did not maintain a contemporaneous time worked log or its equivalent, which itself is a departure from standard practice in capital cases, virtually ensures the result here. For example, the conflict in testimony between what Dr. Carbonell said about being a witness in her 1996 deposition and what Mr. Howard said thirteen years later should be resolved in Dr. Carbonell's favor because she was speaking at the time of the event when it was fresh, she referred to Mr. Howard

by name thus demonstrating some factual particularity, and billing records show that she did not bill any time to the defense, although she did bill her time giving a deposition, appropriately, to the State.

Likewise Dr. Berland's testimony about seeking access to lay witnesses and being told (falsely) that they were unavailable, was substantiated by his contemporaneously maintained records. By contrast, the attorneys did not keep contemporaneous records and repeatedly had to defer to the record. Deficient performance is established by the record.

The posture that this case is in, namely that the 1996 resentencing proceeding in contrast with the 1992 postconviction evidentiary hearing produced diametrically opposite results, is a product of penalty phase counsel's deficient performance. However in these proceedings, in making the determination whether there is a reasonable probability that the result of the proceedings would have been different if competent counsel had investigated Hildwin's mitigating circumstances and had presented and explained the significance of all the available evidence on his behalf, the Court must again evaluate the totality of the evidence adduced at the 1996 resentencing and in the postconviction proceedings. Wiggins, 539 U.S. at 524; Williams, 529 U.S. at 399 ("The entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised `a reasonable probability that the

result of the sentencing proceeding would have been different' if competent counsel had presented and explained the significance of all the available evidence."). That includes the 1992 postcoinviction proceedings as well. Thus Dr. Carbonell's 1992 testimony, and the Court's finding that the testimony was "most persuasive and convincing," must now factor into this Court's analysis of prejudice.

In addition, this Court must evaluate the ineffectiveness claim cumulatively with the newly discovered evidence claim previously presented to this Court. The results of the DNA testing must be considered cumulatively when this Court considers whether confidence in the reliability outcome is undermined. Certainly, the fact that the 1996 jury immediately asked questions about whether the victim had been raped shows how important it was to the jury's sentencing recommendation. Moreover, the DNA results may have caused the jury to develop lingering doubts about Mr. Hildwin's guilt of the murder which may have led jurors to give more weight to the mitigating evidence and less weight to the aggravating evidnce. The DNA results exonerating Mr. Hildwin of the sexual assault allegations, at a minimum, lightens the load on the aggravating side of the scales. When proper cumulative consideration is given to ineffective assistance of counsel and the newly discovered evidence claim, it is clear that confidence is undermined in the reliability of the 1996 penalty phase. Mr. Hildwin's sentence of death must be vacated, and the matter remanded for a new sentencing.

ARGUMENT II

MR. HILDWIN WAS DENIED A RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PROSECUTOR'S ARGUMENT AT THE PENALTY PHASE PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY, MISSTATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER. DEFENSE COUNSEL'S FAILURE TO RAISE PROPER OBJECTIONS WAS DEFICIENT PERFORMANCE, WHICH DENIED MR. HILDWIN EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Hildwin's penalty phase counsel was ineffective for failing to object to the prosecutor's improper comments and argument that were made to the jury during the State's closing argument at the 1996 penalty phase.

Assistant State Attorney Richard Ridgway began the State's closing argument by emphasizing the weighing process:

> You first determine what aggravating circumstances have been proven beyond a reasonable doubt and what mitigating circumstances have been reasonably established. And then once you've determined what those are, you then weigh them one against the other to determine which is weightier, which is more important in your mind of those that you have heard.
>
> It is not a counting process; well, we have four over here and three over here so the four wins. One could outweigh a dozen if the one is important and weighty enough in your decision-making process.
>
> So the first thing that you need to do when you go back there is to look at the evidence and consider the testimony and determine what aggravating circumstances have been placed on this side of the scale and what mitigating circumstances have been placed on this side of the scale and you weigh them.

(R2 Vol. V, 894-95). Mr. Ridgway closed with the following statement:

> In weighing the circumstances that are before you, it is the choices made by Paul Hildwin which far outweigh everything that had ever happened to him in his own life.
>
> When he got out of that car sitting on the side of the road without gas, he had a choice to make.
>
> * * *
>
> Paul Hildwin held Vronzettie Cox's life in his balance. And on this side of the balance was Vronzettie Cox's life. On this side of the balance was this cheap little radio, a pearl that she had gotten out of an oyster at Silver Springs and $754. And he weighed that against her life.
>
> And for Vronzettie Cox, Paul Hildwin chose death and not life. As we choose, our lives are formed. In choosing for Vronzettie Cox.
>
> Paul Hildwin chose for himself. He chose his own fate. And just as for Vronzettie Cox, he chose death and not life. Thank you, Your Honor.

(R2 Vol. V, 912-14). Defense counsel did not object during the State's closing argument.

A comment made by the State during closing argument "violates the Constitution if it renders the defendant's trial so fundamentally unfair as to deny him due process." Wilson v. Kemp, 777 F.2d 621, 623 (11th Cir. 1983). This threshold of fundamental unfairness is reached when the State's argument "is so egregious as to create a reasonable probability that the outcome was changed." Id.

Prosecutorial arguments that unnecessarily "appeal to the sympathies of jurors" are impermissible. Nowell v. State, 998 So,2d 597, 607 (2008); *See also*, Rhodes v. State, 547 So.2d 1201, 1206 (Fla. 1989); Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992); Urbin

v. State, 714 So.2d 411 (Fla. 1998). These types of arguments are "calculated to influence [the jurors'] sentence recommendation." Rhodes, 547 So.2d at 1206. In Urbin v. State, for example, this Court found that it was improper when the prosecutor argued:

> If you are tempted to show this defendant mercy, if you are tempted to show him pity, I'm going to ask you to do this, to show him the same amount of mercy, the same amount of pity that he showed Jason Hicks on September 1, 1995, and that was none.

Urbin, 714 So.2d at 421. In Nowell v. State, this Court found it equally improper when the prosecutor during the State's closing argument in the penalty phase of a capital trial made the following comment:

> Mercy. State asks that you recommend mercy if mercy is warranted. And mercy wasn't given in this case, not by Mr. Nowell, not by Mr. Bellamy. There was no mercy there, none whatsoever.

Nowell, 998 So.2d at 606-07. Likewise, in Richardson v. State, this Court found that the State committed error when it asked "the jury to show Richardson as much pity as he showed his victim." Richardson, 604 So.2d 1109.

On January 21, 2009, Mr. Hildwin's attorneys from the 1996 resentencing proceeding, William Hallman and Richard Howard, testified regarding their failure to object during the State's closing argument. Mr. Hallman testified that Judge Tombrink enforced a "one-lawyer, one-witness rule," by which only the attorney who handled each particular portion of the trial could make objections (PC-R3. 2514). Therefore, because Mr. Howard presented the closing

argument for the defense, it would have been Mr. Howard's responsibility to object to the State's closing argument (PC-R3. 2513-14).

Mr. Howard testified in 2009 that it was his opinion that the State's closing argument was not objectionable (PC-R3. 2650). Mr. Howard was mistaken. The portion of the State's closing argument that is quoted above is an eye-for-an-eye argument. This argument is analogous to the improper arguments made by the State in the cases above. Although Mr. Ridgway did not use the words "mercy" or "pity" in his arguments, the essence of his closing argument was that the jury should not show Mr. Hildwin mercy by recommending a life sentence because Mr. Hildwin did not show the victim mercy when he killed her (R2 Vol. V, 912-14). This argument was improper in that it "was an unnecessary appeal to the sympathies of the jurors, calculated to influence their sentencing recommendation." Rhodes, 547 So.2d at 1206. By equating the jury's obligation to weigh aggravating and mitigating circumstances with Mr. Hildwin's supposed weighing of the victim's life against some personal possessions, Mr. Ridgway was blatantly telling the jury to do unto Mr. Hildwin what had been done unto the victim. The State's argument that Mr. Hildwin chose the death penalty for himself when he killed Ms. Cox suggested to the jury that they were obligated to recommend a sentence of death regardless of the mitigating circumstances (R2. Vol. V, 914).

In testifying as to his understanding of the law, trial counsel demonstrated his failure to know the law. Such a failure to know capital case law when handling a capital case is deficient performance. Reasonably competent counsel is held to know the applicable law.

In addition to testifying that the prosecutor's closing arguments were not objectionable, Mr. Howard testified at the evidentiary hearing that he made a "tactical decision" not to object because he felt it would have drawn the jury's attention to the argument and heightened its impact (PC-R3. 2549). Under Strickland, tactical decisions must be "reasonable considering all the circumstances." Strickland, 466 U.S. at 688. In the case at hand, a tactical decision not to object to the State's improper argument would have been unreasonable.[20] Any impact that an objection may have had in drawing the jury's attention to the State's argument was outweighed by the negative impact of the State's unnecessary appeal to the sympathies of the jurors. By not objecting to the State's improper arguments, defense counsel provided deficient performance under Strickland. Id. at 687.

[20]Mr. Howard's reasoning was that by making a valid objection and having the judge instruct the jury to disregard the remark, counsel would cause the jury to focus on the remark and pay it more heed in complete violation of the judge's instruction to disregard. Such a cynical disbelief in the jury system and in individual juror's ability to follow the law cannot be the basis for a reasonable strategy within the meaning of Strickland. Such cynicism strikes at the core of the constitutional guarantee to an adversarial process designed to produce reliable results.

The prejudice prong of Strickland was also satisfied in light of counsel's deficient performance in knowing the law and holding the State to complying with the law. Following Mr. Hildwin's 1996 penalty phase retrial, the jury recommended the death sentence by a vote of eight to four (R2. Vol. II, 264). If defense counsel had objected to the State's improper arguments, the objection would have been sustained. There is a reasonable probability that, but for the improper arguments made by the State, a majority of jury would have recommended a life sentence, particularly when the prejudice analysis is conducted cumulatively with Mr. Hildwin's other ineffectiveness claim and with his newly discovered evidence claim premised upon the results of the DNA testing which demonstrated that he was not the donor of the semen and saliva found on the victim's panties and the wash rag lying on the laundry bag in the victim's car. The prejudice to Mr. Hildwin is a sentence of death.

CONCLUSION

For all of the foregoing reasons, this Court should vacate the circuit court's order denying Mr. Hildwin's Rule 3.851 motion, vacate his sentence of death, and remand for a new sentencing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Kenneth Nunnelley, Assistant Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, FL 32118, on June 8, 2010.

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This is to certify that this Initial Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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