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IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

Cornelius Baker
Petitioner,
v.
Michael D. Crews
Secretary, Florida Department of Corrections,
Respondent.
and
PAMELA BONDI
Attorney General,
Additional Respondent,

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Baker's first habeas corpus petition in this Court. Art. 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution, claims demonstrating that Mr. Baker was deprived of the right to a fair, reliable and individualized sentencing proceeding and direct appeal. The proceedings resulting in his death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "R. __" followed by the appropriate volume and page number. The postconviction record on appeal will be referred to as "PC-R. __" followed by the appropriate volume and page number.

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

REQUEST FOR ORAL ARGUMENT

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

INTRODUCTION

Significant evidence which was before the trial court in determining an appropriate sentence for Mr. Baker was not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. During the Penalty Phase, defense counsel presented testimony from Harry Krop, Ph.D., a psychologist that evaluated Mr. Baker. As part of Dr. Krop's evaluation, he reviewed medical records and a number of psychological reports that were prepared over the course of Mr. Baker's life. During Dr. Krop's testimony, he referred to these records and reports, as they contributed to his opinions. At the conclusion of Dr. Krop's direct examination (R. Vol. 17, p. 105), and again at the start of the Spencer Hearing, the record reflects that defense counsel entered these documents into evidence and they were accepted by the trial court. (R. Vol. 20, pg 6–10.) Nevertheless, the Clerk failed to make these documents part of the Record on Appeal. Appellate counsel failed to move the trial court to correct the record to include these documents. Accordingly, this Court was unable to make a comprehensive analysis of the case, because vital evidence was missing from the record.

In addition, Dr. Krop was asked on cross-examination about an April 2002 history and assessment of Mr. Baker prepared by a social worker for the ACT

Corporation. (R. Vol. 17, pg. 110-111.) This report was never entered into evidence by either party. Though it did not come out during any testimony at trial, the Sentencing Order at page 7 refers to the date, title and name of the evaluator, information that was listed in the report. Appellate counsel failed to move the trial court to supplement the record to include this document. Accordingly, this Court was unable to make a thorough analysis of this case, because vital evidence was missing from the record.

Pursuant to Fla. R. App. P. 9.200(f)(2), no proceeding shall be determined, because of an incomplete record, until an opportunity to supplement the record has been given. Appellant counsel had the opportunity, but breached his duty. Petitioner prays this Court will set aside its mandate and reconsider Mr. Baker's appeal. There is a reasonable probability that evidence contained in the reports, which supports and augments the mitigating testimony of Dr. Krop, would lead this Court to find that the trial court abused its discretion when weighing the mitigating evidence, and that under a proportionality review, Mr. Baker's death sentence should be reduced to life in prison with no possibility of parole.

PROCEDURAL HISTORY

Mr. Baker was charged by Indictment dated January 19, 2007 (R. Vol. 1, p. 19). He was subsequently set for Arraignment on February 14, 2007 (R. Docket Sheet Summary, p.28). Mr. Baker proceeded to a jury trial on August 18, 2008, in

the Circuit Court of the Seventh Judicial with the Honorable Kim C. Hammond presiding (R. Vol. 8, p. 1). On August 25, 2008, the jury returned a verdict finding Mr. Baker guilty as charged in the Indictment (R. Vol. 16, pp. 1231-1233). The penalty phase was conducted on August 27, 2008 (R. Vol. 17, p.1). On August 28, 2008, the jury returned a nine (9) to three (3) recommendation of death (R. Vol. 19, p. 286).

On November 21, 2008, Mr. Baker appeared before Judge Hammond for his Spencer hearing (R. Vol. 20, p.1). The trial court imposed a sentence of death. The Order was entered on March 4, 2009 (R. Vol. 4, p.561). The trial court found three (3) aggravating factors sought by the State (R. Vol. 4, pp. 562-565). The trial court found three (3) statutory mitigating factors: the crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance (R. Vol. 4, pp. 565-567), the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (R. Vol. 4, pp567-568), and the Defendant's age (R. Vol. 4, p. 568). On direct appeal, Mr. Baker's conviction and sentence were affirmed (PC-R. Vol. 1, p.3), with two justices dissenting as to the sentence of death (PC-R. Vol. 1, p.43).

The Mandate is dated October 7, 2011 (PC-R. Vol. 1, p.2). Postconviction counsel was appointed on November 4, 2011 (PC-R. Vol. 1, p.71). On December

14, 2012, Mr. Baker filed a Motion to Correct the Record of the Direct Appeal to include documentary evidence and transcripts that had been omitted from the record (PC-R. Vol. 1, p.135). On January 11, 2013, the Honorable J. David Walsh granted that Motion (PC-R. Vol. 1, p.146). On February 22, 2013, Mr. Baker filed his Motion for Postconviction Relief (PC-R Vol. 1, p. 150). On April 19, 2013, the State's Response in Opposition to Defendant's Motion to Vacate Conviction and Sentence of Death was filed (PC-R. Vol. 2, p.209). Mr. Baker sought an evidentiary hearing as to Claim I and the state concurred (PC-R. Vol. 3, p. 573). On September 16, 2013, an evidentiary hearing was held (PC-R. Vol. 3, p. 566). On October 14, 2013, the Honorable J. David Walsh entered an Order denying Claims I-VI (PC-R. Vol. 3, p. 570). On November 7, 2013, Mr. Baker filed an appeal, which is pending before this Court (PC-R. Vol. 3, p. 599). Mr. Baker has also prepared and filed this petition for habeas corpus relief, challenging the effectiveness of appellate counsel.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See, Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, Sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Baker's sentence of death.

Jurisdiction in this action lies in this Court. See, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981), because fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Baker's direct appeal. See, Wilson, 474 So.2d at 1163; Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf., Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Baker to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Wilson, 474 So.2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See, Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction and of its authority to correct constitutional errors such as those herein pled is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Baker's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for writ of habeas corpus, Mr. Baker asserts that his capital conviction and sentence of death were obtained and then affirmed during this

Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eight and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

DEFENSE EXHIBITS ENTERED INTO EVIDENCE DURING THE PENALTY PHASE, AND AGAIN DURING THE SPENCER HEARING, WERE NOT MADE PART OF THE RECORD ON APPEAL. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE THE COURT TO SUPPLEMENT THE RECORD, THEREBY DEPRIVING THE SUPREME COURT OF THE OPPORTUNITY TO REVIEW ALL THE EVIDENCE PRESENTED AT TRIAL AND RENDERING MR. BAKER'S DEATH SENTENCE UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Due to the uniqueness and finality of death, the Florida Supreme Court considers the propriety of all death sentences in a proportionality review. See, Kalisz v. State, 124 So.3d 185, 212 (Fla. 2013), citing Hurst v. State, 819 So.2d 689, 700 (Fla. 2002). This Court described their standard of review as follows:

> "[W]e make a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." We consider the totality of the circumstances of the case and compare the case to other capital cases. This entails "a *qualitative* review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." In other words, proportionality review "is not a comparison between the number of aggravating and mitigating circumstances."

> Williams v. State, 37 So.3d 187, 205 (Fla.2010) (quoting Offord v. State, 959 So.2d 187, 191 (Fla.2007)). Thus, our proportionality review requires that we discretely analyze the nature and weight of the underlying facts; we do not engage in a "`mere tabulation' of the aggravating and mitigating factors." Terry v. State, 668 So.2d 954, 965 (Fla.1996) (quoting Francis v. Dugger, 908 F.2d 696, 705 (11th Cir.1990)).

Kalisz at 213, citing Scott v. State, 66 So.3d 923, 934-35 (Fla. 2011).

The issue before this Court is whether the absence of a complete record on direct appeal precluded the meaningful review and consideration of appellate claims. Darling v. State, 808 So.2d 145 (Fla. 2002). This Petition will demonstrate why the exhibits were necessary for a complete review of Mr. Baker's sentencing and why having an incomplete record has prejudiced Mr. Baker's appeal. Appellant counsel's failure to ensure that defense exhibits entered into evidence were part of the Record on Appeal amounted to ineffective assistance of counsel and requires a reconsideration of Mr. Baker's appeal.

As part of Mr. Baker's defense during the Penalty Phase, trial counsel called Harry Krop, Ph.D., a licensed psychologist (R. Vol. 17, p. 50). Dr. Krop testified to the forensic evaluation he performed on Mr. Baker and the conclusions he reached. Dr. Krop also described the collateral information he reviewed that helped inform his opinion. In addition to interviews of family members, Dr. Krop read a number of psychological evaluations that dated back to when Mr. Baker was seven (7) years old until he was fifteen (15) years old, as well as reviewed the

neurological results of the MRI and PET scan that Dr. Krop had recommended for Mr. Baker. (R. Vol. 17, pp. 57-59, 110).

During his testimony, Dr. Krop mentioned highlights from the various psychological evaluations and the brains scans. At the conclusion of direct examination, trial counsel sought to introduce into evidence Defendant's Composite Exhibit A, which contained the reports that Dr. Krop relied upon during his evaluation process, combined with the reports that Dr. Krop prepared (R. Vol. 17, p. 105). After comments by the parties, the trial court received the documents, but they were incorrectly marked as Plaintiff's Exhibit 1 (R. Vol. 17, p. 105-106). (The actual Plaintiff's Exhibit 1 is a photo of the victim. R. Vol. 21, p. 1).

Three months later at the beginning of the Spencer[1] Hearing on November 21, 2008, trial counsel again entered into evidence the five (5) psychological reports, which were marked as Defense Exhibit 1. Exhibit 1 comprised the following:

1) Psychological Evaluation by J. Jeff Oatley, Ph.D. dated April 6, 1994;
2) Act Corporation Psychiatric Evaluation by Sharon Winters, M.D. dated April 22, 1994;
3) Psychological Evaluation by James D. Upson, Ph.D. dated June 24, 1994;

[1] Spencer v. State, 615 So.2d 688 (Fla. 1993).

4) Act Corporation Psychiatric Evaluation by Ann Mian, M.D, dated April 30, 1998; and

5) Psychological Report by Peter Larkin, M.A., NCSP dated April 14, 2000. (R. Vol. 20, p. 7-8).

At this time, trial counsel also marked and entered into evidence the following exhibits:

1) Two (2) reports of Harry Krop, Ph.D. dated July 6, 2007 and September 7, 2007 as Defense Exhibit 2;

2) PET scan dated February 8, 2008 and an MRI dated September 10, 2007 as Defense Exhibit 3;

3) Composite of records from Central Florida Eye Institute from 1992-1993 as Defense Exhibit 4;

4) Composite of records from Shands Hospital from Mr. Baker's 1992 eye surgery as Defense Exhibit 5;

5) Composite of Flagler County School health records for Mr. Baker as Defense Exhibit 6;

6) Composite of Flagler County School system assessment reports for Mr. Baker as Defense Exhibit 7;

7) Composite of Flagler County School "other reports" for Mr. Baker as Defense Exhibit 8;

8) Composite records from Flagler Palm Coast Hospital from 2003 when Mr. Baker was involved in a motor vehicle accident that resulted in a loss of consciousness as Composite of Flagler County School system assessment reports as Defense Exhibit 9;

9) Composite records from Flagler Palm Coast Hospital from 2005 when Mr. Baker was suffering from acute bronchitis as Defense Exhibit 10.

(R. Vol. 17, pgs. 8-10).

Though the trial court received these exhibits into evidence, they did not become part of the Record on Appeal. Only the State's thirty-six (36) exhibits were sent to the Florida Supreme Court for review (R. Vol. 21). The above listed defense exhibits were finally made part of the record after a motion filed by postconviction counsel was granted on January 11, 2013 by Judge Walsh (PC-R. Vol. 1, p. 146 and Vol. 12- Parts A, B and C).

While Dr. Krop mentioned highlights from the various psychological evaluations and PET scan during his testimony, the reports themselves contain additional information that support and augment Dr. Krop's conclusions. Furthermore, it is evident from the Sentencing Order that the trial court was aware of information in these missing exhibits. For instance, the trial court found, "Dr. Krop reached the opinion that as a result of neuropsychological testing he performed, along with the results of a PET scan that the Defendant suffers from

significant brain damage. No other of the numerous reports *even suggested the possibility* of brain damage." (Emphasis added.) (R. 566). In reaching this conclusion, the trial court reviewed the reports themselves, challenging Dr. Krop's opinion. If this Court were able to review the same reports, a different conclusion may have been reached. Dr. Upson's June 1994 report shows that Mr. Baker was screened for "organic impairment" and was found to have scored four standard deviations below the norm for his age on the Token Test for Children, which showed significant impairment in the area of receptive language (PC-R Vol. 12-A, p.9). While not using the exact phrase "brain damage," this report shows that another evaluator reached a conclusion similar to Dr. Krop's that Mr. Baker's brain functioning is impaired, somewhat contrary to the trial court's findings.

Furthermore, the Sentencing Order is worded so as to give the impression that only Dr. Krop expressed the opinion that Mr. Baker suffers from brain damage. This statement could be misleading, because a review of the other psychological reports shows that only Dr. Krop ordered a PET scan for Mr. Baker. The other evaluators did not look for metabolic signs of brain damage, so naturally this issue was not specifically discussed in their reports. If similar tests had been performed, the trial court's finding would be more relevant.

Additionally, the PET scan itself contains a conclusion that supports Dr. Krop's finding of brain damage. The PET scan report reads, "Impression: Areas of

decreased uptake in the bilateral posterior parietal, temporal and frontal regions which may be consistent with patient history of dementia." (PC-R Vol. 12-A, p.52). The American Heritage Stedman's Medical Dictionary defines dementia as, "deterioration of intellectual faculties, such as memory, concentration, and judgment, resulting from an organic disease or a disorder of the brain, and often accompanied by emotional disturbance and personality changes."[2]

If this Court had been able to review these missing reports, which trial counsel had entered into evidence twice, this Court may have found that the trial court improperly marginalized Dr. Krop's findings, which lead the trial court to

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[2] **American Psychological Association (APA):** dementia. (n.d.). *The American Heritage® Stedman's Medical Dictionary*. Retrieved April 30, 2014, from Dictionary.com website: http://dictionary.reference.com/browse/dementia

Chicago Manual Style (CMS): dementia. Dictionary.com. *The American Heritage® Stedman's Medical Dictionary*. Houghton Mifflin Company. http://dictionary.reference.com/browse/dementia (accessed: April 30, 2014).

Modern Language Association (MLA): "dementia." *The American Heritage® Stedman's Medical Dictionary*. Houghton Mifflin Company. 30 Apr. 2014. <Dictionary.com http://dictionary.reference.com/browse/dementia>.

Institute of Electrical and Electronics Engineers (IEEE): Dictionary.com, "dementia," in *The American Heritage® Stedman's Medical Dictionary*. Source location: Houghton Mifflin Company. http://dictionary.reference.com/browse/dementia. Available: http://dictionary.reference.com. Accessed: April 30, 2014.

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improperly weigh this mitigating factor. This Court has stated, "...we have consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order." Rose v. State, 675 So.2d 567, 573 (Fla. 1996). While this comment was made in reference to trial counsel failing to present psychological mitigation during the Penalty Phase, it is also relevant in considering whether it was an abuse of the trial court's discretion to give this factor only "some weight" (R. Vol. 4, p. 567).

The trial court also focused on some notations in the psychological and psychiatric reports, while omitting other observations. The trial court correctly noted that most evaluations found impulsive behavior; however Dr. Mian's 1998 psychiatric evaluation also found poor insight into problems and limited intellectual functioning and knowledge. (PC-R. Vol. 12-A, pg. 12) This is an example of information that did not come out through the testimony of Dr. Krop and upon which the trial court chose not to focus, though it was made part of the evidence in Mr. Baker's case. Intellectual functioning and the ability to use insight to resolve problems are key factors for determining the degree of Mr. Baker's culpability and an appropriate sentence for his behavior. Mr. Baker's appeal was prejudiced by not having this information before this Court.

Another important function of the missing reports is that they provide specific examples of behavior that contributed to the conclusions of the examiners.

The reports go beyond the assignment of labels to Mr. Baker (e.g. Borderline Intellectual Functioning, Developmental Articulation Disorder, and Attention Hyperactivity Disorder), which is all that was included in Dr. Krop's testimony (R. Vol. 17, p.67) an the Sentencing Order (R. Vol. 4, p. 565). We learn from Dr. Oatley that in reaching his diagnosis, he considered the fact that Mr. Baker had difficulty focusing on a task for more than 60 seconds; was very fidgety; had difficulty remaining seated and even fell out of his chair on one occasion; was easily frustrated; had poor concentration; and overactivity (PC-R. Vol. 12-A, pp. 1-2).

Dr. Winters' conclusions that Mr. Baker suffers from Attention Deficit Hyperactive Disorder were supported in her report by a full description of Mr. Baker playing with play dough. She describes his inability to stay seated for more than ten (10) seconds, his need to throw the play dough rather than make something with it and his inability to follow instructions (PC-R. Vol. 12-A, p. 5). Through this description, this Court can better understand why Dr. Winters found Mr. Baker has low average intelligence and impaired insight, two findings not mentioned in Dr. Krop's testimony, only in the report missing from the Record on Appeal (PC-R. Vol. 12-A, p. 6). Likewise, from a review of Dr. Upson's report, the record shows that it took three (3) offices visits before he was able to get Mr.

Baker to settle down enough to focus on and complete intellectual and psychological testing (PC-R Vol. 12-A, p. 7-8).

Mr. Baker's emotional disturbances and learning disabilities continued throughout his childhood, which is evident from the last report entered into evidence, but missing from the Record on Appeal. Further support for Dr. Krop's testimony that Mr. Baker suffers from serious emotional disturbance can be found within the April 2000 report from Peter Larkin which states, "Until recently Cornelius was placed in a self-contained class for students with behavioral problems, but now has an individual aide in his self-contained class due to his tendency to go off task, escalate emotions and not care about the consequences of his actions – to himself or others." (PC-R. Vol. 12-A, p. 15). Again and again, the reports indicate that Mr. Baker has poor impulse control and impaired insight, to the extent that he would even harm himself. Mr. Baker's history shows that he does not have the same ability as a normal person to control himself and to understand the consequences of his actions, yet the trial court found, "...there was *no evidence* presented that he was unable to take responsibility for his acts and appreciate the consequences of them at the time of the murder." (Emphasis added.) (R. Vol. 4, p. 568). Information contained in the reports themselves contradicts the trial court's findings and therefore calls into question whether the mitigating evidence was properly weighted.

Similarly, the trial court found that while there was evidence to establish Mr. Baker suffered from mental and emotional disturbances, it did not affect his ability to conform his conduct to the requirements of the law (R. Vol. 4, p. 567). However, the psychological evaluations and testing reveal that Mr. Baker's judgment and insight are impaired. These reports support Dr. Krop's findings from the neuropsychological tests and the PET scan that Mr. Baker has a cognitive disorder due to the frontal lobe part of the brain impairment, which relates to executive functions (i.e. impulse control, judgment, problem solving, and ability to pull back from a course of action), which is always going to be there (R. Vol. 17, p. 87-91, 97). In other words, the ability to conform his conduct has been and will always be impaired. It amounts to an abuse of discretion to give this mitigator "little weight" (R. Vol. 4, p. 568).

The reports also reveal that Mr. Baker was medicated with Ritalin, a stimulant[3], three (3) times a day, as well as Clonidine, a drug that enabled Mr. Baker to sleep, from the time he was seven (7) years old until he was fifteen (15) years old (PC-R. Vol. 12-A, pp. 6, 13, 46). He was also given Wellbutrin[4], an antidepressant, from the time he was eleven (11) years old, until he was fifteen (15) years old (PC-R. Vol. 12-A, pp. 46-47). Mr. Baker's system was fed drugs from the time he was a child in order to alter his mood and control his behavior. It

[3] The American Heritage® Stedman's Medical Dictionary. Retrieved April 30, 2014.
[4] Id.

seems natural that Mr. Baker also turned to illegal substances in an effort to self-medicate. The trial court's finding that Mr. Baker chose to abuse drugs and alcohol fails to consider to what extent the years of drug therapy may have caused his system to crave narcotics (R. Vol. 4, p. 569). A review of all the documented evidence of Mr. Baker's brain damage, low intellectual functioning and substance abuse would lead this Court to find that these mitigators are entitled to more than "some weight."

As to the mitigator concerning Mr. Baker's exposure to alcohol when he was a growing fetus in his mother's womb, the trial court's only comment on the evidence presented is that it didn't describe fetal alcohol syndrome (hereinafter "FAS") (R. Vol. 4, p. 569). That comment ignores the fact that the reports all list behavioral features that are consistent with alcohol related neurological disorder (hereinafter "ARND"). Currently, the only expression of fetal alcohol exposure that is defined by the International Statistical Classification of Diseases and Related Health Problems (hereinafter "ICD")[5] is FAS[6]. However, several authorities on FAS, including the Institute of Medicine (hereinafter "IOM"),[7] the

[5] ICD is the official system in the United States to classify and assign codes to health conditions.
[6] ICD-9 CM, 760.71 and ICD-10 CM, Q86.0.
[7] Stratton, K.R., Howe, C.J., & Battaglia, F.C. ,*Fetal Alcohol Syndrome: Diagnosis, Epidemiology, Prevention, and Treatment,* Institute of Medicine (IOM), 1996 at 77-79.

University of Washington[8] and the Canadian Medical Association Journal[9], have recognized there is a continuum of effects that may manifest due to a mother's consumption of alcohol during her pregnancy. The term ARND was developed to describe disabilities associated with the consumption of alcohol on a developing brain. Common symptoms of ARND are short attention span, hyperactivity, poor impulse control, learning disabilities and poor judgment, which appear along with a history of the mother using alcohol while pregnant.[10] In effect, ARND is similar to fetal alcohol syndrome, but is used where the physical characteristics associated with fetal alcohol syndrome are not present, yet there are neurodevelopmental abnormalities.[11] Two (2) psychological evaluations accepted into evidence establish that Mr. Baker's mother was abusing alcohol and drugs during her pregnancy (PC-R Vol. 12-A, pp. 1, 10). The information supplied by Mr. Baker's grandmother in 1994, and again in 1998, to psychologists evaluating Mr. Baker was supported by trial testimony of Mr. Baker's mother (R. Vol. 17, pp. 126). Those same reports also catalogue the following behaviors: impulsivity, poor concentration, short attention span, overactivity, very fidgety, which mirror the symptoms of ARND. (PC-R. Vol. 12-A, pp. 2, 13).

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[8] Astley, S.J., *Diagnostic Guide for Fetal Alcohol Spectrum Disorders: The 4-Digit Diagnostic Code,* Seattle: University of Washington, 2004.
[9] Chudley, A., Conry, J., Cook, J., et al,*Fetal alcohol spectrum disorder: Canadian guidelines for diagnosis*, CMAJ, March 1, 2005, vol. 172, no. 5 supp.
[10] IOM at 77.
[11] Id.

The trial court erred when it in effect dismissed the reports of fetal alcohol exposure, just because the evidence did not satisfy the criteria for fetal alcohol syndrome. Mr. Baker does not appear to have the physical characteristics associated with fetal alcohol syndrome (i.e. distinctive facial features, including small eyes, an exceptionally thin upper lip, a short, upturned nose, and a smooth skin surface between the nose and upper lip[12].) However, a review of the psychological and psychiatric reports reveals that Mr. Baker consistently presented with the symptoms and features of ARND. Though ARND is not yet a standardized diagnosis, what is important is the evidence that Mr. Baker suffered with neurodevelopmental deficiencies, which fetal alcohol exposure could explain. These mental disabilities are far more important and relevant to a determination of an appropriate sentence than any physical manifestations associated with fetal alcohol exposure. The evidence showed that Mr. Baker's ability to reason, use good judgment and regulate his behavior was handicapped since birth. If this Court had been able to review the reports that were missing from the Record on Appeal, it may have concluded that it was improper for the trial court to marginalize the evidence of fetal alcohol exposure and the weight given to this mitigator.

[12] University of Washington at 8.

This Court gives great deference to the weight a trial court assigns t mitigating circumstance and will only overrule the lower court's determination if this Court finds that the trial court abused its discretion. Rogers v. State, 783 So.2d 980 (Fla. 2001). However, this Court must first be satisfied that the trial court in fact considered all of the evidence in making its determination. James v. State, 695 So.2d 1229, 1237 (Fla. 1997). A review of the Sentencing Order, in light of the reports left out of the Record on Appeal, demonstrates that not all the evidence presented to the trial court was considered or was only considered in such a perfunctory way as not to be a meaningful review. Had all the evidence been before this Court, there is a reasonable probability that Mr. Baker's death sentence would have been reduced to a sentence of life imprisonment without the possibility of parole, in accordance with the sentence recommended by Justice Pariente and Justice Perry in their dissenting opinion (PC-R. Vol. 1, p.43). These Justices disagreed with the majority's conclusion that the crime was committed in a cold, calculated and premeditated manner, nor did they find that Mr. Baker's acts met the legal definition of heinous, atrocious and cruel.

Appellant counsel had the duty and the burden to ensure that the record is prepared and transmitted in accordance with the Rules of Appellate Procedure.[13] The Appellate Rules also provide, "No proceeding shall be determined, because of

[13] Fla. R. App. 9.200(e).

an incomplete record, until an opportunity to supplement the record has been given.[14]" The ABA Guidelines for defense counsel in death penalty cases emphasize, "...it is of critical importance that counsel on direct appeal ...proceed in a manner that maximizes the client's ultimate chances of success."[15] Appellant counsel made no attempt to supplement the record with exhibits that trial counsel entered into evidence (twice), but the Clerk failed to make part of the record. The breach of this duty prejudiced Mr. Baker's appeal and this Court's ability to review his sentence of death. Therefore, Appellant counsel's failure to ensure a complete record was before this Court satisfies the Strickland test for ineffectiveness:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.
>
> Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). In the context of the Penalty Phase, "the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 695. The missing exhibits prevented this Court from being able to adequately review the

[14] Fla. R. App. 9.200(f) (2).
[15] American Bar Association, DPG Guidelines, 2003, Vol. 31, p. 1083.

trial court's determination of Mr. Baker's sentence, which further prevented this Court from performing a competent proportionality review. Had all the evidence in this case been before this Court, it may have decided to vacate Mr. Baker's death penalty as it did in Crook v. State, 908 So.2d 350 (Fla. 2005), where Defendant also suffered from brain damage, borderline intellectual functioning and substance abuse .

CLAIM II

THOUGH PORTIONS OF A PSYCHOSOCIAL REPORT WERE REFERENCED DURING TRIAL TESTIMONY, THE DOCUMENT WAS NOT ENTERED INTO EVIDENCE. FURTHERMORE, THE SENTENCING ORDER CONTAINS INFORMATION FROM THIS REPORT THAT WAS NOT MENTIONED DURING TRIAL TESTIMONY. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE THE COURT TO SUPPLEMENT THE RECORD WITH THE FULL REPORT, THEREBY CAUSING AN INCOMPLETE RECORD TO BE REVIEWED ON DIRECT APPEAL. THE SUPREME COURT WAS DEPRIVED OF THE OPPORTUNITY TO REVIEW ALL RELEVANT EVIDENCE, RENDERING MR. BAKER'S DEATH SENTENCE UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Psychologist, Dr. Krop, was asked on cross-examination by the State about an April 2002 history and assessment of Mr. Baker prepared by a social worker for the Act Corporation (R. Vol. 17, p. 110-111.) This report was provided to the State by defense counsel before Penalty Phase (R. Vol. 17, p. 110). The State

tendered the document to Dr. Krop, and then asked him if he recognized it. Dr. Krop confirmed that the 2002 assessment was part of the documents that he reviewed. The State asked him to explain an entry. The document was never entered into evidence by either party.

Though it did not come out during testimony, the Sentencing Order refers to the exact date, title and name of the evaluator (R. Vol. 4, p. 567), information that was only listed in the report, which is appended to this Petition.[16] In the Sentencing Order, the trial court includes a comment by Act clinical specialist, Rhonda McEntire, in an April 24, 2002 evaluation that noted Mr. Baker has a "strong street sense." This cite is followed by the trial court reiterating its finding that the crime was committed in a cool, calculated and premeditated manner." (R. vol. 4, p. 567). Dr. Krop cautioned in his testimony that no documentation was available to the social worker at the time of her interview (R. Vol. 17, p. 110-111). However, the trial court referenced the social worker's statement in its Order.

The Sentencing Order includes details that are not found in the trial testimony, leading to the conclusion that the trial court also reviewed the actual report. A review of the report indicates that the reason Mr. Baker was interviewed by the social worker is that a referral was made by "VRJDC that [Mr. Baker] was 'tying a sheet around his neck.'" Though Mr. Baker denied this behavior, the

[16] Appendix: Rhonda McEntire, Act Corporation, April 24, 2004.

prognosis found he was a low to moderate risk of suicide. When taken as a whole, the report shows further proof that Mr. Baker suffered from extreme emotional disturbances. If this Court had been presented with the full evaluation of Rhonda McEntire cited by the trial court, there is a reasonable probability that the outcome of the appeal would have been different.

As with Claim I, Appellant counsel had the duty and the burden to ensure that the record is prepared and transmitted in accordance with the Rules of Appellate Procedure.[17] Appellate counsel failed to move the trial court to supplement the record to include this document. Accordingly, this Court was unable to make a thorough analysis of Mr. Baker's case, because vital evidence, which was referred to during testimony and again referenced in the Sentencing Order, was missing from the record.

The breach of this duty prejudiced Mr. Baker's appeal and this Court's ability to review his sentence of death. Therefore, Appellant counsel's failure to ensure a complete record was before this Court once again satisfies the Strickland test for ineffectiveness.[18] Had all the evidence in this case been before this Court, the majority may have decided to vacate Mr. Baker's death penalty as it did in Crook v. State, 908 So.2d 350 (Fla. 2005), joining Justices Pariente and Perry in recommending a life sentence with no possibility of parole.

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[17] Fla. R. App. 9.200(e).
[18] Strickland at 687, 695.

CONCLUSION AND RELIEF SOUGHT

Claims I and II both address Appellate counsel's failure to make sure a complete record was before this Court. Taken separately or cumulatively, they demonstrate that Appellate counsel's ineffectiveness created fundamental errors on direct appeal. For all the reasons discussed herein, Cornelius Baker respectfully urges this Honorable Court to grant habeas relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by E-MAIL to james.riecks@myfloridalegal.com and CapApp@myfloridalegal.com and U.S. Mail to Cornelius Baker DOC# V25581, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026 on this 2nd day of May 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Petition for Writ of Habeas Corpus was generated in Times New Roman 14-point font pursuant to Fla. R. App. P. 9.210.

/s/Richard Kiley
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/s/Ann Marie Mirialakis
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COUNSEL FOR PETITIONER

APPENDIX A

Appendix: Rhonda McEntire, Act Corporation, April 24, 2004

Act Corporation

PSYCHOSOCIAL HISTORY AND EVALUATION

Client Name: Baker, Cornelius

Client #: 1161806

Clinical Specialist: R. McEntire, MS/CSAT 02065

Date Completed: 04-29-02

EVALUATION

1. *Identifying Information* — age; race; gender; physical description; current living situation; school/grade; work
2. *Presenting Problem* — precipitating events; history of problem (onset, frequency, duration and intensity)
3. *Mental Status Examination* — administer protocol
4. *Family History* — family constellation; legal custody; parenting interventions; support systems; extended family; abuse history (physical, sexual, emotional); neglect; strengths, history of living arrangements; parent's marital history
5. *Developmental History* — pregnancy issues; milestones (speech, language, motor), sexual development. Developmental History Form indicated.
6. *Medical information* — administer protocol
7. *Psychiatric or Social Services Interventions* — current; past; outcomes; effective strategies; dates and locations of service
8. *Substance Abuse* — if current user or history of use, administer protocol
9. *Educational Information* — current grade: highest grade completed; attendance; learning difficulties; Exceptional Student Education; behavioral issues; academic performance; schools attended; relevant caregiver and sibling information
10. *Legal/Custody Issues* — delinquency; dependency; caregiver and sibling history; criminal charges; civil court actions
11. *Economic/Vocational/Military* — income source; insurance; entitlements; current/past work history; reasons for job changes; child care arrangements; skills; military history/type of military discharge
12. *Socialization* — peer relationships; dating; activities (home, school, community); interests; aptitudes; cultural activities; religion/spirituality
13. *Other Significant Information*
14. *Assessment Summary and Recommendations* — strengths (individual & support system); weaknesses (individual & support system); needs
15. *Signature of Staff Completing w/ Credentials/Degree/Title*

(1) Yx is a 15 yr old black male, black hair, brown eyes, 5'4, 128 lbs. Yx attended Palm Coast High School, finished 8th grade there, finished 3 semesters of 9th grade. Yx reports average grades. Yx got suspended for fighting "a couple of times". Yx lives with Grandmother who has custody.

(2) A referral was made at VRJDC that yx was "tying a sheet around his neck". Yx denies this and any depression.

(3) See protocol!

(4) Mx and Fx never married. Mx has alcoholism. Fx did not have room for youth and had drug + alcohol issues. Yx has been with Grandmother for 3 yrs. Yx has one brother and one sister in the home. Yx has a brother "out of school", and a sister who lives with his Aunt.

(5) Normal pregnancy, birth + development.

(6) See protocol.

(7) Nancy Acousta with ACT saw youth once a week. Yx now has a new counselor, yx but doesn't know her name.

(8) See protocol

(9) Yx is in 9th grade. Was attending PCHS (See above #1).

(10) Yx is in Custody of Maternal Grandmx. Grand Theft Auto is yx's current charge. Yx has an old burglary charge. Yx has had several violations.

(11) Yx is a dependent minor; not working

(12) Yx reports having a couple of close friends, attending Church, and being "spiritual".

(13) Yx denies feeling suicidal and claims the referral is false.

(14) Some speech deficits, does not affect socialization, intelligence normal, has strong street sense, likes to listen to music.

(15) No documentation available at this time.

Rhonda McEntire MS/CSAT 02065

a human services corporation

DISCHARGE SUMMARY

CLIENT: Baker, Cornelius CLIENT #: 1161806

DATE OF DISCHARGE: 4-24-02 DATE OF PLC: 4-24-02

TERMINATION STATUS: 1 REFER TO: 22 (AGENCY CODE) S E MH PH A N/A:

(AGENCY CODES)

ENTERED MAY 06 2002

AXIS I DIAGNOSIS (INCLUDE PRINCIPAL AND SECONDARY) IMPRESSIONS (WRITE OUT): ICD-9 CODE:

Axis I: 799.09 No Diagnosis

Axis II: V79.09 No Diagnosis

Axis III: None

Axis IV: Problems with legal system/Crime

Axis V: 60

WRITE OUT ANY OTHER AXES CODES/IMPRESSIONS AS APPLICABLE:

SERVICE HISTORY SUMMARY INCLUDE PAST PSYCHIATRIC TREATMENT HISTORY, DURATION, AND FREQUENCY OF SERVICES RECEIVED: ACT - Mental Health Overlay at VRJDC

Current/previous ACT services

CLINICAL COURSE — PROGRESS IN TREATMENT AND PROGNOSIS: Suicide Assessment found c/x at low to moderate risk.

RATIONALE FOR DISCHARGE: c/x released to DJJ

FOLLOW-UP PLANS: ~~DJJ~~ ERROR RM none

DISCHARGE MADE IN COLLABORATION WITH: NAME RELATIONSHIP

DJJ/Gaurdian

CLIENT/RESPONSIBLE PERSON VERBALIZED UNDERSTANDING OF DISCHARGE INSTRUCTIONS:

____ YES ✓ NO

"This information has been disclosed to you from records whose confidentiality is protected by Florida State Law. Florida State Statutes (395-017-1-Exception 2-Exception 00 ...) prohibits you from making any further disclosure of it without the specific written consent of the person to whom it pertains, or as otherwise permitted by such regulations. A general authorization for the release of medical or other information is NOT sufficient for this purpose."

FOLLOW-UP. DATE

RESULTS: N/A

PROGRAM: 67/6010 DEPARTMENT: Mental Health Overlay at VRJDC

FORM COMPLETED BY: R. McEntire, MS/CSH ID #: