IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 10-1830

TROY MERCK, JR.
Appellant,
v.

STATE OF FLORIDA
Appellee,

ON APPEAL FROM THE CIRCUIT COURT
OF THE 6TH JUDICIAL CIRCUIT FOR PINELLAS COUNTY,
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

REQUEST FOR ORAL ARGUMENT

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

CITATION KEY

The record on direct appeal of Mr. Merck's trial shall be cited (FSC ROA Vol. # p. #). The record of Mr. Merck's evidentiary hearing shall be cited as (PCR Vol. # p. #).

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

On November 14, 1991, Defendant Troy Merck Jr. was charged by indictment in Pinellas County with the first-degree murder of James Newton. A trial held before Judge Luten in November of 1992 ended in a hung jury. After a second jury trial held before Judge Luten in September, 1993, Mr. Merck was found guilty as charged and sentenced to death. On direct appeal, the Florida Supreme Court

affirmed the conviction, but reversed the death sentence and remanded for a new penalty trial. See Merck v. State, 664 So.2d 939 (Fla. 1995).

In July, 1997, a resentencing proceeding was held before Judge Khouzam. The jury recommended a death sentence and in September, 1997, Judge Khouzam imposed the death penalty. The Florida Supreme Court reversed the death sentence. See Merck v. State, 763 So.2d 295 (Fla. 2000).

Merck's third resentencing proceeding, held in March of 2004, resulted in a jury recommendation of death by a nine-to-three vote. The trial judge held a Spencer hearing on March 28, 2004. The trial court filed its sentencing order on August 6, 2004. A timely appeal was filed and the Florida Supreme Court denied relief. See Merck v. State, 975 So.2d 1054 (Fla. 2007). The United States Supreme Court Cert. Petition was denied on October 6, 2008.

Capital Collateral Regional Counsel - Middle Region was appointed to represent Merck in postconviction proceedings on February 27, 2008. Merck filed his motion for postconviction relief on September 2, 2009 and the State filed its response on October 30, 2009. The court conducted an evidentiary hearing on claims Ia, Ic, and II of Merck's motion for postconviction relief on July 20-July 21, 2010. The postconviction court entered its order denying relief on August 27, 2010. A timely notice of appeal was filed on September 17, 2010. On September 2, 2010

the Florida Supreme Court noticed all parties that Petitioner (Troy Merck) had filed a petition seeking to invoke all writs jurisdiction. The Respondent was requested to serve a response to the petition on or before October 4, 2010. Respondent, Stephen Ake filed his response on September 30, 2010. On March 31, 2011, the Florida Supreme Court denied petitioner Troy Merck's petition for all writs. This appeal of the evidentiary hearing and subsequent denial of Mr. Merck's 3.851 motion follows.

EVIDENTIARY HEARING FACTS

A. TESTIMONY OF: Fredric Zinober

Fred Zinober represented Troy Merck during his 1993 guilt phase trial. (PCR Vol. VI p.763). his co-counsel was James Martin. (PCR Vol. VI p. 764). Regarding trial strategy, Mr. Zinober wanted to create a reasonable doubt, and that the killer very well could have been Neil Thomas. (PCR Vol. VI p. 765). He remembers pointing out during trial that Katherine Sullivan described the killer as wearing khaki pants, and pointed out the fact the State established Troy Merck as wearing different pants. (PCR Vol. VI p. 766) Mr. Zinober established that Troy Merck had a large tattoo on his arm, where as Neil Thomas had no tattoos; which better matched Ms. Sullivan's description. (PCR Vol. VI p. 767). Similarly, he recalls pointing out that Neil Thomas called the victim a pussy. Id.

Mr.Zinober referred to stating, now let's get really to what the defense is in

this case" after finishing his part of his closing argument about voluntary intoxication. (PCR Vol. VI p. 768). He did not clarify during the charge conference that voluntary intoxication was merely one of the defenses. (PCR Vol. VI p. 770). He confirmed that he could have objected to clarify that voluntary intoxication was "a" as opposed to "the" defense in the trial. (PCR Vol. VI p. 771).

Fred Zinober believes he was aware of Dr. John Brigham during the time of the original trial, due to his failed attempt to use him in a prior case. (PCR Vol. VI p. 772). He never contacted Dr. Brigham about the Troy Merck case, though the factual pattern was different from his prior case. (PCR Vol. VI p. 773). He doesn't know if Dr. Brigham could have helped Troy's case. (PCR Vol. VI p. 774).

Mr. Zinober considers the Henry Brommilsick testimony to be one of the highlights of the case from the defense's perspective. Id. During his trial cross-examination of Mr. Brommelsick, he got Mr. Brommelsick to confirm that if someone pounded their hands on the roof of the car on the passenger side, and said "throw me the keys", that would have been Neil Thomas. (PCR Vol. VI p. 774-775). The trial testimony of Henry Brommelsick was admitted into evidence after Mr. Zinober's identification. (PCR Vol. VI p. 777).

B. TESTIMONY OF: John C. Brigham, Ph.D.

Dr. Brigham is a retired emeritus professor at Florida State University. (PCR

Vol. VI p. 797). He has a bachelor's degree from Duke, plus masters and doctorate degrees from the University of Colorado. Id. He had done research and published about 55 articles on the subject of eyewitness memory, and gave presentations in the U.S., Canada, Italy, Australia, Scotland and Whales. (PCR Vil. VI p. 798). He also taught seminars and workshops to judges in Florida about eyewitness evidence. Id. He was qualified as an expert in Florida's courts prior to 1993. (PCR Vol. VI p. 799). The post-conviction court found that Dr. Brigham was qualified as an expert in eyewitness memory. (PCR Vol. VI p. 800).

C. TESTIMONY OF: Henry Brommelsick

Mr Brommelsick worked for the Pinellas County Sheriff's office for approximately 30 years as a fingerprint examiner. (PCR Vol. VI p. 823). He was able to describe in great detail what creates a latent fingerprint. (PCR Vol. VI p. 824-825). He doesn't think it's possible for two people to share the same fingerprint. (PCR Vol. VI p. 825-826). Mr. Brommelsick rolled the fingerprints of Troy Merck and Neil Thomas prior to the 1993 trial, after they were afforded to him by fingerprint technician James Haims. (PCR Vol. VI p. 826).

Henry Brommelsick identified the 1993 trial exhibit 20-E as a fingerprint belonging to Neil C. Thomas, and it was located on the exterior passenger side window. (PCR Vol. Vi p. 827). Exhibit 20-F from the 1993 trial was identified as

a right index fingerprint belonging to Neil C. Thomas found at the top roof slash near the car's passenger side. (PCR Vol. VI p. 828). Mr. Brommelsick identified exhibit 20-H from the 1993 trial as a palm print belonging to Neil C. Thomas which was located on the passenger side roof. (PCR Vol. VI p. 829). All three exhibits were admitted into evidence. (PCR Vol. VI p. 831). Mr. Brommelsick was able and willing to testify truthfully at the last penalty phase hearing during March of 2004. (PCR Vol. VI p. 831-833).

D. TESTIMONY OF: Dr. Michael Scott Maher M.D.

Dr. Michael Maher was qualified as a medical doctor with an expertise in forensic psychiatry. (PCR Vol. VI p. 847). Dr Maher testified that he had known Troy Merck in his professional capacity for almost ten years. (PCR Vol. VI p. 847). Dr. Maher had prepared Mr. Merck's case in 1992 but had not testified due to a hung jury in the guilt phase of Merck's original trial. (PCR Vol. VI p. 849). The Public Defender gave Maher records related to Merck's school background, juvenile records, which included some law enforcement records, medical records and the police reports related to the offense. (PCR Vol. VI p. 849).

Dr. Maher testified that Mr. Merck was raised by a mother who didn't want him and tried to abort him by drinking alcohol to a significant degree and also specifically drank turpentine in order to induce an abortion while she was pregnant

with him. (PCR Vol. VI p. 850). Dr. Maher opined that Mrs. Merck was herself, mentally ill. He based his opinion on conversations with Merck's sister, Merck himself, and other records that referred to her actions. Dr. Maher opined that the severity of her behavior disturbance is consistent with an individual who is sometimes out of touch with reality. That is psychotic and would be typical of somebody who suffered from schizophrenia. One of the things that is a credible part of the family history is that she beat Mr. Merck relentlessly when he was a child, a small child and a parent in touch with reality typically doesn't do that. (PCR Vol. VI p. 850-852). Dr. Maher defined ptosis as a drooping of the eyelid and after looking at Mr. Merck, opined that Mr. Merck did indeed have ptosis.

(PCR Vol. VI p. 852).

Dr. Maher testified that although there are a variety of things that cause ptosis, one of the things that causes it is fetal alcohol effect. Dr. Maher then testified that alcohol and turpentine would have a toxic effect on the neurological development. (PCR Vol. VI p. 852). Mrs. Merck also abused over-the-counter sedatives to excess. (PCR Vol. VI p. 853). As a result of this pre-natal abuse, Dr. Maher testified that there is substantial evidence of physical and physically documented brain damage. (PCR Vol. VI p. 853). Dr. Maher testified that the pattern of symptoms that Merck described in his life related to impulsiveness and brain scans

that show abnormalities in metabolic processing in the frontal lobe, the part of the brain that is particularly related to judgment and impulsiveness management and control, correlate, that is, they come together in a way which is clinically relevant and one supports the other in indicating that there is fundamental physical dysfunction in the frontal lobes of the brain. (PCR Vol. VI p. 854).

To confirm his suspicions, Dr. Maher consulted with one Dr. Wood. Wood was an expert in reading brain scans. He looked at the case and concluded there was evidence of frontal lobe damage. (PCR Vol. VI p. 854-855). Dr. Maher opined that the primary causes of the brain damage are likely to be en utero, toxic effects on the brain, physical trauma during childhood and during development, involuntary exposure to alcohol as a young child; that is Mr. Merck was given alcohol as a sedative. (PCR Vol. VI p. 855). Dr. Maher further testified that fetal alcohol syndrome makes someone more likely to become an alcoholic later in life and that Mr. Merck was and is an alcoholic but because Merck is incarcerated, he is not drinking alcohol at this time. (PCR Vol. VI p. 856-857).

In addition to a craving for alcohol, other character traits and behavior traits exhibited by alcoholics such as Mr. Merck include: They are dismissive of social conventions and rules. They pursue alcohol and activities related to alcohol, contrary to reasonable social exportations. They drive when they are drunk. They

fight when they are intoxicated. They disregard other people's feelings when they are intoxicated. They take advantage of people when they are intoxicated. Typically alcoholics engage in a pattern of consistent low level antisocial behavior. (PCR Vol. VI p. 857).

At the evidentiary hearing the following questions were asked and answered by Dr. Michael Maher:

> Q. All right. Now, have you diagnosed Troy Merck to have any kinds of psychological disorder?
> A. Yes, I have.
> Q. What does he have?
> A. Fetal alcohol effect I think is the primary diagnosis, and brain impairment secondary to multiple causes, including Post Traumatic Stress Disorder, fetal alcohol effect, alcoholism, are the three primary disorders that are most relevant. (PCR Vo. VI p. 857-858).

Dr Maher testified that as a result of the brain damage Mr. Merck sustained en utero, and the result of the abuse that Merck suffered, both the physical abuse and the emotional and psychological component of the abuse during childhood and adolescence, and partly as a result of Merck's own alcohol consumption as an adolescent, Mr. Merck also suffers from Attention Deficit Disorder. (PCR Vol. VI p. 858-859). ADD is a disorder of brain functioning. It functions on a more fundamental neurological level. It is not preventable. Rather, it is treatable and manageable. (PCR Vol. VI p. 859). Dr. Maher also opined that the regular

beatings which Mr. Merck suffered as a child would cause brain damage and that since Mr. Merck was a child at the time of the beatings, his cortex was not fully developed and Merck was particularly vulnerable to brain damage most specifically, frontal lobe damage. (PCR Vol. VI p. 860-861). Based on eyewitness accounts of Mr. Merck's alcohol consumption at the time of the offense; Merck was "substantially intoxicated beyond the legal limit in the state of Florida for driving." (PCR Vol VI p. 863).

At the evidentiary hearing the following questions were asked and answered regarding statutory mitigation:

> Q. Doctor, are you familiar with Statutory Mitigator Section 921.141, Subsection (b) Subsection (g), " The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance"?
> A. Yes.
> Q. Do you believe back in 1992 and do you believe now that this mitigator applies to Mr. Merck?
> A. Yes.
> Q. –or not?
> A. I believe that it does apply to him.
> Q. Doctor, what do you base your opinion on?
> A. It's based on the totality of the assessment, much of which has been summarized today in my testimony. Both related to very long-term issues of impairment which I believe are related to the mental and emotional disorder and very short-term issues. So the long-term issues would include the en utero abnormal brain development.

The short-term issues would acute intoxication in that parking lot on that night.

There are many things that happened in between that time period, being beaten by his mother, the impulsivity disorder, the Post Traumatic Stress Disorder. All of those things are a part of the mental and emotional disorder, and it's relevant-its relevancy in that particular circumstance is that he was in an impulsive environment, intoxicated, and around other people who were intoxicated.

Q. Doctor, the instruction reads extreme mental or emotional disturbance. In other words, it's conjunctive, correct, sir?

A. Yes.

Q. Can you give me an example of the mental disturbance as it applies to Mr. Merck?

A. I would describe the mental disturbance more in terms of the things that can be documented with evidence of physical brain damage. The frontal lobe abnormality for example. I would describe the emotional factors more related to things that are relational, his horrid upbringing and relationship with his mother and being beaten by her. Although those things also create physical changes in the brain, I would describe that more in the emotional realm.

Q. So he has both?

A. Yes.

Q. Brain damage and emotional disturbance?

A. Yes.

Q. How about, Doctor, are you familiar with Statutory Mitigator 921.141, Subsection (6), Subsection (f), "The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired"? Are you familiar with that instruction, sir?

A. Yes

Q. Do you believe - did you believe back in 1992 and do

you believe now that this mitigator applies to Mr. Merck or not?
A. Yes, I believe it does.
Q. Oh, by the way, just – when is the last time you saw him, meaning Mr. Merck?
A. Several months ago. Maybe – I think it was in the fall of 2010 (sic).
Q. You believe that his judgment was substantially impaired. That's just the alcohol consumption or was it something else?
A. No, it was the entire - as I said, it is the entire history going back to before he was born. The problem is he brings forward every deficit, every problem, every lack of normal brain development, into those moments that were - that occurred prior to and during the time of this offense. So all of that information is relevant to his impulsive, reactive, aggressive actions that occurred at the time of this offense.
Q. So, Doctor, just because this man may have had five or six beers and a couple of shots, you're not going to say that that's the only thing that caused him to slaughter an innocent human being?
A. I do not believe that the acute intoxication alone even begins to describe the mental state and picture of Mr. Merck on that occasion. (PCR Vol. VI p. 864-868).

Dr. Maher was aware that Mr. Merck was given the MMPI on two separate occasions; both by psychologists. (PCR Vol. VI p. 868).

When asked about the MMPI, th e following questions were asked and answered:

> Q. Okay. Can you tell the Court about the MMPI? What does it do? How does it work? What does it measure?

A. The MMPI is a list of about 570 true/false questions. It has a long history. It is utilized to develop a personality profile of an individual and is statistically validated to correlate with certain clinical conclusions. It is, at best, about 70 percent accurate. It does not have specific diagnostic validity in the present diagnostic scheme, and it is widely used by psychologists.
Q. At a Spencer hearing, sir, if Dr. Slomin opined - did you read that testimony?
A. I did.
Q. If Dr. Slomin opined that Mr. Merck is suffering from an antisocial personality disorder as a, quote, basic Disregard for others rights and liberties usually beginning at or about the age of 15, does that characterization in any way explain how this disregard for other's rights and liberties usually beginning at or about the age of 15 occurs?
A. No, it doesn't. It's a description of behavior, not an explanation of cause –
Q. Not what causes this behavior?
A. That's correct.
Q. In other words, Doctor, would you agree that or would you not agree that people don't wake up and say, you know, I think I'm going to get some juvenile priors at the age of 15, and for the rest of my life I'm going to exhibit a complete disregard for other person's feelings?
A. I do not believe that's the way it works, no.
Q. What is co-morbidity, sir?
A. Co-morbity is a phrase that's used to describe the pattern in medical illnesses of one illness coexisting with another illness. It happens in heart disease and lung disease and brain disease and in a variety of other conditions.
Q. So the fact that Ms. Merck tried to abort Troy Merck, an attempt which resulted in the ptosis and fetal alcohol effect, that she beat Troy Merck about the head as a child, that she fed him - involuntarily dosed him with alcohol to

keep him quiet, could that have caused Troy Merck's disregard for other's rights?
A. Yes, absolutely.
Q. How about the Attention Deficit Disorder? Could that cause Troy Merck to disregard other people's rights?
A. It – indeed, it can. And I'm certainly not saying it does, or the association is very strong in the absence of other factors. But impulsivity is a key element in both of those disorders, and it exists, indeed, in Mr. Merck.
Q. Doctor, can you tell the Court a little bit about post traumatic stress, what causes it?
A. Post traumatic stress or Post Traumatic Stress Syndrome is a disorder of brain functioning which is triggered by overwhelming stress either that occurs on a short-term, sometimes even one-time basis, or over a long term. It's a disorder which fundamentally changes brain functioning with regard to issues of fear, anxiety, danger, and impulsiveness. And it exists in adults as well as children.
Q. Doctor, is it safe to say that the earlier the stress occurs in a person's life - say, like constant beatings as a child - the more difficult it would be for a person to cope with post traumatic stress? In other words, sir, if a child had suffered abuse over a long period of time, would that child have a more difficult time understanding the concept of post traumatic stress than would an adult combat veteran?
A. Yes.
Q. In other words, you don't have to - well, sir, did post traumatic stress come to light at the conclusion of the Vietnam War?
A. Not exactly. It really came to light at the conclusion of, or in the modern medical sense, after World War I, and it was called shellshock, and it was originally –
Q. World War II it was called battle fatigue?
A. And it was called battle fatigue after World War II. And our last 40-year understanding of it was especially

focused on Vietnam vets. But also at that time there was a developing understanding that it was not simply a military disorder. It was a disorder related to trauma. And there is a huge literature going back 30 years documenting that it's a disorder which can begin in childhood where there is childhood trauma. Mr. Merck is a perfect example of that.

Q. How does he exhibit the traits of post traumatic stress?

A. He has very poor relationships with people. He attempts to be – was when he was free and has remained to some extent isolated in his relationships. He has a pattern of anxiety and fearfulness which is consistent with believing and feeling on a deep emotional level that everything in the world is dangerous and his well being is constantly threatened. This is something that is absolutely central to the diagnosis in abused children and combat veterans.

Q. What is the fight or flight impulse, sir?

A. The fight or flight impulse is a physiological reaction that is related to being threatened and fearful and triggers physical abilities that can either be used to fight against the danger or run away from it.

Q. Do people choose when faced with a dangerous situation?

A. There certainly is some free choice involved in that. What a person does with it, especially a trained person, sure, they have some choice. A trained -

Q. How about an untrained person such as Mr. Merck?

A. An untrained person is more likely to simply react to an emergence of a fight or flight physiological response. Whereas, a trained person, such as a soldier, might have the fight or flight response and knows under these conditions I'm supposed to flee, return to my unit, or fight back and stand my ground.

Q. Post traumatic stress, do people know they have it?

A. Not initially. Certainly, people can learn that they

> have it. They can understand it, and their understanding of it can help them to manage it, even overcome it.
> Q. How about at the time of Mr. Merck's crime when he was 19? Do you think he was able to understand that he was suffering from post traumatic stress?
> A. No, he was not. He was clueless. (PCR Vol. VI p. 868-873).

Dr. Maher testified that his primary contact with the defense team (and there wasn't a lot of it) was with Michael Schwartzberg. (PCR Vol. Vi p. 873-874).

Defense exhibit 3 was introduced into evidence. (PCR Vol. VI p. 875). Maher billed Schwartzberg for two 15 minute phone conversations. The last phone conversation was days before trial. Dr. Maher testified that he was trying to contact Schwartzberg in order to go over his proposed trial testimony. (PCR Vol. VI p. 877). At the evidentiary hearing, the following questions were asked and answered:

> Q. Well, what did you say to him on 3/11, that's March 11th, 2004?
> A. I'm sorry what did I –
> Q. This is a couple days before trial, sir.
> A. I said I need to talk to you. There are important issues here that we have not discussed.
> Q. Like what?
> A. Like the details of the mitigation, like the specific diagnosis, like the pros and cons, the evidence that supports those diagnoses, the information that I would rely on in that regard. I would have asked him, for example, questions about can I rely on this information? Has it been produced into evidence? What other sources of information might have presented this to the Court besides my testimony? Those are all things that I would typically

> talk to an attorney about in a pretrial meeting.
> Q. Well – so, in other words, is it safe to say that because Mr. Schwartzberg never returned your calls and never met with you before trial, you didn't know what he was going to say?
> A. That would certainly be my conclusion. That was a concern of mine at the time.
> Q. But you didn't tell him, did you?
> A. I told him we needed to meet. This was important. I certainly didn't tell him how to do his job as a lawyer. I don't think that that was my place. I was very concerned that he didn't know what information and evidence I have and what I might have to offer. I didn't know who else he was calling or what other experts might be involved, and it wasn't my place to tell him whether he was doing a good job or not. (PCR Vol. VI p. 879-880).

Dr. Maher testified that Michael Schwartzberg did not give him any material in the way of reports or records. All the material provided to him was done by Nora McClure and Chris Helinger before they withdrew from representing Mr. Merck and before Mr. Schwartzberg was appointed to represent Mr. Merck for the penalty phase. (PCR Vol. VI p. 881).

Dr. Maher testified that he had worked with Michael Schwartzberg on "maybe a dozen cases" prior to working on the Merck case. (PCR Vol. VI p. 882). He described Mr. Schwartzberg's pattern of behavior in this manner:

> Q. Doctor, can you describe Michael Schwartzberg's usual pattern of practice and interaction with experts such as yourself?
> A. Yes. It was my experience that Mr. Schwartzberg

was knowledgeable about the law and the issues that were related to mental health issues related to the law, that he had good insights and understandings about things, that he asked me good questions related to my understanding and input. It was also my observation that he was not very detailed in his understanding of data related to mental health issues. He would tend to develop general understandings and not have specific details at the command of his memory.

Q. Could you break that down into English?

A. He was good on the overall view of things related to mental health issues and not good on the details.

Q. Doctor, were you aware Mr. Schwartzberg suffered a hart attack sometime before the Merck trial and subsequently died on January 5th 2005, after the Merck trial?

A. Yes.

Q. After Michael Schwartzberg's heart attack, did you notice a change in his attitude?

A. I noticed a change in his attitude while he was working on the Merck case.

Q. What did you notice?

A. He was even less attentive to details and specific understanding of my work and input then he had been previously.

Q. How about his wife – wait a minute. How about his focus? Did he seem to focus or not?

A. He was less attentive and less sharp in his mental focus when I interacted with him.

Q. Did he seem to have adopt a cavalier attitude towards the whole thing, the criminal law practice in general?

A. I don't think I would characterize it as cavalier, but I had previously known Michael to be very intense and focused. Even if he didn't know the details, he had good insights, he asked good questions, he understood the big picture. When I worked with him on the Merck case, I really didn't notice at first, but in recalling it and as the

> case developed, I realized I had never had any of those conversations that gave me the information that would tell me that he really understood what my opinions were. (PCR Vol. VI p. 882-884).

Regarding the presentation of Maher at trial and/or the subsequent Spencer hearing; Dr. Maher testified in this manner:

> Q. Okay. Doctor, prior to this case when you worked with Mr. Schwartzberg, did you discuss with him issues relating to the strategy of presenting information before the jury or only at a Spencer hearing?
> A. In previous cases I would have had discussions with him about where my testimony was best presented and the manner in which it was best presented. I never had any discussions with him such as that with regard to the Merck case.
> Q. Well, did that cause you some concern?
> A. It caused me grave concern.
> Q. Sir, were you present in court on either the – right before the State – or the defense rested when it was announced out of the presence of the jury – excuse me, out of the presence of the jury that you would not be called?
> A. Yes.
> Q. That they were streamlining the trial?
> A. Yes.
> Q. All right. And do you remember – and do you remember Judge Downey asking Mr. Merck if he understood this was going on?
> A. Yes, I do remember that quite clearly.
> Q. Did this strike you as unusual?
> A. Yes.
> Q. Well, you said you were concerned, sir, that you never had a discussion with Mr. Schwartzberg as to which information you would present at trial and which information you would present at a Spencer hearing.

A. That's correct.
Q. Okay. Why did that cause you concern, sir?
A. Because it had been my usual pattern of practice with him, as well as other lawyers, to include a discussion about where my opinions and possibly other mental health opinions were best presented in their case. And it would always be something that I would raise. Sometimes lawyers were interested in discussing it. Sometimes they weren't. Mr. Schwartzberg usually was. But there had been no opportunity and certainly no discussion of that between me and Mr. Schwartzberg in regard to this case.
Q. Okay. Well, what are some of the opinions you would have presented had you been asked?
A. Many of the things you've asked me about today, the presence of mitigation evidence, the presence of various diagnoses, Post Traumatic Stress Disorder, fetal alcohol effect, Attention Deficit Disorder, the emotional and mental aspects of his deficits, the effect of alcohol.
Q. How about in previously dealing with Mr. Schwartzberg or other attorneys, had you ever just presented issues at a Spencer hearing only?
A. Not to the best of my recollection, no.
Q. Why not?
A. My understanding of that would be that if I had significant mitigating information, the attorneys would always wanted to present that to a jury and then possibly again at a Spencer hearing.
Q. Did you recall Judge Downey expressing concern that if you weren't called, the jury was not going to hear any mental health testimony, in spite of the fact Mr. Merck had had mental health testimony presented at previous trials?
A. Yes, I do recall the Judge expressing that concern.
Q. Again, sir, you testified that Michael Schwartzberg was going to handle your direct and the other mental health professional, right?
A. That was my understanding, yes. That was my expectation.

> Q. You didn't bill Richard Watts, did you?
> A. No.
> Q. Doctor, who ultimately handled your direst examination at the Spencer hearing?
> A. Mr. Schwartzberg.
> Q. Mr. Schwartzberg at the Spencer hearing?
> A. I believe it was him.
> Q. Well, if the record shows that Mr. Watts handled you at the Spencer hearing, would you have any reason to dispute the trial record?
> A. No. What I remember about the Spencer hearing is that I testified very briefly and - I don't recall independently which of the lawyers -
> Q. Well, had you ever discussed with Mr. Watts your proposed Spencer hearing testimony?
> A. Not other than in a very superficial way. (PCR Vol. VI p. 886-889).

Dr. Maher testified that if he had an opportunity to talk to Michael Schwartzberg before trial, in addition to the previous cited testimony regarding statutory mental mitigation; Maher would have advised Schwartzberg of the pros and cons of the various diagnoses. (PCR Vol. VI p. 889-890).

Dr. Maher outlined the various diagnoses in the following manner:

> A. The axis diagnoses are a scheme of diagnostic formulations in psychiatry that most professionals use and characterize different disorders in different categories. For example, Axis I would include Post Traumatic Stress Disorder, fetal alcohol effect, acute alcohol intoxication. Axis I diagnoses are made as the primary diagnoses. Axis II diagnoses are personality disorder diagnoses, and they are secondary diagnosed. Axis III diagnoses are medical diagnoses that would include some overlap with

Axis I diagnoses. So fetal alcohol effect would also be an Axis III diagnosis.

Q. What is antisocial personality disorder?

A. Antisocial personality disorder is a collection of traits, primarily behavioral, that are related to disregarding social convention, breaking rules, and typically laws.

Q. Doctor, if someone is diagnosed with an Axis I diagnosis entirely characterizes and, in effect explains the symptoms and the deficits present, then there is no Axis II diagnosis present.

For example, an entirely hypothetical context. If an individual is so depressed and chronically depressed that they have a lot of dependency traits, a proper diagnosis would be chronic depression. One wouldn't simply add the diagnosis of dependent personality disorder because the dependent traits are explained by the depression. Likewise, antisocial personality disorder, if an individual has epilepsy that causes them to be isolated and to break the rules and to do other antisocial things, one wouldn't typically make a diagnosis of antisocial personality disorder because the Axis I diagnosis would entirely explain the symptoms that might otherwise be attributed to a personality disorder.

Q. So, in a nutshell and in English, Mr. Merck's condition is explained under Axis I, correct, Doctor?

A. I would say primarily not exclusively. And I'm not saying an Axis I and an Axis II diagnosis shouldn't exist. Sometimes they can and should coexist. What I'm saying is Axis I comes first conceptually, as well as numerically, and that when the symptoms are entirely explained by an Axis I disorder, an Axis II diagnosis is not appropriate.

Q. Can you explain his behavior through Axis I?

A. Yes. What I want to be clear is I wouldn't entirely exclude the possibility of an Axis II diagnosis for him. But I haven't been asked to do that, and I haven't doe that. (PCR Vol. VI p. 890-892).

Doctor Maher testified that at the Spencer hearing Dr. Slomin was allowed to listen to his testimony, but Maher was not allowed to listen to Slomin's testimony. (PCR Vol. VI p. 892). Dr. Maher further testified that if he had the opportunity to talk to Michael Schwartzberg before trial and talk to Richard Watts before the Spencer hearing, he would have related information as to the proper way to cross-examine Dr. Slomin. (PCR Vol. VI p. 892).

Dr Maher testified that if he were asked; he would have suggested that the attorneys ask Slomin some of the details about his Axis I diagnoses and his Axis II diagnoses, and how Slomin justified an Axis II diagnosis in the presence of overwhelming evidence of Axis I diagnoses. (PCR Vol. VI p. 893).

Dr. Maher opined that antisocial personality disorder is a simplistic diagnosis. (PCR Vol. VI p. 917).

E. TESTIMONY OF: Richard Watts

Richard Watts testified at the evidentiary hearing. (PCR Vol. VII p. 944). He is a conflict attorney and was appointed to represent Merck in 2003. (PCR Vol. VII p. 944). Mr. Schwartzberg was appointed to assist Mr. Watts. (PCR Vol. VII p. 893). This arrangement was atypical because there may be only one lawyer in a penalty phase, but with the enormous volume of material, Mr. Watts felt he needed the help. (PCR Vol. VII p. 945).

Mr. Schwartzberg was suffering from health problems before his death and was obese at the time of trial. (PCR Vol. VII p.945). He had a gastric bypass surgery and lost a significant amount of weight. (PCR Vol. VII p. 945). Mr. Schwartzberg also suffered a heart attack before Troy Merck's trial. (PCR Vol. VII p. 945).

Mr. Schwartzberg was also having family problems. (PCR Vol. VII p. 945). Mr. Watts could see the effect of the domestic discord between Mr. Schwartzberg and his wife. (PCR Vol. VII p. 946). Mr. Schwartzberg was upset with his wife's spending habits and she also had several arrests. (PCR Vol. VII p. 946). She was holding their four dogs hostage. (PCR Vol. VII p. 946). The domestic discord between Mr. Schwartzberg and his wife was a big factor contributing and culminating in his death. (PCR Vol. VII p. 946).

Troy Merck's trial was the last trial that Mr. Watts and Mr. Schwartzberg tried together. (PCR Vol. VII p. 947). Mr. Watts and Mr. Schwartzberg divided the labor with Mr. Watts being responsible for the out of town witnesses, Troy Merck's family, his teachers, and the lady that ran the Christian home, Ms. Rackley. (PCR Vol. VII 947). Mr. Schwartzberg was responsible for the cross-examination of the State's case and Dr. Maher. (PCR Vol. VII p. 947). Mr. Watts testified that he was surprised at the little contact that Mr. Schwartzberg had with Dr. Maher. (PCR Vol.

VII p. 987-988). Mr. Schwartzberg was also responsible for lingering doubt, which would have been the role of the co-participant. (PCR Vol. VII p. 948). Mr. Schwartzberg was also responsible for the voir dire although both assumed responsibility for the actual selection of the jury. (PCR Vol. VII p. 948). Jury selection was a team effort. (PCR Vol. VII p. 948).

Mr. Watts did not recall particular jurors that might have been unqualified. (PCR Vol. VII p. 949). He was aware of the case Morgan v. Illinois and believed the issue in the case to be whether the jurors had a propensity to find the heinous, atrocious and cruel aggravator. (PCR Vol. VII p. 949). Regarding jury selection and the law of Morgan v. Illinois, Mr. Watts testified:

> I'm aware of that. And what I would qualify and say is that it seemed the issue was jurors would find heinous, atrocious and cruel would say, yes, I'd vote for death if I found that. Most jurors would. And so, to me, that wasn't a reason to necessarily exclude those jurors. So I stand corrected on the law. But also my feeling was that we were going to be challenging the heinous, atrocious and cruel is that the death was sudden. And so that would be out challenge to that issue. So I'm aware of what you're asking. I wasn't aware of it at the time. (PCR Vol. VII p. 950).

Mr. Watts had no specific recollection of jurors Coop, Rowley, or Schienacher. (PCR Vol. VII p. 950-952).

Mr. Watts did recall that heinous, atrocious and cruel would be an issue in the

case. (PCR Vol. VII p. 952). He recalled that Katherine Sullivan made statements that she saw blood on the victim's back, that Neil Thomas heard a soft popping noise like a screwdriver going through a carpet during the fight, and that Detective Madden observed four stab wounds to the neck, back and chest area. (PCR Vol. VII p. 953). He recalled statements attributed to Mr. Merck that he stabbed the [victim] in the neck. (PCR Vol. VII p. 953). He also recalled statements by the medical examiner that there were multiple stab wounds, 13 or 14 incise wounds, and a stab wound to the ear. (PCR Vol. VII p. 954). The wounds would have caused pain and the victim would have survived for a minute or two. (PCR Vol. VII p. 954). Mr. Watts noted that comments made by a defendant after a victim's death would not go so much to the aspect of heinous, atrocious and cruel because the aggravator stops with the death. (PCR Vol. VII p. 959).

Mr. Watts recalled that heinous, atrocious and cruel was an issue on direct appeal and he knew that it would be an issue during jury selection. (PCR Vol. VII p. 955). He had no recollection of any efforts by Mr. Schwartzberg to clarify issues regarding heinous, atrocious and cruel or of any efforts at all to rehabilitate jurors Rowley and Coop. (PCR Vol. VII p.955-956). Mr. Watts said that the issue of heinous, atrocious and cruel would have been something that should have been clarified or explored further with respect to these jurors. (PCR Vol. VII p. 957).

Further regarding jury selection, Mr. Watts testified that a juror who leans toward voting for the death penalty presents a preconceived opinion over which you have to prevail. (PCR Vol. VII p. 981). A juror being convinced of the heinous, atrocious and cruel aggravator is not enough to mandate a death penalty verdict, although with the caveat that it is usually the strongest aggravating circumstance. (PCR Vol. VII p. 981).

Mr. Schwartzberg was responsible for the examination of mental health expert Dr. Maher. (PCR Vol. VII p. 956). Mr. Watts had no responsibility with respect to Dr. Maher as a witness. (PCR Vol. VII p. 956). Mr. Watts never billed Dr. Maher for any time in preparation. (PCR Vol. VII p. 988). Mr. Watts had no idea what time or preparation Mr. Schwartzberg did with Dr. Maher. (PCR Vol. VII p. 989). Mr. Schwartzberg was responsible for requesting mental mitigators at the charging conference. (PCR Vol. VII p. 957). Regarding negative aspects of Mr. Merck's character coming out during penalty phase, Mr. Watts said that some negative fire is drawn whenever we put on mental health experts. (PCR Vol. VII p. 969). Regarding Mr. Schwartzberg's penalty phase preparation, Mr. Watts testified as follows:

> As it may affect this case – I'm going to just try to be as specific as I can. I'm surprised at the lack of contact that I see with Dr. Maher, who would have been a player at

> some point in the case. So to answer this question as best I can, Mr. Schwartzberg would brush off things that he didn't want to deal with. My best insight into the Dr. Maher issue is that I find I did the direct examination. I did not prepare to do that. And the best I can recall is that I was asked to do that at the 11th hour – 12th hour. And I didn't have a dialogue with Dr. Maher beforehand other than, if I did, was to get in there and I'm – in looking back, I'm surprised that, first of all, Schwartzberg had the responsibility of Dr. Maher and, second of all, that given that he had the responsibility of Dr. Maher, that I'm the one that did the direct examination. We did not spend the typical time that I would spend with a mental health expert. And, apparently, Schwartzberg didn't spend the usual time. Why? I couldn't say. And I wasn't aware of it at the time, but I do recall being somewhat miffed that I'm doing this. (PCR Vol. VII p. 988).

Regarding the decision made in trial to not present Dr. Maher to the jury, but to use him in the Spencer hearing Mr. Watts testified as follows:

> That decision was made. I can't tell you when or how it evolved because I don't have a conscious memory of it. And so just to qualify my testimony on that point, I was surprised to find out that I wasn't responsible for Dr. Maher when the materials came forward and I reviewed with the State and the defense because of my memory was such that I couldn't really recall my work with Dr. Maher. I was somewhat pleased to find out that I hadn't worked with Dr. Maher. That would explain my lack of memory. (PCR Vol. VII p. 966).

When asked whether the most successful strategy was bringing in Troy Merck's sister and the lady from the foster home, and that the defense did not actually need Dr. Maher, Mr. Watts testified:

> Well, and this is a territory where that would have been Schwartzberg's responsibility. And I can see in looking back where, to tie the mitigation together, Dr. Maher would be good at that, so– (PCR Vol. VII p. 962).

Mr. Watts testified that Mr. Schwartzberg did take the deposition of Dr. Maher, the information was available, and he [Watts] was perplexed that more wasn't done with Dr. Maher. (PCR Vol. VII p. 994). Judge Downey was also concerned and perplexed about the defense not presenting mental mitigation. (PCR Vol. VII p. 994). Mr. Schwartzberg explained to Judge Downey why he didn't present Dr. Maher, however, the explanation came after the penalty phase was over and later at the Spencer hearing. (PCR Vol. VII p. 995).

Mr. Schwartzberg would have been responsible for developing any issues regarding Troy Merck being a minor participant. (PCR Vol. VII p. 956, 984, 986). Mr. Watts testified his responsibility was calling Mr. Merck's teachers and family members but Neil Thomas and the alternate theory of his participation was Mr. Schwartzberg's responsibility. (PCR Vol. VII p. 960). Mr. Watts was responsible for the high road mitigation, the troubled, chaotic upbringing of Troy Merck, and also the personal growth that he had achieved while on death row. (PCR Vol. VII p. 960-961). Mr. Watts testified that lingering doubt is something that can be presented to a jury at the penalty phase, that it's something we don't articulate, but

it's there, and it is perceived by the jury. (PCR Vol. VII p. 982). Presenting an alternate theory of defense is different than presenting lingering doubt. (PCR Vol. VII p. 982-983). Mr. Watts testified that there is a jury instruction available with respect to minor participant as a mitigator which needs be proven only by a preponderance of the evidence. (PCR Vol. VII p. 993).

Mr. Watts recalled trial evidence that Neil Thomas provoked the confrontation between the parties, that Thomas supplied alcohol to Mr. Merck, and that Kathleen Sullivan's description of the clothing worn by the killer matched the clothing worn by Neil Thomas. (PCR Vol. VII p. 983-984). Kathleen Sullivan described the killer as wearing khaki pants. (PCR Vol. VII p. 984-985). Mr. Watts recalled that the khaki pants were never recovered and presented to the FBI for analysis. (PCR Vol. VII p. 985).

Mr. Watts recalled that Neil Thomas verbally instigated the altercation by making provoking statements and that Sullivan said that the person who called James Newton a pussy was the killer. (PCR Vol. VII p. 983). He also recalled that Richard Holton testified that the stabber patted the roof on the passenger side, said give me the keys, threw a shirt into the car, reached for something, and then walked over to the victim to assault him. (PCR Vol. VII p. 986). Developing minor participant was not Mr. Watt's responsibility (PCR Vol. VII p. 984), but the

evidence of minor participant could have been presented by Mr. Schwartzberg. (PCR Vol. VII p. 986). Mr. Schwartzberg toward the end of the trial told the Court that he would be proffering to the Court further evidence of mitigation. (PCR Vol. VII p. 986).

Mr. Watts said that it is possible that Mr. Schwartzberg's health and personal problems affected his performance at Mr. Merck's trial. (PCR Vol. VII p. 989).

F. TESTIMONY OF: Vincent Slomin Ph.D.

Vincent Slomin was a psychologist who testified for the State at the Spencer hearing of Mr. Merck's trial. (PCR Vol. VII p. 1017). Slomin testified that he was not a medical doctor (unlike Maher) and could not prescribe medication. (PCR Vol. VII p. 1028). Slomin testified that he had not given Mr. Merck any new tests and was standing by his original Spencer hearing testimony. (PCR Vol. VII p. 1029). Slomin testified that he was aware that Mr. Merck had an eye condition which caused him (Merck) a lot of problems with other peers and Merck had operations to assist him with that. (PCR Vol. VII p. 1029). Vincent Slomin also testified that he had no idea the eye condition (ptosis) was an indicator of fetal alcohol syndrome. (PCR Vol. VII p. 1030).

At the evidentiary hearing, regarding prefrontal lobe brain damage the following questions were asked and answered:

> Q. Okay, Now, because you are not a medical doctor, sir, is it safe to say that you have no expertise in reading and interpreting PET scans?
> A. Safe to say.
> Q. So if Dr. Maher interpreted - consulted with a neuropsychologist and interpreted a PET scan and found prefrontal lobe brain damage on Mr. Merck, you would be unable to refute that; isn't that correct, sir?
> A. No. I can come up with a hypothesis being a psychologist.
> Q. But, sir, my question was you can't interpret a PET scan, can you?
> A. No, I can't.
> Q. Nor do you pretend to, right? You don't hold yourself out as a medical doctor?
> A. Again, I am not a medical doctor. (PCR Vol. VII p. 1031-1032).

Slomin testified that his conclusion regarding Mr. Merck was based on his "extensive" clinical interview and the MMPI testing. (PCR Vol. VII p. 1032).

SUMMARY OF ARGUMENTS

Issue I. Trial counsel should have objected to the characterization made by the judge, during the final instructions to the jury, that **"the(**emphasis added) defense asserted in this case is of voluntarily intoxication by use of alcohol." Id. Such an assertion mislead the jury because voluntary intoxication was not "the" defense asserted in this case, but rather a lesser, secondary defense. Trial counsel was ineffective. The lower court erred in denying this claim.

Issue II. During jury selection, trial counsel was ineffective for allowing two

jurors on the final panel, who were biased toward voting for the death penalty and mistaken about the proper legal standards for imposing death. Moreover, trial counsel was ineffective for failing to rehabilitate the two biased and confused jurors. The lower court erred in denying this claim.

Issue III. Trial counsel was ineffective for failing to proffer essential testimony which would have demonstrated that Mr. Merck was an accomplice or minor participant in the crime charged in accordance with Fl. Stat. 921.141 (6) (d). The minor participant mitigator would have been proven by a preponderance of the evidence, and Troy Merck would not have been sentenced to death. The lower court erred in denying this claim.

Issue IV. The state acted in bad faith at the trial level, when a lead investigating detective failed to preserve physical evidence that was exculpatory for Mr. Merck. Had the detective properly preserved this evidence for discovery at trial, Mr. Merck would have been acquitted. The lower court erred in denying this claim.

Issue V. There was ineffective assistance of counsel at the trial level during penalty phase. Trial counsel failed to provide proper background material to the mental health professional, which would have established both statutory and non-statutory mitigation. The lower court erred in denying this claim.

Issue VI. Trial counsel was ineffective during penalty phase due to his ignorance

of the law regarding statutory mitigation. Counsel failed to request two appropriate statutory mitigators which would have resulted in Mr. Merck being sentenced to life in prison. The lower court erred in denying this claim.

THE STANDARD OF REVIEW

All of the issues discussed in the brief, should be reviewed under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999). The claims are a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

ISSUE I

THE LOWER COURT ERRED IN DENYING THE CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO AN IMPROPER AND MISLEADING JURY INSTRUCTION IN THE GUILT PHASE OF THE TRIAL. AS A RESULT OF TRIAL COUNSEL'S INEFFECTIVENESS; THE JURY WAS MISLEAD AS TO THE ACTUAL THEORY OF DEFENSE AND MR. MERCK WAS DEPRIVED OF A FAIR TRIAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The lower court denied this claim in its Order and found that trial counsel was not ineffective in his handling of the intoxication defense instruction. (PCR Vol. III p. 302-303). This was error. At the evidentiary hearing, Mr. Zinober admitted certain key issues. Regarding trial strategy, Mr. Zinober wanted to create a reasonable doubt, and that the killer very well could have been Neil Thomas. (PCR Vol. VI p. 765). He remembers pointing out during trial that Katherine Sullivan described the killer as wearing khaki pants, and pointed out the fact the State established Troy Merck as wearing different pants. (PCR Vol.VI p. 766). Mr. Zinober established that Troy Merck had a large tattoo on his arm, where as Neil Thomas had no tattoos; which better matched Ms. Sullivan's description. (PCR

Vol.VI p.767). Similarly, he recalls pointing out that Neil Thomas called the victim a pussy. Id.

During the charge conference at Mr. Merck's guilt phase, the following exchange between the attorneys and the trial court took place regarding voluntary intoxication:

> THE COURT: You can both go out, Mr. Martin, Mr. Daniels, go out release and all your witnesses. Introduction of homicide.
> MR.ZINOBER: What number is that, Judge?
> THE Court: Pardon me?
> MR.ZINOBER: I'm sorry.
> THE COURT: That is precisely what is in that packet at this point.
> MR. ZINOBER : Right.
> THE COURT: This is first degree premeditated. So, you have this instruction. The lesser included are second and manslaughter, right?
> MR. RIPPLINGER: Yes, Your Honor.
> THE COURT: You have instruction on voluntary intoxication by alcohol. It's not that I'm being awfully, totally informal when I'm trying to go through a charge conference, but I really would appreciate if you are going to have a communication, please let me know that you're not just ignoring me but there is something that you want to discuss.
> MR. ZINOBER: Your Honor, I was not ignoring you. I'm sorry.
> THE COURT: Well, I'm finding it very offensive. I really am.
> MR. ZINOBER: I want to confer with Jim. There is any other lessers?
> THE COURT: Voluntarily intoxication by use of alcohol;

2.03, plea of not guilty, reasonable doubt, burden of proof: 2.04, weighing the evidence, one through five, and six, and eight, and ten – excuse me, and nine. Standard witness received preferred treatment, inconsistent statement, conviction of a crime, 2.04 (a) expert,; 2.04 (b). Does the Defense to have that instruction?
MR. ZINOBER: Yeah.
THE COURT: 2.04 (c), the defendant testifying.
MR. ZINOBER: One second, Judge.
THE COURT: You don't have a choice, Counsel. If the defendant testifies, that instruction is given.
MR. ZINOBER: Both paragraphs?
THE COURT: No, there is only one. Two paragraphs when the defendant doesn't testify.
MR. ZINOBER: Okay.
THE COURT: When the defendant does there is just one paragraph.
MR. ZINOBER: yeah.
THE COURT: There is no statement to law enforcement which is what I perceive 2.04 to cover. Does either side wish 2.04?
MR. RIPPLINGER: No, Your Honor.
MR. ZINOBER: No.
THE COURT: 2.05, rules for deliberation one through eight; 2.07, cautionary; 2.08, as we have discussed at this point, the verdict is guilty of murder in the first degree as charged, guilty of murder in the second charge as included, not guilty. Submitting the case to the jury, 2.09. Is there anything else that anybody wishes or that we need to discuss?
MR.ZINOBER: May I have a moment?
THE COURT: You certainly may.
MR. ZINOBER: I have nothing else, Your Honor. Please let me clarify on intoxication as a defense to murder in the first degree, it is not a defense to murder in the second degree or manslaughter. I'm mistaken if neither one of those is a specific intent crime.

> MR. RIPPLINGER: That's correct, Judge. I think was not in the last packet.
> THE COURT: *I know it was in the last packet, just wanted to make sure I go over it. Again, I got new lawyers. That's why I'm doing it one by one by one.* (emphasis added).
> MR.ZINOBER: I'm not aware of a law that says it would be a defense to either second degree or manslaughter. Let me put it that way. I'm inadequate in that regard.
> THE COURT: Any other instructions that either side wishes the Court to give?
> MR. RIPPLINGER: Nothing form the State, Your Honor.
> MR. ZINOBER: No, Your Honor (FSC ROA Vol. VII p. 1066-1069-L)

That above-quoted exchanges, demonstrates that the trial counsel was aware that the trial Court intended to instruct the jury regarding involuntary intoxication. At trial, regarding voluntary intoxication, the following instruction was read to the jury:

> The defense asserted in this case is of voluntarily intoxication by use of alcohol. The use of alcohol to the extent that it merely arouses passions, diminishes perception, releases inhibitions, or clouds reason and judgment it does not excuse the commission of a criminal act. However, where a certain mental state is an essentially element of a crime and a person was so intoxicated that he was incapable of forming that mental state, the mental state would not exist, and, therefore, the crime could not be committed. As I have told you, the premeditated design to kill is an essential element of the crime of murder in the first degree. Therefore, if you find from the evidence that the defendant was so intoxicated from the voluntarily use of alcohol as to be incapable of

> forming the premeditated design to kill, or you have a reasonable doubt about it, you should find the defendant not guilty of murder in the first degree. Voluntarily intoxication is not a defense to the crime of murder in the second degree or the crime of manslaughter. The defendant has entered a plea of not guilty. This means you must presume or believe the defendant is innocent. The presumption stays with the defendant as to each material allegation in the indictment through each stage of the trial until it has been overcome by the evidence..... (FSC ROA Vol. VIII p.1213-1214-L)

At no time, either at the charge conference itself, or after the jury instructions were read to the jury, did trial counsel object to the voluntary intoxication instruction. The issue is that Mr. Zinober should have objected to the characterization made by the judge that **"the** (emphasis added) defense asserted in this case is of voluntarily intoxication by use of alcohol." Id. Such an assertion mislead the jury because voluntary intoxication was not "the" defense asserted in this case, but rather a lesser, secondary defense. As a jury is instructed to follow the Court's instruction's, they were clearly confused about the issue of "the" defense being voluntary intoxication; which hindered their ability to find Mr. Merck actually not guilty or innocent of the crime

Due to trial counsel's ineffectiveness this issue was not properly preserved by objection and therefore not preserved for appellate review. During the evidentiary hearing Mr. Zinober admitted he did not clarify during the charge conference that

voluntary intoxication was merely one of the defenses. (PCR Vol. VI p. 770). He confirmed that he could have sought clarification that voluntary intoxication was "a" as opposed to "the" defense in the trial. (PCR Vol.VI p. 771). During defense counsel's closing argument, Mr. Zinober only briefly made reference to voluntary intoxication. (FSC ROA Vol VIII p. 1135-1138 -L). Immediately after a brief discussion of voluntary intoxication the following took place:

> Now, that being said, *let's get really to what the defense is in this case.* (emphasis added) That is the second element. Have they proven beyond a reasonable doubt that Troy is the individual that committed this crime. And I suggest to you that the answer to that is a resounding no. As I mentioned to you, the Judge is gonna tell you that reasonable doubt is to come basically from three areas, from the evidence, conflict in the evidence, or lack of evidence. And those are gonna be the issues that I'm gonna be discussing. We're gonna be talking first about the evidence and the conflict in the evidence, and then we'll talk about the lack of evidence. As there was no secret from the beginning, in opening statements, I think it was clear from Mr. Daniels' opening statement. And I mentioned to you in my opening statement the State's case was based right from the get-go upon the testimony of Katherine Sullivan. I think even Detective Nestor admitted that after he got the description from Katherine Sullivan that was when they had decided who the killer was and who the other person was. And basically they went on that. And that's how they put their case together. They started putting search warrants together with the State. And they wound up preparing the case in a sense of who they had established in their mind from the beginning was the killer. (FSC ROA Vol. VIII p.

1138-39 -L)

Regarding that passage, Mr. Zinober had this to say at the evidentiary hearing: "*Our primary defense* (emphasis added), as I mentioned, was to establish that the State could not prove beyond a reasonable doubt that Troy was the individual that had committed the crime". (PCR Vol.VI p.768).

The prejudice is obvious. In its rebuttal closing argument, the State vitiated trial counsel's ID argument:

> And intoxication is only a defense of first degree murder. It's not a defense of second degree or manslaughter. And it's only a defense if somebody would be so impaired their mental process is so impaired from alcohol they would not be able to form the intent to kill. In this case he would just have absolutely have no consciousness of what he was doing, no consciousness of the nature and the quality of his actions of what he was doing.
>
> This wasn't a disorganized sequence of events in the conduct from Troy Merck. Because, like I said, was very deliberate, goal-oriented series of acts that led to that man's death. There wasn't any provocation on the part of Mr. Newton. He wasn't talking to him. He wasn't calling him names. He wasn't – he was standing there saying, "I'm not gonna fight you."
>
> That wasn't good enough for Troy Merck. He decided to get the knife and end his life. So, his very actions show this goal-oriented, purposeful series of conduct. And the testimony of the people in the parking lot that saw him – you talk more about ridiculous amounts of alcohol. He wants you to believe he drank in that bar. But there is not one single piece of evidence that would be consistent with anybody drinking quantities of alcohol

> that he indicated or quantity of alcohol that were raised to the extent he would not have any – he wouldn't be able to go through the purposeful action of which you heard.
>
> The witnesses testify that he did. But it's not a defense to the extent that the use of alcohol merely arouses passions, diminishes perception, releases inhibition or clouds reason and judgment. It does not excuse the commission of a criminal act. It has to be from the evidence.
>
> When this trial started, he was presumed innocent. He's not presumed intoxicated. So, if you want to make a finding he was intoxicated, you got to look for reliable creditable evidence to indicate he was impaired from alcohol to the extent – people saw him out in this parking lot and said he was walking. He was talking fine. He was catching keys. He takes the keys. Puts them in the key hole. Puts – takes the shirt off. Going through very normal, easy physical activities that everybody can do when they're sober not showing one bit of impairment.
>
> His speech isn't slurred. He's not staggering. He's not falling down. He's, he's in total control of what he's done. And he knew very well he wanted to do this and that was to end that man's life. Drinking had no affect on him at all. All it did was release his inhibition to that fact he knew very well what he did and what he wanted to do.
>
> Mr. Zinober says we're trying to put a square peg in the round hole. No, no, that's Mr. Square peg in a round hole back there. Because find he didn't intent to kill, find he wasn't the killer, you would have to force a doubt. It goes both ways. (FSC ROA Vol. VIII p. 1200-1202-L)

Clearly the State's reference to "Mr. Square peg in a round hole" was an allusion to trial counsel's inconsistent defenses. Trial counsel was ineffective in failing to object to the irrelevant, confusing, in-applicable jury instruction of

voluntary intoxication. At the very least, counsel should have sought clarification that voluntary intoxication was merely ONE of the defenses. And again, trial counsel was ineffective for not objecting when the Court called voluntary intoxication "the" defense in it's instructions to the jury. The prejudice is obvious and as stated by the prosecutor in his argument cited above, trial counsel is unable to raise a reasonable doubt by advancing two inconsistent defenses; trial counsel is attempting to force a doubt by pleading in the alternative.

Legal argument

In Capehart v. State, 583 So.2d 1009 (Fla. 1991) the Florida Supreme Court discussed the failure to object in the following manner:

> The law is clear that error predicated on the admission of such evidence must be preserved for review by appropriate objection at trial. *Grossman v. State,* 525 So.2d 833 (Fla. 1988), *cert denied*, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989). Accordingly, we do not address the merits of Capehart's claim. The defense counsel's failure to object to the admission of this evidence and the resulting prejudice, if any, is a question appropriately decided in a proceeding for post-conviction relief. *See* Fla. R. Crim. P. 3.850; *see also*, *e.g. Kelly v. State*, 486 So.2d 578 (Fla.), *cert denied*, 479 U.S. 871, 107 S.Ct. 244, 93 L.Ed.2d 169 (1986). Id. At 1014.

In Mr. Merck's case the prejudice was blatant. By failing to object to the inclusion of this irrelevant, misleading, voluntary intoxication jury instruction, trial counsel

was forced to address it in his closing before he was able to "get really to what the defense is in this case." Mr. Zinober stated in part at the evidentiary hearing that they wanted to infer that Neil Thomas was the killer by raising the issue as a reasonable doubt regarding Troy's involvement: "Basically, our position was that there wasn't enough evidence to establish that it was Troy, that there was a reasonable doubt, that it very well could have been Neil, and that there was as much evidence, we suggested it was Neil as it was Troy". (PCR Vol. V I p. 765).

The guilt phase jury was misled into thinking that trial counsel, by raising inconsistent defenses was trying to "force a doubt" rather than raise a reasonable doubt as to whether or not the State had proved that Merck was the actual stabber of Newton.

The issue of inconsistent defenses is addressed in Dufour v. State, 905 So.2d 42 (Fla. 2005):

> This Court has held that it will not second-guess counsel's strategic decisions concerning whether and intoxication defense will be pursued. *See Jjones v. State*, 855 So.2d 611, 616 (Fla. 2003); *see also Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000) (holding that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct"). In *State v. Williams*, 797 So.2d 1235 (Fla. 2001), this Court analyzed whether trial counsel was ineffective for failing to present a

> voluntary intoxication defense at trial and concluded that counsel could not be deemed ineffective for failing to pursue such defense when the defense would have been inconsistent with Williams' theory of the case that he did not commit the crime. *See* *id.* At 1239. Similarly, here pursuing a voluntary intoxication defense in Dufour's case would have been totally inconsistent with the defense theory presented that Dufour did not commit the murder.
>
> The theory of the case advanced during Dufour's trial was that he did not commit the crime but that Robert Taylor, the leader of Dufour's gang, committed the murder. Therefore, similar to this Court's conclusion in *Williams*, we conclude that counsel cannot be deemed ineffective for failing to pursue a voluntary intoxication defense when it would have been inconsistent with Dufour's theory of the case that he did not commit the crime. Id. At 52-53.

In Mr. Merck's case, trial counsel argued that Merck was not the killer, Neil Thomas was. Trial counsel was ineffective pursuant to Capehart in failing to object to the irrelevant jury instruction of voluntary intoxication held over from the last trial (the hung jury). In the instant case, as in Dufour, the theory of the case advanced during Mr. Merck's trial was that he did not commit the crime but that Neil Thomas did stab Newton.

If, pursuant to Dufour and Williams, counsel cannot be deemed ineffective for failing to pursue a voluntary intoxication defense when it would have been inconsistent with Dufour's theory of the case that he did not commit the crime; trial counsel can and should be deemed ineffective for including a voluntary intoxication

defense when it was inconsistent with Mr. Merck's theory of the case that he did not commit the crime. Trial counsel attempted to vitiate this issue during the evidentiary hearing, by stating that he would have requested the voluntary intoxication jury instruction regardless, as an option for a second degree murder verdict. (PCR Vol. VI p. 782). However, that doesn't excuse his ineffective strategic decision pursuant to Dufour and Williams. At the very least, as Mr. Zinober stated, he could have objected to clarify that voluntary intoxication was "a" as opposed to "the" defense in the trial. (PCR Vol. VI p. 771). If he had done so, Troy Merck would not have been convicted. That is the prejudice. Relief is both necessary and proper.

ISSUE II

THE LOWER COURT ERRED IN DENYING THE CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO STRIKE TWO JURORS WHOSE STATEMENTS DURING VOIR DIRE REVEALED THAT THEY WERE INCAPABLE OF BEING IMPARTIAL BUT WERE RATHER BIAS TOWARDS VOTING FOR THE DEATH PENALTY AND OR MISTAKEN ABOUT THE LAW AND DEPRIVED HIM OF HIS RIGHTS TO A FAIR TRIAL AND CAPITAL SENTENCING UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The lower court denied this claim in its Order, and deemed trial counsel effective concerning his handling of jury selection. (PCR Vol. III p. 308-310). This was error. Trial counsel allowed two biased jurors to sit on Mr. Merck's jury, in violation of his constitutional rights. Counsel performed in a deficient manner. If trial counsel had properly corrected the jurors in front of the entire pool, and removed jurors Rowley and Coop, Troy Merck would have received a life sentence. Certain facts are undisputed. Juror Coop stated that he would vote for the death penalty if he could be convinced of the HAC aggravator:

> MR. RIPPLINGER: And what type of thoughts do you have about the death penalty?
> PROSPECTIVE JUROR COOP: I think I depends entirely on the specific circumstances. It is warranted in more extreme circumstances.
> MR. RIPPLINGER: When I use the words "heinous, atrocious and cruel", is that the type of adjectives that would kind of fit what you are talking about?
> PROSPECTIVE JUROR COOP: Yes.
> (ROA 2nd Addendum Vol. I p. 181-182).

> Juror Rowley felt the same way:
> MR. RIPPLINGER: What Mr. Daniels and I are primarily going to be doing in this is trying to convince you beyond a reasonable doubt that this was committed in what is known as a heinous, atrocious and cruel manner.
> PROSPECTIVE JUROR ROWLEY: If that's the case then I would vote for the death penalty if you can convince me of that.
> (ROA 2nd Addendum Vol. 1 p. 129-131).

These views were never touched on or corrected by trial counsel or the Court. Not once. There is another issue that never got touched on by trial counsel. Juror Rowley stated that he leaned toward the imposition of death, unless he could be convinced by trial counsel of something else:

> MR. SCHWARTZBERG: You are leaning toward the imposition of death unless I can convince you of something else, fair?
> PROSPECTIVE JUROR SCHOENACHER: Yes.
> MR. SCHWARTZBERG: How many people agree with Mr. Schoenacher? Mr. Hunt? Mr. Maul? Anyone else? Mr. Bubser, how about you, are you in that group?
> PROSPECTIVE JUROR BUBSER: I'd say that I am.
> MR. SCHWARTZBERG: Mr. Rowley, are you in that group?
> PROSPECTIVE JUROR ROWLEY: I'm in that group.
> MR. SCHWARTZBERG: You are going to wait until you hear everything and then make a decision?
> PROSPECTIVE JUROR ROWLEY: Yes.
> (ROA 2nd Addendum Vol. I p. 231).

At the evidentiary hearing, attorney Richard Watts, who aided in jury selection, admitted that HAC was something they hoped to overcome. (PCR Vol. VII p. 200-203). He had this to say about the HAC issue:

> I'm aware of that. And what I would qualify and say is that it seemed the issue was jurors would find heinous, atrrocious and cruel would say, yes, I'd vote for death if I found that. Most jurors would. And so, to me, that wasn't a reason to necessarily exclude those jurors. So I stand corrected on the law. But also my feeling was that we were

> going to be challenging the heinous, atrocious and cruel in that the death was sudden. And so that would be our challenge to that issue. So I'm aware of what you're asking. I wasn't aware of it at the time.
> (PCR Vol. VII p. 197-198).

Richard Watts further testified that he has no independent recollection of the jurors ever being rehabilitated. (PCR Vol. VII p. 203). The record will reflect that they were not rehabilitated. Trial counsel admitted the deficient performance on the part of he and his co-counsel here:

> MR. VIGGIANO**:** Mr. Watts, regarding the jury selection, would you agree that the issue of HAC would have been something that should have been clarified or Mr. Schwartzberg could have went into further with respect to these jurors?
> MR. WATTS**:** Having read your materials, I would answer yes. (PCR Vol. VII p. 205).

Mr. Merck fully expects the State to diminish the importance or relevance of those passages. Taking the entire voir dire transcript into account, Mr. Rowley came across as confused and unpredictable. That served as no comfort to Mr. Merck's desire for justice.

During cross-examination at the evidentiary hearing, the State left out what lead to Mr. Rowley stating that he would "hear everything and then make a decision". (PCR Vol. VII p. 226). They left out the full context of the statement being in response to Juror Rowley stating that he leaned toward the imposition of

death unless he could be convinced of something else. (ROA 2nd Addendum Vol. I p. 231). There was never any clarification, rehabilitation, or follow up.

Similarly, the lower court attempted to prop up Juror Coop, in it's Order with Mr.Coop's statement that his thoughts on the death penalty "depends entirely on the specific circumstance...most warranted in the most extreme circumstance". (PCR Vol. VII p. 226-227). The lower court left out the fact that this was followed by Juror Coop stating the words "heinous, atrocious and cruel", were the type of adjectives that would kind of fit what he was talking about. (ROA 2nd Addendum Vol. I p. 181-182). Again, there was never any clarification, rehabilitation, or follow up. When one looks at the State's cross-examination, at the evidentiary hearing and the lower court's Order, you'll see that the main point is that these jurors weren't so bad, and that things could have been worse. This is not the proper standard, and Mr. Merck is paying for trial counsel's incompetence with his life.

After sitting through numerous hours of the voir dire process, these two jurors made up their minds–biases and all. There was never any attempt to correct or rehabilitate their last, final, statements. The jury pool was poisoned, and these two biased and legally confused jurors were placed on the panel. They took part in the deliberations with these false assumptions, and helped get Troy Merck a sentence of death.

Legal Argument

The lower court's decision was contrary to the law. The jurors were biased and the bias was never rehabilitated. At best, the answers of the jurors were equivocal. Crawford v. State, 805 So.2d 997, 999 (Fla. 2nd DCA 2002). In Crawford, based on the juror's equivocal responses, the Court decided that the juror wasn't sufficiently rehabilitated to serve on the jury. Id. The reason for this is based on the reasonable doubt as to the juror's ability to follow the law and render an impartial verdict. Bryant v. State, 656 So.2d 426, 428 (Fla. 1995). Because of the failure on the part of trial counsel to rehabilitate these jurors in any fashion, they were permitted to sit on the jury with misconceptions about the law.

In a case directly on point, in Hill v. State, 477 So.2d 553, (Fla. 1985), a juror articulated that he leaned toward voting for the death penalty in the same vain as Mr. Rowley. Specifically, the juror in that case, in response to defense counsel's questioning, articulated that "he was inclined towards the death penalty if in fact there was a conviction, and that's the presumption that he went into court with." Id. at 555. That's almost precisely what Juror Rowley stated. Mr. Rowley's statement that he would listen to everything and then decide, didn't cure his preconceived feelings of leaning toward death. Again, he leaned toward death. He was not objective. The Florida Supreme Court held that the challenged juror in Hill should

have been removed for cause, and that it was reversible error not to do so. Id. at 556. In reliance on the landmark Singer v. State, 109 So.2d 7, 24 (Fla. 1959, the Court wrote:

> It is exceedingly important for the trial court to ensure that a prospective juror who may be required to make a recommendation concerning the imposition of the death penalty does not possess a preconceive opinion or presumption concerning the appropriate punishment for the defendant in the particular case. *A juror is not impartial when one side must overcome a preconceived opinion in order to prevail*.(emphasis added). Id.

Mr. Watts admitted that a juror who leans toward voting for the death penalty, presents a preconceived opinion, over which he'd have to prevail. (PCR Vol. VII p. 981). Similarly, Mr. Watts admitted that Jurors Coop and Rowley would be mistaken if they believed the establishment of the heinous, atrocious, and cruel aggravator mandated a sentence of death. (PCR Vol. VII p. 981). Mr. Watts admitted the deficiency of trial counsel by submitting that the HAC matter was "something that should have been clarified or Mr. Schwartzberg could have went into further with respect to these jurors." (PCR Vol. VII p. 957).

In this case, two jurors had preconceived opinions that showed a tendency to be disinclined to follow the law in an impartial manner. Mr. Merck was prejudiced in that he had to overcome these opinions that were never corrected or rehabilitated.

At best, the answers were equivocal, and a reasonable doubt existed as to their ability to follow the law, and render and impartial verdict. At worst, two plainly biased jurors were permitted to sit on the jury and decide Troy Merck's fate. If these two jurors were properly rehabilitated in front of the panel, or stricken for cause, Troy Merck would not have been sentenced to death. Relief is proper.

ISSUE III

COUNSEL'S FAILURE TO PROFFER ESSENTIAL TESTIMONY TO SHOW THAT MR. MERCK WAS A MINOR PARTICIPANT IN THE CRIME DEPRIVED HIM OF HIS RIGHTS TO A FAIR TRIAL AND CAPITAL SENTENCING UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The lower court denied this claim in its Order, deemed trial counsel effective, and stated that there was no reasonable likelihood the result would have been different had the proffer occurred. (PCR Vol. III p. 310-313). This was error. Trial counsel was ineffective for failing to proffer essential testimony which would have demonstrated that Mr. Merck was an accomplice or minor participant in the crime charged in accordance with Fl. Stat. 921.141 (6) (d). The minor participant mitigator would have been proven by a preponderance of the evidence, and Troy Merck would not have been sentenced to death. Troy Merck was a minor participant because the actual killer of James Newton was Neil Thomas.

On March 1, 2004, a motion in limine hearing was held. (FSC ROA Addendum, p. 618-633-D). Among the things that trial counsel wished to put before the penalty phase jury were: Neil Thomas provoked the confrontation

between the parties, Thomas was the individual who supplied the alcohol to Merck on the night of the incident, Katherine Sullivan's description of the clothing worn by the killer matched the clothing worn by Neil Thomas, and most importantly, Henry Brommelstick, the Pinellas County Fingerprint Examiner previously testified that fingerprints found near and on the front passenger side roof, belonged to Neil Thomas. Id. at 619-620.

Also, trial counsel wanted to develop the point that Neil Thomas verbally instigated the altercation by making provocative comments. Id. at 620. Significantly, Katherine Sullivan said that the person who called the victim a "pussy" was the killer. (FSC ROA Vol. III p. 423, 467-L). Neil Thomas admited that he was the person who called Jim Newton a pussy. (FSC ROA Vol. VI p. 796-L) (FSC ROA Vol. IV p. 80-D).

Katherine Sullivan also described the killer as wearing khaki pants. (FSC ROA Vol. III p. 472-L). FBI DNA analyst, John Mertens, testified that he was never given khaki pants to test for analysis. (FSC ROA Vol. IV p. 581-582-L). Neil Thomas testified that he can't remember what type of pants he had on. (FSC ROA Vol. VI p. 738-L). According to State's evidence, Troy Merck is accused of wearing blue pants and belt during the stabbing, (See States exhibit 21) not khaki pants as Katherine Sullivan testified to.

Regarding the prints, the fingerprints on the side of, and location of the car where the killer was positioned-the passenger door roof-demonstrate that Neil Thomas was the actual killer. Katherine Sullivan testified that the killer retrieved the weapon from the front passenger side of the car. (FSC ROA Vol. III p. 424-432-L). Another State witness, Richard Holton, testified that the stabber patted the roof of the passenger side, said, "give me the keys", threw a shirt into the car, reached for something, and then walked over to the victim to assault him. (FSC ROA Vol. VI p. 722-723-L). During Mr. Merck's first jury trial which led to conviction, in front of Judge Claire K. Luten, senior fingerprint examiner, Henry Brommelstick, testified for the State. (FSC ROA Vol. V p. 600- 623- L). Mr. Brommelstick gave specific testimony regarding the placement of Neil Thomas' palm print on the passenger side of the vehicle in question. (FSC ROA Vol. V p. 611-612-L).

Mr. Brommelsick testified at the evidentiary hearing and restated the above quoted testimony in regards to1993 trial exhibits, 20-E, 20-F, and 20-H, as all three exhibits were admitted into evidence. (PCR Vol. I p. 75-79). He personally rolled the prints of Thomas and Merck, and doesn't believe it's possible for two people to share the same fingerprint. (PCR Vol. I p. 73-74).

During the 1993 trial, Mr. Brommelsick further testified on cross-examination

about the location of Neil Thomas' prints. (FSC ROA Vol. V p. 621-622-L). On redirect, Mr. Brommelstick testified and clarified that Neil Thomas' print was on the car roof above the door handle, while Troy Merck's prints were on the roof, but toward the back of the vehicle. (FSC ROA Vol. V p. 623-L). Fred Zinober testified about that trial exchange at the evidentiary hearing, as one of the highlights of the trial. (PCR Vol. I p. 22-23). This was a "highlight" that Mr. Schwartzberg recognized but failed to take advantage. This crucial bit of testimony in addition to that mentioned above should have been proffered before Judge Downey and preserved for appeal. Henry Brommelsick was able and willing to testify truthfully at the last penalty phase during March of 2004. (PCR Vol. I p. 79-81).

Trial counsel knew that the information should have been proffered, but he failed to do so. (FSC ROA Vol. V p. 300-D). The testimony was never actually proffered to the Court. Trial counsel mentioned "evidence that I will be proffering", but then simply failed to do so. Trial counsel simply did not follow up, and Mr. Merck was prejudiced by the deficient performance.

Trial counsel levied a deficient performance by not proffering the testimony to show that Troy Merck was an accomplice or minor participant in the murder of Jim Newton. Troy Merck was further prejudiced because the Florida Supreme Court was unable to consider the claim, but rather denied it outright, due to trial

counsel's failure to proffer. Merck v. State, 975 So.2d 1054,1061 (Fla. 2007). If the Florida Supreme Court had considered the properly preserved testimony, it would have granted Mr. Merck a new penalty phase. The testimony regarding who verbally provoked the fight, the fingerprints, and the killer's khaki pants raise doubt that Troy Merck was the murderer; but was rather at best, a "minor participant". The law is clear that Mr. Merck was entitled to put on testimony that he was a "minor participant" in the murder of Jim Newton. Downs v. State, 572 So.2d 895, 899 (Fla. 1990).

The trial court erred in denying this claim. The Florida Supreme Court did not consider the claim because the claim was not properly preserved. The claim was not denied for the reasons stated in the trial court's order denying post conviction relief.

Trial counsel's performance was deficient as trial counsel did not properly preserve the claim for review by the Florida Supreme Court. The ineffectiveness was failure to proffer testimony. The prejudice is clear in that the establishment of the "minor participant" mitigator would have caused the jury to grant Mr. Merck a life sentence. Mr. Merck is entitled to a new penalty phase.

ISSUE IV

THE FAILURE OF LAW ENFORCEMENT TO KEEP AND PRESERVE EVIDENCE LOCATED DURING THE SEARCH OF THE VEHICLE ABANDONED BY TROY MERCK AND NEIL THOMAS, WAS A BAD-FAITH FAILURE TO PRESERVE EXCULPATORY EVIDENCE IN VIOLATION OF TROY MERCK'S RIGHT TO DUE PROCESS UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The lower court denied this claim in its Order as procedurally barred. (PCR Vol. III p. 303-305). This was error. At trial, the significant issue of the case was the identification of the alleged assailant of the victim, James Newton. The only eyewitness who was able to describe the attacker in any detail was Katherine Sullivan. The State relied on Katherine Sullivan to prove its case. As the only eyewitness to the attack on James Newton, Katherine Sullivan described the attacker as wearing a light blue dress shirt and tan or khaki-colored pants.

Troy Merck, upon taking the stand, testified that Neil Thomas was wearing a light blue dress shirt and tan or khaki-colored pants. Roberta Connors testified that Neil Thomas had informed her, following the assault on James Newton, that both he and Troy Merck were both covered with blood, and, thus, had to change clothes and leave the clothes in the Mercury Bobcat. A search warrant on the Mercury Bobcat

was executed the same day as the homicide. The testimony and evidence at trial demonstrated that the khaki pants and blue dress shirt were never placed into property in connection with this case.

Detective Nestor, the case agent, who was both the individual who interviewed Katherine Sullivan (and took the description of the attacker as wearing khaki-colored pants and light-colored dress shirt) as well as the individual who executed the search warrant, testified that the vehicle and its contents had been released to the owner. During the search of the Mercury Bobcat, Detective Nestor examined everything that might have evidentiary value for either the prosecution or the defense. However, he testified that it is not necessary to actually take everything into custody; [t]here are a lot of items in there that had no evidentiary value, that were not retrieved from the vehicle that are left in the vehicle." Such items would be released whenever the vehicle was picked up by the registered owner. (T684-86 - L). Nestor was the one who made the decision what was important or not; "If I didn't collect it, then it wasn't in evidence." (T686-88 - L).

It was established, through trial, that the owner of the vehicle was the Defendant's brother and sister-in-law, Tony and Joyce Whitmire. Thus, inasmuch as Detective Nestor suggested or testified that the contents had been released to the owner, an argument was likely precluded that the Sheriff's Department did not

preserve essential evidence (inasmuch as it would have been in the hands of family members of the Defendant). Neither the vehicles nor the contents were returned or released to the owner. The owners never requested that the vehicle be towed or stored. The vehicle was abandoned and released to City Wrecker in St. Petersburg, Florida were it was likely sold for salvage and the contents destroyed.

Detective Nestor had, earlier in the cause, been deposed by the Defendant's prior counsel, who had pursued a different (intoxication) defense over the Defendant's objection.

The shirt and particularly khaki pants were material evidence in the case, in that, if there was any blood at all on the pants linked to the victim, James Newton, it would tend to show that Neil Thomas was the perpetrator rather than the Defendant. A critical factor in the State's presentation of its case was the fact that the victim's blood was found on the pants belonging and identified to the Defendant.

The examination of the khaki pants would have uncovered evidence that the victim's blood was located thereupon based upon the fact that: (1) Katherine Sullivan testified that the stabber was wearing khaki pants; (2) Troy Merck testified that Neil Thomas was wearing khaki pants; (3) Roberta Connors testified that Neil Thomas stated that they were both covered with blood; (4) it was Neil Thomas' idea to change clothes following the stabbing; and (5) Agent Jack Mertens testified that

he would have analyzed whatever clothing was submitted to him for the presence of the victim's blood.

Through no fault of Troy Merck, material, favorable evidence has been lost or destroyed.

After conviction and on direct appeal, Troy Merck raised the claim that the conviction must be vacated as a result of the State's bad-faith failure to preserve potentially exculpatory evidence. In denying the claim in Merck v. State, 664 So.2d 939 (Fla. 1995) the court held:

> Merck asserts that the failure on the part of Detective Nestor to keep as evidence a pair of khaki pants located during the search of the vehicle abandoned by Merck and his companion after the murder, was a bad-faith failure to preserve potentially exculpatory evidence, resulting in a denial of due process. In examining the items found in the vehicle, Detective Nestor meticulously looked at every item found in the car, and a videotape was made of the search. Detective Nestor testified that it was his job as the case agent to determine which of these items had evidentiary value. He retained all items that he determined to have evidentiary value, and he left the other items in the vehicle. The vehicle was thereafter available to be picked up by its registered owner. One of the items examined by Detective Nestor was a pair of "baggy khaki colored style pants." Detective Nestor testified that after he examined those pants and found no blood stains on them, he concluded that they did not have evidentiary value and left the pants in the vehicle.
> Merck raised this issue in post-trial motions which were acknowledged not to be timely. Merck asserts that the

> failure to maintain this evidence was fundamental error and, as such, can be raised for the first time post-trial. We do not agree. Here, the failure to preserve the khaki pants was clearly known by Merck prior to and during the trial. The issue was not preserved by timely objection and was not properly the basis for a post-trial attack on the conviction. State v. Matera, 266 So.2d 661 (Fla. 1972). However, even if there had been a timely presentation of this issue, based upon out review of the record, we conclude that the failure to preserve the khaki pants was not a denial of due process pursuant to Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), and Kelley v. State, 569 So.2d 754 (Fla. 1990). There is simply no showing that detective Nestor acted in bad faith in deciding not to preserve pants which had no blood stains. Moreover, Merck has to stack multiple inferences in order to postulate that the pants were either material or exculpatory. Thus, we find no merit in Merck's fourth issue.

At an evidentiary hearing held on July 14, 1997 through July 18, 1997, Detective Nestor again gave testimony. Detective Nestor testified that he conducted a meticulous search of the vehicle that was recovered and that he looked at everything. (ROA Vol. 14, p. 684 -K). Detective Nestor would determine what would have evidentiary value. (ROA Vol. 14, p. 685 -K). He would make the decision as to what's important and what's not. (ROA Vol. 14, p. 686 -K). If he didn't collect it, then it wasn't in evidence. (ROA Vol. 14, p. 688 -K). Detective Nestor was aware that the perpetrator was wearing khaki colored pants. (ROA Vol. 13, p. 648

-K). He believed that a pair of khaki colored pants and a blue colored shirt were removed from the Bobcat car and placed in a plastic bag. (ROA Vol. 13, p. 649 -K). The bag including the khaki colored pants and blue colored shirt were left in the Bobcat car and were not taken into evidence. (ROA Vol. 13, p. 651 -K). Detective Nestor testified that the items not collected were left in the vehicle and returned to the owner. (ROA Vol. 13, p. 651 -K). Detective Nestor testified that when he looked at the khaki style pants he recognized that the pants might be consistent with what the witness said the perpetrator was wearing. (ROA Vol. 13, p. 656 -K). Even though the eyewitness told Detective Nestor that the perpetrator was wearing khaki styled pants, Detective Nestor made the decision that the pants had no evidentiary value. (ROA Vol. 13, p. 659 -K).

The testimony of Detective Nestor was not known to the defense at the time of trial in 1993 or on direct appeal in 1994 because the testimony was elicited at the evidentiary hearing held July 14, 1997 through July 18, 1997. Although this claim was raised on appeal in 1999 based on Detective Nestor's revised testimony at the evidentiary hearing in 1997, the Florida Supreme Court did not address the issue as the Court reversed on other grounds and found the issue to be moot. Merck v. State, 763 So.2d 295, 297 (Fla., 2000).

Although Katherine Sullivan identified Troy Merck as the person who

stabbed Jim Newton, she also testified that Troy was the person who was taunting Newton and trying to provoke him to fight. (ROA Vol. 12 p. 473-75, 497-98 - K). Neil Thomas, however, made it very clear that it was he, rather than Troy who was calling Newton a "pussy" and trying to provoke him. (ROA Vol. 12 p. 543-44,573 - K). Katherine Sullivan told Detective Nestor that the person who stabbed Newton was the same individual who started the argument. (ROA Vol. 13 p. 648-49 - K). Ms. Sullivan described the person who did the stabbing as wearing khaki pants. (ROA Vol. 12 p. 496; 13 p. 648 -K). The state introduced Troy's pants in the guilt phase trial; they are variously described as blue, gray, or dark, but - - as Ms. Sullivan acknowledged - - they are not khaki. (ROA Vol. 12 p. 496-97 -K). A pair of khaki trousers were observed by Detective Nestor in searching the Bobcat automobile; because he saw no visible bloodstains he discarded them. (ROA Vol. 13 p. 648-61 -K). It was the defense's contention in the guilt phase trial that these may have been the pants worn by the stabber, Neil Thomas, and that potentially exculpatory evidence was intentionally or negligently lost. While Neil's palm print and Troy's palm print were both found on the roof of the Bobcat, Neil's print was closer to the location where - - according to another witness Richard Holton (who could not make an identification) - - the stabber pounded the top of the car. (ROA Vol. 13 p. 662 -K).

Detective Nestor testified that Katherine Sullivan was the only witness who

gave a description of the suspect, so the composite and the BOLO were based solely on her statements. (ROA Vol. 13 p 682 -K). Detective Nestor acknowledged that after talking with Ms. Sullivan, the investigators focused on Troy Merck as being the stabber and Neil Thomas as being the driver. (ROA Vol. 13 p. 682-83 -K).

During the search of the Mercury Bobcat, Detective Nestor seized a pair of blue pants (State's Exhibit 21) which were later tested for human blood, and the DNA profile matched that of victim James Newton. (ROA Vol. 12 p 577-80 -K).

Troy Merck testified that he was wearing the dark trousers, while Neil Thomas wore tan colored pants. (ROA Vol. 13 p 821, 856-57 -K). Thomas emphatically stated that there was no way he could have fit into the dark pants. (ROA Vol. 13 p 767-68, 777 -K).

Detective Nestor testified that during the search of the Mercury Bobcat, he examined everything meticulously and looked through everything that might have evidentiary value for either the prosecution or the defense. However, he testified that it is not necessary to actually take everything into custody; "[t]here are a lot of items in there that had no evidentiary value, that were not retrieved from the vehicle that are left in the vehicle." Such items would be released whenever the vehicle was picked up by the registered owner. (ROA Vol. 13 p. 684-86 -K). Nestor was the one who made the decision what was important or not; "If I didn't collect it, then it wasn't

in evidence." (ROA Vol. 13 p. 686-88 -K).

Detective Nestor testified at the evidentiary hearing held July 14, 1997 through July 18, 1997 that he felt the khaki pants did not have evidentiary value so he did not collect the pants.

In Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333 (1988), the Court set a minimum standard regarding the destruction of possible exculpatory evidence. "Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. Id. at 58 ; see Kelley v. State, 569 So.2d 754 (Fla. 1990). Conversely, where bad faith has been shown, the loss or destruction of such evidence requires dismissal of the charges or depending on the level of prejudice) suppression of the state's secondary evidence.

In United States v. Elliott, 83 F.Supp. 637 (E.D. Va. 1999), the court set a standard for objective bad faith. The District Court in Elliot held:

> Where, as here, there is no evidence of an established practice which was relied upon to effectuate the destruction, where the applicable documents teach that destruction should not have occurred, and where the law enforcement officer acted in a manner which was either contrary to applicable policies and the common sense assessments of evidence reasonably to be expected of law enforcement officers or was so unmindful of both as to constitute the reckless disregard of both, there is a

> showing of objective bad faith sufficient to establish the bad faith requirement of the Trombetta/Youngblood test.

Id. at 647-648.

In this case, there was no established practice governing whether evidence was gathered other than Detective Nestor making the decision what was important or not. Detective Nestor said; "If I didn't collect it, then it wasn't in evidence." This is no standard at all and is merely an arbitrary method for gathering evidence. Detective Nestor's actions were contrary to the common sense assessments of evidence reasonably to be expected of law enforcement officers. Detective Nestor should have gathered the Khaki colored pants after he knew the witness to the attack said that the perpetrator was wearing khaki colored pants. The failure to gather that evidence was so unmindful as to constitute the reckless disregard and objective bad faith sufficient to establish bad faith under Youngblood.

In this case, the khaki pants were destroyed. The evidence was in control of Detective Nestor, was not retrieved, and then discarded. Troy Merck is entitled to a favorable inference that the intentional destruction of the evidence was adverse to his position. See Stuart v. State, 907 P.2d 783 (Id. 1995). The appropriate remedy for this Youngblood due process violation is to vacate the sentence of death.

ISSUE V

THE LOWER COURT ERRED IN DENYING THE CLAIM THAT MR. MERCK DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL THROUGHOUT HIS PENALTY PHASE, VIOLATING HIS FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE IN THE PENALTY PHASE OF MR. MERCK'S TRIAL IN THAT HE FAILED TO PROVIDE HIS MENTAL HEALTH EXPERT WITH SUFFICIENT BACKGROUND INFORMATION TO ESTABLISH BOTH STATUTORY AND NON-STATUTORY MITIGATION. TRIAL COUNSEL MADE AN UNINFORMED DECISION NOT TO PRESENT HIS MENTAL HEALTH EXPERT TO THE JURY.

The lower court denied this claim in its Order and held that trial counsel was not ineffective because the detrimental effect of preparing and calling the mental health expert would have outweighed the benefit. (PCR Vol. III p. 313-316). This was error. Schwartzberg's comments during the Spencer hearing were based on hindsight. The 2003 deposition of Dr. Michael Maher at which Schwartzberg was present, contains almost no elaboration regarding the statutory mental mitigators found by Dr. Maher in 1992. (PCR Vol. III p. 338-339). The rest of the 2003 deposition consisted of information on how Merck had adapted to incarceration and

how his outlook on life had changed. Although Schwartzberg may have had access to Maher's 1992 deposition; there is no evidence in the record to suggest he read the deposition. There is however, evidence that Schwartzberg had undergone a change in his attitude regarding his practice of law.

At the evidentiary hearing, the following questions were asked and answered by Dr. Maher:

> Q. Subsequent to two – to 12/11/ 2003 and prior to 3/11/2004, did you attempt to contact Mr. Schwartzberg?
> A. Yes.
> Q. Okay. Why isn't it reflected in your bill?
> A. Because when I would make a contact and say we need to talk about this, but nothing – there was no follow up, I would often make another phone call in order to try to schedule something. And if it was three minutes or two minutes and I didn't pull out the file and look at it, I wouldn't bill it. So if I made a phone call, it was five minutes trying to set up something in the future, it wouldn't appear on my billing record.
> Q. Well, Doctor, were you aware that the trial of Mr. Merck in front of Judge Downey occurred on St. Patrick's Day, 2004, March 17th?
> A. I didn't independently recall that, but it's consistent with my recollection and my records.
> Q. Well, were you there?
> A. I was there for some of it, yes.
> Q. You were listening to the civilian witnesses; were you not, sir?
> A. Yes.
> Q. Well, what did you say to him on 3/11, that's March 11th, 2004?

A. I'm sorry what did I –
Q. This is a couple days before trial, sir.
A. I said I need to talk to you. There are important issues here that we have not discussed.
Q. Like what?
A. Like the details of the mitigation, like the specific diagnoses, like the pros and cons, the evidence that supports those diagnoses, the information that I would rely on in that regard. I would have asked him, for example, questions about can I rely on this information/ has it been produced into evidence? What other sources of information might have presented this to the Court besides my testimony? Those are all things that I would typically talk to an attorney about in a pretrial meeting.
Q. Well – so, in other words, is it safe to say that because Mr. Schwartzberg never returned your calls and never met with you before trial, you didn't know what he was going to say?
A. That would certainly be my conclusion. That was a concern of mine at the time.
Q. But you didn't tell him, did you?
A. I told him we needed to meet. This was important. I certainly didn't tell him how to do his job as a lawyer. I don't think that that was my place. I was very concerned that he didn't know what information and evidence I have and what I might have to offer. I didn't know who else he was calling or what other experts might be involved, and it wasn't my place to tell him whether he was doing a good job or not.
Q. But you were there at the trial?
A. I was –
Q. Were you not?
A. I was there I think at some other – actually, I'm not sure I was at the trial. I was at the – at a part of a hearing. Maybe it was part of the trial. I'm not sure I know exactly what is a hearing and what's the trial. I don't think, for example, I was ever at the trial while there was a jury

present.
Q. Uh-huh. But you were at a trial when the jury was not present?
A. I don't recall. I really don't recall what part of a trial I might have been present.
Q. All right. Well, Doctor, after Mr. Schwartzberg assumed representation of Mr. Merck, did he ever supply you with material like witness statements or transcripts of previous trials?
A. Yes. Well, wait a minute. Did he supply me with those?
Q. Correct, sir.
A. No. I didn't get – I don't recall getting anything from him that I didn't already have.
Q. Okay. Would that have been from Nora McClure and Chris Helinger before they withdrew from representing Mr. Merck and before Mr. Schwartzberg was appointed to represent Mr. Merck for the penalty phase?
A. I believe that's how I got the records, yes.
Q. Do you remember taking a deposition with Mr. Ripplinger and Mr. Schwartzberg?
A. Yes, I have some recollection of that.
Q. That would be on October 20th of 2003, right?
A. Yes.
Q. Did Mr. Schwartzberg ask about the statutory mitigators or did Mr. Ripplinger ask about the statutory mitigators?
A. I don't recall.
Q. If, in fact, Mr. Schwartzberg asked no questions, would that surprise you?
A. No. That would be consistent with my recollection. But I don't specifically recall he asked nothing.
Q. Doctor, had you worked with Mr. Michael Schwartzberg prior to working on the Merck case?
A. Yes.
Q. How many cases?
A. Maybe a dozen.

Q. Doctor, can you describe Michael Schwartzberg's usual pattern of practice and interaction with experts such as yourself?
A. Yes. It was my experience that Mr. Schwartzberg was knowledgeable about the law and the issues that were related to mental health issues related to the law, that he had good insights and understandings about things, that he asked me good questions related to my understanding and input. It was also my observation that he was not very detailed in his understanding of data related to mental health issues. He would tend to develop general understandings and not have specific details at the command of his memory.
Q. Could you break that down into English?
A. He was good on the overall view of things related to mental health issues and not good on the details.
Q. Doctor, were you aware Mr. Schwartzberg suffered a heart attack sometime before the Merck trial and subsequently died on January 5th, 2005, after the Merck trial?
A. Yes.
Q. After Michael Schwartzberg's heart attack, did you notice a change in his attitude?
A. I noticed a change in his attitude while he was working on the Merck case.
Q. What did you notice?
A. He was even less attentive to details and specific understanding of my work and input then he had been previously.
Q. How about his wife – wait a minute. How about his focus? Did he seem to focus or not?
A. He was less attentive and less sharp in his mental focus when I interacted with him.
Q. Did he seem to have adopted a cavalier attitude towards the whole thing, the criminal law practice in general?
A. I don't think I would characterize it as cavalier, but I

> had previously known Michael to be very intense and focused. Even if he didn't know the details, he had good insights, he asked good questions, he understood the big picture. When I worked with him on the Merck case, I really didn't notice at first, but in recalling it and as the case developed, I realized I had never had any of those conversations that gave me the information that would tell me that he really understood what my opinions were.
> (PCR Vol. VI p. 878-884).

It is clear from the above cited testimony and from the lower court's order, that Schwartzberg's contact with Dr. Maher was not only minimal but that attempts by Dr. Maher to properly inform Schwartzberg of the mitigation available was rebuffed by Schwartzberg. Regarding the presentation of Maher at trial and/or the subsequent Spencer hearing; Dr. Maher testified in this manner:

> Q. Okay. Doctor, prior to this case when you worked with Mr. Schwartzberg, did you discuss with him issues relating to the strategy of presenting information before the jury or only at a Spencer hearing?
> A. In previous cases I would have had discussions with him about where my testimony was best presented and the manner in which it was best presented. I never had any discussions with him such as that with regard to the Merck case.
> Q. Well, did that cause you some concern?
> A. It caused me grave concern.
> Q. Sir, were you present in court on either the – right before the State – or the defense rested when it was announced out of the presence of the jury – excuse me, out of the presence of the jury that you would not be called?
> A. Yes.
> Q. That they were streamlining the trial?

A. Yes.
Q. All right. And do you remember – and do you remember Judge Downey asking Mr. Merck if he understood this was going on?
A. Yes, I do remember that quite clearly.
Q. Did this strike you as unusual?
A. Yes.
Q. Well, you said you were concerned, sir, that you never had a discussion with Mr. Schwartzberg as to which information you would present at trial and which information you would present at a Spencer hearing.
A. That's correct.
Q. Okay. Why did that cause you concern, sir?
A. Because it had been my usual pattern of practice with him, as well as other lawyers, to include a discussion about where my opinions and possibly other mental health opinions were best presented in their case. And it would always be something that I would raise. Sometimes lawyers were interested in discussing it. Sometimes they weren't. Mr. Schwartzberg usually was. But there had been no opportunity and certainly no discussion of that between me and Mr. Schwartzberg in regard to this case.
Q. Okay. Well, what are some of the opinions you would have presented had you been asked?
A. Many of the things you've asked me about today, the presence of mitigating evidence, the presence of various diagnoses, Post Traumatic Stress Disorder, fetal alcohol effect, Attention Deficit Disorder, the emotional and mental aspects of his deficits, the effect of alcohol.
Q. How about in previously dealing with Mr. Schwartzberg or other attorneys, had you ever just presented issues at a Spencer hearing only?
A. Not to the best of my recollection, no.
Q. Why not?
A. My understanding of that would be that if I had significant mitigating information, the attorneys would always wanted to present that to a jury and then possibly

again at a Spencer hearing.
Q. Did you recall Judge Downey expressing concern that if you weren't called, the jury was not going to hear any mental health testimony, in spite of the fact Mr. Merck had had mental health testimony presented at previous trials?
A. Yes, I do recall the Judge expressing that concern.
Q. Again, sir, you testified that Michael Schwartzberg was going to handle your direct and the other mental health professional, right?
A. That was my understanding, yes. That was my expectation.
Q. You didn't bill Richard Watts, did you?
A. No.
Q. Doctor, who ultimately handled your direct examination at the Spencer hearing?
A. Mr. Schwartzberg.
Q. Mr. Schwartzberg at the Spencer hearing?
A. I believe it was him.
Q. Well, if the record shows that Mr. Watts handled you at the Spencer hearing, would you have any reason to dispute the trial record?
A. No. What I remember about the Spencer hearing is that I testified very briefly and – I don't recall independently which of the lawyers –
Q. Well, had you ever discussed with Mr. Watts your proposed Spencer hearing testimony?
A. Not other than in a very superficial way. (PCR Vol. V I p. 886-889).

Michael Schwartzberg was ineffective in failing to make an informed decision as to whether Dr. Maher should have been presented to the penalty phase jury. At the penalty phase trial before Judge Downey the following transpired:

(THEREUPON, the sidebar conference was held outside the presence of the Jury as follows:)

> ***
> MR. WATTS: We are going to take a break and regroup. We are excusing Ron Bell.
> THE COURT: He is not going to testify.
> MR. WATTS: We are streamlining and we
> MR. RIPPLINGER: how about Maher?
> MR. WATTS: I don't think so.
> MR. RIPPLINGER: I'm trying gage whether I'm bringing Sloman.
> MR. WATTS: That's why I need to take a break now and then I can make that decision.
> THE COURT: Fine. We'll be in recess for ten minutes. Thank you.
> (THEREUPON, a recess was held.)
> THE COURT: Mr. Watts, who is next?
> MR. WATTS: Nora McClure.
> THE COURT: have the Jury come in, please. (FSC ROA Vol. V 268-269).

The trial court was concerned enough to conduct the following outside the presence of the penalty phase jury:

> MR. WATTS: Judge, we are winding down to the point of we may be calling Troy, I expect that we will, and I would like to have a few minutes with him and get that ready, and that's the last witness that we'll be calling.
> THE COURT: I'm wondering if it not be in everyone's best interest that we get Mr. Merck on the record saying that he understands that there were other potential people that would testify in the hearing that testified in the last one, and that's my understanding, that they are not going to be called to make sure that he is in agreement with this strategy.
> MR. RIPPLINGER: Good idea, and that he doesn't have to testify if he doesn't want to and if there are other witnesses that he wants called that they are available to

him.
MR WATTS: Fine. I think that's a good idea.
THE COURT: I'll send the Jury out and I'll talk with him and we'll take a break.
THE COURT: Take the Jury out, please.
***
(THEREUPON, the Jury is excused from the courtroom and proceedings resumed as follows:)
***
THE COURT: Mr. Merck, I have had a chance to talk to Mr. Watts off and on throughout the course of the Defense presentation here and he has advised me now that it is his plan at this point that the only additional potential witness that he is going to be calling is you. Are you aware of that plan, Mr. Merck?
THE DEFENDANT: Yes, I was just made aware of that a few minutes ago.
THE COURT: I'm aware, as I am sure that you are aware, this being your third penalty phase, that in penalty phases of the past other witnesses were called to testify to attempt to establish certain other mitigating circumstances. In particular, Mr. Bell to testify with regards based on the testimony presented in the extrapolation that he could do with regard to, at least within a range anyway, of what your alcohol content was way back then. My understanding that he is not going to be called as a witness, right?
MR. WATTS: That is correct, Judge.
THE COURT: Do you understand that, Mr. Merck?
THE DEFENDANT: Yes, it has been explained to me.
THE COURT: The reason that I'm mentioning this is that just because something was presented in '97, in front of Judge Khouzam, we are starting all over again and I cannot take into account or into consideration what happened back then. So if Mr. Bell doesn't testify, it would delete from the Jury's consideration, and then potentially my consideration, with any exactness what

your state of sobriety or lack thereof might have been on that night and it might have bearing on what the Jury hears certainly and what I might be called upon to rule on down the road if we get that far. In addition, I'm told by Mr. Watts that no mental health expert is going to be called. Have you been made aware of that, Mr. Merck?
THE DEFENDANT: Yes, I have been told that anyway.
THE COURT: Again, we are not in a situation here where – we are not in a Mohammad situation where we have a defendant that doesn't want any mitigation presented. We are in a situation where in prior penalty phases certain things were done. I know that there were things done in '97 that were not done in '93, and vice versa, and now we are in a situation where certain things were done in both '97 and '93 at the prior hearings that are not going to be done now. Those are the two main ones, as I see it anyway, that we are not hearing from. Of course, if your defense attorneys don't present a mental health expert then, of course, that precludes the State from being able to call their expert in rebuttal. I don't how in your lawyer's mind that weighs out, but certainly that – and I'm talking to you about this on the record to make sure that there is a firm understanding in your mind and between you and your lawyers and your lawyers and me that there is some understanding and agreement on your part that this is the way that you want to go and that you understand that if I don't hear it and this Jury doesn't hear it, then your lawyers cannot argue it, and if it comes back in a 7 to 5 or more for death, they can't present it to me in mitigation and I cannot consider it in a sentencing order.
MR. SCHWARTZBERG: With all due respect, Judge, we have a Spencer Hearing available.
THE COURT: We do have a Spencer in which some of that could be presented, but it could not be argued to the Jury. I just want to make sure that you understand that that's where we are going on this. (FSC ROA Vol. V p. 277-280).

Mr. Richard Watts,(Schwartzberg's co-counsel) detailed Schwartzberg's problems in this manner:

> Q. Okay. Is Mr. Schwartzberg deceased?
> A. Yes.
> Q. And do you know if Mr. Schwartzberg was suffering from health problems before his death, or was it a sudden death?
> A. Well, the death was sudden, but his decline was – I'm not exactly sure the sequence. I believe he was still obese at the time of this trial, then he had a bypass surgery and lost a significant amount of weight.
> Q. Heart bypass?
> A. Gastric bypass.
> Q. Gastric bypass. And you believe that happened the first part – he had – a first heart attack, did that happen before Troy Merck's trial?
> A. Yes.
> Q. Was he also having family problems –
> A. He was.
> Q. – before his death?
> A. Yes.
> Q. Could you describe what type of family problems he was having?
> A. I would say that his wife had a mental illness that was getting worse and caused a lot of arguments.
> Q. A lot of arguments?
> A. Yes, I would say domestic discord.
> Q. And could you see the effect of the domestic discord between Mr. Schwartzberg and his wife?
> A. Yes.
> Q. And what kind of things did you see?
> A. Well, they argued. He was upset with her spending habits. I believe she had several arrests around that time, had a problem with authority. It was somewhat – he had

four dogs. She was sort of holding the dogs hostage, that sort of thing. And this – what I'm saying doesn't necessarily happen – it culminated in his death. I think that was a big factor in his actual passing was he had had – the feud with her hit a higher level, and that was January '05. And our trial was in March of '04, but it was getting worse.

Q. You say the domestic discord between he and his wife culminated with his death?

A. Yes.

Q. Do you think that it may have, based on your observations, contributed to him – to his passing?

A. To his death? Yes, I'm pretty sure it did.

Q. It must have been pretty intense and somewhat – intense discord between he and his wife?

A. Yes.

MR. RIPPLINGER: Judge, I'm going to on the to leading questions, and I'm going to object to the relevance of whatever was going on in January of '05.

THE COURT: Sustained.

BY MR. VIGGIANO:

Q. Would you say that the problems that Mr. Schwartzberg suffered began before his trial with Mr. Merck, specifically, the heart attack?

A. I didn't see him at the time. In looking back, I could say maybe. I couldn't say for sure. But I know that – I think that was the last – my best recollection is that is the last trial that we had together, Schwartzberg.

Q. With respect to Mr. Merck's trial, did you have some sort of division of labor, so to speak?

A. We did.

Q. And what was that division of labor?

A Well, there were a lot of out of town witnesses, South Carolina, Troy Merck's family, teachers. The lady that ran the Christian home, Ms. Rackley. I took those witnesses. Schwartzberg took the cross-examination of the State's case, and he would have also taken Dr. Maher. As the

> mental health expert. And he – he, Schwartzberg, was responsible for what I want to say the lingering doubt, which would be the role of the co-defendant, or I call him the co-defendant, the co-participant.
> Q. And did you, in fact, handle the lay witnesses at the trial?
> A. I did. (PCR Vol. VII p. 945-948).

During cross examination the State attempted to minimize Dr. Maher's role in this manner:

> BY MR. RIPPLINGER:
> Q. But as far as the – his upbringing and background and education, that was a big emphasis of your strategy?
> A. Yes.
> Q. And that was actually the most successful strategy historically than any other penalty phases, bringing in the sister, the lady from the foster home, and those aspects?
> A. Yes.
> Q. And you actually didn't need Dr. Maher to focus on those things. You had the actual people who were there?
> A. Well, and this is a territory where that would have been Schwartzberg's responsibility. And I can see in looking back where, to tie the mitigation together, Dr. Maher would be good at that. (PCR Vol. VII p. 961-62).

Schwartzberg did not "tie the mitigation together" because he had never bothered to talk to his own expert regarding Maher's specific diagnoses such as the brain damage, fetal alcohol effect, Post Traumatic Stress Disorder and ptosis discussed by the civilian witnesses. Mr. Watts had done his job in presenting the civilian witnesses. It was the responsibility of Michael Schwartzberg to explain the

mitigation testimony of the civilian witnesses. Although Mr. Schwartzberg had experience in penalty phase litigation; he was ignorant of the facts and issues mitigation of *this* case. Dr. Maher was listening to the civilian witnesses while applying his diagnoses to the testimony. As cited above in Dr. Maher's testimony; " I realized I had never had any of those conversations that gave me the information that would tell me he really understood what my opinions were."

Regarding the Spencer hearing, Mr. Watts testified as follows:

> Q. And you and Mr. Schwartzberg had worked with Dr. Maher on probably numerous occasions prior to this trial?
> A. We had. The difference was every previous time I was in charge of presenting Dr. Maher's testimony, and this particular time Schwartzberg took that responsibility.
> Q. But you were familiar with him?
> A. I was.
> Q. And kind of how he thinks about things and analyzes things?
> A. Yes.
> Q. And it would be fair to say over two depositions, a prosecutor in his case had gone through a lot of Dr. Maher's thought processes –
> A. Yes.
> Q. – explored in the depositions? And was there a decision made in that trial to not present Dr. Maher to the jury, but to use him in the Spencer hearing?
> A. That decision was made. I can't tell you when or how it evolved because I don't have a conscious memory of it. And so just to qualify my testimony on that point, I was surprised to find out that I wasn't responsible for Dr. Maher when the materials came forward and I reviewed with the State and the defense because my memory was

> such that I couldn't really recall my work with Dr. Maher. I was somewhat pleased to find out that I hadn't worked with Dr. Maher. That would explain somewhat my lack of memory.
> Q. You hadn't worked with him?
> A. I hadn't worked with Dr. Maher in the preparation of his testimony in this case. (PCR Vol. VII p. 965-966).

When the testimony of Maher and Watts are examined in context with the trial testimony cited above, it is clear to see what actually happened in this case.

Watts was fulfilling his responsibility to handle the civilian witnesses. Maher was in the courtroom listening to the witnesses and preparing to "tie the mitigation up". When the time came for Schwartzberg to do his job; he realized that he had not spoken to Dr. Maher and had no idea what Maher's opinions would be so he got "cold feet" and abdicated his responsibility. Watts then continued on with Nora McClure.

Regarding the Spencer hearing and Schwartzberg's performance therein, Mr. Watts testified as follows:

> Q. You were asked a lot of questions about Mr. Schwartzberg's death which occurred some time after this trial?
> A. Yes.
> Q. And he had gastric bypass operation after this trial?
> A. Yes.
> Q. And that operation, you know, was also contributing to his health demise, strain on the heart and that type of thing?

> A. Yes.
> Q. And you're not saying that during this trial, you know, that Mr. Schwartzberg was having a lot of health complaints or was overtly distracted by the situation with his wife, are you?
> A. All those things were – he had health problems that were chronic, and if his wife was getting worse, I didn't notice. In retrospect, I'm looking back and wondering why no more emphasis on Dr. Maher. That's my main concern. But I didn't have it at the time. (PCR Vol. VII p.971-972).

Even on cross examination, Mr. Watts was unshakable in his concern that Schwartzberg did not properly handle his witness; Dr. Maher. At the evidentiary hearing Mr. Watts further addressed Schwartzberg's actions and mental attitude in this manner:

> A. Well, and minor participation, I believe, is how we talk about it because you can't, per se, raise lingering doubt.
> Q. Right.
> A. But there was a series of facts there that would present that possibility, yes, and that was not my direct responsibility.
> Q. Right. Mr. Schwartzberg's responsibility?
> A. Yes.
> Q. Now, on cross-examination you were asked about Mr. Schwartzberg and his life, that he was an actor?
> A. Yes.
> Q. He was a trial attorney?
> A. Yes.
> Q. And when he was acting and when he was a trial attorney, he was trying cases, that he was, quote, hitting life on all cylinders?

A. Yes.
Q. Did Mr. Schwartzberg have a love of life?
A. Yes.
Q. Did his love of life diminish once the onset of the health problems and marital problems began?
A. As it may affect this case – I'm going to just try to be as specific as I can. I'm surprised at the lack of contact that I see with Dr. Maher, who would have been a player at some point in the case. So to answer this question as best I can, Mr. Schwartzberg would brush off things that he didn't want to deal with. My best insight into the Dr. Maher issue is that I find I did the direct examination. I did not prepare to do that. And the best I can recall is that I was asked to do that at the 11th hour – 12th hour. And I didn't have a dialogue with Dr. Maher beforehand other than, if I did, was to get in there and I'm – in looking back, I'm surprised that, first of all, that Schwartzberg had the responsibility of Dr. Maher and, second of all, that given that he had the responsibility of Dr. Maher, that I'm the one that did the direct examination. We did not spend the typical time that I would spend with a mental health expert. And, apparently, Schwartzberg didn't spend the usual time. Why? I couldn't say. And I wasn't aware of it at the time, but I do recall being somewhat miffed that I'm doing this.
Q. So you wouldn't be surprised that there is no record of Dr. Maher billing you for time and preparation of the Spencer hearing?
A. Yeah.
Q. There's no record of it. And there is no record of you billing the County for time expended with Dr. Maher.
A. It's consistent with everything else that I see that I wasn't working with Dr. Maher.
Q. Mr. Watts, were you literally handed the questions or handed the responsibility to do the direct examination of Dr. Maher at the Spencer hearing on the spot?
A. Basically, yes. Although, I can't say I was handed

> the questions. I was asked to make the presentation.
> Q. Given that Mr. Schwartzberg intended to proffer to the Court something which you didn't follow through on with respect to – with respect to mitigation, and given that you have no ideal what preparation or lack of preparation or what happened between Mr. Schwartzberg and Dr. Maher, is it possible that given his health problems and his personal problems that he just, what we might say, left part of the case back in his office?
> A. I don't know.
> Q. Is that possible?
> A Yes, it's possible. (PCR Vol. VII p. 987-989).

In reviewing the evidentiary hearing testimony of Mr. Watts and Dr. Maher and a review of the trial testimony and comments of Judge Downey concerning Schwartzberg's efforts to "streamline the trial"; it is clear that Mr. Watts was abiding by the team effort of division of labor. He was handling the civilian witnesses so Dr. Maher could "tie up the mitigation." Dr. Maher was observing the civilian witnesses so he could tie up the mitigation as planned. When it was time for Schwartzberg to call Dr. Maher to the stand and explain the mitigation; he realized that he had not spoken to Maher and had no idea what Maher's opinions were. At the 11th hour, he abdicated his responsibility to direct Dr. Maher. At the 12th hour, the Spencer hearing, again Schwartzberg passed Maher off to a surprised and miffed Mr. Watts. Keeping in mind that this was a two attorney penalty phase with a clear delineation of duties; Schwartzberg was assigned to handle the minor participant

issue and he bungled it by not proffering evidence and preserving the issue for appellate review. He was supposed to handle the direct examination of Dr. Maher and Schwartzberg did not prepare his witness, or supply the witness with data that would have been useful to Maher in the preparation of Maher's testimony. Schwartzberg did not "tie up the mitigation" as planned because he wanted to " streamline the trial". Schwartzberg even passed off Dr. Maher to a surprised and unprepared Watts because Schwartzberg "didn't want to deal with it." The question now arises as to what exactly did Schwartzberg do to justify his billing Pinellas County for his representation of Troy Merck and the answer is *nothing.*

The prejudice is as obvious as the ineffectiveness of Schwartzberg was blatant. When the trial court stated "if I don't hear it and this Jury doesn't hear it, then your lawyers cannot argue it, and if it comes back in a 7 to 5 or more for death, they can't present it to me in mitigation and I cannot consider it in a sentencing order." Id. When Schwartzberg reminded the trial court of the Spencer hearing; the trial court responded: " We do have a Spencer in which some of that could be presented, but it could not be argued to the Jury. I just want to make sure that you understand that that's where we are going on this."Id. The factual situation of presenting Dr. Maher only at the penalty phase falls squarely on point with Larzelere v. State, 979 So.2d 195 (Fla. 2008) in which the Florida Supreme Court held:

Unlike the attorneys in Lewis who consulted a mental health expert before allowing Lewis to waive the presentation of mitigation evidence, Wilkins and Howes did not retain Dr. Krop to examine Larzelere until after the jury recommended death. Dr. Krop testified that he had done over 1500 first-degree murder evaluations in his career and that "this case was the only case that I've ever been involved in when I was asked to get involved **after the jury already come back with its recommendation.**" (emphasis added). Donald West testified that there is "probably no worse timing" than to hire an expert after the jury recommendation because "at that point, all you can do is ask the court to override... a jury's recommendation which, by law, the court is required to give great weight." Howes testified that he did not know why Dr. Krop was not retained early in the representation because he did not become Larzelere's counsel of record until around the time jury selection began. Wilkins first could not remember why he did not contact Dr. Krop before the recommendation but later explained that he did not contact Dr. Krop sooner because he did not suspect that Larzelere had been abused, and he did not feel that it was worth looking for a needle in a haystack until after the death recommendation. Ordinarily counsel is not deficient where counsel has made a strategic decision. However, "strategic choices made after less than a complete investigation are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation." Wiggins, 539 U.S. at 528, 123S.Ct. 2527 (quoting Strickland. 466 U.S. at 690-91, 104 S.Ct. 2052.). Counsel would have seen a reason to consult a mental health expert regarding Larzelere had counsel interview her family members or otherwise pursued the investigator's report. As Dr. McClaren explained, "When you're talking to [Larzelere], boy she's easy to believe, but when you're out of the situation and start looking at all of those conflicting things ...there are

> many inconsistencies." The trial court correctly concluded that counsel was deficient for failing to obtain an informed mental health evaluation of Larzelere in advance of the penalty phase. Larzelere at 205-206.

In Mr. Merck's case, Schwartzberg never consulted with Dr. Maher despite Maher's efforts to consult with Schwartzberg. Furthermore, Maher testified that in previous dealings with Michael Schwartzberg or other attorneys, Dr. Maher had never just presented issues at a Spencer hearing only.

Mr. Watts' testimony that "Mr. Schwartzberg would brush off things that he didn't want to deal with." Id., is telling. Michael Schwartzberg's deteriorating health and personal problems caused his conduct to fall far below professional norms as detailed in Strickland. His refusal to investigate and prepare the mental mitigation can in no way be deemed strategic. After Mr. Watts had done his job and presented the lay witnesses; he needed Dr. Maher to "tie it up." At the 11th hour, Schwartzberg simply "didn't want to deal with" presenting Dr. Maher to the penalty phase jury. At the 12th hour, the Spencer hearing, Michael Schwartzberg again didn't want to deal with presenting Dr. Maher. Schwartzberg never wanted to deal with Dr. Maher. Schwartzberg failed to adequately investigate the statutory mental mitigators and prepare his expert for presentation to the penalty phase jury. The Spencer hearing was more of the same. Schwartzberg passed Dr. Maher to a surprised and

miffed Richard Watts. Due to trial counsel's ineffectiveness, Mr. Merck was deprived of a fair adversarial testing of the evidence. Had Schwartzberg met with and prepared Dr. Maher, the statutory mental mitigators would have been fully established. Had Schwartzberg proffered the fingerprint evidence, the statutory mitigator of minor participant would have been established by preponderance of the evidence. Three jurors would have been swayed to vote for life over death.

Mr. Merck's life was, and still is, at stake. He needed an advocate to present his case to the penalty phase jury. Instead he got an attorney who brushed off critical aspects of his case simply because he "didn't want to deal with it." Relief is proper and a new penalty phase is the remedy.

The lower court's order denying this claim is based on a misapprehension of fact. The horrific aspects of the crime and Merck's behavior after the crime already was brought before the penalty phase jury through the testimony of Neil C. Thomas. (See FSC ROA Vol. IV p 55-76 (Downey)). It was up to Schwartzberg to mitigate these facts by explaining the brain damage, the alcoholism, the ADD and the fetal alcohol syndrome through the testimony of Dr. Maher. Merck's prior history of violence (the five convictions for robbery with a deadly weapon) were already been introduced into evidence. (See FSC ROA Vol. IV p. 184-188 (Downey)).

The contention by the lower court that Merck's admission to Dr. Maher that

he had stabbed the victim and was thereby prejudiced by that fact is error. Schwartzberg was prohibited from arguing minor participant and failed to preserve the issue by proffering evidence. That issue was moot. Furthermore, the guilt phase jury had already found by its verdict that Merck had stabbed the victim.

The penalty phase jury had asked the question as to how much time Merck would have remaining on his sentence and the trial court did not answer the question. Relief is proper and a new penalty phase is the remedy.

Legal Argument

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

> We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, *Ross v. Moffitt,* 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), it has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system," *Id.,* at 612, 94 S.Ct., at 2444. To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal, "*Britt v. North Carolina* 404 U.S. 226, 227, 92 S.Ct. 431, 433, 30 L.Ed.2d 400

> (1971), and we have required that such tools be provided to those defendants who cannot afford to pay for them. Id. at 77

The Ake Court further held:

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

Dr. Maher was crucial to Merck's ability to marshal his defense. Maher had gathered facts before the trial by evaluating Mr. Merck and the PET scan. Dr. Maher through interviews and an examination of the data provided to him by Nora McClure and Chris Helinger that Merck's ptosis was caused by an attempt to abort him. He was prepared to offer an opinion on how Mr. Merck's mental condition might have affected his behavior at the time of the crime. With Dr. Maher's testimony, the statutory mental mitigation would have been established. Dr. Maher

was prepared to provide Schwartzberg with probative questions to properly cross examine Slomin. Dr. Maher tried to prepare Schwartzberg to properly represent Mr. Merck but alas, Michael Schwartzberg "didn't want to deal with it." The prejudice was outlined by Judge Downey cited above.

"One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial." Magill v. Dugger, 824 F.2d 879, 886 (11th Cir. 1987); "pretrial preparation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation." House v. Balkom, 725 F.2d 608, 618 (11th Cir.), cert.denied, 469 U.S. 870 (1984); Weidner v. Wainwright, 708 F.2d 614, 616 (11th Cir. 1983). As the above cited testimony of Dr. Maher in the evidentiary hearing reflects, Michael Schwartzberg did *nothing* to prepare himself for the penalty phase. Before the trial, Dr. Maher stressed the importance in setting a meeting to discuss his testimony. Dr. Maher was ignored. As Dr. Maher testified above, it was his [Dr. Maher] usual pattern of practice with Schwartzberg to meet and prepare before trial. This case was different. Mr. Merck suffered prejudice due to Schwartzberg's abdication of his duty to follow the Strickland standard. Relief is proper.

ISSUE VI

TRIAL COUNSEL WAS INEFFECTIVE IN THE

PENALTY PHASE BY FAILING TO ASK FOR THE STATUTORY MENTAL MITIGATORS AT THE CHARGE CONFERENCE. TRIAL COUNSEL WAS IGNORANT OF THE PREVAILING LAW AT THE TIME. DUE TO TRIAL COUNSEL'S INEFFECTIVENESS, ME. MERCK WAS DEPRIVED OF A FAIR TRIAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The lower court, in its Order, held that trial counsel was not ineffective for failing to request the two statutory mitigators. (PCR Vol. III p. 317). This was error. At the charge conference, the following exchange took place regarding the two statutory mitigators:

> THE COURT: We are going to eliminate the aggravators for the Jury to consider about was committed while he was under the influence of extreme mental or emotional disturbance, that's out?
> MR. SCHWARTZBERG: Yes, sir.
> THE COURT: The capacity of the Defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law, was impaired, that's out?
> MR. SCHWARTZBERG: Yes, sir.
> THE COURT: We just have one and two. Two being any other aspect of the Defendant's character or record, or any other circumstances of the offense. Those are the only mitigators that this Jury will consider?
> MR.SCHWARTZBERG: That is based on the Court's

> ruling, Judge. It is our position previously, as I have stated, that without the evidence that I will be proffering to the Court after we are completed about this substantial participation of another and that Mr. Merck was not the person who actually committed the crime based on other factors which this Court has precluded from being there. The answer to your question is the only two mitigators which the Court has a lot of testimony to be brought in front of this Jury that would be allowed to go to this Jury are the ones that we just talked about. (FSC ROA Vol. V p. 299-300-D).

Impairment was a theme which ran rampant throughout the penalty phase testimony. For example, Neil Thomas testified that although Mr. Merck was underage; Thomas had consumed alcohol and every time he ordered a drink, he provided the same to Mr. Merck. (FSC ROA Vol. IV p. 57-58-D) and (FSC ROA Vol. IV p. 78-D). Troy Merck himself, in his direct examination, described his usage of alcohol which began when he was a small child and continued on through his young life. (FSC ROA Vol. V p. 286-87-D).

Had trial counsel been aware of the prevailing law at the time he would have known that this testimonial evidence of alcohol use would mandate the giving of the two statutory mental mitigators. The prejudice is obvious. Not only did Schwartzberg forget to proffer evidence which deprived Mr. Merck of the "minor participant" instruction; he failed to request two additional statutory mitigators

despite the overwhelming evidence to support the giving of the mitigating instructions. Thus, instead of having four statutory mitigators and the "catch-all" instruction, Mr. Merck's jury only considered age and the "catch-all" instruction. Mr. Merck was sentenced to death by a vote of 9 to 3. Had the additional statutory mitigation been tendered to the penalty phase jury for its consideration; the outcome would have been different, at least three jurors would have been swayed, resulting in a life sentence for Mr. Merck.

Legal Argument

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

> We have previously stated that the "Defendant is entitled to have jury instructed on the rules of law applicable to this theory of the defense *if there is any evidence* to support such instructions." *Hooper v. State*, 476 So.2d 1253, 1256 (Fla. 1985), *cert. Denied*, 475 U.S. 1098, 106 S.Ct. 1501, 891 L.Ed.2d 901 (1986). (emphasis added) *Smith v. State*, 492 So.2d 1063 (Fla. 1986). Regarding mitigating factors dealing with extreme mental or emotional disturbance, we have stated that where a defendant has produced any evidence to support giving instructions on such mitigating factors, the trial judge should read the applicable instructions to the jury. *Toole v. State,* 479 So.2d 731 (Fla. 1985). It is clear from this record that Bryant presented sufficient evidence in the penalty phase to require the giving of these instructions to the jury. Id. At 533.

In light of the testimony of the civilian witnesses for the defense detailing Mr. Merck's placement in emotionally handicapped classes for a great part of his childhood; trial counsel was ineffective in not researching the law and providing this earlier case to the trial court. Trial counsel was ineffective in not objecting to the statutory mitigator not being given to the penalty phase jury. The recommendation of death was the prejudice.

In Smith v. State, 492 So.2d 1063 (Fla. 1986), the Supreme Court of Florida held: "There was also some evidence, however slight, that Smith had smoked marijuana the night of the murder sufficient to justify giving instructions for reduced capacity and extreme emotional disturbance". Id. at 1066. In Mr. Merck's case there was ample evidence that Merck was consuming alcohol at the time of the offense and it's sufficient to justify the court giving both statutory mitigators. Trial counsel was ineffective in not objecting to the statutory mitigators not being given to the penalty phase jury. Due to trial counsel's ineffectiveness, Mr. Merck was deprived of a fair adversarial testing of the evidence. The recommendation of death was the prejudice.

In Stewart v. State, 558 So.2d 416 (Fla. 1990), the Supreme Court of Florida held:

To allow an expert to decide what constitutes "substantial"

> is to invade the province of the jury. Nor may a trial judge infect into the jury's deliberation his views relative to the degree of impairment by wrongfully denying a requested instruction. "The Legislature intended that the trial judge the sentence with advice and guidance provided by a jury, the one institution in the system of Angle-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors. *If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted.* The jury's advice would be preconditioned by the judge's view of what they were allowed to know." *Floyd v. State*, 497 So.2d 1211, 1215 (Fla. 1986) (quoting *Cooper v. State*, 336 So.2d 1133, 1140 (Fla. 1976) (emphasis added) *cert. Denied.* 431 U.S. 925, 97 S.Ct. 2200. 53 L.Ed2d 239 (1977)). We are unable to say beyond a reasonable doubt that the failure to give the requested instruction had no effect on this jury's recommended sentence. *See State v. DiGuilio* 491 So.2d 1129 (Fla. 1986). This error mandates a new sentencing proceeding. Id. At 420-21.

In Mr. Merck's case, the trial court decided which mitigation would be presented. The statutory scheme was distorted because the jury's advice was preconditioned by the judge's view of what they were allowed to know. Trial counsel was ineffective because he was unaware that Merck's jury was entitled to receive the statutory mental mitigation instructions.

In Gallo-Chamorro v. United States, 233 F3d 1298, 1304 (11th Cir. 2000), the Federal court held that: "the mere absence of authority does not automatically

insulate counsel's failure to object on that basis" Id. at 304. In Mr. Merck's case, trial counsel's error of failing to object at the charge conference is compounded by the fact that there was case law to support the giving of the instruction. It was available to trial counsel if only he had bothered to look for it. Failure to adequately research the law and to object at the trial court's refusal to give the aforementioned instructions fell below the standard of reasonableness outlined in Strickland. The recommendation of death is the prejudice.

The lower court in its order, assumes that had these statutory mitigating instructions been asked for by Schwartzberg; they would have been denied by the trial court. The above cited cases clearly indicate that *any* evidence however slight, justify the giving of the instructions regarding statutory mitigation. There is no basis to believe that the trial court, when presented with the above cited cases, would not have given the statutory mental mitigation instructions. Had the trial court ignored the request for the statutory mental mitigation instructions, Schwartzberg would have preserved the issue for review on direct appeal. The prejudice is now compounded. Merck was deprived of two statutory mitigators which would have changed the outcome of the trial. The trial court unilaterally decided what instructions the jury would hear. This decision flies in the face of the above cited law. Schwartzberg's failure to object prevented the issue from being addressed on

direct appeal. Relief is proper and a new penalty phase is the remedy.

CONCLUSION AND RELIEF SOUGHT

In light of the facts and arguments presented above, Mr. Merck never received a fair adversarial testing of the evidence. Confidence in the outcome is undermined and the judgement of guilt and subsequent sentence of death is unreliable. Mr. Merck requests this Honorable Court to vacate the convictions, judgments and sentences including the sentence of death, and order a new trial.

CERTIFICATE OF SERVICE

HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this____, day of August, 2011.

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CERTIFICATE OF COMPLIANCE

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

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